AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

Construction Industry Amendment (Protecting Witnesses) Bill 2015

10 April 2015

EXECUTIVE SUMMARY

ACCI welcomes the opportunity to make submissions to the Education and Employment Legislation Committee regarding the inquiry into the *Construction Industry Amendment (Protecting Witnesses) Bill 2015* (Cth) (**the Bill**) and recommends its urgent passage as an interim measure pending passage of the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) (**BCI (IP) Bill**).

The Bill is straightforward. It proposes to amend the *Fair Work (Building Industry) Act 2012* to extend the period during which the Director of the Fair Work Building Industry Inspectorate can apply to a nominated Administrative Appeals Tribunal presidential member for an examination notice by a further two years. ACCI supports the passage of the Bill because, pending the passage of the BCI (IP) Bill, the amendments in the Bill are necessary for the Fair Work Building Industry Inspectorate's effective functioning.

To clarify, in supporting the passage of the Bill, ACCI in no way departs from its primary position that the persistence of the unlawful behaviours of the nature highlighted in Royal Commission findings warrant stronger industry specific regulation and a specialist regulator with greater enforcement powers. The BCI (IP) Bill must also be passed.

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 position. This includes:

- the ACCI submission to the Senate Standing Education and Employment Legislation Committee's inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) in November 2013;
- 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* (Cth) 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.

The recent history of the building and construction industry has seen:

- successive Royal Commissions finding there to be a culture of union thuggery, intimidation and lawlessness;

- recommend reforms shepherded in via a legislative response;
- the resumption of normal standards of behaviour;
- the reforms then being wound back as a result of a subsequent change in Government;
- a reversion to union thuggery, intimidation and lawlessness.

As custodians of the economic and social wellbeing of all Australians, it is time for all Parliamentarians to break the cycle of union thuggery, intimidation and relentless lawlessness that has plagued the building and construction industry for too long.

To do so would have obvious benefits for the industry and its participants. No less significant would be the broader social dividend. The Government's Mid-Year Economic and Fiscal Outlook indicated that the Government's Infrastructure Growth Package will lead to over $125 billion of new productive infrastructure over the next decade. Significant investment in infrastructure is necessary to create jobs in the construction industry which contributes to over 9 per cent of Australian employment. The performance of the sector has a broad ripple effect across the economy.

With an ageing population and our sources of economic activity changing off the back of the downturn in the minerals sector, our public purse is coming under increased pressure. It is critical that the infrastructure necessary to support our living standards, including hospitals, schools and roads, is delivered as efficiently as possible, with value for money for Australian taxpayer. We need a building and construction industry that operates safely, productively, harmoniously and lawfully. To continue to tolerate anything less will only hurt us all.

Submissions will be made by ACCI members that address matters particular to their specific interests and views. ACCI commends these submissions to the Commission. ACCI's submission is made without prejudice to specific interests and views advanced by our members.

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1. IMPORTANCE OF THE BUILDING AND CONSTRUCTION INDSUTRY TO THE NATIONAL ECONOMY

The significance of the building and construction industry to the economy has been highlighted by Master Builders Australia, stating:

> *The building and construction industry accounts for close to 8 per cent of gross domestic product, and around 9 per cent of employment in Australia. It makes an essential contribution to the generation of wealth and welfare of the community. At the same time, the wellbeing of the building and construction industry is closely linked to the prosperity of the domestic economy.*[1]

Australia's softening economic conditions make it necessary to turn our attention to policy settings concerned with driving investment and job creation. The significant contribution of the building and construction industry and its multiplier effects mean that it has a critical role to play in rebalancing the economy.

Infrastructure investment underpins economic growth and has an important part to play in maintaining Australia's living standards. However Australian governments are facing challenges in the provision of infrastructure due to growing community needs, an ageing population and declining revenue, factors which place significant pressure on government budgets.

The 2014-2015 Budget statements set out the Australia Government's has commitment to investing $50 billion in infrastructure across Australia over seven years which, when combined with State/territory and private sector funding, is expected to catalyse additional infrastructure investment in excess of the $125 billion.[2]

It is critical that public revenue is allocated in the most efficient way possible. Equally, the private sector should also be engaged to the maximum extent possible in the financing and delivery of infrastructure assets. This necessitates the creation of a regulatory environment conducive to private sector investment.

Workplace relations reform is required to address industrial behaviour that results in heighted risk, anti-competitive practices, unnecessary delays and inefficiencies. Combined, these act as a disincentive to investment. The culture of industrial lawlessness that has been reported in multiple Royal Commissions and which is enduring in the building and construction industry warrants specific regulatory attention and has significant economic and social consequences.

[1] Master Builders Australia, 2015/16 Pre-Budget Submission, February 2015, p. 2.
[2] Budget 2014-15, Building Australia's Infrastructure, May 2014, p. 1.

2. THE HEYDON ROYAL COMMISSION INTERIM REPORT

Previous Royal Commissions have uncovered wilful defiance, disregard or contempt of the law by the CFMEU and there is evidence that such behaviours have not been adequately addressed by the current framework. In order for civil penalties to be an effective deterrent, the penalty levels must be appropriately set. They are not currently serving as an effective deterrent. Since the previous Government abolished the Australian Building and Construction Commission (ABCC), we have seen an return to the sort of behaviour identified by previous Royal Commissions, such as the illegal CFMEU blockade of Melbourne's CBD, alleged secondary boycott activity against Boral simply because it was a supplier to Grocon and reports of intimidation and contractors being locked out of building sites for refusing to give in to union demands.

Such behaviours are being examined by the current Royal Commission into Trade Union Governance and Corruption which was established by Letters Patent issued by the Governor General on 13 March 2014. The Commissioner John Dyson Heydon AC QC handed an Interim Report of the Royal Commission into Trade Union Governance and Corruption to the Governor General at Government House in Canberra on Monday 15 December 2014 (Interim Report). The Interim Report was tabled in Parliament on 19 December 2014.

The Interim Report suggests that case studies associated with the CFEMU "raise fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU".[3] The Interim Report found that the "evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law"[4], stating that:

> *The 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 subject of baseless slurs and vilification.*[5]

The Interim Report also identified that:

> *The conduct undertaken by officers of the CFMEU has included:*

[3] Interim Report, p. 26.
[4] Interim Report, p. 1008.
[5] Interim Report, p. 1008.

(a) conduct which may constitute the criminal offences of blackmail and extortion by officers of the CFMEU in Victoria and Queensland;
(b) behaviour by officers of the CFMEU in Victoria and Queensland which may give rise to contraventions of the boycott, cartel and other provisions of the Competition and Consumer Act 2010 (Cth);
(c) covert action undertaken by the New South Wales Secretary of the CFMEU to convince senior employees of Cbus secretly to hand over to the CFMEU the private information of Cbus members and the subsequent misuse of that information by the State Secretary;
(d) the making of a death threat by one CFMEU Construction and General New South Wales Divisional organiser to a fellow organiser…the failure on the part of senior officials to undertake any proper and considered investigation into the incident, and the subsequent victimisation of the complainant by those same officials;
(e) organising and engaging in industrial action in deliberate defiance of orders made by the Fair Work Commission and the Federal Circuit Court of Australia; and
(f) obstructing Fair Work Building Commission inspectors in the performance of their statutory duties through intimidation, insults and generally threatening behaviour.[6]

2.1.1 Boral case study

The Royal Commission has drawn on a number of case studies in making such findings, including a CFMEU black ban of Boral preventing the pouring of concrete at CFMEU-controlled sites in Melbourne as a part of an ongoing dispute between the CFMEU and Grocon Pty Ltd.[7] The black ban continued in defiance of orders obtained by Boral from the Supreme Court restraining the CFMEU from carrying on the ban.[8] The Director of Fair Work Building Industry Inspectorate commenced separate proceedings against the CFMEU and the ACCC commenced Federal Court proceedings against the CFMEU in November 2014 alleging contraventions of the *Competition and Consumer Act 2010* (Cth).

In describing the conduct of the CFEMU toward Boral, the Interim Report states:

> *In the present case, the CFMEU had two purposes in engaging in the ban of Boral. One was to cause substantial damage to Boral so as to intimidate it into stopping supply to Grocon. The second was, by intimidating Boral into ceasing supply to Grocon, to cause substantial damage to Grocon…*
>
> *…*

[6] Interim Report, p. 1009.
[7] Interim Report, p. 1016.
[8] Interim Report, p. 1016.

> *Plainly, the actual loss suffered by Boral from the CEMEU's conduct may be substantial. Boral estimates it has suffered loss of between $8-$10 million to the end of June 2014. It has clearly lost many orders of concrete…*[9]

The Interim Report also makes out a clear case for change to the regulatory framework to address such behaviours and the anti-competitive practices engaged in by the CFMEU, stating:

> *…the CFMEU's conduct in relation to Boral suggests that there may be a number of deficiencies with the existing legal and regulatory framework in relation to secondary boycotts, the enforcement of court orders, the regulation of trade unions generally and the regulation of, and the duties owed by, trade union officials.*
>
> *In particular, the conduct suggests the existence of the following possible problems:*
>
> *(a) The ineffectiveness of the current secondary boycott provisions in ss 45D and 45E of the Competition and Consumer Act 2010 (Cth) to deter illegal secondary boycotts by trade unions.*
> *(b) The absence of specific provisions making it unlawful for the competitors of the target of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target.*
> *(c)* ***An inability or unwillingness by the regulatory authorities to investigate and prosecute breaches of the secondary boycott provisions by trade unions speedily. There may be a number of root causes for this problem: difficulties in obtaining documentary evidence, lack of co-operation of witnesses who may fear repercussions from giving evidence*** (emphasis added), *the potential overlap between the roles of a number of regulators and difficulties in ensuring compliance with court orders made in relation to secondary boycott conduct.*
> *(d) The absence of any speedy and effective method by which injunctions granted by a court restraining a trade union from engaging in an illegal secondary boycott can be enforced. The Byzantine complexity of the law of contempt, and its ineffectiveness to deter secondary boycott conduct by a trade union, is amply demonstrated by the contempt proceedings commenced by Grocon and Boral in the Victorian Supreme Court.*
> *(e) The absence of a single statutory regulator dedicated to the regulation of trade unions with sufficient legal power to investigate and prosecute breaches of the secondary boycott provisions.*
> *(f) The absence of appropriate legal duties owed by the officers of trade unions to their members, and the absence of appropriate mechanisms by which such officers can be held accountable to their members.*
>
> *It is also necessary to consider possible improvements in relation to the administration of the law by both regulators and courts.*[10]

[9] Interim Report, p. 1083.
[10] Interim Report, pp. 1107-1108.

Importantly, the Interim Report highlights the difficulties experienced by the relevant agencies in obtaining the evidence necessary to institute proceedings to address unlawful industrial conduct in the industry, stating:

> *… It is worth noting that nearly two years have passed since the black ban began.*
>
> *However, it is clear that public regulators are likely to have grave difficulties in obtaining evidence where witnesses are reluctant to speak against parties to illegal conduct in view of the risk of retaliation.*
>
> *A legal system which does not provide swift protection against the type of conduct which Boral alleges it has suffered at the hands of the CFMEU, and which does not have a mechanism for the swift enforcement of court orders, is fundamentally defective. The defects are so great as to make it easy for those whose goal is to defy the rule of law. The defects reveal a huge problem for the Australian state and its numerous federal, State and Territory emanations. The defying of the Victorian Supreme Court's injunctions for nearly two years, and the procedural history outlined above, will make the Australian legal system an international laughing stock. A new form of 'sovereign risk' is emerging – for investors will not invest in countries where their legal rights receive no protection in practice. At least so far as the courts are concerned, it may be appropriate for consideration to be given to procedures which ensure the swift determination of contempt applications, complemented where necessary by appropriate court rules and legislation.*[11]

2.1.2 Other case studies

The unlawful conduct to which Boral was subject is not an isolated occurrence and the Heydon Royal Commission highlights other case studies, including one examining the conduct of officers of the Queensland Branch of the CFMEU toward Smithbridge Group Pty Ltd companies.[12] In particular, the Interim Report finds that certain CFMEU officials:

> *…pursued a campaign against Smithbridge Group in order to force companies in that group to enter into enterprise agreements with the CFMEU on terms which required the companies to make payments to BERT, BEWT and CIPQ. The campaign involved CFMEU officials (i) dictating to customers of the Smithbridge Group that Smithbridge Group be removed from their sites, and otherwise applying pressure designed to turn those customers away from Smithbridge Group, and (ii) threatening to kill off Smithbridge Group through such action unless they signed the union's form of enterprise agreement and arranged for all employees to become union members.*[13]

[11] Interim Report, p. 1114.
[12] Interim Report, p. 1399.
[13] Interim Report, p. 1400.

In describing the nature of the campaign, the Interim Report states:

> *The 'campaign' the CFMEU waged against Universal Cranes involved two steps. One was the officers of the CFMEU threatening to apply pressure to customers of Universal Cranes to stop dealing with Universal Cranes unless and until the Union's demands that Universal Cranes and others enter into the Union's form of EBA were satisfied. The other involved the CFMEU acting on those threats when its demands were not satisfied by entering work sites and shutting down the operations of Universal Cranes or Smithbridge on those sites.*[14]

The CFMEU's conduct is described in the Interim Report as involving "a deliberate and protracted campaign of industrial blackmail and extortion"[15] and the following observations are made:

> *The decision Mr Smith had made to buckle to the union pressure and have Universal Cranes agree to sign a CFMEU pattern agreement was made under very considerable economic duress. The CFMEU attack on the company had caused substantial loss for the company and the workers. Universal Cranes' equipment was sitting in the yard because the company could not get onto sites. The company's workers were 'scratching to get 40 hours a week work' with a consequence that the company was having to start putting workers off. Mr Smith's view was that he had no alternative but to sign the agreement.*
>
> *The union's demand for an increase in membership amongst Universal Cranes employees also placed great pressure on the workers…*
>
> *The conduct of the CFMEU in the course of its dealings with Mr Smith does not make pleasant reading. It cannot be regarded as the 'legitimate use of industrial muscle'. It cannot be regarded as bona fide negotiation – for every move by Mr Smith towards consensus was met by the introduction of an entirely fresh demand. It cannot be regarded as justified in the interests of employees – for many of the benefits generated by BERT do not flow to the employees whose employer provides BERT with its funding. It would be kind to call the CFMEU's conduct paltering. It was nothing but a brutal and ruthless drive for complete capitulation.*[16]

The Interim Report also explores the conduct of certain officers of the Victorian Branch of the CFEMU (including the Victorian State Secretary) toward West Homes Pty Ltd and Pentridge Village Pty Ltd. Among the Interim Report's findings in relation to that conduct are findings that the CFMEU applied "illegitimate pressure" on "builders and subcontractors to enter into the CFMEU form of enterprise bargaining

[14] Interim Report, p. 1413.
[15] Interim Report, p. 1400.
[16] Interim Report, pp. 1434 - 1435.

agreement" and sought to exclude non-union members from the site.[17] The Interim Report also states:

> *An investigation into the Pentridge site has also revealed a number of discrete instances where Mr Setka engaged in grossly offensive and aggressive conduct. It indicates a type of behaviour that one would not expect to see from any trade union leader. The behaviour, and the underlying attitudes it reveals, fall well short of the professional standards expected of a State Secretary of the CFMEU.*[18]

The Interim Report states that:

> *This case study illustrates the way in which officers of the CFMEU, and persons appointed by them to act on the CFMEU's behalf, misuse their powers and position in order to force builders, subcontractors and workers to enter into agreements and join a union against their will.*[19]
>
> *…*
>
> *Even if Mr Setka and others initially held strong and genuine concerns about safety on the site, that does not excuse the behaviour that is now under consideration. That behaviour was not motivated by a concern for safety. It was motivated by a desire to control the work site and the workers on it, increase the membership base of the union, and increase the number of subcontractors bound to the CFMEU's form of enterprise bargaining agreement (the terms of which require subcontractors to make payments to Incolink and Cbus, two companies in which the CFMEU has a substantial financial interest).*[20]

On 20 October 2014, the Governor General amended the Letters Patent by extending the deadline for delivery of the Royal Commission's report to 31 December 2015. While final recommendations as to law reform may be made at the conclusion of that process, the evidence detailed within the Interim Report combined with the persistent culture of lawlessness described by two previous Royal Commissions already provide strong justification for industry specific regulation and the existence of information gathering powers.

Evidence received "raise[s] fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU."[21] Among the recommendations contained within the Interim Report is that the Interim Report and other relevant materials be referred to the appropriate authority for consideration of whether the CFEMU or relevant officials should be prosecuted.[22] Commissioner Heydon also produced a

[17] Interim Report, p. 1533.
[18] Interim Report, p. 1533.
[19] Interim Report, p. 1559.
[20] Interim Report, p. 1560.
[21] Interim Report, p. 26.
[22] Interim Report, p. 1010.

Confidential Report, which has not been publicly released "in order to protect the physical well-being of … witnesses and their families".[23] Commissioner Heydon considered it "unfortunate" that the Confidential Report could not be published, because it "reveals grave threats to the power and authority of the Australian state".[24]

There is a clear need for the continuation and strengthening of regulation aimed to protect witnesses from unlawful conduct.

3. THE FINDINGS OF PREVIOUS ROYAL COMMISSIONS

The culture of union lawlessness identified in the Interim Report reflects the CFMEU's history of behaviour as reflected in the findings of previous Royal Commissions.

By Letters Patent dated 29 August 2001, the Honourable Terence Cole RFD QC was appointed a Royal Commissioner to inquire into certain matters relating to the building and construction industry. The Final Report of the Cole Royal Commission was tabled in Parliament on 26 and 27 March 2003, stating that the findings demonstrated "an urgent need for structural and cultural reform".[25] The following findings were amongst those recorded in the Cole Royal Commission's Final Report:

- widespread disregard of, or breach of, enterprise bargaining laws;
- widespread disregard of, or breach of, freedom of association laws;
- widespread requirement to have union-endorsed enterprise bargaining agreements 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 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;
- threatening and intimidatory conduct;
- disregard of, or breach of, the right of entry provisions;
- disregard of Australian Industrial Relations Commission (AIRC) and court orders;

[23] Interim Report, p. 30.
[24] Interim Report, p. 30.
[25] Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations (Volume One), Royal Commissioner, The Honourable Terrence Rhoderic Hudson Cole RFD QC, February 2003, p. 3.

- disregard by senior union officials of unlawful or inappropriate acts by inferior union officials;
- reluctance of employers to use legal remedies available to them;
- inflexibility in workplace arrangements;
- endeavours by unions, particularly the Construction, Forestry, Mining and Energy Union (CFMEU), to regulate the industry; and
- disregard of the rule of law.[26]

The Final Report states that such findings "demonstrate an industry which departs form 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".[27]

Among the recommended reforms to address such conduct was:

> *the creation of the Australian Building and Construction Commission (ABCC). This body will be responsible for monitoring conduct in the industry, and prosecuting unlawful industrial action, breaches of freedom of association laws, and addressing all complaints of unlawfulness in the industry. It will become a 'one stop shop' for all complaints. It will have the power to commence proceedings to restrain unlawful industrial action, and to restrain secondary boycotts.*[28]

In describing the intended role of the ABCC, the Final Report stated:

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

[26] Final Report of the Royal Commission Into the Building and Construction Industry, Summary of Findings and Recommendations (Volume One), Royal Commissioner, The Honourable Terrence Rhoderic Hudson Cole RFD QC, February 2003, p. 6.
[27] Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations (Volume One), Royal Commissioner, The Honourable Terrence Rhoderic Hudson Cole RFD QC, February 2003, p. 6.
[28] Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations (Volume One), Royal Commissioner, The Honourable Terrence Rhoderic Hudson Cole RFD QC, February 2003, p. 14.

> *conduct comes to the attention of an entity established to ensure the law is adhered to.*[29]

The continuation of industrial lawlessness necessitates specific regulation of this nature to facilitate a productive, safe and harmonious construction industry where all industry participants respect the rule of law.

The nature of the behaviours that led to such recommendations were not dissimilar from the behaviours unearthed in the findings of a Royal Commission into Productivity in the Building Industry in NSW in 1992, over ten years earlier, in which Commissioner Roger Gyles QC found that "[o]bservance 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".[30] In describing the serious consequences of such disregard for the rule of law, Commissioner Gyles went on to state:

> *The effect of illegal activities upon the culture of the industry and upon the commercial and industrial morality of participants in it is, in the long run, greater than the direct economic consequences. Once it becomes acceptable to break, bend, evade or ignore the law and ethical responsibilities, there is no shortage of ways and means to so. Those who pay and suffer the other consequences of disruption in the end are the public.*[31]

4. THE ECONOMIC BENEFITS OF PRIOR REFORM

Notwithstanding the serious social consequences flowing from a culture of disregard for the rule of law, there are also significant economic impacts. The *Building and Construction Industry Improvement Act 2005* (Cth) (**BCII Act**) was passed in response to the findings of the Cole Royal Commission and sought to address the culture of lawlessness in the building and construction industry. The BCII Act established the Office of the Australian Building & Construction Commissioner (**ABCC**) which resulted in significant improvements in the performance of the sector. Research conducted for Master Builders Australia by Independent Economics found that when the ABCC was in place:

- building and construction industry productivity grew by more than nine per cent;
- consumers were better off by around $7.5 billion annually; and
- fewer working days were lost through industrial action.

[29] Final Report of the Royal Commission into the Building and Construction Industry, Summary of Findings and Recommendations (Volume One), Royal Commissioner, The Honourable Terrence Rhoderic Hudson Cole RFD QC, February 2003, pp. 13 -14.
[30] Reproduced from Master Builders Australia, 'Crime and the Construction Sector', *Paper presented at the conference Crime Against Business, convened by the Australian Institute of Criminology, Melbourne, 18-19 June 1998*, p. 3.
[31] ibid.

However, the ABCC was replaced by the Office of the Fair Work Building Industry Inspectorate following the enactment of the *Fair Work (Building Industry) Act 2012* (FW (BI) Act). There were limitations placed on the new agency's powers together with the removal of building industry specific laws that prescribed higher penalties for breaches, and the narrowing of the circumstances in which industrial action is unlawful. Conduct of the nature described earlier in this submission has resumed. The research conducted for Master Builders Australia by Independent Economics found that abolishing the ABCC led to a permanent loss in construction activity, a loss in consumer real wages and an increase in working days lost by 65,000 days to an estimated total of 89,000 working days lost in 2012/13.

Unlawful union behaviour on construction sites is indefensible. A strong and effective legislative framework is required to address such behaviour.

5. BUILDING AND CONSTRUCTION INDUSTRY (IMPROVING PRODUCTIVITY) BILL 2013

The *Building and Construction Industry (Improving Productivity) Bill 2013* (BCI(IP) Bill) remains before the Senate and, if passed, would re-establish the Australian Building and Construction Commission and affect a number of important reforms to address the behaviours highlighted in the findings of the various Royal Commissions which are inadequately addressed by the current legal framework. The BCI(IP) Bill's main object is to 'provide an improved workplace relations framework for building work so 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'.[32]

The proposed laws would enable a stronger response to the sort of unlawful industrial action, unlawful picketing, coercion, discrimination and other unlawful behaviour that has been uncovered by multiple Royal Commissions and which is continuing to be reported. It proposes to do this by:

- improving the bargaining framework to encourage genuine bargaining at the workplace level;
- promoting respect for the rule of law;
- ensuring respect for the rights of building industry participants;
- ensuring that building industry participants are accountable for their unlawful conduct;
- providing effective means for investigating and enforcing the Act;
- improving work health and safety in building work;
- encouraging the pursuit of high levels of employment in the building industry; and
- providing assistance and advice to building industry participants.[33]

[32] *Building and Construction Industry (Improving Productivity) Bill 2013*, cl. 3(1).
[33] *Building and Construction Industry (Improving Productivity) Bill 2013*, cl. 3(2).

The BCI (IP) Bill proposes to re-establish the ABCC with powers proven to be effective while it existed under the BCII Act. Other proposed amendments contained within the BCI (IP) Bill would:

- enable the Minister to issue a Building Code prescribing the standards which building industry participants who undertake Commonwealth funded building work are required to comply with;[34]
- introduce stronger laws to address unlawful industrial action and unlawful picketing;[35]
- prohibit the coercion of persons in relation to the engagement of contractors and employees or choice of superannuation fund, and coercion or undue pressure in relation to industrial instruments;[36]
- enable the ABCC to require a person to give information, produce documents or answer questions relating to an investigation of a suspected contravention of the BCI(IP) Bill or a designated building law by a building industry participant;[37]
- enable an authorised applicant, who includes an inspector or a person affected by the contravention, to apply for an order relating to the contravention. The courts would be able to grant injunctions, order damages, and impose a civil penalty.[38]

ACCI continues to support the passage of the BCI (IP) Bill, including the re-establishment of the ABCC to replace the Fair Work Building Industry Inspectorate and the restoration of the examination powers of the ABCC to their original strength under the BCII Act. ACCI's support for the Bill needs to be viewed in this context.

6. THE NEED FOR INFORMATON GATHERING POWERS

Building and construction industry participants are genuinely fearful to stand up to unlawful union behaviour and an ABCC Report on the Exercise of Compliance Powers found:

> *In the absence of the compliance powers many ABCC investigations would be thwarted due to the unwillingness of witnesses to cooperate. The fear of the consequences of being seen to cooperate with the ABCC is evident in parts of the industry. This is to be regretted.*[39]

Such fear of retribution is not misplaced and the report of the Interim Building Industry Taskforce formed after the Cole Royal Commission also highlighted the need for compulsory information gathering powers, stating:

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[34] *Building and Construction Industry (Improving Productivity) Bill 2013*, cl. 34.
[35] *Building and Construction Industry (Improving Productivity) Bill 2013*, ch. 5.
[36] *Building and Construction Industry (Improving Productivity) Bill 2013*, ch. 6.
[37] *Building and Construction Industry (Improving Productivity) Bill 2013*, ch. 7.
[38] *Building and Construction Industry (Improving Productivity) Bill 2013*, ch. 8.
[39] Australian Building and Construction Commission, "Report on the Exercise of Compliance Powers by the Australian Building and Construction Commission" (1 October 2005 to 30 September 2008), p. 6.

> *The Final Report of the Royal Commission cited the possibility of retribution against persons who appeared before the Royal Commission as one of the reasons to establish an interim taskforce. This conclusion proved to be correct as the Taskforce has received information from subcontractors who have not been awarded any contracts since testifying before the Royal Commission. In every instance, it has been expressly indicated by the victim that they have been targeted as a consequence of their involvement with the Royal Commission, effectively being black-banned from the industry.*
>
> *Unlike the Royal Commission, the Taskforce is unable to require persons to assist with many of its investigations. This severely restricts the ability of the Taskforce to conduct investigations to uncover any such attempts to take revenge upon subcontractors. Likewise, there have been frequent instances where subcontractors will not use the services of the Taskforce because they fear their businesses will be black-banned. Disturbingly, similar experiences have been reported across the country. In nearly all circumstances, the fear of losing future contracts overrides the need to support steps to enforce the law*.[40]

The Taskforce described its challenges in investigating in the absence of such powers stating '"the Taskforce has investigated over 380 matters in its 17 months of operation. Of this number, the Taskforce has had to finalise approximately 50% of these investigations due to the lack of powers to gather information. These investigations have had to be finalised because witnesses will not make a statement or victims have simply given up…"[41]

Furthermore, the disrespect for the functions of the Office of the Fair Work Building Industry Inspectorate is apparent with the Heydon Royal Commission's Interim Report stating that a number of CFMEU officers "engaged in aggressive and intimidatory conduct against a number of FWB Inspectors who were working at the Barangaroo site in Sydney. By so acting they may have committed offences under s.184.1 of the *Criminal Code Act* 1995 (Cth)."[42] In the face of such behaviour, how can it be refuted that a strong legislative framework is necessary to compel cooperation in investigative processes in building and construction industry?

Accordingly, ACCI supports the use of examination powers to issue notices and enforce failures to comply with any notice. Compulsory powers are widely used by many other Government agencies, such as the ACCC, APRA, ASIC and the ATO.

As noted earlier in this submission, the Bill proposes to amend the *Fair Work (Building Industry) Act 2012* (Fair Work (Building Industry) Act) to extend the period during which the Director of the Fair Work Building Industry Inspectorate is able to

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[40] *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce*, 25 March 2004 at http://fwbc.gov.au/sites/default/files/UpholdingTheLawReport2004.pdf accessed 8 April 2015 at p 13.
[41] Ibid p 18.
[42] Interim Report, p. 1495.

apply to a nominated Administrative Appeals Tribunal presidential member for an examination notice by a further two years, to 1 June 2017. The need for such an amendment arises as section 46 of the Fair Work (Building Industry) Act provides:

> *The Director may not make an application under section 45 after the end of 3 years after the day on which that section commences. The period expressed in this section expires on 31 May 2015.*

The rationale for this sunset provision was described in the Explanatory Memorandum to the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* which stated:

> *This section implements the Wilcox Report recommendation that the compulsory examination power be subject to a sunset clause. It provides that an application for an examination notice may not be made after the end of 3 years after the day on which section 45 commences. It is intended that, before the end of that period, the Government would undertake a review into whether the compulsory examination powers continue to be required.*[43]

It is instructive to recall the Wilcox Report referred to in the Explanatory Memorandum to the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*. On 19 June 2008, the then Minister for Employment and Workplace Relations appointed the Honourable Murray Wilcox QC "to undertake consultation and prepare a report on matters related to the creation of a Specialist Division of the Inspectorate of Fair Work Australia." In report handed down on 31 March 2009 (**the Wilcox Report**), the following observation demonstrating the effectiveness of information gathering powers under the BCII Act was made:

> *The ABCC commenced operations on 1 October 2005. Between that date and 3 February 2009, it conducted 128 compulsory interrogations and launched 36 court proceedings seeking the imposition of a civil penalty upon one or more "building industry participants". Most of the completed proceedings have been successful; many because of information acquired by the ABCC at compulsory interrogations.* (The Hon. M. Wilcox QC, 'Transition to Fair Work Australia for the Building and Construction Industry', Commonwealth of Australia, March 2006, p. 1).

In considering the arguments of opponents to the compulsory interrogation powers under the BCII Act, the Wilcox Report concluded:

> *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*

[43] Para 125.

> *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.* (The Hon. M. Wilcox QC, 'Transition to Fair Work Australia for the Building and Construction Industry', Commonwealth of Australia, March 2006, p. 3)

In arriving at a recommendation to retain powers similar to that contained in section 52 of the *Building and Construction Industry Improvement Act 2005*, to cause people compulsorily to attend for interrogation, the Wilcox Report stated at page 60:

> *…I have reached the opinion that it would be unwise not to endow BCD (at least for now) with a coercive interrogation power. Although conduct in the industry has improved in recent years, I believe the job is not yet done. I have already mentioned the anecdotal evidence that there is still a significant degree of contravention of the relevant industrial laws; particularly in Victoria and Western Australia. This anecdotal material is supported by information, about penalty proceedings, contained in the ABCC's three Annual Reports.*

There was however a difference between what was recommended in the Wilcox Report and what was eventually enacted via the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* that was not acknowledged in its Explanatory Memorandum. While Recommendation #3 of the Wilcox Report recommended a sunset provision of 5 years, a sunset provision of just 3 years was enacted. Indeed, the effect of passing the Bill would simply be to implement the 5 year sunset provision recommended in the Wilcox report[44]. The case for passage of the Bill is therefore compelling.

In light of the behaviours demonstrated since the abolition of the ABCC, the continuation of information gathering powers is even more compelling than was the case at the time of the making of the Wilcox Report.

There is a large body of evidence supporting the continuation of examination powers to appropriately investigate the unlawful behaviours highlighted in Royal Commission findings, behaviours which have persisted. While ACCI supports the passage of the Bill, its passage would only provide an interim solution because the information gathering powers currently held by the Office of the Fair Work Building Industry Inspectorate are encumbered with a number limitations, including the threat of being 'switched off'.

The powers formerly possessed by the ABCC are preferred by ACCI and the best legislative response would be the reinstatement of the ABCC with its full suite of powers as has long been advocated by ACCI in previous submissions. In this regard, in addition to the passage of the Bill, ACCI continues to urge the Senate to also pass the BCI (IP) Bill.

[44] The Hon. M. Wilcox QC, 'Transition to Fair Work Australia for the Building and Construction Industry', Commonwealth of Australia, March 2006, Recommendation 3

7. ABOUT ACCI

7.1 Who We Are

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

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 eight state and territory chambers of commerce
- 29 national industry associations
- 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
- Are located throughout metropolitan and regional Australia.

7.2 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 & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- 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;
- Business representation 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 policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

ACCI MEMBERS

ACCI CHAMBER MEMBERS: ACT AND REGION CHAMBER OF COMMERCE & INDUSTRY **BUSINESS SA** CHAMBER OF COMMERCE NORTHERN TERRITORY **CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND** CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA **NEW SOUTH WALES BUSINESS CHAMBER** TASMANIAN CHAMBER OF COMMERCE & INDUSTRY **VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY** **ACCI MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC AND SPECIALTY PRODUCTS INDUSTRY **AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION** AUSTRALIAN BEVERAGES COUNCIL **AUSTRALIAN DENTAL INDUSTRY ASSOCIATION** AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES **AUSTRALIAN FOOD & GROCERY COUNCIL ASSOCIATION** AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RETAILERS' ASSOCIATION** AUSTRALIAN SELF MEDICATION INDUSTRY **BUS INDUSTRY CONFEDERATION** CONSULT AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA (THE) **NATIONAL BAKING INDUSTRY ASSOCIATION** NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL RETAIL ASSOCIATION **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY GUILD OF AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA **RESTAURANT & CATERING AUSTRALIA** VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE