Senate Education and Employment Legislation Committee

Building and Construction Industry (Improving Productivity) Bill 2013

and the

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

SUBMISSION BY THE

AUSTRALIAN MANUFACTURING WORKERS UNION,

AUSTRALIAN WORKERS UNION,

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

AND THE

TRANSPORT WORKERS UNION OF AUSTRALIA

19 February, 2016

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1. Introduction

The Federal Government has recently reintroduced the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (the Bill/s) into the Parliament.

These Bills are in identical terms to Bills rejected by the Senate in 2014 after an inquiry and report by this Committee.[1]

If approved, the reintroduced 2013 Bills will:

1. re-name the Fair Work Building Industry Inspectorate (FWBC)[2] as the Australian Building and Construction Commissioner (ABCC);
2. remove safeguards on the coercive powers which are currently available to the FWBC;
3. include industry specific laws relating to unlawful industrial action, coercion, discrimination and unenforceable agreements; and
4. impose higher civil penalties for contraventions of industrial laws.

The Federal Government also intends to make major changes to the rules applying to construction projects that are funded by the Commonwealth. In the Second Reading Speech for the Bills, the Government confirmed that its 2014 *Building and Construction Industry (Fair and Lawful Building Sites) Code*[3] was to take effect at the same time as the 'new ABCC' started to operate.[4] The Bills and the new Code must therefore be considered as a single package of 'reforms'.

The construction unions opposed these Bills when they were introduced over two years ago. We refer to and rely on the union submissions made to this Committee and the Education and Employment References Committee, in 2013-14. We maintain our opposition to the Bills.

The Government places some reliance on the Final Report of the Heydon Royal Commission to support the passage of these Bills. However, a close reading of the Heydon Royal Commission Report shows that this reliance is entirely misplaced and misleading. In fact, the recommendations in the Report contradict the most fundamental features of these Bills.

The Heydon Report specifically considers, and **rejects, the idea of creating industry-specific legal restrictions.** It also concludes that different penalties

[1] See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ABCC_2013. The Education and Employment References Committee also considered the Bills in early 2014 - http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ABCC_Reference
[2] Strictly, the name under the *Fair Work (Building Industry) Act* 2012 is Fair Work Building Industry Inspectorate (FWBII). See s 26J. FWBC is the acronym adopted by the inspectorate.
[3] Released April 2014, amended September 2014
[4] 2 February 2016, page 10.

should **not** be included in legislation that applies to just one industry. These are central features of the Bills. Both elements are repudiated by the Heydon Royal Commission Report.

The Royal Commission Report has weakened, not strengthened the case for the passage of these laws.

This submission, made on behalf of the Australian Manufacturing Workers Union, the Australian Workers Union, the Construction, Forestry, Mining and Energy Union and the Transport Workers Union of Australia, deals with the most common arguments put forward to support the ABCC laws. When the arguments are considered, it can be seen that these are not laws to improve the industry or balance the interests of those who work within it. Rather, they are politically-driven laws designed to attack construction unions and their members and promote the economic interests of large construction companies and property developers at the expense of workers' rights.

The Government has failed to demonstrate why proposed laws which were rejected less than two years ago should now be approved.

The Senate should again reject the Bills.

2. We Need to Re-introduce the ABCC as the Construction Industry 'Watchdog'

We already have a 'watchdog'.

The construction industry 'watchdog' was never abolished. The ABCC was simply re-named 'FWBC' in 2012 as part of the changes made by the previous Government following a review by former Federal Court judge, Hon. Murray Wilcox QC.

When its name changed, the FWBC **retained** its strong investigative powers, including the power to compel people to attend interviews and answer questions (or face a possible six months imprisonment) and to hand over documents.

Those powers have existed since 2005 and were extended last year for a further two years.[5]

The Heydon Royal Commission Final Report does not recommend the passage of the Bill. It recommends the continuation of an industry-specific regulator.

> *Recommendation 61*
>
> *There should continue to be a building and construction industry regulator, separate from the Office of the Fair Work Ombudsman, with the role of investigating and enforcing the Fair Work Act 2009 (Cth) and other relevant industrial laws in connection with building industry participants.*[6]

The Bills do not need to be passed to achieve this outcome.

This is not a case of choosing whether to have a powerful regulator or not. We already have the FWBC, which is separate from the FWO. It is has both the power and the resources[7] to investigate and prosecute breaches of industrial laws.

[5] *Construction Industry Amendment (Protecting Witnesses) Act 2015*
[6] Chapter 8, paragraph 112
[7] The FWBC has significant public resources at its disposal. Total FWBC income increased from $29.780m in 2013-14 to $34.792m in 2014-15. It has 146 staff.

3. We Need the ABCC to Clean up Criminality and Corruption in the Construction Industry

The ABCC/FWBC has never had any role in investigating breaches of the criminal law. It deals with possible industrial law contraventions, which are and always have been civil, not criminal matters. This Bill would not change that situation at all.

The Government, the FWBC and sections of the media are trying to give the public the impression that a new ABCC would tackle criminality in the construction industry. For example the Explanatory Memorandum for the Bill refers to violence and thuggery as reasons why the Bill should be passed. The second reading speech does this as well.

A page 1 story in 'The Australian' newspaper on 15 October 2015 declared that the FWBC had dealt with *'1000 crimes on building sites'* in a year. In fact, no crimes were involved at all. Even the 948 supposed (civil) contraventions of workplace laws referred to, was baseless.

The FWBC Director was forced to reluctantly concede in Senate Estimates that the figure of 948 referred to the number of *complaints* that had been received by the FWBC and investigated. He said, '*It could be a complaint about a drainpipe over someone's back fence.*'[8]

The ABCC/FWBC has no role in investigating or prosecuting violence, extortion or any of the other forms of criminality that have been reported in the media or referred to by politicians.

The current FWBC Director has confirmed this position. In Senate Estimates last year he said criminal matters were '*not within our purview*'.[9] In 2014 he told Estimates if the FWBC comes across criminal conduct they refer it to the police.[10] He told the media last year *'The FWBC does not prosecute these matters.'* [11]

The Bill does not confer a criminal law enforcement role on the new ABCC. As the previous Minister pointed out in his submission to this Committee in the 2014 inquiry, '*The ABCC's role under the Bill will be to regulate workplace relations."*[12]

[8] Nigel Hadgkiss – Senate Estimates – 22 October 2015.
[9] Estimates 22/10/15 at 107.
[10] Estimates 23/10/14, pg 85:
[11]] http://www.heraldsun.com.au/news/law-order/labor-leader-daniel-andrews-under-pressure-as-kickback-allegations-claim-senior-cfmeu-scalp/story-fni0fee2-1226811620548
[12] Submission pg 9

Criminal matters are properly dealt with by the existing laws and criminal law enforcement agencies. The FWBC already has the ability to refer possible criminal behaviour to the police.

The Heydon Royal Commission made a number of referrals to various prosecuting authorities, including the FWBC, for those authorities to consider. That is not to say that each referral amounted to a contravention of the law. As the Commission report itself noted:

> *A referral may be made to the prosecuting authorities, but the grounds for a referral are quite different from the grounds on which a court might convict.*[13]

Possible contraventions of the criminal law were referred to the relevant agencies – Directors of Public Prosecutions and the police. A number of referrals for possible *industrial* contraventions were made to the FWBC. Exactly how many of these will ultimately lead to court proceedings and of those, how many will result in a court concluding that a contravention has occurred, is impossible to say. This is because Royal Commission conclusions or 'findings' emerge from a very different process to court proceedings. The Heydon Royal Commission Report put it this way:

> *Notions of a 'fair trial', however rhetorically appealing, do not apply to commissions of enquiry including this Royal Commission. Criminal trials involve a final adjudication of guilt. Commissions of inquiry have a duty to inquire.*

In any event, even if this Bill had been passed in 2014 it would have made no difference to the way Royal Commission referrals were dealt with. The FWBC is not a prosecuting authority for criminal contraventions and nor would the ABCC be either.

It is manifestly untrue and completely misleading to say that a new ABCC will deal with criminal matters.

These Bills are not about corruption either. As the ACTU's submission to this Committee makes clear, a completely different legislative response is required if Parliament wants to address corrupt conduct. No doubt proper, non-politicised anti-corruption measures would have widespread community support, including from the trade union movement.

However these are not anti-corruption Bills. They deal with the regulation of industrial relations and industrial rights.

[13] Volume 4 paragraph 197.

4. The New ABCC will be independent and politically neutral. It will prosecute employers too.

Just like its predecessor (and the current FWBC), the ABCC would focus on investigating industrial breaches relating to unions and workers.

From October 2005 until June 2011 the ABCC brought a total of 86 prosecutions against unions and union officials. This compared to a mere 5 prosecutions against employers in the same period. In the period 1 July 2009 to 30 June 2010 there were 29 prosecutions brought against unions and union officials and *none* against employers.

The FWBC does not deal with employer breaches like underpayment of wages and 'phoenix' companies, even though the laws under which it is established requires it to enforce laws applying to *ALL* building industry participants.

Section 10 of the *Fair Work (Building Industry) Act* 2012 says it is the function of the Director of the FWBC to promote and monitor compliance with designated building laws by 'building industry participants'. Section 4 defines building industry participant to include *employers* in the building and construction industry.

On his appointment in October 2013, and despite the clear terms of the Act, the current FWBC Director announced that, just like the original ABCC, the FWBC would no longer pursue breaches by employers of industrial awards and agreements such as underpayment of wages and entitlements to employees. He told Senate Estimates these employer breaches of the industrial law, were not the FWBC's 'core business'.

The failure of the ABCC/FWBC to pursue employee entitlements and prosecute employers who engage in breaches of industrial law, and the Government's failure to direct them to do so,[14] directly contradicts the recommendations of the Cole Royal Commission. Cole recommended that the ABCC adopt a *greater* role in the enforcement of employee entitlements,[15] provide representation for employees who had been underpaid[16] and even monitor and report on mechanisms that would improve this process for employees.[17] None of that has happened.

[14] The Minister can make such a direction - see section 11 *Building and Construction industry Improvement Act* 2005 and *Fair Work (Building Industry) Act* 2012.
[15] Recommendation 157 Final Report Volume 1.
[16] Recommendation 159 Final Report Volume 1.
[17] Recommendation 163 Final Report Volume 1.

Observance of awards and enterprise agreements by employers is a serious problem in the construction industry.

When the FWBC *was* pursuing underpayments for a short period prior to October 2013, many breaches of industrial laws by employers were uncovered. For example, in the 2012-2013 reporting period, the FWBC recovered wages and entitlements totalling $1,622,853.89 for 1363 construction workers.[18] In that year, the greatest number of investigations of all categories, 31%, were undertaken in the area of wages and employee entitlements.

Despite abdicating responsibility for the enforcement of employee wages and entitlements[19], the FWBC makes the extraordinary claim in its Annual Report that *'the FWBC acts impartially and does not single out any industry participant.'*[20]

By unilaterally deciding to opt out of its statutory obligation to pursue employers who underpay their workers, the FWBC allows itself more time and resources to pursue the prosecution of unions and workers.

Employer Breaches

The FWBC does deal with one form of employer breach – those relating to the *Building Code* 2013 (the Code) – in a very limited way. The Code is a legally binding legislative instrument approved by Parliament. Breaches or suspected breaches must be notified to the FWBC within 21 days.[21]

But these employer breaches are handled by the FWBC offering 'advice, assistance and education', rather than the banning or restricting of companies from Federal Government projects, or the punitive court proceedings which they regularly pursue against unions and workers. The most recent FWBC Annual report says:

> *Where breaches of the Building Code were identified, contractors were given advice and assistance to rectify the potential breaches and the necessary reform was initiated*[22].
>
> *In each instance where non-compliance was identified, rectification was achieved through correspondence and education of the contractor.*[23]

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[18] Annual Report 2012-2013 page 31.
[19] Which are automatically referred to the FWO.
[20] Op cit, page 14.
[21] Section 22 Building Code 2013
[22] At page 39.
[23] At page 40.

In its 2015 submission[24] to the Senate Economics References Committee inquiry into insolvency in the Australian construction industry the CFMEU pointed out:-

- According to external administrators' reports lodged with ASIC, **unpaid employee entitlements** of companies in the construction industry experiencing an insolvency event in 2013-14 alone amounted to almost $57 million at the lower end, up to a median amount of almost $137 million.

- ASIC administrators' reports put the figure of **unpaid taxes** and charges for **construction industry companies** for 2013-14 at a lower end figure of $178 million to a median amount of $487 million(in round terms)

- More than three quarters of all administrators' reports lodged in 2013-14 identified some form of **civil or criminal misconduct by insolvent companies and their directors**. The construction industry accounted for more than 20% of these. In that year alone, there were 2393 potential breaches of the general fiduciary duties of directors and the duty to prevent insolvent trading, reported for the construction industry.

- There has **not been a single prosecution** taken under s 596AB of the *Corporations Act* – a section directed to agreements or transactions that prevent the recovery, or reduce the amount of, recoverable employee entitlements.

- The Federal Government has recently **cut ASIC's funding** by $120 million over a four year period. In the current financial year it will lose 12% of its operating budget and 209 staff. By contrast, the Government has **increased funding for the FWBC.**

- Across its entire area of corporate and marketplace responsibility, ASIC obtained civil **penalties against companies/directors** of just over $3 million in the six months to December 2014. FWBC obtained $2.26 million in penalties, **mostly against unions and workers**, in the 2013-14 financial year.

Prosecuting Workers

Over three hundred and fifty ordinary construction workers are currently facing prosecution by the FWBC.

In 2013, the FWBC concluded a prosecution against 117 construction workers in Western Australia over an industrial dispute that took place in 2008. The workers

[24] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Submissions

were fined in excess of $1 million in total. The findings of contraventions against unions and officials were overturned on appeal.[25]

In at least four matters to date, the FWBC has commenced proceedings against approximately 145 individual workers, only to discontinue the case against those workers at a later date.[26]

[25] [2013] FCA 942

[26] See BRG318/2014, BRG894/2014, BRG 312/2015 and WAD 98/2015

5. The Building Industry Watchdog Needs Stronger Powers to Deal with Unlawful Behaviour.

The current FWBC *already has* coercive powers that are unparalleled for an industrial regulator anywhere else in the world.

After it was renamed FWBC, it retained the power held by the ABCC to compel people to attend and answer questions without the ability to refuse on the grounds of self-incrimination.[27] This power abrogates the fundamental common law privilege against self-exposure to penalties and forfeiture.[28]

The FWBC Director maintains that coercive interviews are *'a critical tool in breaking down the walls of silence in the industry.'*[29] This oft repeated claim is simply a very poor political justification for the existence of these extraordinary powers. It is false because:

- Construction industry employers have never shown any reluctance to resist union claims or oppose union policies. Many are openly hostile to unions. Employers regularly oppose union claims and use industrial tactics and the courts and industrial tribunals, to pursue their case without any fear or hesitation about how unions will react. There is no reason why the situation would be any different for employer engagement with FWBC. In fact, it is very common for employers to call the FWBC in the union's presence to get the FWBC's advice and assistance to resist or obstruct union claims. The 'wall of silence' is a myth.

- It is very easy for someone who wanted to assist an FWBC investigation to do so confidentially. Even if a person who met with FWBC confidentially to provide information was later to give evidence in court, they could be required to do so by subpoena and therefore be seen to be doing so under legal compulsion.

- For production of documents, there is already a compulsory power available under the *Fair Work Act*.[30] Failure to comply with this power results in the imposition of civil penalties. The deterrent effect of civil penalties for non-compliance provides a sufficient level of compulsion, irrespective of whether the person receiving the notice does or does not want to hand over the material. An additional criminal offence for non-production is completely unnecessary, excessive and oppressive in the extreme.

[27] Section 52 *Fair Work (Building Industry) Act* 2012
[28] *Sorby v Commonwealth* (1983) 152 CLR 281 and 292 (Gibbs CJ) and 309 (Mason, Wilson and Dawson JJ); *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at [186] (Crennan, Kiefel and Bell JJ).
[29] At page 15.
[30] Section 712 *Fair Work Act* 2009

Aside from these coercive powers, the FWBC also has the full range of powers available to the Fair Work Ombudsman. The construction unions routinely comply with notices from FWBC requiring production of documents. There have been no prosecutions against unions or union members for failing to comply with them.

The civil penalties supporting the power to require production of documents and records is an adequate deterrent against non-compliance and has worked effectively since the *Fair Work Act* was introduced in 2009.

FWO inspectors (including those from FWBC appointed as Fair Work inspectors) currently have the power to:-

- inspect any work, process or object,
- interview any person,
- require a person to tell the inspector who has custody of, or access to, a record or document,
- require a person who has custody of, or access to, a record or document, to produce the record or document to the inspector
- inspect, and make copies of, any record or document that is kept on the premises or is accessible from a computer that is kept on the premises;
- take samples of any goods or substances in accordance with any procedures prescribed by the regulations.

FWBC inspectors would continue to have and use these powers whether the Bill passes or not.

6. The Bill is Needed to Strengthen the Current Coercive Powers

The Bill does not 'strengthen' the existing coercive powers at all.

What the Bill does is strip away the few safeguards that were recommended by the Wilcox Review to protect people who are interrogated and forced to answer questions.

- Under the current Act, a presidential member of the Administrative Appeals Tribunal may, after being satisfied of certain minimum requirements, authorise a coercive notice before it is given to a member of the public.

  Under the Bill, the ABCC Director authorises the notices him/her self.

- Under the current Act, notices can only be authorised where other methods have been tried and were unsuccessful, or are not appropriate in the circumstances.[31]

  Under the Bill, coercive notices can be used by the ABCC as a first resort.

- Under the current Act, the person being interrogated is entitled to be legally represented by the lawyer of their choosing.[32]

  Under the Bill, the person being interrogated can choose to be legally represented[33] but do not have a right that it will be by the lawyer of their choosing.[34]

- Under the current Act, a person who is subjected to a compulsory interrogation is entitled to claim reasonable expenses, including legal expenses,[35] for attending.

  Under the Bill, there is no ability to claim for legal expenses.[36]

- Under the current Act, a person cannot be directed not to discuss the details of interrogation with any other person, including their family members.[37] This ensures that people interrogated by officials of the State

[31] S 47(1)(d)
[32] S 51(3)
[33] S 61(4)
[34] See s. 61 of the Bill, the *Building and Construction Industry Improvement Act* 2005 and the decision in *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner)* **[2006] FCA 1334**
[35] Section 58
[36] Section 63
[37] Section 51(6)

are able to report and seek advice on measures adopted and used by officials during interrogations.

Under the Bill, that important protection is removed. A 'non-disclosure order' of this kind imposed on those who are interrogated by the ABCC is oppressive and unnecessary. No such restrictions are imposed on suspects in serious criminal matters.

- Under the current Act a person does not have to disclose information if the information is subject to legal professional privilege or where public interest immunity applies.[38]

  These core common law rights are not contained in the Bill.

It is imperative that safeguards on these powers be maintained, not removed. No cogent reason has ever been advanced for affording those suspected of breaching industrial laws with fewer rights than the most egregious criminals.

The Heydon Royal Commission Final Report said that suggestions that regulators overreach or abuse coercive powers are rare.[39] Unfortunately this is not so in the case of the ABCC.

The ABCC coercive powers have been seriously misused. This is not a mere suggestion, but a court finding.

In *Commonwealth Director of Public Prosecutions v Tribe (Ark)*[40] the Court held that the Notice issued by the ABCC to construction worker Ark Tribe, was defective. After a lengthy and costly trial where Mr Tribe faced possible imprisonment, he was acquitted of the charge of failing to attend a coercive interview.

Since the *Tribe* decision, the ABCC/FWBC has confirmed that all 203 coercive notices issued from October 2005 until the date of the *Tribe* decision on 24 November 2010, suffered from the same defect as the Tribe notice.[41]

The ABCC therefore engaged in significant and sustained conduct that was beyond its powers and which subjected a substantial number of people to coercive interrogations when it had no legal foundation for doing so.

[38] S 52(2)
[39] Volume 8, paragraph 145.
[40] *File No: MCPAR-09-2146 Magistrates Court SA*
[41] Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Budget Estimates 2011-2012 Question No.EW0119_12

Disturbingly, ABCC prosecutions proceeded on the basis of information or material obtained by it through the use of defective s 52 notices[42] and evidence obtained by this means was admitted in court proceedings.[43] The only advice provided by the ABCC to people issued with one of the 203 defective notices was to contact one of them and tell them that the interview was not going ahead.[44]

The Heydon Royal Commission Report neglected to mention these issues.

[42] Ibid Question No.EW0121_12
[43] Ibid Question No EW0122_12
[44] Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Question No.EW0124_12

7. We need the separate, additional laws for the construction industry in this Bill to control industrial behaviour in the industry

The Heydon Royal Commission Final Report rejected this idea.

In fact, after a lengthy analysis, the Heydon Report said that there should **NOT** be separate laws for the construction industry. It concluded as follows:

> *186. There is, however, merit in **uniformity of substantive industrial laws**, even where there is a need for specific regulatory enforcement.*[45] (emphasis added)

> 187. *Subject to certain matters, the building specific industrial laws proposed in the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) are very similar to those established by the FW Act. This suggests that **rather than having separate legislation governing building industry participants, the provisions of the FW Act should apply to building industry participants, but that amendments to the FW Act are necessary to deter unlawful conduct within the building and construction industry.***

The coverage of these Bills is intentionally *extended* beyond that which applied under the previous ABCC legislation. This is done by extending the definition of 'building work' to off-shore operations and by including the transport or supply of goods used in building work. More employees and employers would therefore be covered by these laws than has ever previously been the case. This makes the problem of non-uniformity of industrial laws identified by the Heydon Report worse. It would also create further arguments about the boundaries of the laws and whether the different industrial rights that exist for those covered by the laws apply at all.

Picketing

The Bill includes a new prohibition on certain forms of picketing.

An unlawful picket is defined to include any action that is industrially motivated and directly restricts persons from accessing or leaving a building site, *or has that purpose.* It follows that for picketing to be unlawful, it does not actually have to restrict or prevent in any material way, access or egress to a building site. Any group of persons, including members of the general public, who have assembled with the purpose of preventing or restricting access, where that purpose is industrially motivated, would be infringing the provision and be exposed to fines and injunctions irrespective of whether they had actually done anything to restrict

[45] Volume 8.

access. The mere *organising* of such action is also deemed to be unlawful, even before persons physically assemble.

The new restrictions may include conduct such as peaceful assemblies and the conveying of information to persons entering or leaving a building site. Thus even action that is not unlawful at common law and action which is motivated by an otherwise perfectly lawful industrial purpose will be caught by these provisions.

The Statement of Compatibility with Human Rights which is annexed to the Explanatory Memorandum concedes that *'The right to freedom of peaceful assembly is limited by the prohibition on unlawful picketing that is contained in s. 47 of the Bill*.'

The Heydon Report rejected the idea that a picketing restriction should only apply to the construction industry.

> 190. *Picketing involving obstruction and besetting is tortious at common law. It is highly anomalous if Fair Work Commission cannot stop that kind of tortious industrial conduct when it can make stop orders under s 418 in relation to other types of industrial action.* ***Again, rather than having special building industry legislation, the FW Act should deal specifically with industrially motivated picketing.***

Coercion and Discrimination

All of the additional sections in the Bill dealing with coercion and discrimination are already covered by the *Fair Work Act* 2009.

The proposed section 52 of the Bill relates to coercion in the allocation of duties to particular persons. This is already dealt with by s. 355 of the FW Act. The MBA conceded as much in relation to the equivalent provision, s. 43 of the BCII Act, during the Wilcox Inquiry.[46] The Explanatory Memorandum acknowledges that the FW Act prohibitions are in similar terms.[47] The proposed section is entirely unnecessary.

The proposed section 53 refers to coercion in relation to superannuation. Again, the Wilcox Report concluded that the equivalent provision of the BCII Act, s. 46,

[46] Final Report 4.74
[47] Para 142.

was already covered by the provisions of s. 343 of the FW Act.[48] This is still the case.

The proposed section 54, which is in similar terms to s. 44 of the BCII Act, is covered by the provisions of ss. 340 and 343 of the FW Act. Wilcox analysed these provisions and expressly reached that conclusion.[49] Again, the Explanatory Memorandum acknowledges that the FW Act prohibitions are in similar terms.[50]

The proposed section 55 is in similar terms to what was contained in the BCII Act. As was found by the Wilcox Report,[51] the FW Act prohibition in s 354 covers this situation. Once again the Explanatory Memorandum acknowledges the repetition.[52]

The Wilcox Report disposed of the arguments about the need to retain additional penalty provisions from the *BCII Act* once and for all. It concluded that each of the provisions was already comprehensively dealt with in the *Fair Work Bill* (now the *FW Act*) and that there was no need to carry any of them forward.

By concluding that there should be uniformity of industrial laws rather than 'add-ons' for particular industries, the Heydon Royal Commission Report provides no support whatsoever for these aspects of the Bill and a strong in-principle reason why they should never become law.

[48] Final report 4.80
[49] Final report 4.75 to 4.78
[50] Para 156.
[51] At 4.79
[52] At 158.

8. Higher penalties are needed to deter unlawful action in the construction industry.

Levels of industrial action in the construction industry, like all other industries, are at historically low levels and have been for a number of years.

Even official figures for industrial action overstate the issue because those figures do not distinguish between 'protected' industrial action, which is perfectly legal and recognised in the *Fair Work Act* as a legitimate element of the collective bargaining system, and other forms of industrial action.

The *Wilcox Report* dealt with the argument that the construction industry is unique in its vulnerability to industrial action.

> *'....it is necessary to remember there are many other industries in which industrial action may cause great loss to an employer, and even the national economy, and/or considerable public inconvenience. One has only to think of the major export industries, most components of the transport industry, the gas and electricity industries, the telecommunication industry and emergency services such as police, ambulances and hospitals.* ***There is no less need to regulate industrial action in those industries than in the building and construction industry. Recognising the serious consequences of industrial action in virtually any industry, the Fair Work Bill proposes a number of severe constraints upon its occurrence.***

The rationale for the higher penalties for the construction industry comes from the Cole Royal Commission. However Commissioner Cole also recommended that the maximum penalties for *employers* who breach awards and agreements by underpaying employees their lawful entitlements should be increased to the same level as those for industrial action.[53] That recommendation was ignored by the Coalition Government. The result was that from the time when the ABCC legislation was introduced in 2005 until 2012, workers were exposed to far higher penalties than employers for contravening industrial laws.

The proposition that one industry should be singled out for higher penalties for industrial conduct contravenes the fundamental principle of equality before the law. As the Wilcox Report concluded:

> *'I do not see how (the history of the building and construction industry) can justify... the contravener... being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and happened to be brought to justice. To do that would depart from the principle... of equality before the law.*

[53] Recommendation 165, Volume 1 Final Report.

It would be anomalous and unfair in the extreme to reintroduce higher penalties into one industry and impose them on workers and unions who operate in that industry.

9. The ABCC will deliver/has delivered economic benefits to the community.

The ABCC has cost Australia taxpayers over $250 million since it was set up in 2005. There is no firm evidence to show that it has delivered any tangible benefits to the industry or the Australian economy more generally. It has, since its inception and continues to engage in a union-busting campaign at an ongoing cost to the public of around $30 million a year.

The FWBC has significant public resources at its disposal. Total FWBC income increased from $29.780m in 2013-14 to $34.792m in 2014-15. It has a total of 146 staff.

Yet the Government claims that there is a compelling economic case for the passage of the Bill.

The so-called economic case for the ABCC was totally demolished by the submissions made on the Bills during the 2013-14 Senate Committee inquiries.

Heavy reliance for the 'improved productivity' argument is placed on an analysis originally undertaken by Econtech (now Independent Economics) which were commissioned, variously, by the ABCC and the Master Builders Association.

These self-serving reports have been widely criticised by a range of people, including Hon. Murray Wilcox QC who described the report as 'deeply flawed' and said it 'ought to be totally disregarded'[54], as well as various academics and economic writers.

A report by PriceWaterHouseCoopers (PwC) in October 2013 on Productivity in the Construction Industry described the reports as *'found wanting on a number of methodological grounds',* with no discernible contribution having been made by the ABCC to productivity in the construction industry. Rather, data used in the PwC report demonstrates that construction industry labour productivity has grown steadily since at least 1994-95 and appears to be broadly consistent with comparable industries.

The Econtech Reports are the source of figure that the ABCC and the 'industry reform package' of the Howard Government was responsible for a 9.4% productivity improvement across the industry. The method used in the Reports to produce this figure was to simply compare the costs of completing standard tasks (e.g. laying concrete) in the less unionised housing sector against the more unionised commercial construction sector, as though union density were the only feature which distinguishes the two sectors.

[54] Wilcox, M. '*Transition to Fair Work Australia for the Building and Construction Industry'* (Report March 2009) at 5.48.

The Reports also argued that the data demonstrated that productivity in the industry during the 'ABCC period' was higher than that which could be predicted as being the case without the ABCC, based on the broader national productivity figures.

Professor David Peetz's submissions to the 2013-14 Senate inquiries show that *not only* was there no evidence of costs narrowing between the two sectors since the establishment of the ABCC, but if anything, the gap slightly widened.[55]

Further, on closer analysis the Econtech Reports do not provide any evidence that supports the hypothesis that the introduction of the ABCC had any impact on improved productivity in the construction industry. This because the Econtech methodology fails to take into account the effect on the 'all industries' productivity figures of unusually low productivity in the mining and utilities sectors.

When actual construction industry labour productivity (as opposed to some predicted figure generated by an economic model) is compared with national productivity figures, Professor Peetz's submission shows that for most of the 'ABCC reform period' it lagged behind national levels, a trend which was only reversed in 2011-12 after the ABCC began making less frequent use of its coercive powers.[56]

Professor Peetz was able to conclude:

> *'Overall, then, construction industry labour productivity followed a path broadly comparable to that of the rest of the economy.* ***There was no magical 9.4 per cent increase in productivity as a result of the ABCC or other reforms,*** *and no equally magical 7 per cent drop in productivity (75 per cent of 9.4 per cent) evident as a result of the FWBC coming into effect.*
>
> *The Reports' claims of productivity gains from the use of coercive powers are also not borne out and nor are they discernible in ABS or Productivity Commission data.*
>
> *In short, if 'economic case' refers to productivity gains, there is no economic case for the reinstatement of the ABCC. If, however, the aim is to increase the share of income going to profits, or reduce it going to wages, then that is an 'economic' objective that would be served by the reintroduction of an institution that may more*

[55] Submission 8 Page 3.
[56] Ibid, p 7.

> *effectively use coercive powers against workers. If this is the aim, however, it should be more clearly stated.'* (emphasis added)

The Heydon Final Report contributes very little to the 'economic' debate. It simply recites the conclusions of the 2014 Productivity Commission Report,[57] which offers no comfort at all to the proponents of the 'ABCC = greater productivity' argument:

> *…..when scrutinised meticulously, the quantitative results provided by [Independent Economics] and others* ***do not provide credible evidence that the [Building Industry Taskforce]/ABCC regime created a resurgence in aggregate construction productivity*** *or that the removal of the ABCC has had material aggregate effects. Indeed, the available date suggests that the regime did not have a large aggregate impact.*[58] (emphasis added)

[57] Productivity Commission Inquiry into Public Infrastructure, *Inquiry Report*, 27/5/14
[58] Quoted at paragraph 92, Volume 5 Chapter 8 Final Report

10. Even if the Bill limits human rights or contradicts international labour standards, those limitations are 'reasonable, necessary and proportionate.'[59]

The building industry laws have, on no less than eight separate occasions, been found by the ILO's *Committee of Experts on the Application of Conventions and Recommendations* and the *Committee on Freedom of Association* to be contrary to core International Labour Conventions to which Australia is signatory.

As early as 2005, the ILO's Committee on Freedom of Association noted:

> *'As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision.'*

In February 2010 the Committee of Experts said:-

> *'The Committee considers that the prosecution of workers does not constitute part of the primary duties of inspectors and may not only seriously interfere with the effective discharge of their primary duties – which should be centred on the protection of workers under Article 3 of the Convention – but also prejudice the authority and impartiality necessary in the relations between inspectors and employers and workers. This is even more so when the laws on the basis of which the workers are prosecuted have been repeatedly found by this Committee to be contrary to other international labour standards, notably Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).'*

In February 2011 the Committee reiterated its previous conclusions:-

> *'Noting with concern that the manner in which the ABCC carries out its activities seems to have led to the exclusion of workers in the building and construction industry from the protection that the labour inspection system ought to secure for these workers under the applicable laws, the Committee urges the Government to ensure that the priorities of the ABCC (or the Fair Work Building Industry Inspectorate) are effectively reoriented so that labour inspectors in the building and construction industry may focus on their main functions in full conformity with Article 3(1) and (2) of the Convention.'*

It is important to have regard to international obligations that have been voluntarily assumed by Australia in deciding the fate of the proposed laws. A

[59] See *Statement of Compatibility with Human Rights* annexed to the Explanatory Memorandum, final paragraph.

reversion to the 'ABCC laws' will inevitably bring Australia back into conflict with the most fundamental of internationally accepted labour standards.

It is not as though the Federal Government is proposing to introduce laws that have never been tested against international standards. These laws have already failed to measure up to these standards.

It is extraordinary that the Government is promoting these laws yet again, despite the strident and sustained international condemnation they have already received.

11. Building and Construction Industry (Fair and Lawful Building Sites) Code 2014

On 17 April 2014, the Coalition Government published an "Advance Release" of the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* ("the new Code"). A revised version was published on 28 November 2014. The new Code is designed to replace the current Building Code 2013, which is a legislative instrument that came into effect on 1 February 2013.

The new Code is said to be made pursuant to section 34 of the Bill, and provides that it takes effect at the same time as section 3 of the Bill. In considering whether or not to approve the Bills, the Senate also needs to have regard to the effect of the new Code, because the Government has said these are a package of 'reforms' that will operate concurrently.[60]

Because the new Code depends on the passage of the Bill into law for it to come into effect, it currently has no status beyond that of an expression of the Executive Government's preferred form of regulation for federally funded construction sites.

Nonetheless, the Government has tried to maximise the new Code's impact on enterprise bargaining in the construction industry. It has done this by publicly indicating that once the new Code comes into effect, all agreements struck after the 24 April 2014 must comply with its terms or companies will be ineligible for Commonwealth funded work.[61] This introduces an element of potential retrospectivity into agreement-making which is damaging and unfair; parties can negotiate an agreement that complies with the law in all respects, including the *Fair Work Act* and the 2013 Code, but have no way of knowing whether or not the Bill (and the new Code) will pass through parliament and render their agreement 'non-compliant', causing potentially significant financial detriment by rendering them ineligible for Commonwealth government work.

The new Code would severely impede the capacity of workers to negotiate terms favourable to them in enterprise bargaining agreements. It introduces wide-ranging restrictions on the content of agreements, above and beyond the limitations in the *Fair Work Act* 2009. Mostly these limitations are imposed under the guise of the *'right of the code covered entity to manage its business or to improve productivity'*.[62]

There are at least seventeen types of clauses which are not permitted to be included in agreements listed in the new Code, regardless of the wishes of the

[60] 'A new statutory code has been developed that is intended to commence at the same time as the re-established Australian Building and Construction Commission'. Second Reading Speech 2 February, 2016, page 10.
[61] See media release Minister Abetz 17 April, 2014.
[62] Section 11(1)(a)

agreement making parties. The list is not exhaustive. These proscriptions are not imposed on employees and employers in any other industry.

Examples of clauses which would be prohibited under the new Code are:

- clauses which require the employment of a certain number of apprentices in relation to the number of tradespeople employed.

- clauses that require employers to make reasonable efforts to attract job candidates from amongst suitably skilled Australian citizens or permanent residents before engaging foreign visa holders.

- clauses that place some limits on the number of casual employees as a proportion of the workforce.

- clauses that protect the employment security of employees by requiring that employees of businesses to whom work is contracted out be paid no less than the rates and conditions of permanent employees.

- clauses placing reasonable limits on the amount of overtime required to be worked based on health and safety considerations.

- clauses that permit union officials to come onto site to assist with a dispute settlement process, or (most extraordinarily and in curtailment of a property owner's right to invite people onto their premises as they see fit) at the invitation of the employer.

- clauses that require employees to only perform tasks that are able to be safely performed having regard to their skills/competencies/experience.

- clauses that provide for consultation with unions or their delegates or members about the use of subcontractors.

- clauses that limit the 'cashing-out' of entitlements through the use of 'rolled-up' rates of pay.

- clauses that allow the Fair Work Commission to arbitrate a dispute outcome which is not consistent with the new Code.

- clauses that try to overcome the prohibitions in s 11 by rendering offending clauses inoperative.

Practices which do not allow for flexibility around operational requirements, such as a rostered day off schedule, are also prohibited even if they are not contained in an agreement clause.

The absurdity of these restrictions is highlighted by the fact that clauses which allow union members and delegates to undertake site induction processes are also prohibited,[63] even though it is a general occupational health and safety requirement that all persons at a workplace be properly inducted.

The new Code also elevates the status and power of the proposed ABCC by making it not just the monitor and investigator of potential Code Breaches, but the decision-maker, with the power to impose heavy commercial sanctions such as exclusion from Commonwealth projects.[64] Decisions about whether or not the wording of particular clauses of enterprise agreements fall within or outside the very broad prohibitions set out in section 11 – for example, on the basis that a clause limits the 'right of a (code covered entity) to manage its business' – are also to be made, 'conclusively', by the ABCC under the new Code.[65]

[63] Section 11(1) Example 2.
[64] See Sections 18 and 19.
[65] Section 22.

12. Conclusion

The Australian public accepts that employer and employee interests can diverge in the workplace and that disputes can arise. They have also observed federal workplace law as a hotly contested political battleground for many years and no doubt accept that there are many different views about the laws that should regulate our workplaces.

It is likely that very few people would disagree with the notion that ideally, an industrial system should offer everyone a 'fair go all round.'

The ABCC laws, which date back to 2005, represent the last and most extreme vestiges of the *WorkChoices* era. The 2013 Bills are an attempt to revive those laws and to breathe life back into an approach to workplace relations that was roundly rejected by the Australian electorate.

These Bills revert to the notion that it is acceptable to single out a sector of the community and allow them fewer workplace rights (and greater exposure to penalties) than the remainder of the general public.

They attempt to normalise the existence of a publicly funded and politicised regulator with invasive powers - which are without precedent in an industrial relations context - being permitted to devote their resources to employee and trade union prosecutions.

They expose a Government that is utterly dismissive of the international authorities who have examined the laws and found that they fall short of the internationally recognised labour standards that Australia has voluntarily agreed to meet.

Perhaps worst of all, and to the discredit of those who have been a party to this campaign, these Bills rely on a deliberate political strategy of confusing industrial and criminal behaviour and the promotion of the idea that these laws are necessary because for some reason which is never articulated, the existing criminal laws and law enforcement agencies are inadequate.

The Bills represent the antithesis of 'a fair go all round' in the workplace.

The AMWU, AWU, CFMEU and TWU oppose these Bills and urge the Committee to recommend that the Bills be rejected by the Senate.