



AUSTRALIAN CHAMBER OF  
COMMERCE AND INDUSTRY

# ACCI SUBMISSION

Senate Standing  
Education and Employment  
Legislation Committee

Inquiry into the Building and Construction  
Industry (Improving Productivity) Bill 2013 and a  
related bill

NOVEMBER 2013



ABN 85 008 391 795

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## TABLE OF CONTENTS

1. ABOUT ACCI.....	1
1.1 Who we are .....	1
1.2 What we do .....	1
2. INTRODUCTION .....	3
3. KEY ISSUES.....	4
3.1 Executive summary .....	4
3.2 Economic analysis .....	7
3.3 Examination powers .....	11
3.4 Industry-specific civil penalties .....	16
3.5 Unlawful picketing .....	21
4. CONCLUSION .....	25
5. ACCI MEMBERS.....	26
CHAMBERS OF COMMERCE & INDUSTRY .....	26
NATIONAL INDUSTRY ASSOCIATIONS .....	27



# 1. ABOUT ACCI

## 1.1 Who we are

The Australian Chamber of Commerce and Industry (**ACCI**) speaks on behalf of Australian business at a national and international level.

As Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- all state and territory chambers of commerce;
- 30 national industry associations; and
- bilateral and multilateral business organisations.

In this way, ACCI provides leadership for more than 300,000 businesses which:

- operate in all industry sectors;
- includes small, medium and large businesses; and
- are located throughout metropolitan and regional Australia.

## 1.2 What we do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- federal government ministers and shadow ministers;
- federal parliamentarians;
- policy advisers;
- federal government public servants;
- regulatory authorities; and
- federal government agencies.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.



Our specific activities include:

- Representation and advocacy to governments, parliaments, tribunals and policy makers both domestically and internationally;
- Representing business on a range of statutory and business boards and committees;
- Representing business in national forums including the Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and developing policies relating to issues that concern Australian business;
- Publishing lead business surveys and other information products; and
- Providing forums for collective discussion amongst business on matters of law and policy.



## 2. INTRODUCTION

ACCI welcomes the opportunity to provide a written submission to the Senate Standing Education and Employment Legislation Committee (**Committee**) in relation to its inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) (**BCIIP Bill**) and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (Cth) (**Related Bill**) (**Inquiry**).

As the Committee is aware, ACCI has actively participated over many years in various reviews and inquiries into industrial relations regulation of the building and construction industry. As such, this submission should be considered as part of a body of material which collectively form ACCI's considered position. This includes:

- the ACCI submission to the then Senate Standing Committee on Education, Employment and Workplace Relations' inquiry into the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* dated 20 January 2012;
- the ACCI submission to the then Senate Standing Committee on Education, Employment and Workplace Relations' inquiry into the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* in July 2009;
- the ACCI response submission to the Wilcox Report Recommendations in May 2009;
- the ACCI submission to the Hon Murray Wilcox QC review into the proposed Building and Construction Division of Fair Work Australia dated 5 December 2008.

ACCI members may make separate submissions to this Inquiry on their own behalf. In particular, Master Builders Australia and the Australian Mines and Metals Association have made submissions to the Committee, which ACCI broadly supports.

This submission is made by ACCI in its own right, without prejudice to any consideration of these matters or submissions made by its members.



### 3. KEY ISSUES

#### 3.1 Executive summary

3.1.1 Broadly, ACCI supports the provisions of the BCIP and Related Bills in their current form.

3.1.2 The findings of the Royal Commission into the Building and Construction Industry (**Cole Royal Commission**) continue to be relevant and justify the need for industry-specific regulation of the building and construction industry:

*These 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.<sup>1</sup>*

3.1.3 Accordingly, ACCI's position - set out in its pre-election policy blueprint, "Getting on with Business: Reform Priorities for the Next Australian Government" - is that legislation should be enacted to restore the former Australian Building and Construction Commission (**ABCC**) and its full suite of powers as a matter of priority. In addition:

- a. the Implementation Guidelines for the National Code of Practice for the Construction Industry dated 1 June 2006 should be restored and improved; and
- b. a taskforce should be commissioned to conduct a public inquiry to establish whether further improvements could be made to assist the building and construction industry, or any other industry crucial to the national economy.<sup>2</sup>

3.1.4 An updated economic analysis conducted by Econtech Pty Ltd (**Independent Economics**) into productivity in the building and construction industry provides a sound evidentiary basis for supporting

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<sup>1</sup> Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Summary of Findings and Recommendations* (Volume 1), February 2003, emphasis added.



the BCIIIP and Related Bills, at least to the extent that they give effect to the above position.

3.1.5 Specifically, the BCIIIP Bill appropriately reconstructs key aspects of the regulatory infrastructure that was originally established by the *Building and Construction Industry Improvement Act 2005* (Cth) (**BCII Act**) but later repealed by the *Fair Work (Building Industry) Act 2012* (Cth) (**FWBI Act**). In particular, ACCI strongly supports the provisions of the BCIIIP Bill which:

- a. re-establish the ABCC to replace the Fair Work Building Industry Inspectorate (also known as Fair Work Building and Construction) (**FWBC**);
- b. restore the examination powers of the Australian Building and Construction Commissioner (**Commissioner**) to their original strength under the BCII Act; and
- c. set the penalties for breaches of civil penalty provisions under the BCIIIP Bill at a level commensurate with the industry-specific penalties previously applicable under the BCII Act.

3.1.6 The BCIIIP Bill also effectively provides statutory redress for unlawful conduct which has hitherto been inadequately dealt with by the common law. By creating a statutory offence for unlawful picketing, the BCIIIP Bill allows a more effective and efficient means to prevent and/or stop unlawful picket action than onerously seeking common law injunctions.

3.1.7 ACCI believes that the above provisions in the BCIIIP and Related Bills will collectively operate to restore the rule of law and stem the sharp decline in productivity in the building and construction industry.

3.1.8 It is important for the Committee to note that the need for industry-specific regulation and an independent industrial regulator is recognised on a bipartisan basis. The former Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Senator the Hon Christopher Evans has acknowledged that:

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<sup>2</sup> Australian Chamber of Commerce and Industry, "Getting on with Business: Reform Priorities for the Next Australian Government" (August 2013) 31.





*the industry contains unique challenges for both employers and employees, and as a result we have always supported a strong building industry regulator to ensure lawful conduct by all parties.<sup>3</sup>*

Accordingly, there is no question regarding whether the building and construction industry should be subject to special regulation. The particulars of this Inquiry relate to the appropriate extent of that regulation and whether it is calibrated to ensure it is necessary to achieve its underlying policy objectives.

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<sup>3</sup> Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Senator the Hon Christopher Evans, Second Reading Speech, *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* (3 November 2011).



## 3.2 Economic analysis

3.2.1 ACCI broadly relies on the findings of year-to-year economic analyses conducted by Independent Economics to justify its support for the BCIIIP and Related Bills.

3.2.2 The Independent Economics report, “Economic Analysis of Building and Construction Industry Productivity: 2013 Update” (**IE Report**) builds on a body of successive annual economic analyses since 2007 of productivity in the building and construction industry.<sup>4</sup> Unlike previous analyses however, the IE Report also considers, for the first time, *“the impact on productivity of recent developments in the industry reform process”*, specifically from mid-2012 onwards, when the FWBC was established by the FWBI Act (**FWBC era**).<sup>5</sup>

3.2.3 In summary, the IE Report adopts a *“conservative assumption that only 75 per cent of the productivity gains (achieved between 2002 and 2012 under the BCII Act (**ABCC era**)) will be lost”*.<sup>6</sup> However, the IE Report indicates that the repeal of the industry-specific provisions of the BCII Act would actually *“justify an assumption that 100 per cent of the productivity gains will be lost in the FWBC era.”*<sup>7</sup>

3.2.4 The IE Report analysed the economic impact of less productive workplace practices during the FWBC era in three key respects:

- a. building and construction industry effects;
- b. wider industry effects; and
- c. national macroeconomic effects.

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<sup>4</sup> Econtech Pty Ltd, “Economic Analysis of Building and Construction Industry Productivity: 2013 Update” (26 August 2013).

<sup>5</sup> Ibid, i.

<sup>6</sup> Ibid, vii.

<sup>7</sup> Ibid, vi.



- 3.2.5 The almost complete regression of productivity gains achieved during the ABCC era necessitates the reconstruction of the industry-specific regulatory infrastructure that is proposed by the BCIP and Related Bills.
- 3.2.6 According to the IE Report, the intra-industry effect of unwinding the BCII Act reforms result in:
- a. a long-term 12.8 per cent decrease in labour efficiency for non-residential building construction;
  - b. an increase in the overall cost of business investment in buildings and structures by 2.6 per cent;
  - c. a reduction in real investment of 1.9 per cent; and
  - d. a 2.3 per cent long-term reduction in total non-residential building construction activity.<sup>8</sup>
- 3.2.7 While employment in non-residential building increases by 4.7 per cent, the increase is motivated in part by a “labour dis-saving effect”; that is, *“the assumed loss in labour productivity of 12.8 per cent means that the number of employees required for an unchanged level of activity is higher.”*<sup>9</sup>
- 3.2.8 Effects of a similar magnitude are borne out with respect to other subsectors within the building and construction industry. Specifically, the IE Report quantifies the average fall in activity across the non-residential building sector at 2.3 per cent, the engineering construction sector at 2.5 per cent, the residential building sector at 1.1 per cent, and the construction services sector at 1.3 per cent.<sup>10</sup>
- 3.2.9 Naturally, the intra-industry impact of the regressive FWBI Act reforms flow onto other industries. These industries include housing, utilities, and media and telecommunication services.

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<sup>8</sup> Econtech Pty Ltd, above n 3, 47.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid, 50-51.



3.2.10 The IE Report highlights that lower labour productivity in the building and construction industry flows through to an 0.4 per cent increase in the cost of dwellings and an overall 0.8 per cent long-term reduction in the level of demand for housing services. Further, the overall cost of investments in buildings and structures will be increased by 2.6 per cent.

3.2.11 ACCI has consistently maintained that restoring the BCII Act reforms, including but not limited to re-establishing the ABCC, will also have significant benefits for the national economy:

*Re-establishing the ABCC with its full suite of powers represents a big win for the industry and consumers, especially for small businesses and contractors which have traditionally been unlawfully locked out of major construction projects. The return of the independent industrial regulator will also result in significant gains for the national economy, as a result of a more productive and efficient industry that observes the rule of law and recognises free enterprise over intimidation and industrial thuggery.<sup>11</sup>*

3.2.12 The findings of the IE Report support this position. Specifically, they calculate that the average rise in production costs is reflected in:

- a. an 0.5 per cent increase to the economy-wide price of production;
- b. 0.2 per cent lower consumer real wages on a pre-tax basis and 0.7 per cent on a post-tax basis;
- c. a fall of 0.7 per cent in consumer real after-tax wages and in real private consumption;
- d. a fall in consumer living standards of \$5.5 billion in 2012/13 dollars; and
- e. a long-term reduction in GDP of 0.6 per cent.<sup>12</sup>

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<sup>11</sup> Australian Chamber of Commerce and Industry, "Business Welcomes the Return of the ABCC", Media Release (14 November 2013).

<sup>12</sup> Econtech Pty Ltd, above n 3, 53-54.



- 3.2.13 In circumstances where the FWBI Act's repeal of the industry-specific provisions of the BCII Act has led to an almost complete reversal of all productivity gains, ACCI submits that restoring industry-specific regulation will be necessary to recover the significant productivity losses in the FWBC era.
- 3.2.14 At least to the extent that the BCIIIP and Related Bills restore the industry-specific regulation and reconstruct the industry-specific regulatory infrastructure, there is a sound economic policy basis for supporting and expediting their passage and commencement, particularly in light of infrastructure projects that are either extant or will be rolled out in the short to medium term.



### 3.3 Examination powers

- 3.3.1 Chapter 7, Part 2 of the BCIP Bill proposes to restore to the Commissioner specific powers to obtain information by empowering the Commissioner to issue examination notices and enforce any failure to comply with the notice.
- 3.3.2 Under the BCII Act, the Commissioner had the power to issue a notice to whichever persons the Commissioner believed on reasonable grounds had information or documents relevant to an investigation, or was capable of giving relevant evidence.<sup>13</sup>
- 3.3.3 Through the notice, the Commissioner could require the person to give information or produce documents to, or attend before the Commissioner to answer questions relevant to an investigation.<sup>14</sup> The Commissioner's powers in this respect were crucial to its ability to inform itself of and investigate ongoing matters.
- 3.3.4 The *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth) significantly curtailed the Commissioner's powers to obtain information in this respect. Under the resultant FWBI Act, the Director of FWBC's powers to issue examination notices are limited and broadly ineffective.
- 3.3.5 According to the FWBC's 2012-13 annual report,<sup>15</sup> the FWBC did not exercise its powers to obtain information under section 45 of the FWBI Act at all during its first full year of operation.<sup>16</sup> This stands in contrast with the ABCC's exercise of its powers under the BCII Act during the ABCC era. Previous ABCC annual reports record that the then Commissioner required 37 people to appear before it in 2009-10 and then six in 2010-11.<sup>17</sup>

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<sup>13</sup> *Building and Construction Industry Improvement Act 2005* (Cth), s 52(1)(a) and (b).

<sup>14</sup> *Ibid*, s 512(1)(c), (d) and (e).

<sup>15</sup> Fair Work Building & Construction, "FWBC Annual Report 2012-13" (October 2013).

<sup>16</sup> Under s 45, the Director may apply to a nominated presidential member of the Administrative Appeals Tribunal for the issue of an examination notice.

<sup>17</sup> Australian Building and Construction Commission, "ABCC Annual Report 2009-10" and "ABCC Annual Report 2010-11".



3.3.6 It is unclear why the FWBC's powers to issue examination notices were not utilised. However, it appears due in part to the creation of higher thresholds for the Director to issue examination notices.

3.3.7 ACCI refers to the following comments made in the ABCC Report on the Exercise of Compliance Powers:

*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.*<sup>18</sup>

3.3.8 Accordingly, ACCI supports the provisions of the BCIIIP Act which propose to restore to the Commissioner the examination powers to issue notices and enforce failures to comply with any notice.<sup>19</sup>

3.3.9 The Committee should be aware that these powers to obtain information are not, as some would suggest, unprecedented or inconsistent with the powers of other regulatory agencies. According to a report conducted by the Administrative Review Council (**ARC**), "The Coercive Information-gathering Powers of Government Agencies" (**ARC Report**), coercive information-gathering powers are not exclusive to the ABCC and are "possessed and widely used by many government agencies", including:<sup>20</sup>

- a. the Australian Taxation Office;
- b. the Australian Prudential Regulation Authority (**APRA**);
- c. the Australian Securities and Investments Commission (**ASIC**);
- d. the Australian Competition and Consumer Commission;
- e. Centrelink; and

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<sup>18</sup> 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), 6.

<sup>19</sup> Building and Construction Industry (Improving Productivity) Bill 2013 (Cth), cl 61 and 62.

<sup>20</sup> Administrative Review Council, "The Coercive Information-gathering Powers of Government Agencies" (May 2008).



f. Medicare Australia.

- 3.3.10 Appendix A of the ARC Report summarises the legislation setting out the coercive information-gathering powers of the six Commonwealth agencies referred to above. The summary demonstrates that many of these agencies are able to exercise similar examination powers as those the BCIP Bill confers on the Commissioner.
- 3.3.11 Further, the statutory threshold for exercising the coercive information-gathering powers is in many cases notably lower than the threshold applicable under clause 61 of the BCIP Bill.
- 3.3.12 In order for the Commissioner to issue a written examination notice, the Commissioner must reasonably believe that the person:
- a. has information or documents relevant to an investigation by an inspector into a suspected contravention, by a building industry participant, of this Act or a designated building aw; or
  - b. is capable of giving evidence that is relevant to such an investigation.<sup>21</sup>
- That is, the Commission cannot exercise his powers under clause 61 unless he has a reasonable belief that relates to a specific investigation.
- 3.3.13 In contrast, a number of Commonwealth agencies may exercise similar coercive information-gathering powers subject to much lower statutory thresholds. For example:
- a. APRA may require an auditor or former auditor to provide information, or produce books, accounts or documents provided that it ***"considers that the provision of the information, or the production of books, accounts or documents, will assist APRA in performing its functions under this Act"***;<sup>22</sup>
  - b. APRA may similarly require an auditor, former auditor or former actuary to provide information, or produce books, accounts or

<sup>21</sup> *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth), cl 61(1).

<sup>22</sup> *Banking Act 1959* (Cth), s 16B, emphasis added.





documents if it “**considers** that the provision of the information, or the production of books, accounts or documents, **will assist APRA in performing its functions under this Act**”;<sup>23</sup> and

- c. APRA, ASIC, the Commissioner of Taxation or the Chief Executive Medicare (**Regulator**) may require persons to provide information or report on matters relating to an entity’s affairs, provided that “**it appears** to the Regulator that conduct has been, is being, or is proposed to be, engaged in” and is likely to affect the values or the interests of beneficiaries.<sup>24</sup>

3.3.14 ASIC’s powers to issue notices requiring an appearance for examination are particularly instructive.

(1) *This section applies where ASIC, on reasonable grounds, **suspects** or believes that a person can give information relevant to a matter that it is investigating, or is to investigate under Division 1.*

(2) *ASIC may, by written notice in the prescribed form given to the person, require the person:*

- a. *to give to ASIC **all reasonable assistance** in connection with the investigation; and*
- b. *to appear before a specified member for examination on oath and to answer questions.*

*Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).<sup>25</sup>*

<sup>23</sup> *Insurance Act 1973 (Cth), s 49, emphasis added.*

<sup>24</sup> *Superannuation Industry (Supervision) Act 1993 (Cth), s 264(2), emphasis added.*

<sup>25</sup> *Australian Securities and Investments Commission Act 2001 (Cth), s 19, emphasis added.*



3.3.15 In almost every respect, the coercive information-gathering powers available to ASIC under section 19 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) are more robust than the powers available to the Commissioner under the BCII Bill. The table below compares powers available to ASIC and the Commissioner under the respective legislation.

	<b>ASIC Act, s 19</b>	<b>BCII Bill, cl 61</b>	<b>Notes</b>
<b>Threshold</b>	Reasonable suspicion or belief that a person can give information relevant to an actual or anticipated investigation	Reasonable belief that a person has information or documents, or is capable of giving evidence, relevant to an investigation	ASIC Act allows for “ <i>reasonable suspicion</i> ” in relation to anticipated investigations
<b>Power</b>	To give all reasonable assistance in connection with the investigation or to appear for examination on oath and answer questions	To give the information or produce the documents to, or attend before the Commissioner and answer questions	ASIC Act requires “ <i>all reasonable assistance</i> ”
<b>Notice period</b>	Not specified	14 days	ASIC Act fails to specify any notice period
<b>Penalty for failure to comply</b>	100 penalty units or 2 years’ imprisonment, or both <sup>26</sup>	6 months’ imprisonment or a monetary penalty <sup>27</sup>	ASIC Act includes a \$17,000 fine, <sup>28</sup> and/or imprisonment for a period four times the maximum under the BCII Bill

3.3.16 By restoring to the Commissioner the examination powers originally available to him under the BCII Act, the BCII Bill will confer on the Commissioner powers that, in the ordinary course, are available to many other regulatory agencies.

3.3.17 ACCI contends that these powers are appropriately targeted, with reasonable safeguards and are a necessary component of the regulatory framework that will allow the ABCC to effectively investigate suspected breaches of the BCII Bill and perform its general functions.

<sup>26</sup> *Australian Securities and Investments Commission Act 2001* (Cth), s 63(1).

<sup>27</sup> See G Williams and N McGarrity, “The Investigatory Powers of the Australian Building and Construction Commission” (2008) 21 *Australian Journal of Labour Law* 263. The authors suggest that s 4B of the *Crimes Act 1914* (Cth) may apply, allowing a financial penalty to be imposed instead of, or in addition to, the term of imprisonment referred to in s 61 of the BCII Act.

<sup>28</sup> See *Crimes Act 1914* (Cth), s 4AA – “**penalty unit**” means \$170 (at the time of filing this submission).

## 3.4 Industry-specific civil penalties

- 3.4.1 ACCI strongly endorses the provisions of the BCIP Bill which restore the increased industry-specific civil penalties applicable to breaches of the BCIP Bill, as was the case under the BCII Act.
- 3.4.2 ACCI's consistent position on this matter is well documented in its previous submissions and comments, and in particular, its submission to the then Senate Standing Committee on Education, Employment and Workplace Relations' inquiry into the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (BCII FW Amendment Bill)* in July 2009.
- 3.4.3 The Committee would be aware that increased industry-specific civil penalties were introduced by the BCII Act, on the recommendation of the Cole Royal Commission. In the section of the Final Report entitled, "Increased penalties for engaging in unprotected industrial action", the Royal Commissioner, the Hon Terence Cole RFD QC noted that:

*the penalties or other liabilities arising from unprotected industrial action cannot be imposed unless orders are obtained from the AIRC and the Federal Court and those orders are not complied with. This process is cumbersome, time consuming and costly. While it is being pursued the target of the industrial action and, possibly, others as well, are all suffering economic loss that is, in practice, irrecoverable. Rarely is legal action taken against those persons who engage in 'unprotected' industrial action, even though such action is unlawful.<sup>29</sup>*

- 3.4.4 Accordingly, the Royal Commissioner recommended increased penalties for 'unlawful industrial conduct', which would be classified as a penalty provision in respect of which victims would be entitled to compensation.
- 3.4.5 On the basis of the above findings and recommendation, the then Minister for Employment and Workplace Relations the Hon Kevin Andrews MP introduced increased civil penalties under the BCII Act vis-à-vis the penalties under the then *Workplace Relations Act 1996* (Cth) (**WR**

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<sup>29</sup> Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, *Final Report of the Royal Commission into the Building and Construction Industry: Reform – Establishing Employment and Conditions* (Volume 5), February 2003, 73.



**Act).** In his second reading speech introducing the *Building and Construction Industry Improvement Bill 2005* (Cth), the then Minister stated:

*Industrial action can affect the reputation of a particular State or of Australia as a good place to invest. The existing legal framework does not adequately address the problem, with employers finding the current remedies available to be cumbersome, slow and costly to pursue. Unions understand the practical delays any employer faces in seeking to challenge their actions through existing measures provided under the WR Act and know that by adopting tactics such as industrial campaigns they can damage the employer commercially without risking legal repercussions.*

*The BCII Bill seeks to address these issues by clarifying what constitutes unlawful industrial action. If unions or other parties take unlawful industrial action they will be liable for a maximum civil penalty of 1 000 penalty units for a body corporate or 200 penalty units in other cases. A Court can also make an order for any loss caused by unlawful industrial action.*<sup>30</sup>

- 3.4.6 Regrettably, the former Labor Government’s subsequent reversal of these increased penalties has breathed new life into the then Minister’s observation that the remedies under the previous WR Act – which are identical to those under the current FWBI and FW Acts – are “*cumbersome, slow and costly to pursue.*”
- 3.4.7 In 2008, the then government appointed the former Judge of the Federal Court of Australia, the Hon Murray Wilcox AO QC to conduct an inquiry into and report on whether the ABCC should be abolished and the FWBC established within Fair Work Australia (**Wilcox Report**).
- 3.4.8 In considering the appropriateness of industry-specific increased civil penalties, Wilcox J recommended:

*The provisions of the Fair Work Bill governing:*

- (i) *the conduct of employers, employees and industrial associations; and*

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<sup>30</sup> Explanatory Memorandum, *Building and Construction Industry Improvement Bill 2005* (Cth), [48]-[49].



(ii) *penalties for contraventions of the Fair Work Bill;*

*apply, unchanged, to participants in the building and construction industry.*<sup>31</sup>

3.4.9 ACCI, in its response to the Wilcox Report, strongly opposed the above recommendation. For the benefit of the Committee, it is worthwhile setting out the relevant sections of ACCI's response at some length:<sup>32</sup>

*ACCI continues to support the BCIIA in its current form.*

*We believe that this should be translated into either a separate Act (preferred), or into the Fair Work Act 2009 (FW Act).*

*A separate Act would provide a signal that there is a "strong cop on the beat".<sup>33</sup> It would also ensure that "the principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue".<sup>34</sup>*

*The current objectives in s.3 should remain, as should:*

- *All provisions in the BCIIA that govern unlawful conduct (ie. Part 2, 3, 4, Chapter 6 and 7).*
- *Particularly, ss.36-49 and s.52(6)'s penalty provision.*

*These are all essential to ensuring that building industry participants adhere to the rule of law and comply with industrial relations rules.*

*ACCI does not support the FW Act applying to the industry. Essentially, this is what occurred prior to the Cole Royal Commission, and is essentially why Cole recommended a specialist enforcer and regime to deal with the industry. Should building industry participants be subject to the FW Act, as other employer s, employees and unions are, we fear that unions would ignore orders of FWA and the Courts, just as Cole observed in his report under the Workplace Relations Act*

<sup>31</sup> The Hon Murray Wilcox AO QC, "Review into the Proposed Building and Construction Division of Fair Work Australia: Final Report", Recommendation 2.

<sup>32</sup> Australian Chamber of Commerce and Industry, "ACCI Response – Wilcox Report Recommendations" (May 2009) 4-5.

<sup>33</sup> Australian Labor Party, "Forward with Fairness" (August 2007) 24.

<sup>34</sup> Ibid.



1996.<sup>35</sup> Cole also stated that: “Section 127 of the [WR Act] has proved to be ineffectual in preventing unlawful industrial action taking place in the building and construction industry”.<sup>36</sup>

*Cole recommended in his report that the existing penalty regime at the time was inadequate, and specifically recommended that penalties for individuals and body corporates be substantially increased.*<sup>37</sup>

*Cole recommended that “a comprehensive package of reforms implemented on a long term basis is required”.<sup>38</sup>*

3.4.10 ACCI maintains its position that it was inappropriate to water down the industry-specific civil penalties or subsume the penalty provisions for unlawful industrial action into the FW Act.

3.4.11 There has been no evidence to date suggesting that the findings of the Cole Royal Commission are any less relevant today than at the time of report in February 2003. While previous Independent Economics reports estimated the magnitude of the productivity gain during the ABCC era between 10 and 21.1 per cent, Wilcox J himself warned:

*...the ABCC’s work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain. It would be unfortunate if the inclusion of the ABCC into the OFWO led to a reversal of the progress that has been made.*<sup>39</sup>

3.4.12 Regrettably, the Report’s findings vindicate Wilcox J’s prediction and quantify a sharp deterioration in building and construction industry productivity. The resurgence of unlawful industrial action – including unlawful picketing – on building sites across Australia during the FWBC era are at least indicative and symptomatic of the reforms under the BCII FW Amendment Bill.<sup>40</sup>

3.4.13 In the circumstances, the onus of establishing a case against the restoration of increased industry-specific civil penalties, weighs heavily

<sup>35</sup> Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, above n 1, 63.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid, 35, 38, 86 and 96.

<sup>38</sup> Ibid, 7.

<sup>39</sup> The Hon Murray Wilcox AO QC, above n 31, 14.

<sup>40</sup> See [3.5.6]-[3.5.14] for examples of unlawful picketing during the FWBC era.



on those parties opposed to the provisions of the BCIP Bill which seek to do so.

3.4.14 ACCI is strongly of the view that such a case has not been made out. The findings of the Report and the enduring relevance of the findings of the Cole Royal Commission collectively provide a compelling case to support the relevant provisions of the BCIP Bill.

3.4.15 Separately, ACCI draws to the Committee's attention the disparity of net assets held by employer organisations versus employee organisations. In circumstances where 24% of employee organisations hold net assets between \$20m and \$50m and 11% hold net assets in excess of \$50m, the current penalty regime under the FW Act is, as the Royal Commissioner previously stated, demonstrably *"ineffectual in preventing unlawful industrial action taking place in the building and construction industry"*.<sup>41</sup>

The following table compares the value of net assets held by employer and employee organisations.<sup>42</sup>

Value of net assets	Percentage of Employer organisations	Percentage of Employee organisations
Less than \$2m	54%	27%
Between \$2m - \$5m	10%	9%
Between \$5m and \$20m	22%	25%
Between \$20m and \$50m	1%	24%
More than \$50m	6%	11%

3.4.16 In order for the civil penalties to be an effective deterrent, the penalty levels must be appropriately set, taking into consideration the vast capacity of liable employee organisations to incur a monetary penalty at little overall or relative cost.

<sup>41</sup> Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, above n 1, 63.

<sup>42</sup> Department of Finance, "Options stage Regulation Impact Statement (RIS) – Registered Organisations" (11 November 2013) 2.





## 3.5 Unlawful picketing

3.5.1 Clause 47 of the BCIP Bill creates a statutory offence for unlawful picketing, contravention of which may incur Grade A civil penalty. Unlawful picketing is defined as action:

*a. that:*

- i. has the purpose of preventing or restricting a person from accessing or leaving a building site or ancillary site; or*
- ii. directly prevents or restricts a person accessing or leaving a building site or ancillary site; or*
- iii. would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site; and*

*b. that:*

- i. is motivated for the purpose of supporting or advancing claims against a building industry participant in respect of the employment of employees or the engagement of contractors by the building industry participant; or*
- ii. is motivated for the purpose of advancing industrial objectives of a building association; or*
- iii. is unlawful (apart from this section).<sup>43</sup>*

3.5.2 ACCI welcomes the creation of the new statutory offence to provide more effective redress for unlawful picket action.

3.5.3 Parties subject to unlawful picketing have hitherto not had access to any form of statutory remedy. Instead, parties have traditionally relied on the common law to prevent or stop unlawful pickets and restrain trade unions from organising the picket action. In the absence of a single consolidated statutory cause of action, parties have been forced to seek injunctions, relying on a range of disparate tortious actions, including: conspiracy; contractual interference;<sup>44</sup> intimidation;<sup>45</sup> trespass to

<sup>43</sup> *Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)*, cl 47(2).

<sup>44</sup> *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383.





property;<sup>46</sup> defamation;<sup>47</sup> public nuisance;<sup>48</sup> private nuisance; and unreasonable harassment.<sup>49</sup> Each cause of action has various evidentiary thresholds to meet, and legal and factual elements to satisfy in order to properly demonstrate tortious liability.

- 3.5.4 The creation of a single consolidated cause of action in clause 47 of the BCIP Bill will provide parties subject to unlawful picketing, a clear avenue for redress and remedy. It will also empower the ABCC commence proceedings specifically in relation to this particular form of unlawful action.
- 3.5.5 During the FWBC era, there has been a notable resurgence in unlawful picket action, involving violence and intimidation. These unlawful pickets are symptomatic of the “*culture of lawlessness*” identified by the Cole Royal Commission,<sup>50</sup> and highlight the urgent need for a unified statutory cause of action.
- 3.5.6 If previously enacted, clause 47 may have been relied on to prevent or more effectively stop the unlawful picket action that has taken place during the FWBC era, particularly the most recent and public Grocon and Little Creatures disputes.
- 3.5.7 In August and September 2012, the Construction, Forestry, Mining and Energy Union (**CFMEU**) organised an unlawful picket of up to hundreds of people at a number of construction sites – including, most notably the Myer Emporium site – operated by Grocon Constructors (Victoria) Pty Ltd, Grocon (FCAD) Pty Ltd and Grocon Constructors (Vic) Pty Ltd (collectively, **Grocon**) (**Grocon dispute**).
- 3.5.8 It has been widely reported that the Grocon dispute involved unacceptable examples of violence and intimidation, including police

<sup>45</sup> *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia* [1986] VR 383.

<sup>46</sup> *Ferguson v O’Gorman* [1937] IR 260; *British Airports Authority v Ashton* [1983] IRLR 287.

<sup>47</sup> *Sid Ross Agency v Actors and Announcers Equity* [1971] 1 NSWLR 760.

<sup>48</sup> *News Group Newspapers v Society of Graphical and Allied Trades 1982 (No 2)* [1987] ICR 181;

*Patrick Stevedores Operations Pty Ltd v MUA* (1998) 82 IR 87 at 92-8.

<sup>49</sup> *Thomas v National Union of Mineworkers (South Wales Area)* [1985] ICR 886.

<sup>50</sup> Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC, above n 1.



horses being punched and police officers being required to use capsicum spray to prevent other officers from being injured by picketers.<sup>51</sup>

3.5.9 In order to disband the unlawful picket, Grocon sought and obtained orders from the Supreme Court of Victoria, including orders that restrained the CFMEU from:

- “preventing hindering or interfering with free access to” Grocon’s Myer Emporium site and McNab Avenue site; and
- “causing, inducing, procuring or inciting any person to do or attempt to do any of those things” that the CFMEU was restrained from doing.

3.5.10 In late August and early September 2012, the CFMEU continued to organise the unlawful picket at the Myer Emporium and McNab Avenue sites, in direct defiance of the orders of the Supreme Court. Accordingly, Grocon filed two applications against the CFMEU for contempt of court; the Attorney-General of Victoria was joined as a plaintiff to the two applications.

3.5.11 In his decision of 24 May 2013, Cavanough J found 30 charges of contempt against the CFMEU for maintaining unlawful picket action at the Grocon sites and breaching orders of the Court. His Honour is yet to hand down his decision on penalties.

3.5.12 ACCI refers the Committee to the following articles:

- “State can ill-afford to be blockaded” by Mark Stone, Chief Executive of the Victorian Employers’ Chamber of Commerce and Industry, published in the *Herald Sun* on 6 September 2012 (**Annexure A**); and
- “We must unite to fight union thuggery” by Peter Anderson, Chief Executive of ACCI, published in *The Australian* on 5 September 2012 (**Annexure B**); and

<sup>51</sup> Mark Skulley and Nick Lenaghan, “Unions’ workplace war goes national”, *Australian Financial Review* (28 August 2013).



- 3.5.13 Separately on 22 October 2012, an unlawful picket was set up outside the planned Little Creatures Brewery in Geelong, Victoria (**Little Creatures dispute**). TFG Pty Ltd – engaged to install specialist piping in the brewery – successfully obtained interlocutory injunctions against the CFMEU and the Australian Manufacturing Workers’ Union, both of whom denied any involvement in the picket.
- 3.5.14 In affidavits to the Supreme Court of Victoria, witnesses swore and/or affirmed that picketers had made throat-cutting gestures, threatened to stomp heads in, told workers that they were dead, and kicked and punched motor vehicles. Additionally, a union member threatened on facebook to boycott a local store for providing food to the workers at the brewery.<sup>52</sup>
- 3.5.15 The Grocon and Little Creatures disputes, inter alia, justify ACCI’s strong support for a comprehensive statutory unlawful picketing offence, in the form of the proposed clause 47 of the BCIP Bill.

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<sup>52</sup> For further information, see the Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth), 2.



## 4. CONCLUSION

For the reasons outlined in this and previous inquiries, ACCI strongly supports the measures contained in the BCIP and Related Bills. Both Bills should be progressed as quickly as possible to ensure the rule of law is re-established in the building and construction industry.

In a 21st century modern democratic country, such as Australia, no one should be subject to intimidation, threats or violence, denied the right to work, or spectator to scenes of violence on our city streets.

ACCI commends the government for taking a strong and measured stance on this priority policy issue.



## 5. ACCI MEMBERS

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