



SUBMISSION BY THE
Housing Industry Association

to the
**Senate Education and Employment References
Committee**

on the
Government's approach to re-establishing the
Australian Building and Construction Commission

17 January 2014

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.



1 EXECUTIVE SUMMARY

- 1.1 HIA welcomes the opportunity to contribute to the Senate Education and Employment References Committee report into the Governments approach and policy to re-establish the Australian Building and Construction Commission (ABCC).
- 1.2 HIA notes that whilst this is a separate inquiry, in November 2013 the Senate Legislation Committee on Education and Employment also inquired into the *Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) (Bill)* and the *Building and Construction Industry (Consequential and Transitional Provisions) (Transitional Bill)* (“the **November Inquiry**”).
- 1.3 On 2 December 2013, the Committee handed down majority and dissenting reports.
- 1.4 As many of the matters raised in this inquiry were already traversed during the November inquiry, HIA reiterates and relies on the submissions it made to that Inquiry. A copy of HIA’s November submissions are **attached**.
- 1.5 HIA separately notes that in September 2009 and February 2012, the Senate Education and Employment committee also inquired into the former Government’s Bills to abolish the ABCC and replace it with the Fair Work Building Inspectorate. It is apparent that many of the broad matters of policy being considered in this Inquiry have been previously ventilated and the views of industry and the unions in this regard are well known.
- 1.6 HIA restates its support for the re-establishment of the ABCC and its opposition to the current legislative framework.
- 1.7 As HIA outlined in its November submissions, the *Fair Work (Building Industry) Act 2012 (FWBIA)* that established Fair Work Building and Construction (FWBC), abolished the ABCC and eroded industry specific penalties has encouraged and provoked a return to industrial lawlessness and union militancy. FWBC has not been the strong, independent or robust enforcement body that the building industry requires.
- 1.8 HIA’s further comments with respect to selected matters raised in the terms of reference to this Inquiry follow:

2 SPECIFIC RESPONSE TO INQUIRY

- **The potential impact of the re-establishment of the Australian Building and Construction Commission on the building and construction industry**

- 2.1 HIA’s support for the re-establishment of the ABCC is a long standing matter of public record.
- 2.2 Re-establishing the ABCC is essential to boosting Australia’s productivity and to ensuring law and order prevails on building sites.

- **The need or otherwise for a specialist industrial regulator in the building and construction industry**

- 2.3 It remains HIA’s strong view that the building industry requires an effective deterrent and enforcer of the rule of law.
- 2.4 In 2002, the Cole Royal Commission detailed systemic lawlessness in the Australian building industry including illegal strikes, pattern bargaining, right of entry infringements and the coercion of non-unionised subcontractors.
- 2.5 One of the recommendations flowing from the Cole Royal Commission was the establishment of a specialist and permanent regulatory body to check industrially



undesirable conduct and ensure that the building industry did not continue to depart from the standards of commercial and industry conduct exhibited in the rest of the Australian economy.

- 2.6 The *Building and Construction Industry Improvement Amendment Act 2005 (BCIIA Act)* gave effect to these recommendations and in the period until its abolition, the ABCC was able to achieve sound and effective job of law enforcement, clamping down on unions and others for illegal industrial behaviour and right of entry breaches.
- 2.7 Yet although the BCIIA Act introduced reforms which led to a dramatically improved workplace relations environment in the construction industry, the work of the ABCC was never completed as pockets of aggressive and unlawful industrial action persisted.
- 2.8 The legislative and institutional framework established to give full effect to the findings of the Cole Royal Commission must be restored.

- **the potential impact of the bills on productivity in the building and construction industry**

- 2.9 HIA refers to paragraphs 2.10 to 2013 of its November submissions.
- 2.10 As various economic analyses conducted by Econtech Pty Ltd/ Independent Economics have demonstrated following the introduction of the ABCC, productivity in the industry improved and commercial construction costs were lowered.
- 2.11 However and according to Independent Economics 2013 report, the dismantling of the ABCC and winding back of industry specific reforms has resulted in a 12.8 per cent decrease in labour productivity for non-residential building construction and increase in the overall cost of business investment in buildings and structures by 2.6 per cent and a reduction in GDP for 0.6%.

- **the potential impact of the bills on employees, employers, employer bodies, trade and labour councils, unions and union members;**

- 2.12 In HIA's submissions the passage of the legislation and the restoration of the ABCC will encourage better compliance with the industrial laws by all participants in the building industry including employees, employers, employer bodies, trade and labour councils, unions and union members.
- 2.13 Further increases in productivity, GDP contribution and construction activity will lead to greater industry investment and create more jobs and wealth within the industry.

- **the extreme and heavy-handed proposed powers of the Australian Building and Construction Commission, including coercive powers, conduct of compulsory interviews, and imprisonment for those who do not co-operate**

- 2.14 HIA supports the coercive powers held by the ABCC. In HIA's view they are not "heavy handed". They are an important regulatory and administrative tool available to the Inspectorate as a law enforcement agency.
- 2.15 Such powers are broadly similar to the investigatory powers held by other Australian law enforcement agencies, including the Australian Taxation Office, Australian Competition and Consumer Commission, the Australian Securities and Investments Commission and even the Australian Charities and Not-for-profits Commission.
- 2.16 In HIA's submission if it is appropriate than such powers be used on charities, then it is entirely appropriate that similar powers be held by the regulator responsible for policing industrial militancy on building sites.



2.17 Of note, the use of the coercive examination powers by the ABCC will continue to be reviewed and reported on by the Commonwealth Ombudsman.

- **the provisions of the bills relating to requirements to provide information to the Australian Building and Construction Commission during interviews including provisions that interviewees have no right to silence**

2.18 From the outset, there is no absolute right to silence in the current FWBII Act (see sections 50-52).

2.19 The abrogation of the right to refuse to answer a Commissioner's question on the grounds of self-incrimination remains appropriate, since the answers cannot be used against that person in any subsequent proceedings.

- **the provisions of the bills that introduce the law of conspiracy into the industrial regulation of the building and construction industry;**

2.20 HIA notes that clause 58 of the Bill provide that a person will contravene the coercion and discrimination provisions if they are advising, encouraging inciting or coercing a second person whilst clause 92 of the Bill introduces ancillary conduct provisions.

2.21 These are important provisions to give the effect to the policy intent behind the legislation, namely to capture and penalise all participants in unlawful industrial conduct, not just those visible, onsite antagonists.

- **whether the provisions of the bills relating to occupational health and safety in the building and construction industry are adequate to protect the health and safety of employees and contractors in the industry**

2.22 HIA notes that matters of occupational health and safety are largely matters already strongly regulated by state and territory based laws, regulations and Codes of Practice.

2.23 HIA submits that the provisions in the Bill are adequate.



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on the
**Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)
and Building and Construction Industry (Consequential and Transitional
Provisions) Bill 2013 (Cth)**

22 November 2013

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1 EXECUTIVE SUMMARY

- 1.1 HIA welcomes the opportunity to contribute to the Senate Legislation Committee on Education and Employment's Report into the *Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)* (**Bill**) and the *Building and Construction Industry (Consequential and Transitional Provisions)* (**Transitional Bill**).
- 1.2 HIA notes that these Bills give effect to the Federal Government's long standing commitments to re-establish the Australian Building and Construction Commission (**ABCC**).
- 1.3 HIA strongly supports the re-introduction of the ABCC and endorses the passage of both Bills through Parliament at the earliest available opportunity.
- 1.4 In HIA's submission, the *Fair Work (Building Industry) Act 2012* (**FWBIA**) that established Fair Work Building and Construction (**FWBC**), abolished the ABCC and eroded industry specific penalties has failed the construction industry.
- 1.5 There is little doubt the abolition of the ABCC has emboldened the construction unions, and provoked a return to union militancy. FWBC has not been the strong, independent or robust enforcement body that the building industry requires.
- 1.6 In particular, the ugly dispute that took place between commercial builder Grocon and the CFMEU on the Myer Emporium site in Melbourne in August and September 2012, which amongst other things involved altercations with police officers and ignorance of Supreme Court orders, demonstrates that certain elements of the industry have little desire to behave in accordance with the law or acceptable standards of civility if it does not suit their industrial motives.
- 1.7 Unfortunately whilst this has been the most public dispute, it is not an isolated incident.
- 1.8 Of further concern has been the off-site targeting and illegal secondary boycotts of certain building suppliers and manufacturers and their customers.
- 1.9 Accordingly, the findings of the 2003 Royal Commission and its recommendation for a specialist, independent and effective regulatory body to uphold the rule of law and facilitate long term cultural change in the building industry remains entirely relevant today. To this end, HIA supports the increased powers the Bill confers on the ABC Commissioner to investigate and enforce breaches of the legislation, including to the transport and supply of building products.
- 1.10 Further, HIA supports provisions contained within the Bill that significantly increase penalties, introduce other remedies in relation to unlawful industrial action and unlawful picketing and enable employers and the ABC Commissioner to seek injunctive relief.

2 INTRODUCTION

- 2.1 HIA is the voice of the residential building sector of the Australian economy, and represents some 40,000 members throughout Australia. The residential building industry includes both cottage construction and multi-unit apartment buildings. HIA's membership includes builders, trade contractors, design professionals, kitchen and bathroom specialists, manufacturers and suppliers.
- 2.2 The residential building industry, in particular, is one of Australia's most dynamic, innovative and highly efficient service industries and is also a key driver of the Australian economy.
- 2.3 As at February 2013, the ABS estimates that construction employed 1,035,300 people. This represented an 8.9 per cent share of total employment in the Australian economy.



Over the past twelve months, construction employment grew by 1.4 per cent. This was slightly slower than the overall employment growth in the economy of 1.7 per cent.

- 2.4 Research also shows how construction activity has wider economic effects. It is estimated that for every \$1 increase in construction activity, GDP rises by \$4.75 with obvious positive implications for employment at the economy wide level. It has also been estimated that for every 1 per cent increase in Total Factor Productivity in construction, GDP will increase by \$2.36 billion. The economic benefits of increases in construction activity are even greater in situations such as the current one where the economy is not at full employment.

Industrial relations arrangements for medium and high density residential

- 2.5 Although the current and proposed definition of “building work” in the Bill only applies to the construction of 5 single dwelling houses or more, many HIA members work across both the commercial, public works and housing sectors. These include builders and developers of multi-unit apartments, mixed-use buildings and public housing sites. Additionally many HIA trade contractors work for both commercial and residential builders.
- 2.6 Historically, the low-rise detached/ cottage construction sector of the residential building industry has not been a source of illegal industrial disputation to the extent suffered by the civil and commercial construction sectors. This is in part due to the engagement of specialist contractors by builders rather than employees, the relatively small scale of construction for single, detached dwellings and consequential low union membership across the industry.¹
- 2.7 However for infill/ medium and high density residential developments, construction costs represent the largest component of overall costs by a considerable margin. Costs are much less elastic than on residential projects.
- 2.8 These types of industrial relations matters typically drive up commercial construction costs:
- days lost because of industrial action;
 - abuse of OH&S issues for industrial purposes;
 - inflexible inclement weather procedures;
 - less working days per annum because of RDO provisions; and
 - cost stemming from pattern bargaining (no ticket, no start).
- 2.9 Home building firms which operate in both low and medium/high-rise housing typically are forced to establish two divisions: One based on subcontracting for their detached housing construction, and for the medium/high rise sector, EBA employees or if subcontractors are permitted by the unions, a rate schedule has to be adhered to and other commercial site conditions.
- 2.10 In 2003, Econtech prepared a study for the then Department of Employment and Workplace Relations (DEWR) that analysed the cost differences for the same standard building tasks between commercial buildings and domestic residential buildings. Using Rawlinson’s quantity surveyor data, Econtech found that building tasks such as laying a concrete slab, building a brick wall, painting and carpentry work cost an average of 10 per cent more for commercial buildings than domestic residential housing. This difference was mainly attributed to differences in work practices between the commercial and domestic residential building sectors. The 2003 study then went on to model the economy wide

¹ This is not to suggest that cottage construction is immune from illegal industrial behaviour. The illegal delay and black banning of building products and supplies involves the same unions and industry players as the commercial sector. Further contractors who move across residential and commercial sectors are often required to extend the more onerous EBA obligations to their residential activities.



benefits of reducing the cost gap through reform to work practices in the commercial building sector.

- 2.11 In 2007 a further report was commissioned by the ABCC which confirmed that the introduction of that agency coupled with other legislative reforms had improved work practices and lifted productivity in the commercial building industry. One measurement of its success was the narrowing of the cost gap between commercial and residential construction.
- 2.12 The Econtech report (now trading as Independent Economics) has been periodically updated including most recently on 26 August 2013 in a report commissioned by Master Builders Australia².
- 2.13 In HIA's submission, the contents of this updated report speak for itself, although there are several salient features of the report:
 - During the FWBC era there has been significant losses in productivity. Consumers have been \$5.5billion worse off, with higher construction costs reducing demand for new construction including a 1.1% fall for residential construction.
 - Because the building industry specific nature of regulation has been almost completely removed, it is reasonable to expect most or all of the productivity gains achieved during the Taskforce/ABCC era will be lost.
 - According to Econtech, consumers will better off by \$7.5 billion on an annual basis if the ABCC is reinstated.
 - Even though detached housing is not within the jurisdiction of the ABCC, the residential building sector as a whole will still experience a productivity gain of 1.5% if the ABCC is reinstated.

3 Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)

- 3.1 HIA supports the Bill and the re-introduction of the ABCC.
- 3.2 Specifically HIA is pleased to see the following included in the Bill:
 - The re-introduction of the objectives of the Bill as they were under the *Building and Construction Industry Improvement Act 2005 (Cth) (BCIIA)*.
 - The extended definition of "building work" to include off-site prefabrication of made-to-order components for parts of buildings, structures or works, and the transporting or supplying of goods to be used in building work. In many instances, disruptions in the supply and delivery of building materials through coordinated 'go slows' can have as economically disruptive impact on a building project as onsite disputation. These comments are expanded upon below.
 - The re-introduction of strong penalties which serve as a powerful incentive to adhere to the industrial relations laws.
 - The reinstatement of the former ABCC's more unrestricted coercive powers. The coercive powers as outlined in the Bill are broadly similar to the investigatory powers held by other Australian law enforcement agencies, including the Australian Taxation Office, Australian Competition and Consumer Commission and the Australian Securities and Investments Commission. Section 155 of the *Workplace Health and Safety Act 2011 (Cth)* also gives OHS regulators extensive powers to provide information, produce documents and appear before an inspector to give evidence.

² "Economic Analysis of Building and Construction Industry Productivity: 2013 Update". 2013 Econtech Pty Ltd trading as Independent Economics.



- The removal of much unnecessary duplication and red tape associated with the issuing of examination notices, but the retention of oversight by the Commonwealth ombudsman.
- The inclusion of a right to legal representation to a person required to attend before the ABC Commissioner.
- The ability of the ABC Commissioner to delegate his or her compulsory examination functions to a deputy commissioner, or SES employee if no deputies have been appointed.
- A reverse onus for unions and employees relying on the health and safety exception for industrial action.
- Making project agreements unenforceable. HIA **recommends** that the Bill additionally make project agreements illegal.

The Building Code

- 3.3 HIA refers to Chapter 3 of the Bill and the power vested with the Minister to issue a Building Code and the ABC Commissioners role in enforcing compliance with that Code.
- 3.4 In HIA's view, the Building Code and the ABCC/FWBC work "hand in glove".
- 3.5 The 2006 Code and Guidelines, although an administrative burden for some members, alongside the ABCC, was responsible for much of the cultural improvements in the industry that occurred prior to the abolition of the ABCC. The Code in effect was a licensing regime for commercial building projects funded by the Commonwealth Government.
- 3.6 HIA submits that the current Building Code is ineffective, because it simply reflects the *Fair Work Act 2009 (Cth)* (**FWA**) and the 'watered down' content of the FWBIA.
- 3.7 The 2013 Code allows participants to agree to rights of entry that are broader than those provided under the FWA and other relevant legislation without breaching the Code.
- 3.8 Further, as noted in the Second Reading Speech, the abolition of the ABCC forced the state governments to set up their own schemes.
- 3.9 The Second Reading Speech further notes that '*a new statutory code is being developed*'. HIA submit that this new code should be developed in line with the Victorian Code of Practice for the Building and Construction Industry (**Victorian Code**).
- 3.10 Such action would prevent further concerns with the (in)consistency between the Federal Building Code and the Victorian Code as demonstrated in the matter of *Construction, Forestry, Mining and Energy Union v State of Victoria [2013] FCA 445* (17 May 2013); and *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2) [2013] FCA 446* (17 May 2013). The outcome in these two cases is of significant concern to the industry.

Unlawful Action and industry specific provisions

- 3.11 HIA refers to Chapter 5 of the Bill which restores the construction industry offence regime, creating offences for unlawful industrial action and unlawful picketing. HIA supports this chapter.
- 3.12 The construction industry is inherently exposed to pattern bargaining and industrial action over disputed terms, such as those that seek to limit the engagement of independent contractors.
- 3.13 Unfortunately, because of the enhanced bargaining rights and the removal of many of the restrictions on prohibited content that were included in the *Workplace Relations Act* under the FWA, the FWBIA in removing the construction industry-specific prohibitions on



unlawful industrial action, coercion and discrimination left the industry worse, in a regulatory sense, then before the Cole Royal Commission.

- 3.14 HIA supports the new offence for unlawful picketing as outlined in section 47 of the Bill and the imposition of a reverse onus as outlined under section 57 of the Bill which will require individuals to prove they were not motivated by industrial objectives.
- 3.15 Individuals and organisations engaging in unlawful blockades of sites should not be able to hide behind a so-called “democratic” right to protest when their conduct is motivated to achieve an industrial relations outcome that is intended to economically harm the building project and strengthen the union’s bargaining position.
- 3.16 HIA would strongly commend actions taken which aim to prevent large-scale and targeted pickets such as those the subject of evidence in *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors* [2013] VSC 275.
- 3.17 Further, HIA supports the provisions of the Bill which enables a person to apply for injunctive relief to restrain a person from organising or engaging in unlawful industrial action that relates to building work and the imposition of penalties to a maximum of \$34,000 for individuals and \$170,000 for unions for breaches of these provisions. The strong penalties under the BCIIA served as a forceful incentive to adhere to the industrial relations laws.

Application to offsite prefabrication and transportation and delivery of building materials

- 3.18 It has been HIA’s long standing view that offsite work and the building supply chain should be monitored. Delays in the supply and delivery of manufactured components can have as much of an impact on the cost and time it takes to complete a project as onsite delays can.
- 3.19 Accordingly, HIA supports the inclusion of “offsite prefabrication” to the definition of building work in the Bill.
- 3.20 The removal of offsite building work was a significant flaw in the FWBIA. Many contractors involved in the offsite prefabrication of certain building components such as cabinets and window frames will also be involved in the on-site installation of those components.
- 3.21 Further, the extension of the powers of the ABCC to the transportation and delivery of building materials is an important improvement to the BCIIA.
- 3.22 Although the interruption of a concrete pour remains a stock standard industrial tactic, many illegal industrial disputes affecting construction projects (residential, commercial, industrial) actually happen at the interface between onsite work and the delivery of manufactured products.
- 3.23 For instance, HIA notes that last year injunctions were in relation to the Myer Emporium blockade to stop the union from applying unlawful pressure to Boral Resources, Always Concrete Pumping (Vic) Pty Ltd, ICPS (Melb) Pty Ltd, Fitzgeralds and Speed Pro to cut off cement and concreting supplies to Grocon sites.
- 3.24 This dispute continues.
- 3.25 It is clear Boral and other building products suppliers and manufacturers need the protection of a strong regulator from such conduct.

4 Building and Construction Industry (Consequential and Transitional Provisions) Bills 2013 (Cth)

- 4.1 HIA supports the Transitional Bill, specifically provisions which will empower the ABC Commissioner to investigate current and past contraventions of the FWBIA with the full suite of investigation powers as prescribed by the Bill available to it.



- 4.2 Of specific note is Item 20 of Schedule 2 of the Transitional Bill which will enable the ABC Commissioner to re-agitate matters that were settled under section 73 and 73A of the FWBIA.
- 4.3 The inability of FWBC to prosecute matters once the parties have agreed to settle the matter is a fundamental defect in the FWBIA. It enables parties to continually flout and breach the industrial laws, so long as they secure a "settlement" with the complaining party.
- 4.4 Accordingly, HIA sees this provision of the Transitional Bill as a significant step to reinforcing the deterrent powers of the ABCC while also empowering the ABCC to prosecute past recalcitrant behaviour.