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Why the ABCC Bill Should Pass

April 2016



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and Industry

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Introduction

The Australian Chamber of Commerce and Industry (Australian Chamber) urges the Parliament to pass the *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* (Cth) (the Bill), which will restore the rule of law and stem the decline in productivity in the building and construction industry.

The Bill reconstructs key aspects of the regulatory infrastructure established by the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act) but repealed by the *Fair Work (Building Industry) Act 2012* (Cth) (FWBI Act).

The Australian Chamber supports the Bill as tabled, including its provisions that will:

- re-establish the Australian Building and Construction Commission (ABCC) to replace the Fair Work Building Industry Inspectorate (also known as Fair Work Building and Construction, FWBC);
- restore the examination powers of the ABCC to their original strength under the BCII Act;
- set the penalties for breaches of civil penalty provisions at a level commensurate with the industry-specific penalties previously applicable under the BCII Act; and
- create a statutory offence for unlawful picketing. The Bill allows a better means to prevent unlawful pickets than the onerous process of having to seek common law injunctions.

The Bill comes before the Parliament after the Heydon Royal Commission identified a pattern of unlawful behaviour on the part of the CFMEU and its officials. The Heydon Royal Commission noted that the union's culture led "to a prodigious amount of evidence which ranged from being less than frank to being mulishly stubborn to being blatantly mendacious. It also led to the suppression or destruction of documentary records or, extreme tardiness and uncooperativeness in producing them".¹ Despite such lack of cooperation the Royal Commission uncovered evidence that it said "raise[s] fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU".

The Australian Chamber remains concerned about the behaviours perpetrated by the CFMEU, for example:

- the Federal Court handing down fines of \$545,000 on 12 June 2015, finding the CFMEU and five officials engaged in unlawful coercion at a Grocon housing project in Brisbane. The court noted that neither the CFMEU nor its officials showed any contrition or remorse for their conduct;²
- the \$3.55 million payment by the CFMEU to Grocon in June 2015 to settle a claim against the CFMEU for the unlawful blockade of the Myer Emporium project in August 2012, which

¹ Royal Commission into Trade Union Governance and Corruption 2015, Volume 1, p. 22.

² *Building Industry Inspectorate v Cradden* [2015] FCA 614 (12 June 2015). See also FWBC [Media Release](#) dated 21 June 2015.

involved behaviour the Supreme Court of Victoria found constituted criminal contempt of that court.³

The behaviour outlined above is not civil, reasonable or fair. It is symptomatic of a serious cultural problem in the building and construction industry that is resulting in:

- disregard for the law;
- important projects costing more and taking longer to complete than they should;
- extreme behaviours on sites that threaten the wellbeing of participants, damage the performance of the industry and discourage investment and job creation.

This cultural problem is not new; successive royal commissions have found there to be a culture of union thuggery, intimidation and lawlessness. In response we have seen a recurring cycle of action:

- laws to introduce recommended reforms (including the ABCC);
- the resumption of civil standards of behaviour;
- a new government winding back reforms;
- a reversion to union thuggery, intimidation and lawlessness.

Parliament has been recalled on 18 April 2016 to debate the bills and the Government has threatened to seek the dissolution of both houses if the bills are not passed.

False claims have been made by opponents to the Bill. This document shows why those claims are wrong and shows why Bill needs to be passed.

The ABCC is a tried-and-tested solution that should be reinstated.

³ *Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors* [2013] VSC 275 (24 May 2013). See also Hannan E, 2015, 'CFMEU pays \$3.55m to settle Grocon Dispute', *Australian Financial Review*, 21 Jun, retrieved 12 April 2016.

Questions and Answers

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1 What important things will the Bill do?

The Bill enables a stronger response to the unlawful industrial action, picketing, coercion and other behaviour uncovered by multiple royal commissions.

The Bill does this by:

- improving the bargaining framework to encourage genuine bargaining at the workplace level;
- promoting respect for the rule of law;
- ensuring respect for the rights of building industry participants;
- ensuring that building industry participants are accountable for their unlawful conduct;
- providing effective means for investigating and enforcing industrial laws;
- improving work health and safety in building work;
- encouraging the pursuit of high levels of employment in the building industry; and
- providing assistance and advice to building industry participants.⁴

Critically, the Bill would re-establish the ABCC with powers proven to be effective while in place, including by:

- introducing stronger laws to address unlawful industrial action and unlawful picketing;⁵
- prohibiting the coercion of persons in relation to the engagement of contractors and employees or choice of superannuation fund, and coercion or undue pressure in relation to industrial instruments;⁶
- enabling an inspector or a person affected by a contravention, to apply for an order relating to the contravention. The courts would be able to grant injunctions, order damages, and impose a civil penalty under the amendments proposed;⁷
- enabling the Minister to issue a Building Code prescribing the standards which building industry participants who undertake Commonwealth funded building work are required to comply with.⁸

2 Why is the passage of these laws in the broader public interest?

The Government has estimated that its Infrastructure Growth Package will lead to over \$125 billion of new productive infrastructure over the next decade. It is critical that taxpayer dollars are spent efficiently as we build infrastructure, including hospitals, schools and roads. Unlawful behaviour on building and construction sites undermines the efficient spending of public funds. Australians' living

⁴ *Building and Construction Industry (Improving Productivity) Bill 2013* [No. 2], cl. 3(2).

⁵ *Ibid*, ch. 5.

⁶ *Ibid*, ch. 6.

⁷ *Ibid*, ch. 8.

⁸ *Ibid*, cl. 34.

standards will fall or their tax bills increase due to unchecked unlawful behaviour in the industry, which is having a negative impact on its performance.

The construction industry contributes to over 9 per cent of Australian employment. The Bill will encourage investment and therefore job creation.

3 Will the reinstatement of the ABCC have a positive economic impact?

Yes. It is a near certainty that productivity will improve under a restored ABCC with its full previous powers and resources. Multiple sources that suggest a link between the ABCC and enhanced industry performance:

- On 8 March 2016 Master Builder's Chief Executive, Mr Wilhelm Harnisch described the institutional culture of unlawfulness suggesting that "these conditions, combined with the unlawful disruption experienced almost every day on building sites, increase the cost of construction by up to 30 per cent;"⁹
- 2014 research by Independent Economics (formerly Econtech) commissioned by Master Builders Australia confirmed that when the ABCC was in place the legislative reforms and the regulator's effective monitoring and enforcement drove productivity increases in the industry.¹⁰ Regardless of any disagreement regarding research methodology, the unlawful behaviours demonstrated in the building and construction industry clearly leads to productivity loss.
- The **Productivity Commission**, in its **2014 Public Infrastructure Report** found that:
 - *"Tactics, such as delaying, blockading of sites, bullying, verbal abuse and other coercive conduct have been features of interactions on sites. The disruption itself would also lead to project delays and lower productivity on sites";*¹¹
 - ongoing disruptive tactics that may not be as visible as stoppages and industrial action could still cause highly costly delays including:
 - blocking access to work sites through a range of means, including the dumping of debris or materials at work gates, or parking of machinery or trucks for the same purpose;
 - delaying the delivery or use of materials (including concrete pours), by either preventing access to sites or preventing the further handling of materials once on site;
 - stopping the removal of waste from sites;

⁹ <http://www.masterbuilders.com.au/newsarticles/return-of-abcc-remains-top-priority-for-master-builders>.

¹⁰ Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2014 Update*, prepared for Master Builders Australia, 2 June 2014, p. i.

¹¹ Productivity Commission 2014, *Public Infrastructure*, Inquiry Report No. 71, Canberra, p. 531.

- placing ‘bans’ on the use of critical equipment, such as cranes;¹²
- disruptive tactics could go on for multiple days or even weeks and this clearly had a negative impact on productivity.¹³
- The 2006 **Wilcox Report**¹⁴ found that information provided locally in terms of productivity improvements on specific construction projects helped to “throw some light” on productivity improvements that had occurred at the project level¹⁵ since the introduction of the previous building industry reforms. These included:
 - **Grocon**, which told the Wilcox inquiry that “[m]any inefficient practices existed before the establishment of the ABCC as we believe it has not only helped to eliminate those practices and improve productivity and efficiency, but also to an increase in benefits in terms of improved OHS standards ... We believe the ABCC has been instrumental in bringing about compliance to lawful conduct in the building and construction industry”;¹⁶ and
 - **Woodside Energy**, which highlighted the differences between two resource projects: LNG Train 4 (which preceded the ABCC and the BCII Act) and LNG Train 5 (which came after their introduction). . The two projects were compared for their industrial relations records, with both having a similar capital cost, a similar-sized workforce during peak periods, and similar “man” hours worked. On the LNG Train 4 project:
 - The number of “man” hours lost due to industrial action was 254,000 (compared with 27,000 on the LNG Train 5 project);
 - The number of disputes resulting in industrial action was 26 (compared with nine);
 - The number of stoppages of two days or more was 17 (compared with three); and
 - The number of matters subject to federal industrial tribunal applications was 10 (compared with four).¹⁷

Woodside told the Wilcox inquiry that while part of the improved industrial performance could be attributed to “proactive management of workplace relations”, “the most significant contributor to the improvement in behaviour was in Woodside’s view the

¹² Productivity Commission 2014, p. 532.

¹³ Ibid.

¹⁴ On 19 June 2008 the former Government commissioned the Hon Murray Wilcox QC to consult and report on matters related to the creation of a specialist division with the inspectorate of Fair Work Australia with responsibility for the building and construction industry. This reflected the policy position of the Australian Labor Party, at the 2007 federal election. On 3 April 2009 the then Minister released Wilcox’s final report, “Transition to Fair Work Australia for the Building and Construction Industry”.

¹⁵ The Hon. M. Wilcox QC 2006, ‘Transition to Fair Work Australia for the Building and Construction Industry’, Commonwealth of Australia, p. 47.

¹⁶ Ibid, p. 48.

¹⁷ Ibid.

threat of compliance powers under the BCII Act, the activities of the ABCC and the Code and Guidelines”.¹⁸

4 Why does the building industry regulator need stronger information-gathering powers?

The need for strong information-gathering powers has been revealed by multiple sources:

- The **Heydon Royal Commission** (during the course of its Inquiry in 2014 and 2015):
 - found “it is clear that public regulators are likely to have grave difficulties in obtaining evidence where witnesses are reluctant to speak against parties to illegal conduct in view of the risk of retaliation”;¹⁹ and
 - revealed disrespect for the functions of the FWBC, finding that CFMEU officers engaged in aggressive and intimidatory conduct against a number of FWBC Inspectors.²⁰

- An **ABCC Report on the Exercise of Compliance Powers** (2008) found:

*In the absence of the compliance powers many ABCC investigations would be thwarted due to the unwillingness of witnesses to cooperate. The fear of the consequences of being seen to cooperate with the ABCC is evident in parts of the industry. This is to be regretted.*²¹

- The **Wilcox Report** (2006) described the effectiveness of information-gathering powers under the BCII Act, stating

*The ABCC commenced operations on 1 October 2005. Between that date and 3 February 2009, it conducted 128 compulsory interrogations and launched 36 court proceedings seeking the imposition of a civil penalty upon one or more “building industry participants”. Most of the completed proceedings have been successful; many because of information acquired by the ABCC at compulsory interrogations.*²²

- A **report of the Interim Building Industry Taskforce** (2004) formed after the Cole Royal Commission stated:

The Final Report of the Royal Commission cited the possibility of retribution against persons who appeared before the Royal Commission as one of the reasons to

¹⁸ The Hon. M. Wilcox QC 2006, p. 47.

¹⁹ Royal Commission into Trade Union Governance and Corruption 2014, ‘Interim Report’, p. 1114.

²⁰ Ibid, pp. 1010, 1495.

²¹ Australian Building and Construction Commission, ‘Report on the Exercise of Compliance Powers by the Australian Building and Construction Commission’ (1 October 2005 to 30 September 2008), p. 6.

²² The Hon. M. Wilcox QC 2006, p. 1.

establish an interim taskforce. This conclusion proved to be correct as the Taskforce has received information from subcontractors who have not been awarded any contracts since testifying before the Royal Commission. In every instance, it has been expressly indicated by the victim that they have been targeted as a consequence of their involvement with the Royal Commission, effectively being black-banned from the industry.

Unlike the Royal Commission, the Taskforce is unable to require persons to assist with many of its investigations. This severely restricts the ability of the Taskforce to conduct investigations to uncover any such attempts to take revenge upon subcontractors. Likewise, there have been frequent instances where subcontractors will not use the services of the Taskforce because they fear their businesses will be blackbanned.

Disturbingly, similar experiences have been reported across the country. In nearly all circumstances, the fear of losing future contracts overrides the need to support steps to enforce the law.²³

The Taskforce described its challenges in investigating in the absence of such powers stating:

the Taskforce has investigated over 380 matters in its 17 months of operation. Of this number, the Taskforce has had to finalise approximately 50% of these investigations due to the lack of powers to gather information. These investigations have had to be finalised because witnesses will not make a statement or victims have simply given up...²⁴

- The information-gathering powers in the Bill were recommended by the **Cole Royal Commission**. The compulsory nature of the provisions was considered necessary to overcome the culture of silence in the industry, existent in part because witnesses are intimidated or pressured to not cooperate with law-enforcement authorities.

The compulsory nature of some provisions will also help protect those providing information used to prosecute third parties from intimidation by those third parties. They also have effect in relation to businesses and their representatives – not just employees and their representatives.

While the *Fair Work (Building Industry) Act 2012* (Cth) retained the compulsory information-gathering powers, it imposed onerous new requirements:

- the director had to apply to an Administrative Appeals Presidential Member to issue an examination notice before requiring a person to give information or attend to answer questions;
- only the director could make such an application; and

²³ Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce, 25 March 2004 at <http://fwbc.gov.au/sites/default/files/UpholdingTheLawReport2004.pdf> retrieved 8 April 2015, p. 13.

²⁴ Ibid, p. 13.

- the director had to notify the Commonwealth Ombudsman when a notice was issued to ensure the appropriate oversight.

These additional hurdles are unjustified and represent a significant watering down of powers. The Bill will remove these hurdles and strengthen the independence of the director.

Compulsory powers are widely used by many other Government agencies, such as the ACCC, APRA, ASIC and the ATO.

5 Is the Bill compatible with Australia's obligations under international law?

The Explanatory Memorandum to the bills contains a detailed statement demonstrating its compatibility with Australia's international law obligations. This statement addresses the compatibility of the bills with:

- Rights to freedom of association.
- Rights to safe and healthy working conditions.
- Rights to a fair trial.
- Rights to peaceful assembly.
- Rights to freedom of expression.
- Rights to privacy and reputation.

6 Why are industry-specific regulations necessary?

On its own, the FW Act does not provide adequate protection against unlawful and inappropriate conduct by participants in the building and construction industry. The Heydon and Cole Royal Commissions and the Wilcox Report agree that a dedicated, additional level of regulation (and an additional regulator) is required for this industry, above and beyond the prevailing fair work framework.

- The **Heydon Royal Commission** recommended the continuation of an **industry-specific regulator** but **with stronger powers**. It recommended that legislation be enacted conferring the building and construction industry regulator with compulsory investigatory and information-gathering powers equivalent to those possessed by other civil regulators. It stated "the powers set out in the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) appear appropriate in this regard".
- The **Wilcox Report** found that:

- the ABCC made a significant contribution to improved conduct and harmony in the building and construction industry;²⁵
- there was still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the Building and Construction Division to undertake compulsory interrogation;²⁶
- any tough regulator in the building and construction industry would need a power of coercive interrogation, at least under present conditions;²⁷ and
- repeated contraventions of the law, even if only industrial law, as distinct from criminal law, may cause considerable disruption to a building project. If the project is sufficiently large or urgent, or the conduct is replicated elsewhere, the breaches may take on national significance.

It is regrettable that despite these findings, the Wilcox Report made recommendations that led to the inspectorate being undermined by bureaucratic, administrative processes and weaker laws. The result is a return to the type of behaviour that the various royal commissions have identified.

- The final report of the **Cole Royal Commission** stated that its findings “demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform”.²⁸

In the future there may no longer be the need for a specialist industry regulator, but it is clear the ABCC had unfinished business and should not have been abolished. The unique industrial culture of the building and construction industry presents such problems for the rule of our industrial laws that dedicated regulation and specialist enforcement are required.

7 How will the ABCC interact with the Fair Work Ombudsman?

The Fair Work Ombudsman (FWO) will handle wages and entitlement matters relating to the building and construction industry. FWO has specialist expertise dealing with these matters. This approach will allow the ABCC to focus on its core business of regulating industrial action, freedom of association, right of entry and discrimination.

²⁵ The Hon. Murray Wilcox QC 2006, p. 2.

²⁶ Ibid, p. 59.

²⁷ Ibid, p. 60.

²⁸ Final Report of the Royal Commission Into the Building and Construction Industry, Summary of Findings and Recommendations (Volume One), Royal Commissioner, The Honourable Terrence Rhoderic Hudson Cole RFD QC, February 2003, p. 6.

8 How can the ABCC improve the culture of the industry?

Several unlawful offences have arisen during industrial activities since the abolition of the ABCC. By ensuring that industrial activities are carried out in accordance with the law and by changing the prevailing culture, the ABCC should lead to a significant fall in the overall incidence of unlawful and inappropriate activities.

This was always the intention behind the ABCC. In describing the intended role of the ABCC, the final report arising from the Cole Royal Commission stated:

There will be obligations imposed upon contractors, subcontractors, union officials and workers to advise the ABCC of possible unlawful conduct, be it underpayment or non-payment of wages, taxation avoidance, departures from proper standards of occupational health and safety, breaches of freedom of association provisions, unlawful industrial activity, or any other form of unlawfulness. It will be the responsibility of the ABCC either itself to address this unlawfulness, or where there is another State or Federal body more suited to its investigation, to refer the matter to that body but with the obligation to monitor and ensure any complaint is properly addressed. This body will remove any reason that any participant in the industry has to engage in unlawful or inappropriate conduct. It will also ensure that unlawful conduct comes to the attention of an entity established to ensure the law is adhered to.²⁹

The passage of the laws will also be complemented by passage of the *Fair Work (Registered Organisations) Amendment Bill 2014 [No. 2]* (Cth) (which applies to all unions, not just building industry unions). This Bill will create the Registered Organisations Commission (ROC) to oversee and enforce new requirements on registered organisations. These will include disclosure and reporting obligations and criminal offences for serious breaches of duties by officers similar to those applicable to company directors and officers under the Corporations Act 2001. It will also confer on the ROC investigative and information gathering powers modelled on those of the Australian Securities and Investments Commission. Stronger governance measures will also help to stamp out corrupt behaviours on the part of registered organisations.

9 How will the Bill improve safety?

The ABCC legislation continues the role of the Federal Safety Commissioner, who administers a scheme that applies to the building and construction industry only. Established in 2005, the Federal Safety Commissioner works with industry and government stakeholders to achieve the highest possible occupational health and safety standards on building and construction projects.

The FSC is not a stand-alone safety regulator in the construction industry. It plays an important ancillary role, as recommended by the Cole Royal Commission, to complement Safe Work Australia and state and territory work health and safety regulators in enforcing safety standards on building and construction sites.

²⁹ Ibid, pp 13-14.

Some people have claimed that the ABCC's work has undermined safety. This is not correct.

The Productivity Commission found that "The fatality incidence rate has continued to fall following the creation of the Building Industry Taskforce and, in 2011-12, it was less than half that in 2000-01." (Public Infrastructure Report 2014 Vol 2 page 515-516).

Indeed, Grocon told the Wilcox inquiry:

*Many inefficient practices existed before the establishment of the ABCC as we believe it has not only helped to eliminate those practices and improve productivity and efficiency, but also to an increase in benefits in terms of **improved OHS standards** (emphasis added)... We believe the ABCC has been instrumental in bringing about compliance to lawful conduct in the building and construction industry.*

Work health and safety is a serious matter and should not be misused to stifle debate on the reintroduction of the ABCC.

The Heydon Royal Commission identified that a particular case study:

...illustrates the way in which officers of the CFMEU, and persons appointed by them to act on the CFMEU's behalf, misuse their powers and position in order to force builders, subcontractors and workers to enter into agreements and join a union against their will.

...

Even if Mr Setka and others initially held strong and genuine concerns about safety on the site, that does not excuse the behaviour that is now under consideration. That behaviour was not motivated by a concern for safety. It was motivated by a desire to control the work site and the workers on it, increase the membership base of the union, and increase the number of subcontractors bound to the CFMEU's form of enterprise bargaining agreement (the terms of which require subcontractors to make payments to Incolink and Cbus, two companies in which the CFMEU has a substantial financial interest).³⁰

Industrial lawlessness can create risks to health and safety where violence and intimidation is involved. The Explanatory Memorandum provides the following examples:

- *In August 2012, the CFMEU / Myer Emporium dispute saw violence in city streets, militant protestors intimidating the community and attacks on police horses.*
- *In November 2012, the Little Creatures brewery site in Geelong suffered a violent dispute where picketers were accused in court documents of making throat-cutting gestures, threats of stomping heads in, workers being told they were dead and of shoving, kicking and punching motor vehicles. On social media, a union member also threatened to boycott a local store for providing food to the workers on site.*

³⁰ Royal Commission into Trade Union Governance and Corruption 2014, 'Interim Report', pp. 1559 - 1560.

- *In February 2013, City West Water in Werribee was subject to a dispute where protestors threatened people with ‘Columbian neckties’ and the dispute was so heated that workers had to be flown in by helicopter.³¹*

Behaviour like this clearly risks health and safety. The Bill seeks to address it.

10 About the Australian Chamber

10.1 Who We Are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia’s most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council

10.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone’s standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

³¹ Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill 2013*, p. 2.

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