

ACTU Responses to Questions on Notice

Senate Standing Legislation Committee on Education and Employment Inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*

Question 1 (Senator Cameron)

Do you have any comment about the argument that, because those organisations [the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission] have these powers, that is justification for giving them to the ABCC?

The ACTU does not believe that the existence and use of coercive investigatory powers by other statutory agencies provides any justification for the provision of similar powers to the ABCC. In making this argument, reference is often made to agencies that operate in very different contexts and for very different purposes. They also often differ significantly from the ABCC in the types of contraventions (including offences) they are tasked with investigating; and the circumstances in which the coercive powers may be exercised.¹

Both the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC) - two statutory agencies to which parallels are drawn in several of the employer submissions to this inquiry - have coercive information-gathering powers. However, these two statutory authorities are tasked with investigating matters of serious (often criminal) magnitude and matters in which there is a strong public interest in the strictest enforcement of the law: that is, these powers are exercisable where non-compliance with the law would jeopardise the functioning of the economic system through anti-consumer conduct or corporate misconduct and fraud respectively. The public interest considerations that may support the availability of coercive powers in support of strict enforcement by these regulatory agencies simply do not apply to the industrial jurisdiction which is concerned with, and regulates, the relationship between employers, employees and unions.

The introduction of coercive powers to obtain information by corporate and competition regulators was introduced in response to repeated failures to obtain the information necessary to secure convictions or penalties in highly complicated cases of, for example, securities fraud and cartel conduct. In these circumstances, the public interest was served by ensuring such evidence was available to regulators. No evidence of such circumstances exists in relation to industrial law. Serious breaches of securities and competition law (for example price-fixing and fraud) are by definition secretive and conspiratorial processes where evidence is difficult to obtain. By contrast a strike, for example, is by its very nature a public event that is independently witnessed.

It is also important to note that, under the Bill, the ABCC may exercise its coercive information-gathering powers with respect not simply in relation to persons suspected of committing an offence, but witnesses or anyone else they consider may assist with an investigation.

¹ The ACTU refers the Committee further to G Williams and N McGarrity, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244, appended to the submission of N McGarrity and G Williams to this Inquiry (Submission 1).

Question 2 (Senator Cameron)

Do you have any comment about the checks and balances on ASIC and the ACCC—checks and balances that do not apply to the ABCC?

The ACTU undertook (on p.9 of the proof Hansard) to undertake a comparison of the safeguards on the coercive information-gathering powers of the ABCC as proposed under the Bill with those exercisable by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investment Commission (ASIC). This comparison is provided in Table 1. It demonstrates that there are significant differences, most notably in that, in comparison with the powers proposed for the ABCC, the decision to exercise the powers by both ACCC and ASIC are subject to judicial review and both agencies have the capacity to impose a penalty for failing to comply with an examination notice of either a fine *or* imprisonment.

We also refer the Committee to our comments above in our response to Question 1, which outline our reservations with respect to drawing comparisons between the coercive powers exercisable by other statutory agencies with that proposed for the ABCC, without adequate regard to the context in which the agency is operating and other significant factors.

Table 1: Comparison of coercive information-gathering powers

	Australian Building and Construction Commission²	Australian Competition and Consumer Commission³	Australian Securities and Investment Commission⁴
Nature of power	A coercive information-gathering power which may require the recipient of the notice to: <ul style="list-style-type: none"> • Give information; or • Produce documents; or • Attend to answer questions relevant to an investigation (cl.61) 	A coercive information-gathering power which may require the recipient of the notice to: <ul style="list-style-type: none"> • provide information; • produce documents; and/or • to give evidence under oath or by way of affirmation (s.155(1)) 	A coercive information-gathering power which requires the recipient of the notice to: <ul style="list-style-type: none"> • give to ASIC all reasonable assistance in connection with an investigation; and • to appear before a specified member or staff member for examination on oath and to answer questions (s.19).
Threshold to issue notice	Where Commissioner ‘reasonably believes’ that the person has information or documents relevant to an investigation; or is capable of giving evidence that is relevant to such an investigation (cl.61(1)).	Where Commission has ‘reason to believe’ that a person has information, documents or evidence relating to a matter that constitutes, or may constitute, a contravention of the Act, designated communications or water matter or certain other matters (s.155).	Where Commission ‘on reasonable grounds, suspects or believes that a person can give information relevant to a matter that is investigating, or is to investigate’ (s.19(1)).
Notice period	At least 14 days (cl. 61(2)).	Not specified in statute.	Not specified in statute.
Legal representation	Examinee may be represented by lawyer (cl.61(4))	Not specified in statute.	Examinee may be represented by lawyer (s.23)
External monitoring/oversight	<ul style="list-style-type: none"> • Submission of annual report to Minister • Commonwealth Ombudsman oversight (cl. 64 and 65), including requirement to notify Ombudsman of issue of examination notice, and to provide a report, video-recording and transcript of the examination cl. 65 	<ul style="list-style-type: none"> • Submission of Annual Report to Minister, which must include number of notices it issues under its compulsory information gathering powers, the numbers of proceedings that are brought against the ACCC to challenge these notices.(s.171). • Subject to Commonwealth Ombudsman oversight. 	<ul style="list-style-type: none"> • Submission of Annual Report must detail the number of times notices were issued under its compulsory information gathering powers.⁵ • Subject to Commonwealth Ombudsman oversight.
Judicial review of decision to exercise power⁶	Not available. ⁷	Available. ⁸	Available. ⁹

² As proposed in the *Building Industry (Improving Productivity) Bill 2013*.

³ *Competition and Consumer Act 2010* (Cth).

⁴ *Australian Securities and Investment Commission Act 2001* (Cth).

⁵ *Australian Securities and Investment Commission Regulations 2001* (Cth), s.8AAA.

⁶ This refers to whether the exercise of the statutory powers is subject to judicial review in accordance with the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Under this Act, a person may seek judicial review by the Australian Federal Court of a Commonwealth agency’s exercise of its statutory powers. Following an application for judicial review, the court will determine whether the decision that is complained about is unlawful and may grant relief.

⁷ *Building Industry (Transitional and Consequential Provisions) Bill 2013*, Schedule 1, Part 2, Item 2.

⁸ Only decisions set out in Schedule 1 of the ADJR Act are excluded from the operation of that statute. Decisions made by the ACCC under the *Competition and Consumer Act 2010* are not listed in this Schedule.

⁹ Only decisions set out in Schedule 1 of the ADJR Act are excluded from the operation of that statute. Decisions made by ASIC under the *Australian Securities and Investment Commission Act 2001* are not listed in this Schedule.

Reimbursement of expenses incurred by persons attending examination	A person who attends an examination as required by an examination notice is entitled to be reimbursed for reasonable expenses (other than legal expenses) incurred in attending the examination (cl. 63).	Not specified in statute.	A person who attends an examination as required by an examination notice is entitled to any prescribed allowances and expenses incurred as a result of complying with that notice (s.89). ¹⁰
Privilege against self-incrimination/ use immunity	Abrogates privilege against self-incrimination, but information or documents provided may not be used against the person in most criminal proceedings (cl. 102)	Abrogates privilege against self-incrimination, but answers given and information provided by a person cannot be used against that person in most criminal proceedings (s.155(7)).	Abrogates privilege against self-incrimination, but answers given and information provided cannot be used against that person in most criminal and civil proceedings (s.68(3)).
Legal professional privilege	Not specified in statute.	A person is not required to produce a document that would disclose information that is the subject of legal professional privilege (s.155(7B)).	A person is not required to produce a document that would disclose information that is the subject of legal professional privilege (s.69).
Other		A person is not required to disclose cabinet documents (s.155(7A)).	
Penalty for failure to comply	Maximum 6 months imprisonment (cl. 52).	Maximum 20 penalty units (currently \$3,400) or imprisonment for 12 months (s.155(6A)).	Maximum 100 penalty units (currently \$17,000) or 2 years imprisonment, or both (s. 63(1)).

¹⁰ See further *Australian Securities and Investments Commission Regulations 2001*, Schedule 2.

Question 3 (Senator Tillem)

Do we have any analysis showing whether, under this regime, there have been any successful prosecutions of employees who have breached the act in the areas of occupational health and safety or workplace death and injury?

The ACTU had understood at the hearing that this question related to breaches of occupational health and safety standards by *employers*; however the proof Hansard records the question as relating to employees. In any event, the ACTU is not aware of any prosecutions of employers or employees by the ABCC in the area of occupational health and safety. The ABCC did not, under the former *Building and Construction Industry Improvement Act 2005* (and will not under this Bill), have prosecutorial powers with respect to breaches of occupational health and safety standards. We refer the Committee to the comments made by Mr Noonan on pp.9 – 10 of the proof Hansard.

The ACTU notes that the biased and narrow scope and priorities of the ABCC (in its former incarnation and as set out under this Bill) is even more objectionable given the serious and ongoing need to improve workplace health and safety in the building and construction industry. According to Safe Work Australia, the national body responsible for improving Australian work health and safety and workers' compensation arrangements, the rate of injuries suffered by construction workers is 60.1 injuries per 1000 workers. This is significantly higher than the average of 57.9 injuries per 1000 workers recorded across all industries.¹¹ Last year alone, 30 construction workers lost their lives at work.¹² The construction industry has the third highest rate of fatalities among industries, after the transport, postal and warehousing industry and the agriculture, forestry and fishing industries.

According to the latest available data, in the 2008-2009 financial year the cost of work-related injury and illness for Australian employers, workers and the community was \$60.6 billion, or 4.8% of Australia's GDP in the period.¹³ Of this total employers bore 5% of the total costs, workers 74% and the community 21%.¹⁴

Question 4 (Senator McKenzie)

I would like the CFMEU and the ACTU to address the Master Builders submission, which I am assuming you have read, particularly around claims in 3.5 of militant behaviour and deliberate flouting of the law and, under 4.9, the right-of-entry issues that they raise around the CFMEU's membership holding those entry permits or not. Could you address those?

The ACTU notes that the MBA submission at 3.5 does not accurately describe the provisions of the *Fair Work (Building Industry Act) 2012*. The submission says that the FWBC is '*powerless to intervene where proceedings are already on foot or where proceedings have been commenced by an interested party.*' In fact sections 71 and 72 of the Act expressly confer on the Director of FWBC the capacity to intervene in court proceedings and makes submissions in FWC matters. Section 71(2) provides that

¹¹ Safe Work Australia, "Australian work-related injury experience by sex and age, 2009-10," Commonwealth of Australia, July 2012, table 15, p.33.

¹² Safe Work Australia, "Work-Related Traumatic Injury Fatalities Australia 2012," Commonwealth of Australia, October 2013, p.10.

¹³ Safe Work Australia, "The Costs of Work-Related Injury and Illness for Australian Employers, Workers and the Community: 2008-09," Commonwealth of Australia, March 2012, p.3.

¹⁴ Ibid, Table 0.1, p.5.

where the Director intervenes in a proceeding he/she is taken to be a party to the proceeding and has all the rights, duties and liabilities a party.

With respect to paragraph 4.9 of the MBA submission, our affiliate the CFMEU advises that there is no 'tactic' of deliberately allowing entry permits to lapse to avoid prosecution for onsite conduct. Generally, the presence or absence of an entry permit has no bearing on whether a prosecution can be maintained for the range of civil penalty contraventions contained in the Fair Work Act 2009 which might relate to 'on-site conduct'.

It is also incorrect to assert, as the MBA does, that no member of the Victoria Tasmania Branch Executive holds an entry permit.

Question 5 (Senator McKenzie)

Can the ACTU outline if there is a correlation between productivity and unionisation of a workplace in the context of domestic and commercial building projects?

Question 6 (Senator McKenzie)

Can the ACTU address the claims that non-unionised domestic building industry productivity is greater than in the unionised commercial building industry?

We thank the Senator for the questions. To the extent that the questions are prompted by the oral submissions of employers to the Committee, our principal response is that those submissions are no more than mere assertions, unsupported by evidence, and should be disregarded. Nevertheless, in the 26 hours between receiving the questions and being required to submit answers to them, we have prepared as comprehensive as response as possible to the questions.

The ABS publishes statistics on both productivity and union density for each industry (such as the construction industry). It does not publish productivity statistics for industry sub-divisions. The Senator's question pertains to the correlation between productivity and unionisation within sub-divisions of the construction industry. This means it is not possible for us (or anyone) to use published ABS data to conclusively answer the questions that have been put.

We have used the ABS publication *Private Sector Construction Industry, Australia, 2011-12* (catalogue number 8722.0) to provide some information about labour productivity within the sub-divisions of the construction industry. This publication was released in June this year, but pertains to the 2011-12 financial year. It provides information about employment (measured in thousands of persons) and industry value added (a measure of output) for parts of the private sector construction industry. Using these figures, we have calculated the level of labour productivity within each industry sub-division and group of the private sector construction industry. The information is provided in Table 2, below.

Table 2: Employment, value added, and labour productivity in the private sector construction industry

	Employment at end June 2011-12 (thousands)	Industry value added (millions)	Industry value added per employed person
30 - Building construction	160	\$19,458	\$121,613
301 - Residential building construction	101	\$11,948	\$118,297
302 - Non-residential building construction	59	\$7,509	\$127,271
31 - Heavy and civil engineering construction	154	\$21,545	\$139,903
32 - Construction services	636	\$58,356	\$91,755
321 - Land development and site preparation services	68	\$13,333	\$196,074
322 - Building structure services	82	\$6,657	\$81,183
323 - Building installation services	236	\$20,780	\$88,051
324 - Building completion services	162	\$10,223	\$63,105
329 - Other construction services	89	\$7,362	\$82,719

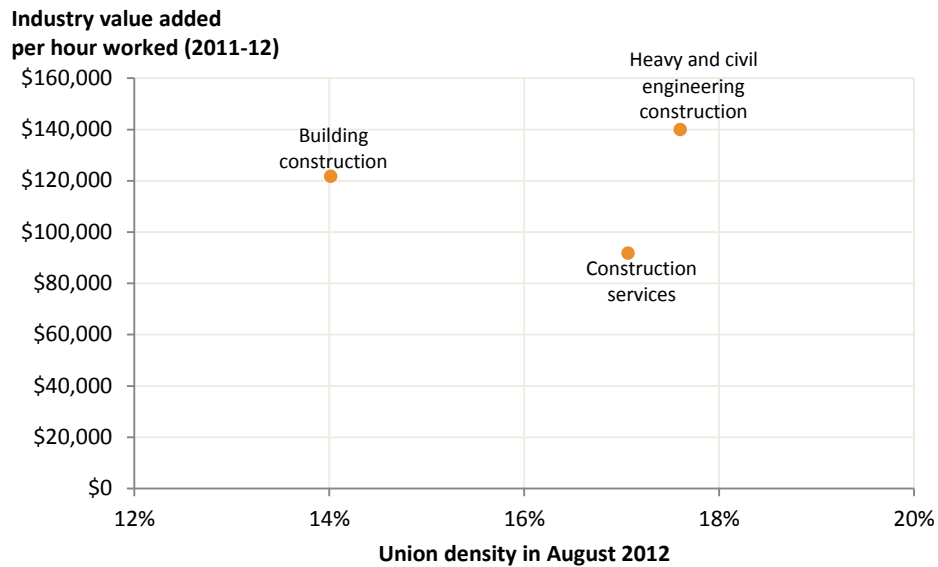
Source: Columns 1, 2 and 3 are from ABS 8722.0, Table 1. Column 4 is an ACTU calculation based on columns 2 and 3. In the table, we measure labour productivity as industry value added per employed person. This differs from the standard measure (gross value added per hour worked), as information is not provided that would allow us to calculate labour productivity on this basis.

The table shows that in 2011-12 there was an average of \$139 903 of industry value added per employed person in heavy and civil engineering construction. This is larger than the average level of labour productivity in the non-residential building construction industry group (\$127 271), which in turn exceeds the level in the residential building construction industry group (\$118 297). Note that the 'residential building construction industry' group, as defined in the Australia New Zealand Standard Industrial Classification 2006, includes both house construction and other residential building construction, such as apartment construction. It is not possible to provide calculations for these separate units of the industry group. The information in Table 2 suggests that the average level of productivity in what could be termed "commercial building projects" (comprising heavy and civil engineering and non-residential building construction) exceeds the average level of productivity in the residential building construction industry group. This difference in the average level of labour productivity in favour of commercial building projects could arise for a number of reasons, including the different capital/labour ratios in the industry groups.

We do not have information regarding union density in each of these industry groups. However, given that union density is known to be higher in non-residential building and heavy and civil engineering than residential building, the information does not support an argument that there is a negative correlation between union density of the industry groups and the level of labour productivity in those groups.

Information is available regarding union density for the three sub-divisions of the construction industry (but not for the groups within those sub-divisions). Heavy and civil has the highest density (17.6%), followed by construction services (17.1%) and building construction (14%). Again, this does not support an argument that there is a negative correlation between union density and the level of labour productivity across these industry sub-divisions.

Figure 1: Labour productivity and union density in construction industry sub-groups



Source: ACTU calculations based on ABS 8772 and ABS 6310. The union density data pertains to the industry sub-groups, while the labour productivity estimates are for the industry sub-groups in the private sector.

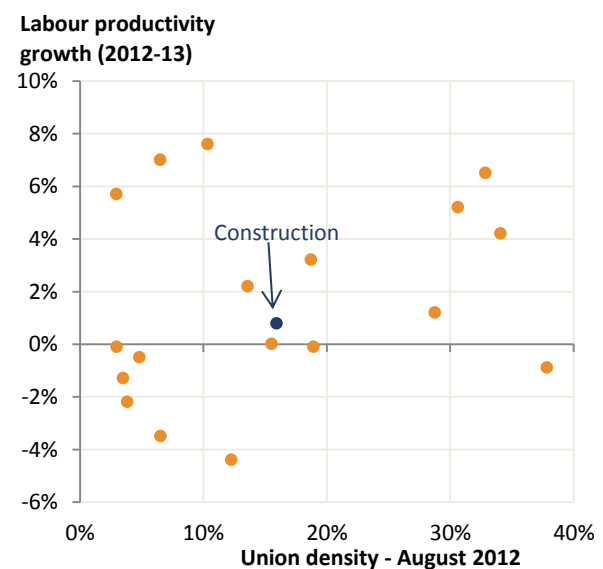
The Senator's questions pertain to the correlation, if any, between productivity and union membership. We have provided what information we can regarding this relationship for the sub-divisions of the construction industry. For the information of the Committee, we also provide charts plotting the level of union density against labour productivity for each industry in the Australian economy. We show both the level, and the latest annual growth rate, in labour productivity for each industry. In each case there is a weakly positive, though statistically insignificant, relationship between union density and productivity.

Figure 2: Union density and the level of labour productivity in 2012/13



Source: ACTU calculations based on ABS 5204 and ABS 6310.

Figure 3: Union density and labour productivity growth in 2012/13



We would also like to contest the implicit suggestion that there is a negative, causal relationship between union membership and productivity outcomes. There is a large international literature

which discusses the economic effects of unionisation (including on productivity). Much of this builds on, or responds to, the seminal 1984 study by Professors Freeman and Medoff “What Do Unions Do?” which found that the unionisation can have a positive impact on productivity (although account needs to be taken of time, place and the IR framework). Subsequent work suggests that the effect of unionisation is either positive or close to zero. The literature suggests that the union effect on productivity is more likely to be positive in a competitive, cost conscious environment like the construction industry. The international literature generally agrees that unionisation is positive for wages, worker voice and safety.

We would like to draw the Committee’s attention to an article by Professor David Peetz in the *Australian Bulletin of Labour* (volume 4, 2012), in which he addresses the question of the relationship between industrial relations and productivity. Professor Peetz finds:

There is some evidence that industrial relations policies that enhance fairness enhance economic performance. However, although this is a trend on average, the effects are conditional: they are not consistent or universal...

The results of research suggests that government policies to encourage or discourage unions, to restrict the extent or scope of collective bargaining or related action, or to discourage non-unionism or individual contracting, will not do a great deal in net terms to change economic performance. Policies aimed at giving employees more say or more voice at work may well improve economic performance.¹⁵

This does not support any suggestion that union membership is negatively correlated with productivity outcomes.

The 9.4 per cent figure (Supplementary Answer)

We would also like to take the opportunity to address further the 9.4 per cent improvement in labour productivity that is assumed by Independent Economics in its analysis. Mr Harnish, in his appearance before the committee on 26 November, again referred to this figure.

We would reiterate that the alleged 9.4% improvement in construction industry productivity that can be attributed to the ABCC is not a finding of the 2013 Independent Economics report. This is made clear on page 28 of the 2013 report:

... in line with earlier reports, for modelling purposes we conservatively assume a smaller gain of 9.4 per cent.

It is a modelling assumption of the 2013 report, not a finding. It also was not a finding of the 2012 report, as is made clear on page iv. of that report:

Earlier reports found that the data continued to support an estimated gain in construction industry productivity, as a result of the ABCC and related industrial relations reforms, of 9.4 per cent.

¹⁵ Peetz, D. 2012, ‘Does Industrial Relations Policy Affect Productivity?’, *Australian Bulletin of Labour*, vol. 38, no. 4, pp.268-292.

It was not a finding of the 2010 report, as is made clear on page 23 of that report:

...the most recent data indicates that, on balance, the modelling assumption made in the Previous Reports remain reasonable. That is, the ABCC and related industrial relations reforms have added in the vicinity of 9.4 per cent to labour productivity in the construction industry. Hence, consistent with the Previous Reports, this report bases its modelling of economy-wide impacts on a gain in construction industry labour productivity of 9.4 per cent.

It was not a finding of the 2008 report, as outlined on pp.iii-iv of that report:

...on balance it is reasonable to conclude the latest evidence indicates that the ABCC and related industrial relations reforms have added about 10 per cent to labour productivity in the construction industry. This is consistent with the 2007 EconTech Report, which used a gain of 9.4 per cent. Hence this report also assumes an ABCC-related gain in construction industry labour productivity of 9.4 per cent for the purposes of economy-wide modelling.

The [2007 report](#), table 1 is the source of the 9.4% figure. It purports to show the change in the labour productivity gap between domestic residential building and the total construction industry between the 1994-2003 period and 2007.

Table 1
Labour Productivity Gaps Compared with Domestic Residential Construction
(per cent)

	Average 1994-2003	2007	Change
Total non-residential construction	15.0	2.4	12.6
Non-residential building	21.0	3.4	17.6
Engineering construction	10.5	1.7	8.8
Total residential building	6.3	1.0	5.3
Domestic residential building	0.0	0.0	0.0
Multi-unit residential building	21.0	3.4	17.6
Total construction	11.2	1.8	9.4

Source: EconTech estimates.

EconTech first estimates the “cost gap” between commercial building and domestic residential building. It then uses this information and unspecified “additional information and assumptions” to arrive at the figures in Table 1.

The credibility of the 2007 EconTech report has been demolished by Professor Peetz, including in the journal article he submitted to the Committee. The Hon. Murray Wilcox QC found that the 2007 report “is deeply flawed” and that “it ought to be totally disregarded.” It is this report from which the 9.4% figure is derived. It should not be relied upon by the Committee.