AUSTRALIAN BUSINESS INDUSTRIAL

Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2] and another bill

SUBMISSIONS TO THE SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE INQUIRY

About ABI and the NSW Business Chamber Ltd

Australian Business Industrial is registered under the *Fair Work (Registered Organisations) Act 2009* and has some 4,200 members and the NSW Business Chamber Ltd is registered under the (NSW) *Industrial Relations Act 1996* and is a State registered association recognised pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009.*

The NSWBC has some 19,000 members.

ABI comprises those NSWBC Ltd members who specifically seek membership of a federally registered organisation.

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Introduction

The *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]* were introduced on 2 February 2016.

These bills are intended to re-establish the Australian Building and Construction Commission (**ABCC**) which was originally established on 1 October 2005 under the *Building and Construction Industry Improvement Act 2005* (**BCII Act**) which had commenced on 12 September 2005. The ABCC was the successor to an interim Building Industry Taskforce which had been set up on 1 October 2002 following an interim report of the Royal Commission into the Building and Construction Industry (**Royal Commission**).

The bills were referred to the Senate Education and Employment Legislation Committee (**Committee**) on 4 February 2016. Australian Business Industrial and the New South Wales Business Chamber (**ABI/NSWBC**) thank the Committee for the opportunity to make submissions.

ABI/NSWBC believe that the bills should be enacted and are hopeful that the Committee will so recommend.

Submissions

Background

The BCII Act was enacted in 2005 to give effect to recommendations 177 - 179 of the Royal Commission. In its final report the Royal Commission said

> 16 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.
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> 17 At the heart of the findings is lawlessness. It is exhibited in many ways. There are breaches of the criminal law. There are breaches of laws of general application to all Australians where the sanction is a penalty rather than possible imprisonment. There are breaches of many provisions of the *Workplace Relations Act* 1996 (C'wth). The unsatisfactory record in respect of occupational health and safety indicates breaches of the various State acts addressing that matter. There is disregard of or breach of the revenue statutes, both Commonwealth and State. When courts or tribunals become involved and make orders, some union participants, particularly the CFMEU, regard such orders as not binding upon them. There is the commonly held view, translated into practice, that agreements entered into are binding upon unions only insofar as they confer upon the union or its members a benefit, but not insofar as they confer an obligation. Underlying all of this lawlessness is an understanding and expectation, which reflects the reality, that those engaging in unlawful conduct will not be held to account by criminal proceedings, proceedings for penalties, or for loss occasioned to others by unlawful conduct.[1]

Earlier in New South Wales

The Royal Commission's findings in 2003 follow findings of lawlessness and corruption by the *Royal Commission into Productivity in the Building Industry in New South Wales* (NSW Royal Commission) which was undertaken by Commissioner Gyles who found that

> "…observance of the law and law enforcement in general play very little part in the industry. The law of the jungle prevails. The culture is pragmatic and unprincipled. The ethos is to catch and to kill your own."[2]

As is often quoted, Commissioner Gyles also said of the illegal activities in the NSW industry in the late 1980s-early 1990s that they

[1] P 6, *Final Report of the Royal Commission into the Building and Construction Industry* Vol 1
[2] The NSW Royal Commission is not available on line. This quote and the following one after the next paragraph are taken from *Crime and the Construction sector*, Murray J, paper presented to Crime against Business conference, Australian Institute of Criminology, 18-19 June 1998, accessible at http://www.aic.gov.au/media_library/conferences/cab/murray.pdf . That paper does not give page references.

> "…range from physical violence and a threat of physical violence at one end to petty pilfering of building materials at the other. In between there is a great variety of illegal activities, essentially economic in nature or effect, from collusive arrangements involving giant corporations and industry associations to labour-only sub contractors paying small amounts of graft to project managers. Those involved range from managing directors of large corporations to labourers on site. No sector of the industry has been immune."

The extreme level of lawlessness in the NSW industry at this period was curbed[3] under the combination of a special body, the Building Industry Task Force (**BITF**) which had been recommended in his first interim report by Commissioner Gyles and the very real threat of deregistration of the then NSW Building Workers' Industrial Union (**BWIU**). The BWIU entered in to an agreement with the NSW government to avoid that fate.

The BITF was originally established in September 1991 with the objective of changing the industry's culture of jungle law and with an intended 12 month life but its term was extended. The BITF investigated and, where appropriate, prosecuted criminal offences in the industry and it also co-ordinated actions for civil remedies. It followed up allegations of illegalities within the industry. The BITF was involved with NSW Government Codes of Practice and Tendering, anti-fraud strategies and law reform.[4]

The demise of the BITF on 31 December 1995 under the successor Government was opposed by ABI/ NSWBC.

The Federal story

A similar pattern was played out nationally. The ABCC was dis-established on 1 June 2012 by the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (**Transition Act**) with the commencement of the *Fair Work (Building Industry) Act 2012* (**FW(BI) Act**).

Before dis-establishing the ABCC the then Government commissioned an inquiry from the Hon. Murray Wilcox QC into the transition from the ABCC to the Government's proposed specialist division of what is now the Fair Work Ombudsman. Mr Wilcox was requested to consult and propose the arrangements which should apply and transition to the Government's proposed new specialist building industry body. In his discussion paper released for comment Mr Wilcox said

> 9. It is not my function to review either the conduct or the findings of the Cole Royal Commission. Nor do I have the time or resources to do this. So I express no opinion about most of the controversial matters. However, there can be no doubt that the Royal Commissioner was correct in pointing to a culture of lawlessness, by some union officers and employees, and supineness by some employers, during the years immediately preceding his report. The evidence summarised in the report is too powerful to permit any other view.
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> 10. This does not necessarily mean I agree with all the recommendations of the Royal Commissioner or the enactment of the *Building and Construction Industry BCII Act 2005* (the BCII

[3] P 4, ibid .The Royal Commission's findings also pointed to the fact that there was a higher level lawlessness in other states than in NSW.
[4] P 55, Annual Report 1993-94, Attorney-General's Department, Sydney

Act). It is not necessary for me to form opinions about those matters; my task is not to consider what ought to have been done in 2003, but what should be the position in 2010.[5]

Is the building industry different?

In his final report Mr Wilcox discussed the question of whether the building industry should be treated differently from other industries. The BCII Act provided special requirements for industrial action to be protected, and therefore immune from penalty or legal remedy, and it also provided higher penalties for unlawful industrial action than those under the FW Act.

Mr Wilcox recommended that that the building industry should no longer be treated differently from others because by its enactment of the FW Act Parliament had identified the appropriate level of penalty for unlawful industrial action and because as enterprise agreements spread throughout the building industry the different tests on unprotected industrial action would effectively become differences of wording rather than substance.

> 1.16 When the Fair Work Bill comes into operation, there will remain a theoretical difference between the circumstances under which industrial action by building employees is unlawful (and, therefore, liable to be penalised) and those applying to other employees. Under the BCII Act, industrial action is unlawful if it is not "protected", by following prescribed procedures. Under the Fair Work Bill, industrial action is unlawful if it occurs during the currency of an industrial instrument.
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> 1.17 However, the Fair Work Bill actively encourages enterprise agreements. In the long term, in the federal system, there will be an enterprise agreement governing almost every building employee almost all the time. This will mean that industrial action in the building industry will almost always be unlawful. The difference in the test of unlawfulness will be semantic rather than real. Neither that difference, nor any of the few other minor differences between the BCII Act and the Fair Work Bill, justifies perpetuating special constraining rules for building employees.[6]

The ABCC was replaced by Fair Work Building and Construction, a division of the Fair Work Ombudsman.

The Transition Act not only renamed the BCII Act, consistent with Mr Wilcox's recommendations it repealed a number of sections of that act, with the effect that a number of relevant definitions, such as that for industrial action, and the penalty structure in the BCII Act were removed. Definitions and offences under the FW(BI) Act were those of the FW Act, as were the penalties.

[5] P 7, *Proposed Building and Construction Division of Fair Work Australia – Discussion Paper*, Canberra, 2008
[6] Pp 2 – 3, *Transition to Fair Work Australia for the Building and Construction Industry: Report*, Canberra, March 2009

The power to compel

Another area of contention under the BCII Act was the capacity of the ABCC to compel attendance for interrogation, and Mr Wilcox recommended retention of the power, with modifications, and its review after 5 years.

> 1.21 Opponents of the power [to compel attendance for interrogation] argued it violated the human rights of those who were summoned to testify. They spoke of the right of silence that applies, even in relation to most criminal accusations. They argued it was iniquitous, and discriminatory, to expose workers in a particular industry to a procedure that did not apply to others. The opponents acknowledged there were other statutes providing for compulsory interrogation, but argued these statutes were concerned with suspected behaviour far more significant than unlawful (not even criminal) workplace conduct.
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> 1.22 Supporters of the power pointed to the protections conferred by sections 53 and 54 of the BCII Act which, they accepted, would be repeated in any new legislation; especially protection against the person's evidence, or anything derived from it, being used against that person in any later proceeding. Primarily, however, they put a pragmatic argument: such is the code of silence in the building and construction industry that, without the power of compulsory interrogation, the BCD would be gravely handicapped in its investigations of suspected contraventions; the rule of law in the industry would be defeated; there would be an increase in lawless and disruptive behaviour, with consequential loss of working time and production.
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> 1.23 It is understandable that workers in the building industry resent being subjected to an interrogation process, that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power. However, that would not be a responsible course. I am satisfied there is 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 BCD to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.[7]

Consistent also with Mr Wilcox's recommendation the FW(BI) Act was enacted with a modified compulsory interrogation power, but inconsistent with his recommendation that the power be reviewed after five years, the FW(BI)Act was enacted with a sunset after three years. This was recently addressed with the commencement of the *Construction Industry Amendment (Protecting Witnesses) Act 2015* which extended the sunset to 5 years.

As well, the capacity of the Director of the Fair Work Building Industry Inspectorate was constrained in another way under the FW(BI) Act. After the Transition Act was tabled and during the course of its enactment the Government amended the Transition Bill to provide that neither the Director nor an inspector could continue as a party (whether intervening or originating) in civil building proceedings if the other parties settled and withdrew (s 73 FW(BI) Act) and could not institute building proceedings in the court if other parties had settled in relation to the conduct (s 73A FW(BI) Act).

[7] P 3, *ibid*

A change in focus

The focus of the BCII Act was bringing change to the building industry, improving it, and its main object (the same as the bill before the Committee)[8] reflected this.

> 3(1) The main object of this Act [the BCII Act] is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.
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> (2) This Act aims to achieve its main object by the following means:
> (a) improving the bargaining framework so as to further encourage genuine bargaining at the workplace level;
> (b) promoting respect for the rule of law;
> (c) ensuring respect for the rights of building industry participants;
> (d) ensuring that building industry participants are accountable for their unlawful conduct;
> (e) providing effective means for investigating and enforcing this Act, designated building laws (to the extent that those laws relate to building work) and the Building Code;
> (f) improving work health and safety in building work;
> (g) encouraging the pursuit of high levels of employment in the building industry;
> (h) providing assistance and advice to building industry participants in connection with their rights and obligations under relevant industrial laws.

Unsurprisingly given Mr Wilcox's recommendation that the industry not be treated differently from other industries the main object of the FW(BI) Act were amended to more strongly reflect the object of the FW Act.

> 3. The object of this Act [the FW(BI) Act] is to provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry by:
> (a) ensuring compliance with workplace relations laws by all building industry participants; and
> (b) providing information, advice and assistance to all building industry participants about their rights and obligations; and
> (c) providing an effective means of enforcing those rights and obligations; and
> (d) providing appropriate safeguards on the use of enforcement and investigative powers; and
> (e) improving the level of occupational health and safety in the building industry.

Nonetheless, the means by which the main object was to be achieved (subsections (a) – (e)) recognised there were issues in the industry even if they were better approached differently. In the context of the recognition that there was a compliance problem it is difficult to discern the policy objective behind the belated ss 73 and 73A amendments. These constraints are imposed on neither the FW Ombudsman nor FW inspectors under the FW Act.

[8] There is a slight difference between the means to achieve the main objective in the BCII Act and the bill. S 3(2)(h) refers to "…rights and obligations under relevant industrial laws.". The bill at s 3(2)(h) refers to "…rights and obligations under this Act, designated building laws and the Building Code.".

The building industry still disregards the law

The industry remains relevantly different and a culture of disregard for the law persists.

As pointed to in various reviews of the industry including by the Productivity Commission as well as various commissions and inquiries, underpinning the industry's difference is the reality of the short termism of clients and the costs of delay. Left unattended a culture of disregard for the law and impunity develops and grows, not only increasingly imposing additional costs on building and infrastructure but exposing individuals who are perceived to stand in the way to outrageous treatment.

One of the features of many of the court's decisions is that the CFMEU, and usually the joined individuals, do not show contrition. It might be argued that this is because they believe their cause to be right, and therefore the means they use, the unlawfulness, to be justified or right. This is not an argument which should be accepted, and it is no more right in the context of asserting industrial rights or remedying perceived industrial wrongs than it is in other spheres of civil life. There are statutory remedies and prescribed processes for redress. As Merkel J stated in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* [2000] FCA 629 (12 May 2000), a decision concerning contempt of Court orders

> 79 The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes (*Patrick Stevedores Operation No 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 641 at [1] per Hayne J), it also requires that parties comply with the orders made by the courts in determining those disputes.

It seems likely that other submissions before the Committee will draw attention to the increasing concern being expressed by judges in building industry matters coming before the courts, and there is no doubt that this is concerning. Under the current legislation there is evidence that the industry is not turning around. The extent to which there is a continuing problem is spelt out in the report of the Royal Commission into Trade Union Governance and Corruption

> 6. In the Interim Report the following comments were made:
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> > The evidence in relation to the CFMEU case studies indicated that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law.
> >
> > That evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:
> > (a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;
> > (b) officials prefer to lie rather than reveal the truth and betray the union;
> > (c) the reputations of those who speak out about union wrongdoing become the subjects of baseless slurs and vilification.
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> 7. The case studies considered in this Report only reinforce those conclusions.[9]

[9] Pp 395 – 396, *Royal Commission into Trade Union Governance and Corruption: Final Report*, Vol 5, 2015

The Report then reports on various judges' finding in matters before them. However, what is even more concerning is the extent of this disregard in the building industry. In discussing the number and extent of court proceedings in the industry which are set out in Appendix A of Volume 5, and its sources, the Final Report advises

> 11. In an attempt to be comprehensive, Commission staff have supplemented those schedules with other publicly available decisions. Of course, it is not possible to assert that Appendix A captures every relevant decision.
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> 12. However, it does paint a picture of repeated contraventions by the CFMEU and its officials. Of the 147 cases in the list, 109 involve findings of breaches of the law or court orders by the CFMEU or its officials. It points to both repeated unlawful conduct in the building and construction industry, and by the CFMEU in particular.
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> …
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> 18. In 2014 the Productivity Commission recorded as summary of penalty proceedings brought by the relevant building industry regulators since 2005, disclosing 169 proceedings, 131 of which were brought against unions, and of those 108 were brought against the CFMEU.[10]

It is inappropriate for this level of disregard for the law to continue.

[10] Pp 397 – 399, *ibid*.