



CCIWA SUBMISSION

Senate Education and Employment Legislation Committee

Inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013*

September 2016

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About CCIWA

1. The Chamber of Commerce and Industry WA (**CCIWA**) is the leading business association in Western Australia with approximately 9000 members.
2. CCIWA members operate across most industries, including building and construction, and are located throughout Western Australia. Most of CCIWA's members are private businesses, although CCIWA also has a significant proportion of members in the not for profit sector and the government sector.
3. CCI has strong engagement with the WA businesses community, particularly small and medium enterprises (SME) who account for 80 per cent of our members.

Overview of CCI's position

4. CCIWA welcomes the opportunity to provide a written submission to the Senate Education and Employment Legislation Committee (**Committee**) regarding its inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013 (Bill)* and gives thanks to the Committee for the opportunity.
5. CCI supports the passage of this Bill as a necessary step to addressing the ongoing problems within the building and construction industry concerning the significant disregard for compliance with industrial relation legislation.

The need for an effective watchdog

6. The recent Royal Commission into Trade Union Governance and Corruption (**Heydon Royal Commission**) has reinforced the need for the active enforcement of workplace laws within the construction industry, finding that a great deal of evidence was put before it concerning the *"activities of unions with coverage of workers in the building and construction industry"* and that the *"conduct that has emerged discloses systematic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits, secondary boycotts, breaches of fiduciary duty and contempt of court"*.¹
7. The findings of the Heydon Royal Commission provides clear evidence of the problems facing both businesses and workers in the building and construction industry.
8. However, this is not the first time that clear evidence of systemic unlawful activities within this industry have been brought to light, with the Winneke Royal Commission in 1982, the Giles Royal Commission in 1992 and the Cole Royal Commission in 2003 all finding clear evidence of corruption and unlawful behaviour.

¹ Royal Commission into Trade Union Governance and Corruption (2015) Final Report Volume 5, Chapter 8, paragraph 1.
CCIWA Submission to the Senate Education and Employment Legislation Committee Inquiry into the *Fair Work Amendment Bill 2014* (Cth)

9. It was the Cole Royal Commission that recommended the establishment of a specialised building and construction industrial relations regulator, from which the Australian Building and Construction Commission (**ABCC**) was established.
10. During its relatively short tenure, the ABCC made significant gains in ensuring all parties within the construction industry complied with the relevant laws. Unfortunately these gains have been largely undone as a result of the significantly weaker compliance regime currently in operation. To stamp out these problems it is important that there is an effective cop on the beat to stand up for the rights of individual workers and small business operators within this industry.
11. The impact of corrupt unlawful behaviour within the construction industry was recently highlighted in a Federal Court decision in which a small tiling contractor was forced off a job because it did not have an agreement with the Construction, Forestry, Mining and Energy Union (**CFMEU**). The judge in this matter concluded that *“such conduct strikes at the heart of freedom of association. For subcontractors ... a major pathway to growing their business is to be awarded contracts from large construction companies like the first respondent. If the only way in which they can break into those circles is to have made an agreement with the CFMEU, then the whole fabric of our industrial relations system will disintegrate”*.²
12. Small businesses are often the forgotten victim of the unlawful practices this Bill seeks to address. These businesses are frequently barred from a number of large construction projects because they have a direct relationship with their employees to which the relevant union is not a party.
13. The lives of workers within this industry are also adversely affected, with many being subjected to bullying and harassment when they seek to stand up for their individual rights against these unions.
14. Taxpayers and job seekers are also adversely affected. The abuse of power by many unions has driven up the costs of construction, which ultimately is a direct cost to taxpayers. It also results in fewer building projects meaning fewer job opportunities.
15. Those parties opposing this Bill have focused on a small number of narrow arguments as to why it should not proceed. The remainder of our submission focuses on these arguments.

The legislation is unnecessary?

16. In this Committee’s previous review of the Bill, consideration was given to the statements of the CFMEU’s national secretary that the union has no tolerance for corruption and that it has previously taken internal action against those accused of it.

² *[Director, Fair Work Building Inspectorate v J Hutchinson Pty Ltd & Ors [2016] FCCA 2175 (9 August 2016)]*

17. In essence, the CFMEU claims that left to its own devices the union is capable of internally policing its activities to ensure compliance with its obligations.
18. This claim is not supported by the findings of the royal commissions referred to in this submission. The final report of the Heydon Royal Commission dedicates over 1100 pages to examining specific allegations against the CFMEU, concluding that:
"the evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:
 - (a) *the law is used to deliberately evade, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;*
 - (b) *officials prefer to lie rather than reveal the truth and betray the union;*
 - (c) *the reputations of those who speak out about union wrongdoing become the subjects of baseless slurs and vilification."*³
19. Concerns over the CFMEU's apparent disregard for the rule of law has also been raised by the relevant courts. In a recent decision before the Federal Circuit Court regarding the taking of unlawful industrial action, the presiding judge, identified that *"the CFMEU has an egregious record of repeated and wilful contraventions of all manner of industrial laws"* and that *"there is plainly a need to impose punishment to deter the CFMEU and others like it from treating this country's industrial laws as little more than an annoyance"*.⁴
20. This is despite the CFMEU and its affiliates having been fined a total \$6.1 million in cases initiated by the Fair Work Building and Construction (FWBC), the ABCC and its predecessor body the Building Industry Taskforce⁵.
21. In the face of the extensive evidence of non-compliance it is clearly necessary for Parliament to take steps to ensure that the laws it created are upheld.

Broad based anti-corruption body

22. A number of parties have recommended that a broad based corruption watchdog be established rather than a taskforce focused on industrial relations behaviours within the building and construction industry.
23. It is clear from the Heydon and previous Royal Commissions that there is a serious issue relation to non-compliance with industrial relations legislation within the building and construction industry, which is not typically experienced in other industries.

³ Royal Commission into Trade Union Governance and Corruption (2015) Final Report Volume 5, Chapter 8, paragraph 6.

⁴ Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union & Ors [2016] FCCA 1692 (8 July 2016)

⁵ Total to 30 June 2015. FWBC (12 August 2015) [FWBC has record number of cases before the courts](#)

24. Consequently the issue will be more effectively addressed by having bespoke legislation aimed at specifically addressing this problem.
25. A broad based approach would not have the flexibility necessary to replicate the specific strategies proposed by this Bill, such as the *National Code of Practice for the Construction Industry*, which has already proven successful.
26. The need to have a specific industrial relations regulator for the building and construction industry has previously been recognised by both major political parties, with the Fair Work Building Industry Inspectorate being established by the previous Labor Government, albeit with substantially reduced ability to enforce the Government's laws.
27. In addition to not having the specific tools and knowledge to deal with the issues facing the building and construction industry, a broad based corruption watchdog would also not have the focus and dedicated resources needed to successfully address the problem. It may be inferred that the CFMEU's support for a broad based anti-corruption body recognises these limitations.

Examination Powers

28. The Bill allows the Australian Building and Construction Commissioner (**Commissioner**) to compel a person to give information, to produce documents, or attend before the Commissioner in relation to an investigation of a suspected contravention of the Bill or a designated building law.
29. Such powers are necessary when dealing with a culture which relies on threats and intimidation to coerce employers and employees into keeping silent about unlawful behaviour and not co-operating with enforcement activities.
30. Compulsory examination powers and enforceable penalties for non-compliance provides an effective antidote to such coercion, by empowering employers and workers to speak up about unlawful practices on the basis that they have to.
31. With respect to concerns that the ABCC would abuse these provisions, it should be noted that the Bill provides a number of checks and balances. In particular when exercising this provision the Commissioner must notify Commonwealth Ombudsman when issuing an examination notice, and provide it with a transcript of the examination. The person may also choose to be represented by a lawyer at the examination.
32. Furthermore, the ability for a Government agency to engage in compulsory examination is not novel, with the Australia Competition and Consumer Commission (**ACCC**), Australian Securities and Investments Commission (**ASIC**), Australian Taxation Office (**ATO**), Centrelink and Medicare having similar powers.

33. It has been claimed that these provisions would give construction workers less rights than suspected drug dealers. This claim has been discredited, with an Australian Broadcasting Commission (ABC) fact check report finding that the claim is “nonsense” and that it conflates “two very different concepts” with questioning of a drug dealer being a “a step in the criminal justice process, and answers to the questions may lead to a conviction and jail sentence for that person”. In comparison a “person examined by the ABCC is providing information as a witness to a civil investigation” and “nothing they say can be used against them in subsequent proceedings”.⁶
34. The concerns over compulsory examination is principally being driven by the CFMEU, with it reasonable to assume that their concern is that these provisions would bring further evidence of unlawful activities.

Safety

35. It has also been alleged that the reintroduction of the ABCC will reduce workplace safety. These claims are mischievous.
36. The Bill does not impinge on the existing rights of workers, unions or regulators to raise and investigate safety concerns.
37. In particular, the Bill does not alter or limit the existing rights that unions have to enter workplaces on legitimate work health and safety grounds. Furthermore an employee’s rights to raise any concerns that they have to a union or relevant Government regulator are unaffected, with the *Fair Work Act 2009* (Cth) and relevant state safety laws providing protection for employees who make a complaint on these grounds.
38. Safety is a key focus of all parties within the building and construction industry, and employers are committed to ensuring that the improvements made in recent decades continue.
39. A report by Safe Work Australia show that between 2001/02 and 2011/12 the rate of serious injuries in the construction industry fell by 31% and deaths decreased by 36%, even with a 33% increase in the number of workers⁷. With the ABCC in operation between 2005 and 2012 it is clear that tackling union lawlessness does not negatively impact on safety.

⁶ ABC (27 April 2016) [Fact check: Would building workers have less rights than ice dealers under ABCC laws?](#)

⁷ [Safe Work Australia \(May 2015\) Construction Industry Profile.](#)