

**Government's approach to re-establishing the  
Australian Building and Construction  
Commission  
Senate Education and Employment References  
Committee**

**Submission from Business SA**

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## Introduction

As South Australia's peak Chamber of Commerce and Industry, Business SA is South Australia's leading business membership organisation. We represent thousands of businesses through direct membership and affiliated industry associations. These businesses come from all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.

We deliver a wide range of integrated services to business, including:

- lobbying and representation on issues significant to industry
- workplace relations advice, advocacy and consulting services
- health, safety, environmental and injury management training and consultancy services
- wide-ranging training programs
- reference publications and handbooks
- international trade and business development services
- management of apprenticeships and traineeships
- administrative support services for industry and trade associations
- networking opportunities
- Workplace Relations seminars and workshops

Business SA is a registered association of employers under the South Australian Fair Work Act 1994 and recognised under that and other legislation as the State's peak business and employer group.

Business SA is also a transitionally recognised association under the *Fair Work (Registered Organisations) Act 2009*.

As the peak employer organisation in South Australia, Business SA is well placed in representing the interests of members across most industries.

## Overview

Business SA is pleased to have the opportunity to make submissions to the Senate Education and Employment References Committee on the Government's approach to re-establishing the Australian Building and Construction Commission through the *Building and Construction Industry (Improving Productivity) Bill 2013* (the Bill).

We note that this is the second inquiry by a Senate Committee into the Bill. Business SA made submissions to the Senate Education and Employment Legislation Committee's inquiry into the Bill. In its report tabled 2 December 2013, the Committee recommended that the Senate pass the bill.

Business SA strongly supported the establishment of the Australian Building and Construction Commissioner (ABCC) by the *Building and Construction Industry Improvement Act 2005* in response to the findings of the Royal Commission into the Building and Construction Industry (the Cole Royal Commission).

The Cole Royal Commission found fundamental cultural problems in the building and construction industry giving rise to unlawfulness and acceptable behaviours; including<sup>1</sup>:

- widespread disregard of, or breach of, the freedom of association provisions;
- widespread requirement by head contractors for subcontractors to have union-endorsed
- enterprise bargaining agreements (EBAs) before being permitted to commence work on major projects;
- widespread requirement for employees of subcontractors to become members of unions
- in association with their employer obtaining a union-endorsed enterprise bargaining agreement;
- widespread requirement to employ union-nominated persons in critical positions on building projects;
- widespread disregard of the terms of enterprise bargaining agreements once entered into;
- widespread application of, and surrender to, inappropriate industrial pressure;
- widespread use of occupational health and safety as an industrial tool;
- widespread making of, and receipt of, inappropriate payments;
- unlawful strikes and threats of unlawful strikes;

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<sup>1</sup> Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations, Volume One, Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, February 2003, Page 5

- threatening and intimidatory conduct; disregard of, or breach of, the strike pay provisions of the *Workplace Relations Act 1996*;
- disregard of, or breach of, the right of entry provisions of the *Workplace Relations Act 1996*;
- disregard of Australian Industrial Relations Commission (AIRC) and court orders; and
- disregard by senior union officials of unlawful or inappropriate acts by inferior union officials.

Unfortunately, the building and construction industry in South Australia was not immune to these unlawful practices. Volume 19 of the Cole Royal Commission's Final Report specifically considered South Australia and identified examples of unlawfulness and unacceptable behaviours, including<sup>2</sup>:

- work stoppages by a significant number of employees constituting unprotected industrial action;
- breaches of the enterprise agreement;
- raising of false safety issues by the unions concerned;
- compulsory union membership before being allowed on site; and
- independent contractors being forced to become employees.

The Cole Royal Commission went on to summarise the unique structural and cultural problems of the industry, as follows:

*“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*

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<sup>2</sup> Final Report of the Royal Commission into the Building and Construction Industry, Hearings – South Australia, Tasmania, Northern Territory and ACT, Volume Nineteen, Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, February 2003

*to account by criminal proceedings, proceedings for penalties, or for loss occasioned to others by unlawful conduct*<sup>3</sup>.

Since the enactment of the *Fair Work (Building Industry) Act 2012* which abolished the ABCC and significantly lowered the penalties for unlawful industrial practices, there is evidence that the lawlessness identified by the Cole Royal Commission now has returned in full force.

Not only have there been serious examples of this in Victoria, including the Grocon dispute in 2012, the Little Creatures dispute in 2012 and the City West Water dispute in 2013, but also examples in South Australia of disregard of right of entry requirements, threats of stopping construction work unless full-time shop stewards are employed and union flags are prominently displayed at the construction site.

In addition, late last year the Fair Work Commission initiated a review of the right of entry procedures of the Construction, Forestry, Mining and Energy Union (CFMEU)<sup>4</sup>. This follows an earlier finding by the Fair Work Commission that visits by CFMEU to four Land Lease sites in Adelaide “constituted a planned and resource intensive series of visits involving intimidatory tactics in breach of right of entry requirements”<sup>5</sup>.

Research undertaken by Independent Economics<sup>6</sup> demonstrates that since ABCC was abolished working days lost to industrial disputes more than trebled, from 24,000 days in the 2011/2012 financial year to an estimated 89,000 in the 2012/2013 financial year.

While there has been an increase in working days lost to industrial disputes and several examples of serious industrial disputes in the industry, over the same period was a reduction in staff in ABCC and its successor Fair Work Building and Construction (FWBC) to investigate and enforce compliance with the relevant laws. From 163 employees in ABCC as of 31 May 2012, a year later, 30 June 2013 there had been a reduction 17% or 27 staff to 136 employees in total.<sup>7</sup>

Business SA submit that the sharp increase in working days lost to industrial disputes and the protracted and very public industrial disputes in 2012-2013 demonstrate that the need for re-

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<sup>3</sup> Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations, Volume One, Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, February 2003, Page 6

<sup>4</sup> [2013] FWC 9860, 16 December 2013

<sup>5</sup> Land Lease Building Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union, [2013] FWC 8659, 1 November 2013

<sup>6</sup> Independent Economics 2013, Economic Analysis of Building and Construction Industry Productivity: 2013 Update, 26 August 2013, pp. 24-26.

<sup>7</sup> ABCC Annual Report 2011-2012; FWBC Annual Report 2012-2013



establishing law and order in the building and construction industry and to properly resource the relevant agency.



## **Specific provisions of the Bill**

### **Building work**

The definition of “building work” in section 6 of the Bill closely follows the definition as included in the *Building and Construction Industry Improvement Act 2005* with some important exceptions. Section 6(2) clarifies that while drilling or extracting oil, gas or minerals is not “building work” for the purposes of the Bill, that Act still applies to building work conducted on land where there is an interest relating to the mining for oil, gas or minerals. Further, transporting or supplying goods used in any of the building work activities in section 6, in itself constitutes building work according to section 6(1)(e).

Business SA support the clarification in Section 6(2) regarding work on land where there is an interest relating to oil, gas or minerals. The exclusions in section 6(1)(f) and (g) otherwise could be misinterpreted to mean that Act would not apply to any building work activities undertaken on land where oil, gas or mineral extraction is being undertaken.

Further, we welcome the expansion of the definition to incorporate transportation and supply of goods, as disturbing the transport and supply of goods otherwise could be used as an industrial tactic to delay or halt large construction projects.

### **Extension of Act to the EEZ**

Section 11 extends the Act to the Exclusive Economic Zone or in waters above the continental shelf. Business SA welcome this extension of the Act as it ensures that building work conducted on resource platforms and the transportation of goods for such building work is subject to the requirements of the Act.

### **Penalty for civil remedy provisions**

Section 81(2) prescribes the maximum penalty for contraventions of civil remedy provisions. For a Grade A civil remedy provision, including unlawful industrial action, unlawful picketing and coercion, the maximum penalty is \$170,000 for a body corporate and \$34,000 for individuals.

For a Grade B civil remedy provision, including failing to produce records or documents and breaching compliance notices, the maximum penalty is \$17,000 for a body corporate and \$3,400 for individuals.

This should be contrasted with the existing penalties under the *Fair Work Act 2009* that currently apply to entities subject to the *Fair Work (Building Industry) Act 2012*. Building industry participants found to have engaged in unprotected industrial action today would be subject to a maximum penalty of \$51,000 for a body corporate and \$10,200 for individuals.

A maximum penalty of \$51,000 clearly is insufficient to deter well-financed industrial organisations with multi-million budgets from engaging in unlawful industrial action. Therefore, in order to re-establish law and order to the industry, penalties must be set at a level that will be effective in deterring building industry participants from contravening the Act.

While the penalties proposed appear appropriate, the Government should continuously monitor the compliance with the Act and if necessary review the penalties if there is evidence demonstrating that they are not effective in deterring repeated contraventions of the Act or otherwise reducing the instances of unlawful action in the industry.

### **Unlawful picketing**

Section 47 prescribes that a person must not engage in unlawful picketing. Not only is this subject to a Grade A civil remedy provision, but an aggrieved person may also apply for an injunction against unlawful picketing.

Unlawful picketing can cause significant delays to building and construction projects. As illustrated by the City West Water dispute in Werribee, the picketing and protests was so aggressive and threatening that workers had to be flown into the site by helicopter. Section 47 will enable the ABCC to take appropriate action against picketing engaged in for unlawful purposes.

Section 47 not only will apply to unlawful picketing of building sites, but also ancillary sites including sites from which goods or labour is transported or supplied. Business SA strongly support section 47 as it will ensure that effective and swift action can be taken against unlawful picketing that otherwise could derail building and construction projects.

### **Coercion**

Section 52 makes it unlawful to coerce another person to for example employ or not employ another person or engage or not engage an independent contractor. While this provision appears closely modelled on section 43 in the *Building and Construction Industry Improvement Act 2005*, section 52 importantly extends further by applying to action intended to coerce third persons.

Business SA support this extension as a person may not only attempt to coerce another person directly, but may also take action with the intent of coercing a third person.

### **The Australian Building and Construction Commission**

To ensure that the Australian Building and Construction Commission is able to successfully contribute to the return of law and order to the building and construction industry, it is vital that the agency is adequately funded.

We welcome the commitment by the Government in the Financial Impact Statement in the Explanatory Memorandum to the Bill that an additional \$35 million over four years will be contributed to the re-established ABCC.

Of equal importance is that the re-established ABCC continues to have an active presence in the States and Territories. We trust that the Government will ensure that ABCC will have a State Office in South Australia in order to be able to establish relationships with key stakeholders and to be able to quickly respond to issues arising locally.

### **The Building Code**

Properly drafted the Building Code is an important instrument to improve productivity and compliance on Commonwealth funded construction projects.

## Conclusion

Business SA welcome the introduction of the *Building and Construction Industry (Improving Productivity) Bill 2013* and broadly support the principles underpinning the Bill.

The Building and Construction Industry is a strategically important industry for the country. Unlawfulness and unacceptable behaviours not only affect building industry participants, but has flow on effects on other industries and on the national economy in the form of higher construction costs, cost blowouts and delays.

The Cole Royal Commission demonstrated that the building and construction industry is unique in terms of culture, industrial practices and disputation and provided a number of key recommendations<sup>8</sup>, many whom are reflected in this Bill. This includes:

- an act of special application to the building and construction industry;
- the creation of the Australian Building and Construction Commission (ABCC);
- the abolition of pattern bargaining in the industry;
- making registered organisations responsible for the acts of officials, organisers and delegates;
- a clear definition of unlawful industrial action; and
- prohibiting coercion in relation to employment of particular persons.

The Bill will contribute to the structural and cultural change the Cole Royal Commission found was necessary *“if the rule of law is to be reintroduced to conduct and activities within the industry, if individuals’ freedoms are to be maintained, and if the industry is to achieve its economic potential.”*<sup>9</sup>

A number of incidents involving serious threats and unacceptable behaviour in 2012 and 2013 clearly demonstrate the need for effective measures to ensure the rule of law in the industry. The legislation, a properly funded ABCC and a properly funded Building Code are essential components to this.

Given that the building and construction industry is under pressure, it is particularly important that the ABCC is established at this point in time.

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<sup>8</sup> Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations, Volume One, Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, February 2003, Page 14-16

<sup>9</sup> Final Report of the Royal Commission into the Building and Construction Industry, Reform - Achieving Cultural Change, Volume Eleven, Royal Commissioner, The Honourable Terence Rhoderic Hudson Cole RFD QC, February 2003, Page 3