

# CHAPTER 2

## Issues

### Introduction

2.1 The key purpose of the bill is to re-establish the Australian Building and Construction Commission (ABCC).

2.2 Submitters who were critical of the bill generally argued that there is no need for special laws for the building and construction industry, criticised the increased powers of the regulator, the increased penalties, and questioned whether productivity would improve if the bill were to be passed.<sup>1</sup> For example, the Australian Council of Trade Unions (ACTU) submitted that the *Fair Work Act 2009* (Cth) constitutes an adequate and appropriate framework for the regulation of industrial relations in Australia, including the promotion and compliance with industrial laws.<sup>2</sup> The Construction, Forestry, Mining and Energy Union (CFMEU) also argued strongly against special laws for the building and construction industry and submitted that the proposed powers for the ABCC are inappropriate in the industrial context.<sup>3</sup>

2.3 The key issues emerging from supporters of the bill include the need for the ABCC to be re-established, the need for specific legislation for building and construction industry, and the increased productivity gains which will result. The committee heard that since the ABCC had been abolished there has been an increase in working days lost, illegal activity and contravention of the relevant legislation. Supporters of the bill argued that the measures contained in the bill would re-establish a strong watchdog to maintain the rule of law and by doing so protect workers and constructors, and improve the productivity of building sites.<sup>4</sup> On balance, the committee found these arguments persuasive, and they are discussed in more detail below.

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1 See for example: Nicola McGarrity and Professor George Williams, *Submission 1*; Professor David Peetz, *Submission 2*; Australian Council of Trade Unions, *Submission 6*, Construction, Forestry, Mining and Energy Union, *Submission 7*, National Union of Workers, *Submission 9*; Maritime Union of Australia, *Submission 10*; and Australian Manufacturing Workers Union, *Submission 14*.

2 Australian Council of Trade Unions, *Submission 6*, p. 4.

3 Construction, Forestry, Mining and Energy Union, *Submission 7*, pp 1–2.

4 See for example: Master Plumbers' and Mechanical Services Association of Australia, *Submission 3*; Master Builders Australia, *Submission 4*; Department of Employment, *Submission 5*; Australian Chamber of Commerce and Industry, *Submission 8*; Civil Contractors Federation, *Submission 11*; Australian Industry Group, *Submission 12*; Australian Mines and Metals Association, *Submission 15*; Housing Industry Association, *Submission 16*; Business SA, *Submission 17*; Northern Territory Government, *Submission 18*; Queensland Government, *Submission 19*.

## **The need for the Australian Building and Construction Commission to be re-established**

2.4 A number of submitters strongly supported the bill's proposal to re-establish the ABCC, submitting that the original reasons for creating the body were still relevant as evidenced by recent examples outlined below.

### ***The Cole Royal Commission***

2.5 In 2001 the government established the Royal Commission into the Building and Construction Industry. The Royal Commission reported its findings in 2003. Chief among these was the conclusion that endemic within the building and construction industry was a disregard for the law.<sup>5</sup> Master Builders Australia described the report's findings in the following terms:

It found that the industrial behaviour of building unions and union officials had established a culture of coercion and intimidation that was to the detriment of productivity in industry and the broader community. This regrettably remains the case. Even in recent times, Justice Wilcox and the previous government held similar views. So they are not just views of the industry but were views found subsequent to the Cole royal commission in other inquiries that have been conducted.<sup>6</sup>

2.6 In response to these findings the Coalition government introduced legislation to establish the ABCC in 2003. This legislation was unfortunately watered down by the Labor government in 2012, with productivity losses. ACCI submitted that the findings of the Royal Commission have 'enduring relevance' and 'are as true today as they were in 2003'.<sup>7</sup>

### ***Recent examples of illegality in the industry***

2.7 The committee heard of examples of recent illegality in the industry, illustrating that the findings of the Royal Commission are still pertinent today. Indeed, Business SA submitted that 'there is evidence that the lawlessness identified by the Cole Royal Commission now has returned in full force'.<sup>8</sup>

2.8 Master Builders Australia described how the 2011 'Melbourne Markets' case demonstrates that the courts have recognised 'deliberate flouting of the law by the CFMEU to obtain industrial advantage'. In that case the court imposed \$250,000 in

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5 Master Builders Australia, *Submission 4*, p. 8.

6 Mr Wilhem Harnisch, Chief Executive Officer, Master Builders Australia, *Proof Committee Hansard*, 26 November 2013, p. 19. See also, Business SA, *Submission 17*, pp 4–5.

7 Mr Daniel Mammone, Director of Workplace Policy and Legal Affairs, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 26 November 2013, p. 11.

8 Business SA, *Submission 17*, p. 6. See also Australian Mines and Metals Association, *Submission 15*, pp 2–3.

finer and awarded \$190,000 in costs against the CFMEU 'after finding that the union had deliberately and illegally prevented work from going ahead on the new Melbourne Markets site in Epping, Victoria'.<sup>9</sup> MBA reported the court's observation that:

...the CFMEU's conduct on this occasion was calculated and deliberate, and that union officials had taken the view that they should simply proceed with the action even though they knew it would cost an enormous amount of money. The cynical rationale behind this decision was that any fine would cost the CFMEU less than the membership benefit to be gained by engaging in the demarcation dispute.<sup>10</sup>

2.9 MBA also listed a number of other examples of illegality and asserted that unions deliberately allow entry permits to lapse to avoid prosecution for onsite conduct.<sup>11</sup> The CFMEU rejected MBA's suggestion that union officials were deliberately allowing entry permits to lapse in order to avoid prosecution.<sup>12</sup> Other examples provided by MBA include:

...the CFMEU war with the construction company Grocon and unions' appalling tactics, including the blockade of the Myer employees on site in Melbourne during August and September 2012. There are other examples—for instance, the Children's Hospital in Queensland, the Little Creatures Brewery in Geelong and the Lend Lease dispute in Adelaide—from recent times.<sup>13</sup>

2.10 Further, there has been a threefold increase in working days lost to industrial disputes, since the ABCC was abolished. Independent Economics reports that this has increased from 24,000 days in the 2011-2012 financial year to an estimated 89,000 days in 2012-2013.<sup>14</sup> The graph below illustrates the number of working days lost to industrial disputes in the construction industry every second quarter between March 2001 and March 2013.<sup>15</sup>

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9 Master Builders Australia, *Submission 4*, p. 9. See also: Melbourne Markets Dispute [2011] FCA 556 (unreported) Tracey J, 2 June 2011.

10 Master Builders Australia, *Submission 4*, p. 10.

11 Master Builders Australia, *Submission 4*, p. 12; Mr Wilhem Harnisch, Chief Executive Officer, Master Builders Australia, Proof Committee Hansard, 26 November 2013, p. 19

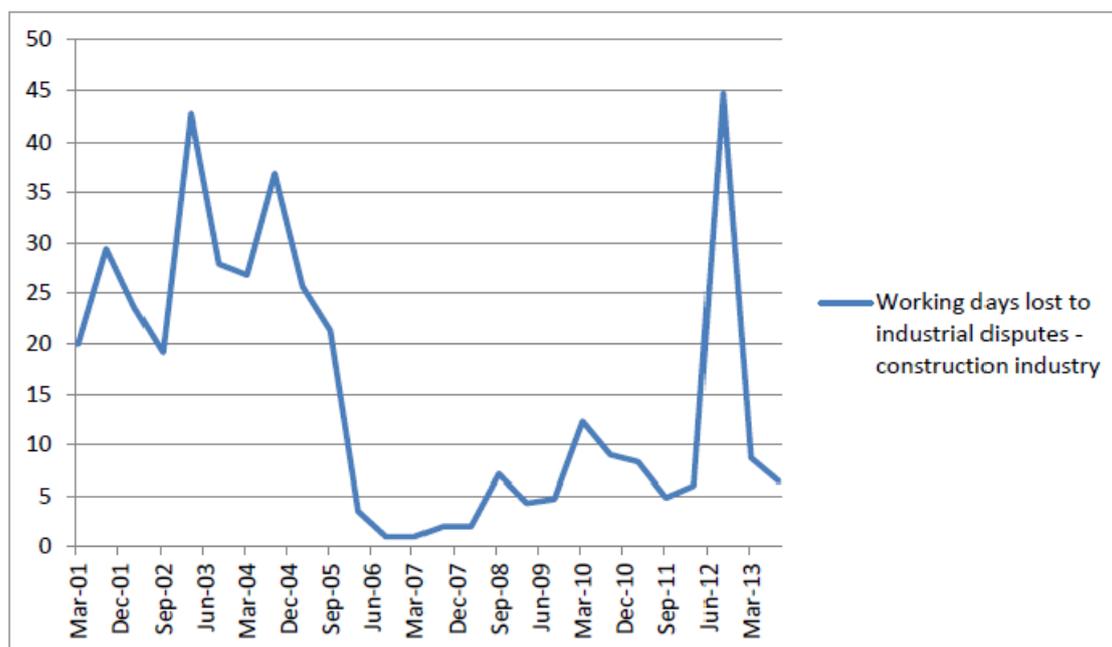
12 Australian Council of Trade Unions, *Response to question taken on notice*, 26 November 2013 (received 28 November 2013), pp 5–6.

13 Mr Wilhem Harnisch, Chief Executive Officer, Master Builders Australia, Proof Committee Hansard, 26 November 2013, p. 19; See also Mr Richard Calver, Industrial Relations and Legal Counsel, MBA, p. 21; Mr Wilhem Harnisch, Chief Executive Officer, Master Builders Australia, Proof Committee Hansard, 26 November 2013, p. 19; Housing Industry Association, *Submission 16*.

14 Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2013 Update*, 26 August 2013, pp 24–66, cited by Business SA, *Submission 17*, p. 6. See also, Australian Mines and Metals Association, *Submission 15*, p. 14.

15 Australian Mines and Metals Association, *Submission 15*, p. 15.

Working days lost to industrial disputes in the construction industry



2.11 The Australian Mines and Metals Association (AMMA) explains the graph in the following terms:

What we are seeing is a high number of working days lost to industrial disputes leading up to the introduction of the ABCC and BCII Act on 1 October 2005, after which we see an immediate and dramatic drop. Working days lost to industrial disputes then remained at relatively low levels until a small increase coinciding with the change to a Labor government in December 2007 and again with the introduction of the Fair Work Act on 1 July 2009. We then see a dramatic spike that coincides almost exactly with the repeal of the BCII Act and ABCC on 1 June 2012.<sup>16</sup>

### ***Re-establishment of the ABCC***

2.12 The committee heard that the only way to address this pattern of unlawful conduct is to pass the bills currently before the committee.<sup>17</sup> The Australian Chamber of Commerce and Industry (ACCI) agreed with this conclusion, observing that all aspects of the economy have been adversely impacted by unlawful conduct in major construction projects. ACCI submitted that the restoration of the ABCC would restore the rule of law in the building and construction industry:

Re-establishing the ABCC with its full suite of powers represents a big win for the industry and consumers, especially for small businesses and contractors which have traditionally been unlawfully locked out of major

<sup>16</sup> Australian Mines and Metals Association, *Submission 15*, pp 15–16.

<sup>17</sup> Mr Wilhem Harnisch, Chief Executive Officer, Master Builders Australia, *Proof Committee Hansard*, 26 November 2013, p. 19

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construction projects. The return of the independent industrial regulator will also result in significant gains for the national economy, as a result of a more productive and efficient industry that observes the rule of law and recognises free enterprise over intimidation and industrial thuggery.<sup>18</sup>

2.13 Business SA submits that the 'sharp increase in working days lost to industrial disputes and the protracted and very public industrial disputes in 2012-2013 demonstrate the need for re-establishing law and order in the building and construction industry and to properly resource the relevant agency'.<sup>19</sup> The Australian Industry Group also supported the bill, submitting that the Australian community has a 'direct interest in ensuring that the rule of law is upheld' and that passage of the bill will have a 'positive effect'.<sup>20</sup> AMMA submitted that the 'ABCC remains a desperately needed regulator to address widespread unlawful industrial conduct in the industry'.<sup>21</sup> The MBA submitted that the actions taken by some unions as outlined above are 'part of a concerted national campaign to exploit the weaknesses' in the current legislation'.<sup>22</sup>

2.14 The CFMEU rejected these conclusions, submitting that the issues connected to the Grocon dispute provided by MBA were 'particular to that employer and the industry and the union' and there is 'no correlation' between that dispute and the abolishment of the ABCC.<sup>23</sup>

### ***Committee view***

2.15 The persistent illegality in the building and construction industry is of serious concern to committee members. The committee notes the indisputable evidence that the building and construction industry still requires specific and robust legislation. The recent examples of illegality in the industry demonstrate the need to re-establish a strong watchdog to maintain the rule of law. The reforms contained in the bill are a necessary and proportionate response to increased militarism and illegality in the construction and building industry.

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18 Australian Chamber of Commerce and Industry, *Submission 8*, paragraph 3.2.11.

19 Business SA, *Submission 17*, p. 6.

20 Australian Industry Group, *Submission 12*, p. 2.

21 Australian Mines and Metals Association, *Submission 15*, p. 13.

22 Master Builders Australia, *Submission 4*, p. 3.

23 Mr Dave Noonan, National Secretary, Construction and General Division, CFMEU, *Proof Committee Hansard*, 26 November 2013, p. 7

## Productivity Gains

2.16 The committee heard that the passage of the bill would also enhance productivity in the building and construction sector. The productivity of the sector has significant flow on effects to the Australian economy more broadly, representing 'approximately eight per cent of Australia's GDP'.<sup>24</sup>

2.17 Research conducted by Independent Economics (formally Econtech), demonstrates that productivity has declined sharply since the previous ABCC regime was dismantled. The research highlights that during the former ABCC regime:

- 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.<sup>25</sup>

2.18 Independent Economic's findings were supported by a number of submitters in the industry, including the Housing Industry Association<sup>26</sup> and the Australian Mines and Metals Association.<sup>27</sup>

2.19 The MBA offered strong support for the bill, submitting that the reforms are necessary 'in order to ensure a return to compliance with the rule of law on building sites and to boost the industry's and the nation's productivity'.<sup>28</sup> MBA contend that industrial relations have a significant impact on labour market outcomes and macro-economic performance, particularly in the construction and building industry. According to their submission the 2005 Act that established the ABCC:

...significantly improved industrial relations and increased productivity in which industrial relations was not the predominant and negative influence that it had been in the past and which it has become again in the current environment.<sup>29</sup>

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24 Mr Daniel Mammone, Director of Workplace Policy and Legal Affairs, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 26 November 2013, p. 11.

25 Cited by Department of Employment, *Submission 5*, p. 4. See also: Mr Wilhem Harnisch, Chief Executive Officer, Master Builders Australia, *Proof Committee Hansard*, 26 November 2013, p. 19

26 Housing Industry Association, *Submission 16*, p. 3.

27 Australian Mines and Metals Association, *Submission 15*, pp 14–16.

28 Master Builders Australia, *Submission 4*, p. 1.

29 Master Builders Australia, *Submission 4*, p. 3.

2.20 MBA commissioned a report in 2013 from Independent Economics, the latest in a series of reports from that organisation. The findings from those reports form the basis for MBA's argument about the impact on productivity of the ABCC:

[T]he data analysed for each update continues to support the findings of the 2007 Report; that there has been a productivity outperformance in the building and construction industry compared to other sectors of the economy and its historical productivity performance prior to the implementation of improved workplace practices.<sup>30</sup>

2.21 The Australian Chamber of Commerce and Industry supported the findings of the Independent Economics report, arguing that without the reforms proposed by the bill, key productivity gains would be lost.<sup>31</sup>

2.22 The ACTU rejects the evidence relied upon by the government, as outlined above, describing the research as being based on 'flawed and discredited analysis'.<sup>32</sup> The committee notes that both the ACTU and CFMEU submissions discredited professional work done by Independent Economics, an internationally renowned independent research body used by both Labor and Coalition governments in the past.<sup>33</sup>

2.23 The Northern Territory Government submitted that the reforms proposed by the bill are necessary to ensure strong growth and promote labour mobility:

The introduction of the ABCC led to an increase in productivity in the sector across the nation. With a significant number of construction jobs coming online over the next few years, the Northern Territory Government sees the reintroduction of the ABCC as having a stabilising and positive influence on the sector, both in terms of providing a solid framework for employers and employees, but also for representative groups.

A vital part of the legislation is enabling the minister to issue a Building Code. This will be a code of practice that all participants in the building and construction industry, employer, employee, union and the Commonwealth must comply with in respect of building work. This will further standardise

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30 Master Builders Association of Australia, *Submission 4*, pp 4–5.

31 Australian Chamber of Commerce and Industry, *Submission 8*, paragraph 3.2.3.

32 Australian Council of Trade Unions, *Submission 6*; Australian Council of Trade Unions, *Response to question taken on notice*, 26 November 2013 (received 28 November 2013), pp 6–10. See also, Construction, Forestry, Mining and Energy, *Submission 7*; Professor David Peetz, *Submission 2*.

33 For example, the Department of Education, Employment and Workplace Relations commissioned KPMG Econtech in 2009 to provide an estimate of the total economic benefits of a suite of human capital reforms. The final report, *Measuring the Impact of the Productivity Agenda*, was released publicly in 2010: Department of Employment, *Response to question taken on notice*, 26 November 2013 (received 27 November 2013), 29 November 2013, p. 6. See also, Australian Council of Trade Unions, *Submission 6*; Construction, Forestry, Mining and Energy Union, *Submission 7*.

work practices across the country, thereby allowing employees to move seamlessly from jurisdiction to jurisdiction, and allowing employers to be able to attract potential employees from across the country.<sup>34</sup>

2.24 The Queensland Government also supported the productivity gains that passage of the bill would achieve, submitting that 'unlocking the activity in Queensland's construction sector to create jobs and investment is crucial to Queensland's economic recovery'.<sup>35</sup>

### ***Committee view***

2.25 The committee is satisfied that the evidence produced by Independent Economics is the result of thorough and careful research. The evidence leads to the inevitable conclusion that the reforms proposed by the bill will contribute to increased productivity in the building and construction industry, for the benefit of workers, employers and, ultimately, all Australians.

### **Other issues**

2.26 The bill proposes to retain the role of the Commonwealth Ombudsman currently performed under the *Fair Work (Building Industry) Act 2012*. The Commonwealth Ombudsman would review and report on the exercise of coercive powers to gather information by the ABC Commissioner.

2.27 The Commonwealth Ombudsman advised that it 'welcomed' retention of its function, submitting that this would 'provide assurance to Parliament and the public that the powers are being exercised in compliance with legislative requirements and best practices'.<sup>36</sup> The Ombudsman indicated he anticipated that his oversight function may expand if the bill is passed, and that he will work with the ABCC to develop a memorandum of understanding to ensure that its oversight function is appropriately resourced.<sup>37</sup> The committee expects that if the bill is passed the ABCC and the Commonwealth Ombudsman will work closely to develop a memorandum of understanding that is appropriate in the circumstances.

2.28 Some submitters who generally supported the policy objectives underpinning the bill suggested technical amendments.<sup>38</sup> The committee is persuaded that the bill as it stands, with the amendments recommended earlier, will achieve the stated policy objectives of the bill: re-establish a strong watchdog to maintain the rule of law and by

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34 Government of the Northern Territory, *Submission 18*, pp 1–2.

35 Queensland Government, *Submission 19*, p. 1.

36 Commonwealth Ombudsman, *Submission 13*, p. 2.

37 Commonwealth Ombudsman, *Submission 13*, p. 3.

38 For example, Australian Industry Group, *Submission 12*, pp 4, 7, 9, 13, 55; Australian Mines and Metals Association, *Submission 15*, pp iv–v.

doing so protect workers and constructors, and improve the productivity of building sites.

## **Conclusion**

2.29 The building and construction industry is an important sector of the Australian economy. Throughout this inquiry the committee has been presented with evidence of increased illegality and disregard for the rule of law in the building and construction industry. It is of the utmost importance that this sector is able to flourish and is not hampered by illegality and a culture of intimidation as evidenced in the inquiry. The committee is also persuaded by evidence that productivity in the sector has declined since the ABCC was abolished by the former government. An independent, empowered, and properly resourced regulator is necessary.

2.30 For these reasons the committee concludes that the measures contained in the bill are an appropriate and prudent response to the issues raised in this inquiry, and considers that the bill should be passed without amendment.

## **Recommendation 1**

**2.31 The committee recommends that the Senate pass the bill.**

**Senator Bridget McKenzie**  
**Chair, Legislation**