

# LABOR SENATORS' DISSENTING REPORT

## Introduction

1.1 Labor Senators do not see merit in the Building and Construction Industry (Improving Productivity) Bill 2013 [No.2] and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No.2] and, as with the previous iteration of the Bills, oppose both in their entirety without amendment.

1.2 The Government's repeated attempts to re-enact the Australian Building and Construction Commission (the ABCC) is not based on a genuine requirement for workplace reform, but solely on political motivation. The Chair's report supports this, in that the entirety of the report points not to the Bill, but instead to an attack on the Senate and the current Senate's opposition to the Bill.

1.3 We continue to support our dissenting report to the Committee Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 of 2 December 2013. As these Bills do not differ substantially from the previous set of legislation, we will therefore utilise this committee process to express additional concerns and build upon previous arguments against the legislation.

1.4 The Bill would re-establish the ABCC, providing the Australian Building and Construction Commissioner with extensive and coercive questioning powers<sup>1</sup> and introduce civil penalties for union activity. Labor Senators again argue that specific laws targeting the construction industry and the introduction of coercive powers continue to be unnecessary.

## The bills will not improve productivity

1.5 Supporters of the bill claim that the 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 and has been shown to be completely inaccurate by experts Professor David Peetz, Cameron Allan, Andrew Dungan<sup>2</sup> and the Hon. Murray Wilcox QC.

1.6 Productivity improvement was not a finding of the 2013 Independent Economics report, commissioned by Master Builders Australia.<sup>3</sup> Neither was it a

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1 Building and Construction Industry (Improving Productivity) Bill 2013, Chapter 7, Part 2.

2 Cameron Allan, Andrew Dungan, and David Peetz, *'Anomalies', Damned 'Anomalies' and Statistics: Construction Industry Productivity in Australia*, February 2010.

3 Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2013 Update*, 26 August 2013, Report prepared for Master Builders Australia, [http://www.independenteconomics.com.au/information/Reports/BCI%20productivity\\_2013\\_fin al.pdf](http://www.independenteconomics.com.au/information/Reports/BCI%20productivity_2013_fin al.pdf) (accessed 9 March 2016).

finding of the 2010<sup>4</sup> or 2008 reports.<sup>5</sup> In 2014 the Government's Productivity Commission, as part of a wider study on infrastructure found:

Productivity growth in the Australian construction sector has ebbed and flowed over the last 30 years. There was a significant increase in labour and multifactor productivity from 1994-95 to 2012-13. However, most of the improvement was concentrated in relatively short bursts spanning just a few years, including most recently in 2011-12.<sup>6</sup>

1.7 The government and employer organisations argue alleged improvements in productivity in the building industry as one of the reasons they want to see a reintroduction of the ABCC. One presumes any improved productivity includes improved health and safety on construction sites. This is not the case. The number of deaths and injuries is unacceptable.

1.8 Unfortunately and disappointingly the government's submission, while acknowledging a reintroduced ABCC will not go to health and safety issues, distorts health and safety data to erroneously claim deaths and injuries improved under the former ABCC.

1.9 When questioned on deaths and injuries in the construction industry all employer organisations—the Australian Chamber of Commerce and Industry (ACCI), Australian Industry Group (AiGroup) and the Master Builders—admitted their organisations had no research or other data on construction health and safety. It was made clear to the inquiry that it was just not on their agenda. All of this reinforces that the reintroduction of the ABCC bill is a political move by the government.

1.10 This matter has been extensively explored and disputed in previous reports to this committee<sup>7</sup> and therefore we will not further revisit this matter, except to say that these facts counter the argument that the basis of this bill is of a productivity not political motivation.

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4 KPMG, *Economic Analysis of Building and Construction Industry Productivity: 2010 Report*, 26 July 2010, Report prepared for Master Builders Australia, <http://acci.asn.au.web02.wwwserver.com.au/getattachment/076685a3-f43c-4840-8322-01be5418a3f8/KPMG-Econtech---Economic-Analysis.aspx> (accessed 9 March 2016).

5 Econtech, *Economic Analysis of Building and Construction Industry Productivity: 2008 Report*, Report prepared for the Office of the Australian Building and Construction Commissioner, Canberra, Econtech Pty Ltd, 30 July 2008.

6 Productivity Commission, Public Infrastructure, *Inquiry Report*, Volume 2, No. 71, 27 May 2014, p. 392, [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0005/137282/infrastructure-volume2.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0005/137282/infrastructure-volume2.pdf) (accessed 9 March 2016).

7 Senate Education and Employment Legislation Committee, *Building and Construction Industry (Improving Productivity) Bill 2013 and Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, December 2013; Senate Education and Employment References Committee, *Governments approach to re establishing the Australian Building and Construction Commission*, March 2014.

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## Special laws that target the building and construction industry are politically motivated, and unnecessary

1.11 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. Both the Wilcox inquiry in 2009 and the Report of the Royal Commission into Trade Union Governance and Corruption dismissed the suggestion that the building industry needed industry specific industrial laws.<sup>8</sup>

1.12 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 the common law rights of workers, and provides for a genuinely independent compliance unit.

1.13 Trade unions have no tolerance for corruption and, where corrupt practices occur, they are dealt with swiftly and transparently. Evidence to support this was given at the March hearing:

**Senator RICE:** Can I just put one final question. I have only been in the Senate for 18 months and during the time of the current government, but I sit there in the Senate during question time and hear the attacks on the CFMEU day after day after day. We just had the industry people saying that we were seeing union thuggery, intimidation and lawlessness and that the CFMEU broke the law and then paid fines rather than comply with the laws. Could I briefly have your response to that, because it seems that we have two very different narratives going on.

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**Mr Noonan:** Turning to the conduct of my union: we have over 400 officials nationally and 100 000 members, and we do not get it right all the time. Sometimes people say and do stupid things. But the laws that are enforced are enforced by a regulator whose sole purpose in life is to attack workers and unions. We have over 500 individual workers who have been, or are being, prosecuted by the FWBC for things like going to a rally in support of apprenticeships and Australian jobs.

In terms of people who behave badly, our union has acted in the past. We have no tolerance for corruption. The word 'corruption' is thrown around freely by those who support this bill—notwithstanding the fact that the bill itself does not address corruption or the criminal law. We have had junior, medium-level and indeed one very senior official who we have sacked and

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8 Royal Commission into Trade Union Governance and Corruption, *Final Report: Volume 5 – Law Reform and Policy*, Commonwealth of Australia December 2015, Chapter 8, paragraph.186.

expelled from the union because their conduct did not meet the standards we expected. Some of those matters are now in front of the courts, so I do not want to name them. We do not have any time for corruption in the industry. Any official of the union, or any delegate of the union, who engages in corruption is not working for the members, they are not working for the union; they are working for the employer who has corrupted them, and we find it disgraceful. Where credible and supported allegations are brought, we deal with them.

**Senator REYNOLDS:** I was very heartened to hear that the CFMEU has no tolerance at all for illegal and other inappropriate behaviour.<sup>9</sup>

1.14 Further to this, the new legislation would extend the ABCC's reach to all workers that supply, transport or prefabricate manufactured goods.<sup>10</sup> Extending the powers of the ABCC outside of the building and construction industry proper applies an extra, unnecessary level of legislation that extends even further than the BCII legislation that initially established the ABCC.

### **The removal of the ABCC by the Labor Government was supported by independent investigation**

1.15 In 2009 the Labor Government committed to undertake a review of the *Fair Work Act 2009* (FW Act). This was not an amendment rushed through without extensive consultation and without support, as has been the case with the shambolic, repeated introduction (and re-introduction) of these Bills.

1.16 On 22 December 2011 the then Minister announced an independent panel of three experts to conduct a post-implementation review of the legislation in accordance with this commitment. The Fair Work Act Review Panel (the Panel) completed its deliberations and delivered its report—*Towards more productive and equitable workplaces: An evaluation of the fair work legislation (the Report)*—in June 2012.<sup>11</sup> The Panel made 53 mainly technical recommendations to improve the operation of the legislation without compromising productivity and fairness in the workplace. The Office of Best Practice Regulation (OBPR) in the Department of Finance and Deregulation confirmed the Report met the best practice regulation requirements.

1.17 The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012 was developed following extensive consultation with superannuation industry stakeholders, members of the National Workplace Relations Consultative Council and their technical advisers through the Committee on

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9 See *Committee Hansard*, 4 March 2016, pp 22–23.

10 Building and Construction Industry (Improving Productivity) Bill 2013, Chapter 1, Subsection 6(1), Paragraphs (d) and (e).

11 Australian Government, *Towards more productive and equitable workplaces – An evaluation of the Fair Work legislation*, 5 June 2012, [https://docs.employment.gov.au/system/files/doc/other/towards\\_more\\_productive\\_and\\_equitable\\_workplaces\\_an\\_evaluation\\_of\\_the\\_fair\\_work\\_legislation.pdf](https://docs.employment.gov.au/system/files/doc/other/towards_more_productive_and_equitable_workplaces_an_evaluation_of_the_fair_work_legislation.pdf), (accessed 9 March 2016).

Industrial Legislation, and State and Territory government officials.<sup>12</sup> It passed through the House of Representatives on Thursday 16 February 2012.

1.18 Further to this, Labor Senators of the committee again reiterate that the FW Act already regulates rights and restrictions of protected industrial action, and that the rate of disputation has not increased since the ABCC was abolished.

**The powers provided to the Australian Building and Construction Commission under the Bills represent a denial of basic rights and liberties**

1.19 Should these bills pass the Senate, the ABCC would be able to use coercive powers stronger than those provided to even the state or federal police to compel workers to give evidence and be interviewed, with no right to silence or representation by a lawyer of their choice.<sup>13</sup>

1.20 The Law Council of Australia, in presenting the Bills' inconsistencies, argue that the Bills are:

... contrary to rule of law principles and traditional common law rights and privileges such as those relating to the burden of proof, the privilege against self incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive. It is also unclear as to whether aspects of the Bill which infringe upon rights and freedoms are a necessary and proportionate response to allegations of corruption and illegal activity within the building and construction industry.<sup>14</sup>

1.21 These powers impact upon the basic rights of individuals, including the right to protection of property and privacy, the right to silence, and statutory rights to the protection of personal information.

1.22 Chapter 7 Part 2 of the Bill would invest the ABCC Commissioner (or his or her delegate) with coercive powers to require any person to produce information or documents to the ABCC Commissioner and answer questions or provide information under oath or affirmation where the Commissioner reasonably believes that the person has information or documents relevant to an investigation.

1.23 Labor Senators wish to note that even in the interrogation of suspected terrorists, a warrant must be issued by a Federal Judge or Magistrate.<sup>15</sup> The ABCC under these Bills would operate with more coercive powers than the Australian Security Intelligence Organisation (ASIO).

1.24 The passage of the Bills would also allow the ABCC to initiate or pursue matters (including instigating court proceedings) in respect of matters that were settled

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12 Fair Work Amendment Bill 2012, *Explanatory memorandum*, p. 2.

13 *Bonan v Hadgkiss* (Deputy Australian Building and Construction Commissioner) [2006] FCA 1334.

14 The Law Council of Australia, *Submission 3*, p. 3.

15 *Australian Security Intelligence Organisation Act 1979*, Part 3, Division 3.

prior to the new Act taking effect.<sup>16</sup> 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.

1.25 The former ABCC was found to systematically overstep its legislated reach, confirmed by answers to Parliamentary questions on notice that revealed the ABCC used defective Section 52 notices to question workers on at least 203 occasions.<sup>17</sup> There exists no clause in either the Bills or the explanatory memorandum that would protect workers against similar behaviour. In fact, the widely inappropriate delegations of legislative power contained in the Bill allowing the ABCC Commissioner to delegate his or her powers to 'a person... prescribed by the rules'<sup>18</sup> would lead to circumstances such as this being more likely to occur.

1.26 Labor Senators note the ABCC's case against construction worker Ark Tribe that was thrown out by the South Australian Magistrate after finding the Commissioner had failed to properly delegate his powers, costing Australian taxpayers over \$100 000 for a single case.

### **The Telecommunications (Interception and Access) Act and the Fair Work Building and Construction (FWBC)**

1.27 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.

1.28 In October 2015, the Government passed an amendment to the *Telecommunications (Interception and Access) Act 1979*. In addition to introducing compulsory metadata retention, it restricted the number of organisations that could have unrestricted access. Under the amended legislation only 21 organisations are allowed unrestricted access as 'criminal law-enforcement agencies'.

1.29 In a Freedom of Information request obtained in January of this year, the Fair Work Building and Construction (FWBC), which, if these Bills are passed will be renamed to the ABCC, has requested to be added to the list of organisations who have that unrestricted access, and be listed as a 'criminal law-enforcement agency'.

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16 Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, Schedule 2 – 2(3).

17 Responses to questions on notice, Senate Education and Employment Legislation Committee, Budget Estimates 2011–2012:  
[http://www.aph.gov.au/~media/Estimates/Live/eet\\_ctte/estimates/bud\\_1112/answers/EW0119\\_12.ashx](http://www.aph.gov.au/~media/Estimates/Live/eet_ctte/estimates/bud_1112/answers/EW0119_12.ashx);  
[http://www.aph.gov.au/~media/Estimates/Live/eet\\_ctte/estimates/bud\\_1112/answers/EW0120\\_12.ashx](http://www.aph.gov.au/~media/Estimates/Live/eet_ctte/estimates/bud_1112/answers/EW0120_12.ashx);  
[http://www.aph.gov.au/~media/Estimates/Live/eet\\_ctte/estimates/bud\\_1112/answers/EW0122\\_12.ashx](http://www.aph.gov.au/~media/Estimates/Live/eet_ctte/estimates/bud_1112/answers/EW0122_12.ashx)

18 Building and Construction Industry (Improving Productivity) Bill 2013, Chapter 2, Part 2, Section 19(1)(d).



1.30 In the last dissenting report to this Bill, the Labor Senators included a section titled 'The ABCC has no power in criminal matters', which suggested that as the ABCC has no criminal jurisdiction, any argument that the agency would quell organized crime in the building and construction industry was deliberately misleading.

1.31 Obviously these recent developments demonstrate that the FWBC, ahead of the passage of these bills, does wish to become a criminal law-enforcement agency with access to unrestricted metadata. This adds to the argument made by Labor Senators that the FWBC, when it is renamed to the ABCC, wishes to be to building and construction workers what ASIO is to terrorists.

1.32 Labor Senators call on the Government to ensure the FWBC or the ABCC are not granted unrestricted access to metadata.

### **The Bills have the potential to breach Australia's commitment to its trading partners**

1.33 To proactively legislate against the UN's International Labour Organisation (ILO) conventions is unacceptable action by the Australian Parliament.

1.34 The former BCII Act was found repeatedly and unequivocally by the ILO to constitute a serious breach of Australia's obligations both as a member-state and as a signatory to specific conventions including the *Freedom of Association and Protection of the Right to Organise Convention, 1947 {No. 87}*, the *Right to Organise and Collective Bargaining Convention, 1949 {No. 98}* and the *Labour Inspection Convention, 1947 {No. 81}*.

1.35 The ACTU gives evidence in its submission to this inquiry that:

...the most significant change in environment has been Australia's recent adoption of the *Korea-Australia Free Trade Agreement* and the *Trans Pacific Partnership Agreement*. Through those instruments, Australia has re-stated its commitment to its trading partners to the very international labour rights that the International Labour Organization has found the ABCC laws to have violated. For the Government to knowingly and so enthusiastically renege on those commitments, particularly so soon after re-stating them, is enormously disappointing and potentially damaging to our trading relationships.<sup>19</sup>

1.36 This is of particular concern with regard to the Trans Pacific Partnership. The substantive obligations under Chapter 19 of that agreement provide that Australia:

- Affirms its obligations as a member of the ILO; and
- Specifically commits to adopt and maintain in its statutes and regulations and practices, the rights of freedom of association and the effective recognition of the right to collective bargaining as stated in the

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19 Australian Council of Trade Unions, *Submission 2*, p. 2.

Declaration on Fundamental Principles and Rights at Work and its Follow-up.<sup>20</sup>

1.37 It is therefore particularly unacceptable that the same Government that argued the case for Australia to sign onto these agreements is now actively legislating in breach of those agreements.

**The Australian Building and Construction Commission would see an increase of workplace injuries and deaths**

1.38 Under this legislation, the ABCC could seek to have any workplace meeting deemed illegal (including one related to OHS) and fine workers who attend \$36 000 each and the union \$180 000 if it called the meeting, or did anything outside the narrow definition of 'protected action'. Evidence provided to the Committee argues that this would impact on worker's motivation to report and have investigated workplace health and safety matters.<sup>21</sup>

1.39 Labor Senators remind the Committee that data from the Australian Bureau of Statistics suggests that close to 10 per cent of all workplace injuries occur in the construction industry, and that between 2013 and 2014 over 50 000 people in that industry suffered a work related injury.<sup>22</sup> In 2014, the construction industry accounted for 16 per cent of workplace fatalities.<sup>23</sup> In 2015 the industry accounted for 13 per cent, and to date accounts for almost 27 per cent of workplace fatalities.<sup>24</sup>

1.40 Should we assess the widening of the scope contained in this bill to transport and logistics, the statistics increase markedly, to 41 per cent of all fatalities in 2014, 42 per cent in 2015, and shockingly more than half (53 per cent) of all fatalities this year to date.<sup>25</sup>

1.41 Labor Senators argue that these statistics should be of far more concern to the Committee than demonstrated by the Chair's draft report.

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20 Department of Foreign Affairs and Trade, *Summary of the Trans-Pacific Partnership Agreement*, p. 9, <https://dfat.gov.au/trade/agreements/tpp/Documents/summary-of-the-tpp-agreement.pdf> (accessed 9 March 2016).

21 Australian Council of Trade Unions, *Submission 2*, p. 5.

22 Australian Bureau of Statistics, *Work-Related Injuries, Australia Jul 2013 to Jun 2014*, Catalogue No. 6324.0, Table 4, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6324.0> (accessed 9 March 2016).

23 Safe Work Australia, *Work Related Traumatic Injury Fatalities, Australia 2014*, October 2015.

24 Safe Work Australia, Worker fatalities, <http://www.safeworkaustralia.gov.au/sites/swa/statistics/work-related-fatalities/pages/worker-fatalities> (accessed 9 March 2016).

25 Safe Work Australia, Worker fatalities, <http://www.safeworkaustralia.gov.au/sites/swa/statistics/work-related-fatalities/pages/worker-fatalities> (accessed 9 March 2016).



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## **The Building and Construction Industry (Fair and Lawful Building Sites) Code**

1.42 In the Second Reading Speech for the Bills, the Government confirmed that its 2014 Building and Construction Industry (Fair and Lawful Building Sites) Code (Code) was to take effect concurrently to these Bills. Labor Senators therefore wish to note that the Code would result in any Enterprise Bargaining Agreement (EBA) linked with Commonwealth-funded work to align to certain conditions.

1.43 The Code will remove worker's ability to access shift-allowances, and will prohibit:

- any clauses that prevent unlimited ordinary hours worked per day,
- guaranteeing the days off on Christmas Day and Easter Sunday, Public holidays and;
- the inclusion of guaranteed stable and secure shift arrangements or rosters.

1.44 It is worth noting the evidence of the Electrical Trades Union with regard to the impact of the Code:

... the construction industry has a number of characteristics that are potential workplace stressors that may affect workplace health and safety, including long hours, tight deadlines, severe financial penalties if targets are not met, non-permanent employment, six day working weeks (sometimes thirteen-day fortnights), early starts, as well as the intrinsic dangers arising from working at heights, and with heavy equipment and electricity. Stress through work and associated work-life interference have been shown to be associated with problems in wellbeing, psychological strain, psychiatric disorders and substance abuse. Thus mental health is a major safety issue in construction. Through much of the 2000s, the age standardised suicide rates of male construction workers in New South Wales and Queensland were well above the general population in those states, though finally in 2012, after considerable program activity (the 'MATES' program in Queensland) suicide rates in Queensland construction fell to the state average.<sup>26</sup>

1.45 Importantly for young and older workers, it would also remove any references to encouraging apprentices or discouraging discrimination against mature workers.

1.46 The Code will prohibit any clauses that will impact on the rights of construction workers to have a safe workplace. The prohibition on agreements including safe working hours will lead to more deaths and injuries and more exploitation.

1.47 During the operation of the former ABCC, fatalities for all workers increased by more than 25 per cent, while fatalities for construction workers skyrocketed from an average of 2.5 fatalities per 100 000 to almost five fatalities per 100 000 workers.

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26 Electrical Trades Union of Australia, *Submission 18*, p. 22.

1.48 The Code also states that enterprise agreements with building companies cannot contain terms to ensure that labour hire workers are not discriminated against in their rates of pay for doing the same work, and that enterprise agreements with builders cannot insist on only skilled, trained tradespeople doing dangerous work.

### ***Conclusion***

1.49 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**

**1.50 That in view of the *now repeated* failure of the government and proponents of the re-establishment of the ABCC to:**

- **establish an economic or productivity case for the ABCC;**
- **address the very serious incursions on human rights in the bills;**
- **establish the uniqueness of the building and construction industry sufficient to warrant draconian powers and penalties;**
- **establish that the coercive powers proposed for the ABCC are subject to sufficient oversight and safeguards; and**
- **establish that the ABCC would improve occupational health and safety in the building and construction industry;**

**The Senate not support the re-establishment of the Australian Building and Construction Commission and, accordingly, not pass the Building and Construction Industry (Improving Productivity) Bill 2013 [no.2] and related bill.**

**Senator Sue Lines  
Deputy Chair**