

The Senate

Education and Employment
Legislation Committee

Building and Construction Industry
(Improving Productivity) Bill 2013
[Provisions]

Building and Construction Industry
(Consequential and Transitional Provisions)
Bill 2013 [Provisions]

December 2013

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RECOMMENDATIONS

Recommendation 1

2.31 The committee recommends that the Senate pass the bill.

CHAPTER 1

Introduction and Background

Reference

1.1 On 14 November 2013, the Senate referred the provisions of the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, to the Senate Education and Employment Committee for inquiry and report by 2 December 2013.¹

Conduct of the inquiry

1.2 Details of the inquiry were made available on the committee's website and the committee also contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 18 individuals and organisations, as listed in Appendix 1. A public hearing was held in Melbourne on 26 November 2013. The witness list for that hearing is available in Appendix 2.

Acknowledgement

1.3 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions, giving evidence at the hearing and responding to questions taken on notice.

Note on references

1.4 References in this report to the Hansard for the public hearing are to the Proof Hansard. Please note that page numbers may vary between the proof and the official transcripts.

Background to the Bill

1.5 The Building and Construction Industry (Improving Productivity) Bill 2013 proposes to regulate certain conduct of building industry participants who perform building work.

1.6 The bill would replace the Office of the Fair Work Building Industry Inspectorate with the re-established Australian Building and Construction Commission. The bill governs the appointments and functions of the Commission as well as those of the Office of the Federal Safety Commissioner.

Legislative History

1.7 The Australian Building and Construction Commission was abolished in 2012 under the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012 (The current Act). The committee considered that bill in its

1 *Journals of the Senate*, 14 November 2013, p. 123 (44th Parliament).

report of February 2012.² Over the last decade or so the committee has considered much of the subject matter and many of the key issues contained in this bill.

1.8 In 2003 the Royal Commission into the Building and Construction Industry released its reports and findings.³ Consequently, the government introduced the Building and Construction Industry Improvement Bill 2003. This bill lapsed in the Senate when Parliament was prorogued in 2004. Nevertheless, the committee produced a report in June 2004 covering the 2003 bill and related matters.⁴

1.9 In 2005 the Building and Construction Industry Improvement Bill 2005 was introduced and passed. The committee inquired into the 2005 bill and tabled a report in May of that year. The Building and Construction Industry (Restoring Workplace Rights) Bill 2008 was introduced as a private members' bill and the committee inquired into and reported on this bill in November 2008.

1.10 On 17 June 2009 the Labor government introduced the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009. The Senate referred the provisions of the bill to the committee. The bill lapsed when Parliament was prorogued on 19 July 2010. The committee inquired and presented a report in September 2009.

Findings of the Committee in 2012

1.11 The committee considered the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012 that abolished the Australian Building and Construction Commission in its 2012 report and made a series of recommendations to amend the bill.

1.12 Coalition Senators provided a dissenting report which concluded with a single recommendation expressing opposition to the bill and a commitment to the re-establishment of the Australian Building and Construction Commission.

Purpose of the Bill

1.13 The bill re-establishes the Australian Building and Construction Industry Commission (ABCC) that was abolished under the 2012 Act and replaced by the Office of Fair Work Building Industry Inspectorate (FWBII). The bill proposes that the FWBII would continue in existence under the name of the ABCC. Chapter 2 would also regulate the appointment and functions of the Australian Building and Construction Industry Commissioner (ABC Commissioner).

1.14 The bill would provide powers to either the Minister or to the ABC Commissioner and staff to:

2 Senate Employment, Workplace Relations and Education References Committee *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, February 2012.

3 *Explanatory Memorandum*, Statement of Compatibility with Human Rights, p. 50.

4 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole: The future of the construction industry: confrontation or co-operation?*, June 2004.

-
- issue a Building Code which includes providing the ABC Commissioner with the power to require a person to report on his or her compliance with the Code;
 - prohibit unlawful industrial action if the action has a connection to a constitutionally-covered entity;
 - prohibit coercion of persons in relation to the engagement of contractors and employees or choice of superannuation fund;
 - prohibit coercion or undue pressure on persons in relation to Commonwealth industrial instruments; and
 - obtain information.

1.15 The bill also includes enforcement provisions and deals with administrative matters.

The Building Code

1.16 Chapter 3 of the bill would provide the Minister with the power to issue a Building Code. The current Building Code was issued by Legislative Instrument under the *Fair Work (Building Industry) Act 2012* and commenced on 1 February 2013. This bill adds a provision that building industry participants may be directed to report to the ABC Commissioner on their compliance with the Code.

Unlawful Industrial Action

1.17 Chapter 5 of the bill prohibits unlawful industrial action. Unlawful industrial action includes bans on working, employees failing to attend work and employers locking out employees.⁵ This Chapter would apply only if the unlawful action or unlawful picket has a connection to a constitutionally-covered entity. Any person would be able to apply for an injunction to restrain a person from organising or engaging in unlawful industrial action or an unlawful picket in relation to building work.⁶

1.18 The bill also states that the provisions in Part 3-3 of the *Fair Work Act 2009* relating to strike pay would also apply in relation to unlawful industrial action.

Coercion, discrimination and unenforceable agreements

1.19 Chapter 6 would prohibit action that:

- intends to coerce a person to employ or engage individual employees or independent contractors;
- intends to coerce a person to assign particular duties or responsibilities to people or contractors;

5 Building and Construction Industry (Improving Productivity) Bill 2013, clause 44.

6 Explanatory Memorandum, Building and Construction Industry (Improving Productivity) Bill 2013, p. 3.

- intends to make an employee or employer nominate a particular superannuation fund.

1.20 In addition, the chapter proposes to ban actions that intend to coerce or apply undue pressure to make, vary or terminate enterprise agreements.

1.21 Part 3 of Chapter 6 would make an agreement unenforceable if the agreement is entered into with the intention to secure standard employment conditions for building employees at a particular site and not all the employees are employed in a single enterprise.

Obtaining Information

1.22 The powers to obtain information in relation to an investigation of a suspected contravention of the bill or a designated building law are set out in Chapter 7. The bill would give the ABC Commissioner the power to issue an examination notice to a person directing them to provide documents or information relevant to the investigation. The person would have 14 days to comply.

1.23 These powers were first introduced in the Building and Construction Industry Improvement Bill 2005. The powers were retained in the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012 but with a requirement to notify the Commonwealth Ombudsman of the issue of an examination notice. This provision has been retained in the bill.

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

1.24 The Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 is consequential to the Building and Construction Industry (Improving Productivity) Bill 2013. The bill would wholly repeal the Fair Work (Building Industry) Act 2012 and amend the following Acts:

- Administrative Decisions (Judicial Review) Act 1977;
- Fair Work (Registered Organisations) Act 2009;
- Jurisdiction of Courts (Cross-Vesting) Act 1987; and
- Building and Construction Industry (Improving Productivity) Act 2013.

1.25 The bill provides administrative arrangements relating to the transition from the institutions, functions and powers contained in the Fair Work (Building Industry) Act 2012 to those proposed in the Building and Construction Industry (Improving Productivity) Bill 2013.

Compatibility with human rights

Building and Construction Industry (Improving Productivity) Bill 2013

1.26 The explanatory memorandum states that the Building and Construction Industry (Improving Productivity) Bill 2013 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁷

1.27 A number of human rights are engaged by the bill, including: the right to freedom of association, the right to just and favourable conditions of work, the right to a fair trial, the right to peaceful assembly, the right to freedom of expression, and the right to privacy and reputation.⁸ The explanatory memorandum submits that the measures contained in the bill are a reasonable and proportionate response to the findings of the 2003 Royal Commission and 'recent evidence of lawlessness in the building and construction industry'.⁹

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

1.28 The explanatory memorandum states that the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.¹⁰

1.29 The bill engages the right to privacy. For example, the bill contains provisions to protect privacy and also to enables the transfer of information relating to current investigations from the current regulator to the ABC Commission, to ensure continuity in enforcement activities. The explanatory memorandum concludes that the bill is consistent with human rights because 'to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate'.¹¹

Consideration by legislative scrutiny and human rights committees

1.30 The bills have not yet been considered by the Parliamentary Joint Committee on Human Rights or the Senate Standing Committee for the Scrutiny of Bills.

7 *Explanatory Memorandum*, Building and Construction Industry (Improving Productivity) Bill 2013, p. 50.

8 *Explanatory Memorandum*, Building and Construction Industry (Improving Productivity) Bill 2013, p. 51.

9 *Explanatory Memorandum*, Building and Construction Industry (Improving Productivity) Bill 2013, p. 51.

10 *Explanatory Memorandum*, Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, p. 10.

11 *Explanatory Memorandum*, Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, p. 11.

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.¹ 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.² 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.³

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.⁴ On balance, the committee found these arguments persuasive, and they are discussed in more detail below.

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.⁵ 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.⁶

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'.⁷

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'.⁸

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

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.

finest 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'.⁹ 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.¹⁰

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.¹¹ The CFMEU rejected MBA's suggestion that union officials were deliberately allowing entry permits to lapse in order to avoid prosecution.¹² 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.¹³

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 2012-2013.¹⁴ 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 2013.¹⁵

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

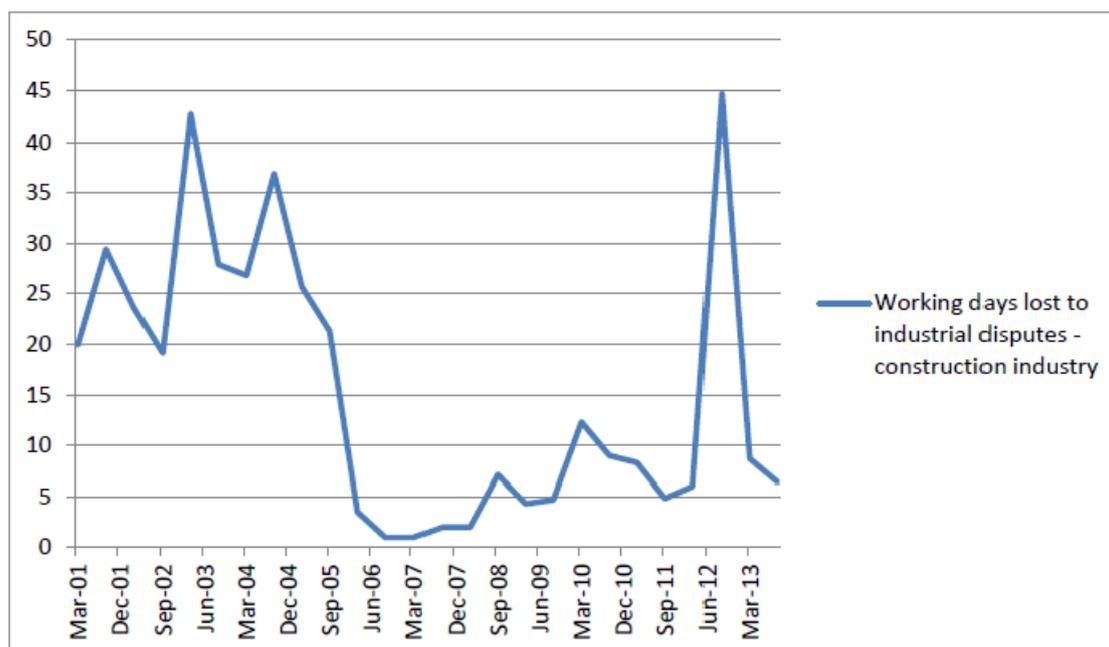
12 Australian Council of Trade Unions, *Response to question taken on notice*, 26 November 2013 (received 28 November 2013), pp 5–6.

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 2012.¹⁶

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.¹⁷ 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

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

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

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.¹⁸

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'.¹⁹ 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'.²⁰ AMMA submitted that the 'ABCC remains a desperately needed regulator to address widespread unlawful industrial conduct in the industry'.²¹ 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'.²²

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.²³

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.

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'.²⁴

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.²⁵

2.18 Independent Economic's findings were supported by a number of submitters in the industry, including the Housing Industry Association²⁶ and the Australian Mines and Metals Association.²⁷

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'.²⁸ 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.²⁹

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.³⁰

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.³¹

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'.³² 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.³³

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

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*, p. ; 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.³⁴

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'.³⁵

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'.³⁶ 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.³⁷ 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.³⁸ 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

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

LABOR SENATORS' DISSENTING REPORT

Introduction

1.1 Labor Senators do not see merit in these bills and oppose both in their entirety without amendment.

1.2 The short period of time given for submissions to this particular inquiry of the committee, which proposes significant changes to the law and to the rights of workers in Australia, was not appropriate and did not allow reasonable time for submissions or appropriate consideration by the committee. The urgency to re-enact the Australian Building and Construction Committee is not based on genuine requirement for urgent workplace reform, but on political motivation following the change of government. Labor senators feel strongly that the bills are being rushed unnecessarily through the Parliament.

Specific laws targeting any one industry are unnecessary

1.3 Special laws that target the building and construction industry are politically motivated, and unnecessary. Workers in the Australian building and construction industry should be subject to the same industrial laws as all other Australian workers. We reject both the majority view of the Committee and the Cole Royal Commission's finding that the building and construction industry is special or 'singular' in nature.

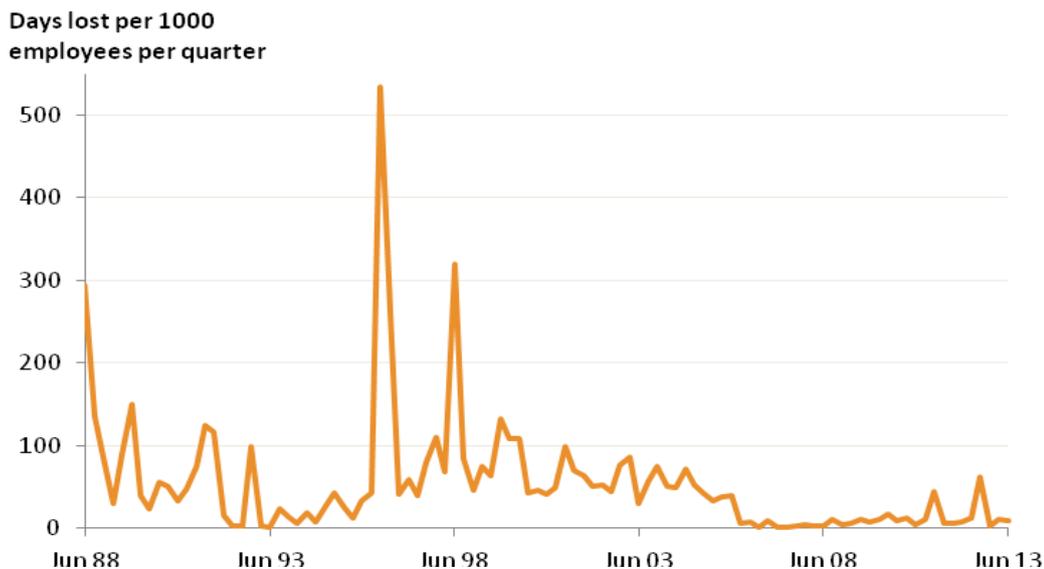
1.4 The Fair Work Building Industry Inspectorate has a full suite of appropriate investigative and prosecution powers to deal with any unlawful behaviour in the building and construction industry — whether by employers, employees, unions or contractors. The existing *Fair Work (Building Industry) Act 2012* (Cth) is a secure, fair and adequate regulator of industrial relations in Australia that:

- Provides enforcement that is based on education rather than prosecution;
- Retains common law rights of workers; and
- Provides for a genuinely independent compliance unit.

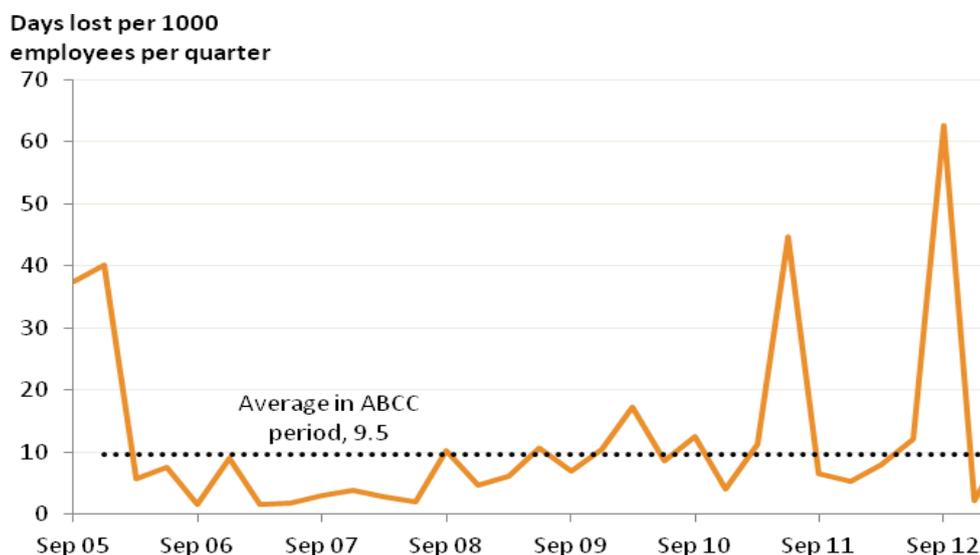
The Fair Work Act 2009 already regulates rights and restrictions of protected industrial action. The rate of disputation has not increased since the ABCC was abolished

1.5 The *Fair Work Act 2009* (Cth) already comprehensively regulates rights and restrictions of protected industrial action. Any additional rules are unnecessary and unjustifiable. This is especially in light of Australian Bureau of the Statistics (ABS) evidence (below) showing the rate of industrial disputation in the industry remains extremely low relative to its historic levels, and that there is no demonstrable evidence that the rate of disputation in the industry has materially increased in the period since the ABCC was abolished.¹

1 Figure 1: Construction industry industrial disputes, ABS 6321.0.55.001.



1.6 During the ABCC's operation, there was an average of 9.5 working days lost to disputes per 1000 employees per quarter in the construction industry. In the four quarters after the abolition of the ABCC, the rate of disputation in the industry has been below the ABCC-era average twice (in December 2012 and June 2013) and above it twice (in September 2012 and March 2013), as the graph below demonstrates.²



1.7 Labor Senators express concern that the employer groups, in particular the Master Builders' Association (MBA) submitted supplementary information in opposition to their support of the bills and the reintroduction of the ABCC. For example, paragraph 7.2 of the Master Builder's supplementary submission confirms agreement that in the industry there are now fewer strikes, yet paragraph 7.4 of the same document states that:

² Australian Council of Trade Unions, *Submission 6*, p. 21.

Master Builders notes that unlawful industrial action occurs almost daily in some States and Territories.³

1.8 The evidence presented then lists 16 counts of alleged industrial action across two states, between 9 July 2013 and 30 October 2013. Although no party has been allowed the time or resources to adequately assess every alleged industrial action (threat or demonstration) over the period since the ABCC was abolished, to note that this action is daily is certainly inaccurate, and if this is indeed the case, it is in direct conflict that the MBA supports the argument that the reintroduction of the ABCC would result in reduced industrial disputes, when they agree that there are now fewer strikes since it was dissolved.

1.9 To proactively legislate against ILO conventions is unacceptable action by the Australian Parliament. The former BCII Act, upon which this bill is based, was found to constitute a serious breach of Australia's international obligations by the United Nations' International Labour Organisation (ILO) under:

- *The Labour Inspection Convention 1947 (no. 81)*
- *The Freedom of Association and Protection of the Right to Organise Convention 1947 (no.87); and*
- *The Right to Organise and Collective Bargaining Convention 1949 (no. 98).*

Coercive powers available to the ABCC under these bills are excessive

1.10 The Building and Construction Industry (Consequential And Transitional Provisions) Bill 2013 gives the ABCC new investigative powers which may be applied to conduct occurring, or investigations begun, prior to the new Act taking effect.

1.11 Any such powers, if they are to be introduced, should operate prospectively, and not allow the ABCC to initiate or pursue matters (including instigating court proceedings) in respect of matters that were settled prior to the new Act taking effect. It is a fundamental principle of fairness and a basic precept of the rule of law that laws are applied prospectively. Parties should be entitled to rely upon the law as it exists and applies at the time.

1.12 During the hearing, witnesses demonstrated that there was sufficient agreement that the bills required modification to protect the freedom of association and right to silence. For example, Mr Daniel Mammone, Director of Workplace Policy and Legal Affairs, Australian Chamber of Commerce and Industry, responded to questioning in the follow terms:

Senator CAMERON: Do you—ACCI—believe in freedom of association?

Mr Mammone: Yes. I can adamantly say, with my hand on my heart, on behalf of ACCI that we believe in freedom of association and the principles of freedom of association.

3 Master Builders Australia, *Answers to questions taken on notice*, 26 November 2013 (received 27 November 2013), p. 8.

Senator CAMERON: Privilege against self-incrimination?

Mr Mammone: Yes, those presumptions; yes, we generally support those.

Senator CAMERON: And the right to silence?

Mr Mammone: Yes, we generally support those presumptions.

Senator CAMERON: So you generally support those presumptions but you support their being suppressed under this proposed legislation?

Mr Mammone: Our submission goes to the detail of what we support in terms of the bill. Those general norms you have just outlined are not absolute. They can in some circumstances need to be modified to address the particular policy issues. We generally do support those fundamental legal norms but in some cases we support legislation which modifies the application of those.⁴

1.13 The ACTU's response to questions taken on notice during the hearing is also relevant.⁵ Coalition Senators agree that the comparison of the coercive information gathering powers vested in the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission — two statutory agencies to which parallels were drawn in several of the employer submissions to this inquiry — do not apply to the industrial jurisdiction which is concerned with, and regulates, the relationship between employers, employees and unions. 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. Coercive information-gathering powers in this context are both excessive and unnecessary.

Extending the powers of the ABCC outside of the building and construction industry proper applies an extra, unnecessary level of legislation

1.14 The bill proposes to extend the reach of the ABCC into picketing, offshore construction and the transport and supply of goods to building sites. This expansion encompasses the transport or supply of goods to building sites, including resource platforms, extending the definition of building work and the powers of the ABCC more widely than previous legislation, including the 2005 legislation that initially established the ABCC. This proposal would subject industries beyond the building and construction industry to unnecessary legislation and judicial complication, which could in theory lead to disengagement of the logistics industry from the building and construction industry proper.

4 Mr Daniel Mammone, *Proof Committee Hansard*, 26 November 2013, p. 33.

5 Australian Council of Trade Unions, *Response to questions taken on notice*, 26 November 2013 (received 29 November 2013).

The ABCC has no power in criminal matters, and there is no evidence organised crime exists in the building and construction industry

1.15 Public debate has suggested that these laws will quell organised criminal activity in the industry. However, this argument is misplaced as the ABCC has no power in relation to criminal matters and the argument that it can address that issue is deliberately misleading.

The bills will not improve productivity

1.16 Supporters of the bill claim that that passage of the bill will improve productivity. Submissions demonstrated that the data from Independent Economics (formally trading as EconTech) relied upon by the Department and the majority of the Committee is inherently flawed.⁶

1.17 The alleged 9.4% improvement in construction industry productivity that Mr Harnisch, Master Builders Australia, attributed to the ABCC in both submissions and his appearance before the Committee is not a finding of the 2013 Independent Economics report. This is a modelling assumption only drawn from estimates of the preceding reports, and not a finding. Significantly, the report states that:

... in line with earlier reports, for modelling purposes we conservatively assume a smaller gain of 9.4 per cent.⁷

1.18 Neither was it a finding of the 2010 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.⁸

1.19 Further, it was not a finding of the 2008 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

6 See for example: 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); Construction, Forestry, Mining and Energy, *Submission 7*; Professor David Peetz, *Submission 2*.

7 Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2013 Update*, 26 August 2013, p. 28.

8 Independent Economics, *Economic Analysis of Building and Construction Industry Productivity*, 2010, p. 23.

labour productivity of 9.4 per cent for the purposes of economy-wide modelling.⁹

1.20 Relying on a continuing modelling estimate and representing this as evidence as demonstrating the ‘successes’ of the ABCC is neither accurate nor appropriate. The credibility of the 2007 EconTech report has been demolished by the respected academic Professor David Peetz.¹⁰ Further, the Hon. Murray Wilcox QC described the 2007 report as "deeply flawed" and concluded that "it ought to be totally disregarded."¹¹ It is from this discredited report that the 9.4 per cent figure of lost productivity is derived. It should not be relied upon by the Committee.

1.21 The proposition that the bills would enhance productivity in the building and construction industry is highly objectionable given the evidence.

Conclusion

1.22 The legislation proposed by the bills is excessive, discriminatory, unnecessary and unjustifiable. The policy arguments in support of the bills are based on discredited analysis and faulty assumptions. For these reasons Labor Senators do not see merit in either the Building and Construction Industry (Improving Productivity) Bill 2013 or the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 and oppose both in their entirety.

Recommendation 1

1.23 Labor senators strongly recommend that the bills be rejected.

Senator Sue Lines
Deputy Chair

9 EconTech, *Economic Analysis of Building and Construction Industry Productivity*, 2008, pp iii—iv.

10 Professor David Peetz, *Submission 2*.

11 Wilcox, M., *Transition to Fair Work Australia for the Building and Construction Industry, Report to Minister for Employment and Workplace Relations*, 31 March 2009, p. 46.

AUSTRALIAN GREENS' DISSENTING REPORT

Overview

1.1 In considering the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 it is appropriate to note the role played by the Australian Building and Construction Commission (ABCC) during its seven years of existence.

Conduct of the ABCC

1.2 The way this body acted provides an insight into the impact these bills could have if passed. The ABCC failed to act as independent regulator committed to the best interests of the industry, the conditions of the workers and the needs of legitimate employers.

1.3 This ABCC was unwilling or unable to address industry employers engaging in illegal activities including the widespread use of misleading contracts. Construction companies signing up workers as independent contractors instead of hiring them as employees remains a serious issue that reduces industry standards. For employees it means they lose basic work and safety rights.

1.4 The construction industry is one of this country's top four most dangerous industries. The ABCC never took an employer to court over breaches of occupational health and safety laws. The number of deaths in the construction industry increased during the period that the ABCC was in operation. In 2004 the number of deaths was 3.14 per 100,000 workers. In 2007 it stood at 4.8 and in 2008 at 4.27, per 100,000 workers.

1.5 The coercive powers of the ABCC, which could subject construction industry workers to secret interrogations and force them to answer questions under oath, resulted in construction workers having fewer rights than other workers.¹

Particular issues with the bills

1.6 Legal experts who submitted to the inquiry state the ABCC's investigative powers are anomalous in a modern system of industrial relations, particularly in a nation that values political and industrial freedoms.²

1.7 Other submitters pointed out that the source used by Minister the Hon. Eric Abetz MP to allege the ABCC had enhanced industry productivity has now been so critiqued that it cannot be considered credible.³

1 See for example, Construction, Forestry, Mining and Energy Union, *Submission 7*.

2 See for example, Ms Nicole McGarrity and Professor George Williams, *Submission 1*.

1.8 The explanatory memorandum for the Building and Construction Industry (Improving Productivity) Bill 2013 states that it is compatible with human rights. However the bills have not yet been considered by the Parliamentary Joint Committee on Human Rights or the Senate Standing Committee for the Scrutiny of Bill, leaving their compatibility an unresolved question.

1.9 This is particularly problematic as the majority report notes at paragraph 1.27 that 'A number of human rights are engaged by the bill, including: the right to freedom of association, the right to just and favourable conditions of work, the right to a fair trial, the right to peaceful assembly, the right to freedom of expression, and the right to privacy and reputation.'

Conclusion

1.10 The ABCC was biased in its work as it was driven by an ideological attack on construction workers and unions. Further, in recent years Australia's construction industry laws have been condemned by the International Labour Organisation six times. For these reasons the Australian Greens reject the bills in their entirety.

Recommendation

The Australian Greens recommend that the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 not be passed.

**Senator Lee Rhiannon
Australian Greens**

3 See for example, Professor David Peetz, *Submission 2*; Australian Council of Trade Unions, *Submission 6*.

APPENDIX 1

Submissions received

- 1** Ms Nicola McGarrity and Professor George Williams AO
- 2** Professor David Peetz
- 3** Master Plumbers' and Mechanical Services Association of Australia
- 4** Master Builders Australia
- 5** Department of Employment
- 6** Australian Council of Trade Unions (ACTU)
- 7** Construction, Forestry, Mining and Energy Union (CFMEU)
- 8** Australian Chamber of Commerce and Industry (ACCI)
- 9** National Union of Workers (NUW)
- 10** Maritime Union of Australia (MUA)

Additional information received

- 1** Document tabled by Australian Chamber of Commerce and Industry (ACCI) on 26 November, 2013
- 2** Document tabled by Department of Employment on 26 November, 2013

Answers to questions on notice

- 1** Answers to questions on notice received from the Department of Employment on 27 November, 2013.
- 2** Answers to questions on notice received from Master Builders Australia on 27 November, 2013.
- 3** Answers to questions on notice received from the Australian Council of Trade Unions (ACTU) on 28 November, 2013.
- 4** Answers to questions on notice received from the Australian Chamber of Commerce and Industry (ACCI) on 29 November, 2013.

Correspondence

- 1** Correction of evidence provided by the Department of Employment on 27 November, 2013.

APPENDIX 2

Witnesses who appeared before the committee

Melbourne, Tuesday, 26 November 2013.

CALVER, Mr Richard, National Director, Industrial Relations and Legal Counsel, Master Builders Australia Ltd

CH'NG, Mr Adam, Adviser, Workplace Policy and Legal Affairs, Australian Chamber of Commerce and Industry

COWGILL, Mr Matt, Economic Policy Officer, Australian Council of Trade Unions

HARNISCH, Mr Wilhelm, Chief Executive Officer, Master Builders Australia Ltd

KIBBLE, Mr Steve, Group Manager, ABCC Re-establishment Taskforce, Department of Employment

LANDAU, Ms Ingrid, Industrial Officer, Australian Council of Trade Unions

LYONS, Mr Tim, Assistant Secretary, Australian Council of Trade Unions

MAMMONE, Mr Daniel, Director of Workplace Policy and Legal Affairs, Australian Chamber of Commerce and Industry

NOONAN, Mr Dave, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union

O'SULLIVAN, Mr Jeremy, Chief Counsel, Workplace Relations Legal Group, Department of Employment

PARKER, Ms Sandra, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment

ROBERTS, Mr Tom, Senior National Legal Officer, Construction and General Division, Construction, Forestry, Mining and Energy Union

ROSS, Ms Justine, Executive Lawyer, Workplace Relations Legal Group, Department of Employment