Review of the Building and Construction Industry (Improving Productivity) Act 2016

Submission of the Australian Council of Trade Unions, 10 April 2018

About the ACTU

1. Since 1927 the Australian Council of Trade Unions (**ACTU**) has been the peak trade union body in Australia. There is no other national confederation representing unions. Governments have consulted with the ACTU in the development of almost every legislative measure concerning employment relations over the ACTU's 90 year history. The ACTU consists of 43 affiliated unions and state and regional trades and labour councils, who between them have approximately two million members engaged across a broad spectrum of industries and occupations in the public and private sector. All of the unions that represent the interests of workers in the building and construction industry are affiliated to the ACTU.

Introduction

2. The ACTU thanks Jaguar Consulting for the opportunity to make this submission to the review of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**BCIIP Act**).

3. However the ACTU has several concerns about the review process which, in our view, give rise to an inference that the process is biased in favour of the Government's interests. First, the review claims to have sought input 'from a range of stakeholders', but none of the unions that represent the interests of workers in the building and construction industry were invited to make a submission. Not even the Construction, Forestry, Mining and Energy Union (**CFMEU**), which continues to be the main target of the Australian Building and Construction Commission (**ABCC**) and which is clearly a key stakeholder, was contacted by the review nor made aware that the review was occurring. Second, in terms of process, the ACTU notes with concern the short timeframe provided for the review, particularly given that the Minister was on notice of the requirement in s 119A of the BCIIP Act for the review to occur. Finally, s 119A requires 'a review into the operation of this Act', but the terms of reference are narrower than the general review contemplated by s 119A and do not include an assessment of the operation of the BCIIP Act against its object.

4. The ACTU submits that the operation of the BCIIP Act has not achieved its object as set out in s 3. In particular, the workplace relations framework established under the BCIIP Act is not operating 'without distinction between interests of building industry participants' or 'for the benefit of all building industry participants'. The words 'without distinction between interests of building industry participants' were introduced to make clear that the framework should no longer operate in a discriminatory manner against unions and workers, but the ABCC is continuing to target unions and to fail to protect workers (discussed further under heading 1 below). Further, the operation of the BCIIP Act is: preventing 'genuine bargaining', by imposing artificial restrictions on the matters that parties can agree to include in their bargains;[1] failing to improve work health and safety in building work, largely because of an undermining of the role of unions in work health and safety;[2] doing nothing discernible to encourage youth employment or the engagement of apprentices;[3] and, in respect of wages and entitlements, utterly failing to promote respect for the rule of law or for the rights of unions and workers.[4]

[1] BCIIP Act, s 3(a) (discussed further under heading 4 below).
[2] BCIIP Act, s 3(f) (discussed further under headings 5 and 6 below).
[3] BCIIP Act, s 3(g) (discussed further under heading 5 below).
[4] BCIIP Act, s 3(b) and (c); see, also, BCIIP Act, s 16(1)(ba), (2) and (3)(a) (discussed further under heading 1 below).

The nature of the building and construction industry

5. In order to properly understand these failings of the BCIIP Act and, in particular, of the ABCC as the regulator established under the BCIIP Act, it is important to understand the nature of the building and construction industry. The building and construction industry is characterised by poor work health and safety and low rates of employer compliance with employee wages and entitlements obligations. High rates of insolvency and sham contracting compound these issues.

6. The most important issue facing workers in the building and construction industry is poor workplace safety. The construction industry had the third highest rate of fatalities on average of the last ten years (2007-2016)[5] and had the fourth highest incident rate of serious workplace injury claims per 1000 workers in 2012/13.[6] Seven construction industry workers have been killed at work this year already (to 29 March 2018).[7]

7. In 2014/15, the Fair Work Ombudsman (**FWO**) undertook a targeted campaign of the building and construction industry in response to the high rates of contraventions of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) within the industry.[8] As part of the campaign, the FWO audited the compliance of 700 businesses nationally.[9] The campaign found that only 59 percent of employers were compliant with all requirements.[10] Twenty-five percent of employers were not paying their employees correctly and 23 percent were not meeting their record keeping and pay slip obligations.[11]

8. When the Fair Work Building Commission (**FWBC**) was pursuing underpayments for a short period prior to October 2013, many breaches of industrial laws by employers were uncovered. For example, in the 2012-2013 reporting period, the FWBC recovered wages and entitlements totalling $1,622,853.89 for 1363 construction workers.[12] In that year, the greatest number of investigations of all categories of investigations undertaken by the FWBC (31 percent) was in the category of wages and employee entitlements.

9. In 2015, the Senate Economic References Committee undertook an inquiry into insolvency in the construction industry. The inquiry found that the industry's high rate of insolvencies is attributable in large part to 'harsh, oppressive and unconscionable commercial conduct … combined with criminal conduct and a growing culture of sharp business practices'.[13] The inquiry further found a culture in which 'contempt for the rule of law is becoming all too common' and company directors 'consider compliance with the corporations law to be optional, because the consequences of non-compliance are so mild and the likelihood that unlawful conduct will be detected is so low'.[14] The inquiry identified that workers are one of the main groups of victims of this conduct. Workers are 'a particularly vulnerable category of creditor in the event of corporate failure' and risk losing considerable entitlements built up over many years, including superannuation, annual leave, long service leave and

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[5] Safe Work Australia, *Fatality Statistics by Industry* < https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>.
[6] Safe Work Australia, *Construction Industry Profile*, May 2015.
[7] Safe Work Australia, *Fatality Statistics by Industry* < https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>.
[8] Fair Work Ombudsman, *National Building and Construction Industry Campaign 2014/15 Report*, July 2015, 4.
[9] Ibid.
[10] Fair Work Ombudsman, *National Building and Construction Industry Campaign 2014/15 Report*, July 2015, 3.
[11] Ibid.
[12] FWBC Annual Report 2012-2013, 31.
[13] Senate Economic References Committee, *'I just want to be paid': Insolvency in the Australian Construction Industry*, December 2015, *xvii*.
[14] Ibid, *xix.*

redundancy payments.[15] In its submission to the inquiry, the Australian Securities and Investments Commission noted that, across all categories of unpaid employee entitlements and across all ranges of amounts owing, 'the construction industry consistently rates as either the highest or second highest as against all other industries'.[16]

10. In 2011, the CFMEU undertook a detailed study of sham contracting in the building and construction industry, and estimated that between nine and 16 percent of persons working in the industry were sham contractors and that the tax leakage attributable to sham contracting was in the order of $2.457 billion per annum.[17]

11. The deliberate or negligent use of non-conforming building products, and the use of building products in a manner not in compliance with the National Construction Code, is widespread in the industry. Even employer organisations acknowledge the severity of the problem. For example, on the issue of fraudulent certification and other problems with certification reliability, the Senate Economic References Committee's current inquiry into non-conforming building products has heard evidence from Master Builders Australia, the Australian Industry Group, the Australian Window Association, the Building Products Innovation Council, the Australian Institute of Building Surveyors, the Housing Industry Association, the Australian Steel Institute, the Engineered Wood Products Association of Australasia, the National Electrical and Communications Association about the extent of the problem.[18] In addition to employer organisations, the Australian Building Codes Board and the certifiers themselves such as SAI Global and CertMark International have acknowledged the problem of fraudulent certification.[19]

12. Yet in the face of these pressing issues, the ABCC continues to target unions and workers and does little to address misconduct and law breaking by employers in the industry. According to international legal standards, the primary purpose of a government industrial inspectorate is 'to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons'.[20] The ABCC fails to meet this brief.

13. The Australian union movement has for many years questioned the motivation and wisdom of having a separate inspectorate for the building and construction industry. We again call for the repeal of this politically-motivated law, which was designed to attack the construction unions and their members and to promote the economic interests of large construction companies and property developers at the expense of workers' rights.

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[15] Ibid, 32-33.
[16] Ibid, 33.
[17] CFMEU Construction & General Division, *Race to the bottom: Sham contracting in Australia's Construction Industry*, March 2011.
[18] CFMEU Answers to questions taken on notice from a public hearing of the Senate Economic References Committee Inquiry into Non-Conforming Building Products on 14 July 2017, 13 October 2017, <https://www.aph.gov.au/DocumentStore.ashx?id=d1130cb0-3226-4190-bcfe-6deb7794847b>.
[19] Ibid.
[20] ILO Convention 81, Labour Inspection in Industry, Part 1, Article 3.

1 – The performance of the ABCC of its 'full service regulator' function

14. The types of matters that are investigated and prosecuted by the ABCC show a strong bias towards targeting alleged conduct by unions and workers, while widespread wage theft and the unlawful denial of employment entitlements continue to characterise the industry. The ABCC has for many years chosen to ignore its statutory functions in respect of enforcing employer compliance with wages and entitlements obligations[21] and has instead focussed its resources on attacking unions, in particular the CFMEU, and workers.

15. In the face of its statutory mandate to enforce laws applying to *all* building industry participants, the ABCC adopted the view that enforcing wages and entitlements obligations and investigating sham contracting was not its 'core business', and that it would only investigate such matters if they arose in conjunction with freedom of association issues and the like.[22] From October 2005 to June 2011, the ABCC brought a total of 86 prosecutions against unions and union officials, compared to a mere five prosecutions against employers in the same period.[23] In the period 1 July 2009 to 30 June 2010, there were 29 prosecutions brought against unions and union officials and *none* brought against employers.[24] From 1 July 2010 to 1 June 2011, the prosecution of unions still outnumbered the prosecution of employers by almost three to one.[25] This total failure to carry out its wages compliance functions occurred even before the then Minister for Workplace Relations, Senator Eric Abetz, made the extraordinary request on 12 November 2013 that the then FWBC transfer its wages compliance functions to the FWO – despite it being a clear statutory function of the FWBC.[26]

16. With the reinstatement of the ABCC in 2016 came legislative amendments that were intended to address its partisan and politicised operation. These amendments can be broadly grouped into three categories, discussed below: first, a requirement that the ABCC apply a reasonable and proportionate balance to enforcing employer compliance with wages and entitlements obligations and regulating building industry participants' industrial activities;[27] second, a requirement that the Commissioner perform his or her functions in an apolitical and impartial manner;[28] and third, additional reporting requirements to enable an assessment of the ABCC and the Commissioner's performance against these requirements.[29] Despite these amendments, the ABCC continues to prioritise the interests of building employers ahead of unions and workers and is manifestly failing to perform its 'full service regulator' function.

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[21] BCIIP Act, s 16(3)(a).
[22] Hansard, Senate Education and Employment Legislation Committee, Estimates, 21 November 2013, 70-71.
[23] Senate Standing Committee on Education Employment and Workplace Relations, Questions on Notice Additional Estimates 2010-2011, Question No.EW0675_11.
[24] Ibid.
[25] Ibid.
[26] ABCC Answer to question on notice from Senator Doug Cameron in a Senate Standing Committee on Education and Employment Budget Estimates 2017-18 hearing, 20 May 2017 <https://www.aph.gov.au/~/media/Committees/eet_ctte/estimates/bud_1718/Employment/Answers/SQ17-004185.pdf> and, for a copy of the request, see: <https://www.aph.gov.au/~/media/Committees/eet_ctte/estimates/bud_1718/Employment/Answers/SQ17-004185-Correspondence-Attachment.pdf>.
[27] See: the reference to 'without distinction between building industry participants' in s 3(1); the inclusion of 'ensuring building employers and building contractors comply with their obligations under this Act, the designated building laws and the Building Code' in the Commissioner's functions in s 16(1)(ba); the requirements for the Commissioner's allocation of resources etc in s 16(2); and the inclusion of 'wages and entitlements' in the list of Fair Work Act provisions that the Commissioner must perform his or her functions in relation to in s16(3).
[28] See: the requirement that the Minister only appoint as Commissioner a person who will perform his or her functions in an apolitical manner and act impartially and professionally in s 21(3)(c) and the power of the Minister to terminate the appointment of a Commissioner who fails to perform his or her functions with impartiality in s 28(1)(c).
[29] See: the requirement for greater disclosure of the types of matters pursued via the new reporting requirements in s 20.

(1) A reasonable and proportionate balance

17. In the most recent quarterly reporting period for which the report has been publicly released (1 July to 30 September 2017), 'wages and entitlements' and 'misclassification/sham contracting' constituted only 24.39 and 7.32 percent respectively of investigations open during the period.[30] The balance of investigations was into alleged 'coercion', 'unlawful industrial action', 'freedom of association' and 'right of entry'.[31] The conduct of employers was the subject of investigation in 27 matters, but only 18 of those pertained to wages and entitlements or misclassification and sham contracting.[32] Five examination notices were issued, none of which related to wages and entitlements or misclassification and sham contracting.[33] Two proceedings were commenced, both against the CFMEU or CFMEU officials.[34]

18. This trend is consistent. In the 1 April to 30 June 2017 period, 'wages and entitlements' and 'misclassification/sham contracting' constituted only 15.85 and 6.1 percent respectively of investigations open during the period.[35] Only six of 34 matters in which the conduct of the employer was the subject of the investigation related to 'wages and entitlements' or 'misclassification and sham contracting'.[36] No proceedings were commenced, but the ABCC became involved in two proceedings in the Fair Work Commission, objecting to the grant of right of entry permits to two CFMEU officials.[37] In the 1 January to 31 March 2017 period, 'wages and entitlements' and 'misclassification/sham contracting' constituted only 12.35 and 4.93 percent respectively of investigations open during the period.[38]

1. At a Senate Estimates hearing on 2 March 2017, then Commissioner Nigel Hadgkiss admitted that the CFMEU was the respondent in 57 of 62 proceedings brought by the ABCC that were currently before the courts.[39] The Communications, Electrical and Plumbing Union was the respondent in one matter. Employers were the respondent in only four matters. Mr Hadgkiss told the hearing that, as at 27 February 2017, the ABCC had six matters before the courts involving employers and there had recently been three matters whereby employers had been penalised by the courts following ABCC action. When asked to characterise what sort of contraventions by employers cause the ABCC to take action against them, Mr Hadgkiss said, 'The six cases are generally coercion and the taking of adverse action. On one occasion, it was a payment of strike pay.' None of the cases involved a failure to pay wages or entitlements or misclassification and sham contracting.

2. The ABCC commenced a total of 42 proceedings in the 2015-16 and 2016-17 reporting periods. *Not one* related to 'wages and entitlements' or 'misclassification and sham contracting'.[40] The ABCC secured $4,219,200 of penalties awarded in those periods, of which only $19,250 was for failure to pay correct wages and entitlements (0.45 percent).[41] Of the $1,802,675 m in penalties awarded in proceedings brought by the ABCC in 2015-16, 95 percent were against the CFMEU.[42] This lack of prosecution of employers is remarkable given that the very high rate of non-compliance among employers in the industry, and given that the FWO recovered a total of

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[30] ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 7.
[31] ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 7.
[32] ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 11.
[33] ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 15.
[34] ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 13.
[35] ABCC, *Quarterly Report – Fourth quarter of 2016-17: operations from 1 April to 30 June 2017 inclusive*, 7.
[36] ABCC, *Quarterly Report – Fourth quarter of 2016-17: operations from 1 April to 30 June 2017 inclusive*, 11.
[37] ABCC, *Quarterly Report – Fourth quarter of 2016-17: operations from 1 April to 30 June 2017 inclusive*, 13.
[38] ABCC, *Quarterly Report – Third quarter of 2016-17: operations from 1 January to 31 March 2017 inclusive*, 7.
[39] Hansard, Senate Education and Employment Legislation Committee, Estimates, 2 March 2017, 102.
[40] ABCC, *Annual Report 2016-17*, 24.
[41] .Ibid, 25.
[42] Ibid.

$6,076,325 in unpaid wages and entitlements between 1 July 2013 and 4 October 2016 – despite not being the industry regulator.[43]

3. None of the eight 'significant' cases prosecuted by the ABCC that were finalised in the 2016-17 reporting period (as described in the ABCC 2016-17 Annual Report) related to wages and entitlements or misclassification and sham contracting.[44] The CFMEU was the respondent in every case, except one in which a CFMEU official was the respondent. The dearth of litigation in respect of wages and entitlements and misclassification and sham contracting occurred despite 'higher than planned external legal expenses as the ABCC had continued agency-wide focus on enhanced compliance and litigation activities which resulted in increased litigation in the Federal Court and the Fair Work Commission'.[45]

4. Ms Cathy Cato, while Acting Commissioner of the ABCC, is on record as stating that 'to change any culture and change any type of behaviour … you need a stick—a big stick. When that big stick doesn't hurt, then it's hard to change behaviour.'[46] It is curious then that the ABCC has been so reluctant to use its 'big stick' in order to change the culture of non-compliance with wages and entitlements obligations amongst employers in the industry. For example, the Commissioner of the ABCC has made only one recommendation to the Minister that a sanction be imposed on a building contractor or building industry participant for failure to comply with the *Code for the Tendering and Performance of Building Work 2016* (**Building Code**). The exclusion was recommended for breaches generally pertaining to alleged 'freedom of association' issues such as allowing a 'no ticket, no start' sign to be displayed on a worksite. The Commissioner has made no such recommendations in respect of companies that have failed to comply with the Fair Work Act in relation to the underpayment of an employee's wages or entitlements.[47]

(2) An apolitical and impartial Commissioner

5. The Federal Court very recently handed its decision in 'The Cup of Tea Case',[48] in which the ABCC prosecuted two CFMEU officers for having a cup of tea with a union delegate. Justice North was scathing in his criticism of the ABCC and Mr Hadgkiss. He was reported in the *Financial Review* as saying, during the course of the hearing, that it was:

> *… "astounding" that commissioner Nigel Hadgkiss had briefed silk and conducted days of hearing with dozens of participants, including Australian Federal Police, over "such a miniscule, insignificant affair".*
>
> *"This is all external forces that are beating up what's just a really ordinary situation that amounts to virtually nothing," he said.*
>
> *"For goodness sake, I don't know what this inspectorate is doing."*
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> *He said when the ABCC "use[s] public resources to bring the bar down to this level, it really calls into question the exercise of the discretion to proceed".*

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[43] Department of Employment, 'Responses to questions taken on notice by the Department of Employment', Senate Education and Employment Committee, *Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013, and the Fair Work (Registered Organisations) Amendment Bill 2013*, 4 October 2016.
[44] ABCC, *Annual Report 2016-17*, 25-29.
[45] Ibid, 55.
[46] Hansard, Senate Education and Employment Legislation Committee, Estimates, 27 October 2017, 90.
[47] The Commissioner is empowered to do so by clause 18(1)(a)(ii) of the Building Code.
[48] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case)* [2018] FCA 402.

…

Justice North said he was "surprised the matter has come back, frankly". "I must say it's a terrible waste of everybody's time."[49]

6. In his Honour's reasons for dismissing the ABCC's application for declarations of contraventions and the imposition of pecuniary penalties, Justice North described the case as '*excitare fluctus in simpulo*' (a 'storm in a teacup').[50] On 30 May 2017, the ABCC gave evidence to a Senate Estimates hearing that the cost of the case to the ABCC was $146,177.10 to date.[51]

7. Justice North's criticism of Mr Hadgkiss underscores the partisan and politicised way in which he performed his role as the Commissioner, which in turn reflects on the structure and operation of the ABCC as a whole. In evidence to a Senate Estimates hearing on 2 March 2017, Mr Hadgkiss stated explicitly that, in his view, the reason for 100 percent union membership on building and construction sites is coercion and cartel behaviour.[52] Mr Hadgkiss did not have the ideological capacity to accept that workers may choose to join their union for the benefits the union provides.

8. It should have come as no surprise therefore when Mr Hadgkiss admitted in Federal Court proceedings against him to causing incorrect information to be provided, purportedly advising employers on 'what to do when a union official comes onto your site', in breach of s 503 of the Fair Work Act.[53] ABCC emails showed that Mr Hadgkiss had declined to amend the information in the belief that the incoming Coalition Government would follow through on its declared aim to reverse laws introduced by the previous Labor Government.[54] Describing his conduct as 'serious', Justice Collier ordered Mr Hadgkiss to pay a penalty set at approximately 87 percent of the maximum. Her Honour said:

The Director admitted to contravening a law he was required to police. The consequence of his conduct was the dissemination by the FWBC – at his direction – of false information to the industry of which the FWBC was not only the regulator, but supposedly a trustworthy source of reliable information for industry participants. Making matters worse, the wrongdoing was exacerbated by the fact that right of entry is commonly a source of industrial dispute in a frequently volatile industrial environment. Indeed the Director has not hesitated to commence legal proceedings against the CFMEU in circumstances where the FWBC alleges CFMEU officers or agents infringe rights of entry on to building sites.[55]

9. The ABCC's then Deputy Commissioner, Anthony Southall QC, resigned shortly after Mr Hadgkiss' resignation, issuing a statement which said, 'In the circumstances Mr Southall desires to totally disassociate himself from the conduct of Mr Hadgkiss, and considers that he had no alternative but to resign his position as deputy commissioner.'[56] Representatives of the ABCC gave evidence to a Senate Estimates hearing that the total cost to the taxpayer of the litigation defending Mr Hadgkiss was more than $436,000.[57]

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[49] David Marin-Guzman, 'Judge turns on ABCC for wasting time over 'cup of tea' CFMEU incident', *Financial Review*, 13 March 2017.
[50] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case)* [2018] FCA 402, [82].
[51] Hansard, Senate Education and Employment Legislation Committee, Estimates, 30 May 2017, 171.
[52] Hansard, Senate Education and Employment Legislation Committee, Estimates, 2 March 2017, 142.
[53] *Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166.
[54] *Workplace Express*, 'ABCC says Hadgkiss has already paid "high price" for breach', 15 September 2017.
[55] *Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166, [43].
[56] *Workplace Express*, 'ABCC in-house counsel quits over Hadgkiss conduct', 23 October 2017.
[57] Hansard, Senate Education and Employment Legislation Committee, Estimates, 1 December 2017, 70-71.

10. The ACTU is concerned about whether any real change in the biased operation of the ABCC will be realised with the appointment of the new Commissioner, Mr Stephen McBurney. At a recent Senate Estimates hearing on 28 February 2018, in response to a question about the ABCC's education and awareness programs, Mr McBurney said:

> *If the law is observed on building sites, if we can reintroduce and reinforce the rule of law on building sites, one of my main aims is that a worker can turn up at a building site and go about his work free from harassment, intimidation or bullying, be able to choose whether or not to join an association, and be able to carry out his work, much as most of us turn up to work each day without facing coercion or the threat of unlawful industrial action. So our education is really pitched at ensuring that all building industry participants understand their legal rights and obligations.*[58]

11. Mr McBurney's comments suggest that the ABCC will continue to maintain its disproportionate focus on unions. He says nothing about the right of a worker to attend for work knowing that they will receive their correct wages and entitlements – let alone whether their employment contract will be correctly classified, whether they will be safe at work, whether they will have a job to go to, or whether the subcontractor that employs them will be able to pay them on time or keep them in work (or will instead be waiting on the head contractor to pay them). Mr McBurney was previously Deputy Commissioner to Mr Hadgkiss.

(3) Transparent reporting

12. Amendments to the ABCC's reporting requirements in s 20 of the BCIIP Act were moved by Senators Nick Xenophon and Derryn Hinch to enable an assessment of the ABCC and the Commissioner's performance against the requirements discussed above. However the operation of these reporting requirements has revealed that they are ineffective in enabling a proper assessment.

13. First, they do not capture the requisite level of detail. For example, a report that an investigation was open in which the main allegation being investigated was 'right of entry' does not indicate whether, for example, the allegation was that a union official contravened their right of entry obligations by failing to give the proper notice of their visit, or that an employer contravened the obligation by interfering with the exercise of a union official's entry.[59] Detail of the category of building industry participant (as defined in s 5 of the BCIIP Act) that each investigation or compliance action is targeting, along with the nature of the allegations, should be provided.

14. For wages and entitlements contraventions, the quarterly reports provide the number of matters under investigation but do not provide detail of the total shortfall of the wages and entitlements alleged, or how many employers and workers the allegations involve. The ABCC officers came unprepared to provide this information at the Senate Estimates hearing on 28 February 2018 but took the question on notice. Answers to the questions on notice are due by 12 April 2018.

15. In addition, the quarterly reports do not provide sufficient detail to assess whether the ABCC is enforcing compliance with the Building Code in a fair and unbiased manner. For example, in the quarterly report for the period ending 30 September 2017, the ABCC reported that it had finalised eight Building Code audits (with six audits finding 'potential issues') and undertook 59 Building Code inspections (with 13 issues identified) in the period. Not only are the nature of the issues identified not reported on, but again the ABCC officers present at the Senate Estimates hearing on 28 February 2016 were unable to provide this information. Consequently the extent

[58] *Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166, [43].
[59] See, eg, Table a)(i) of ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 7.

of the issues identified and acted upon in relation to issues such as work health and safety, labour market testing, security of payments, sham contracting and disputed payments or compliance with the *Migration Act 1958* (Cth) (**Migration Act**) cannot be assessed. The questions were taken on notice but answers are not due until 12 April 2018.

16. In respect of compliance with the migration-related Building Code requirements, we note that the ABCC has indicated that it is undertaking a 'desktop auditing' of code-covered entities' compliance with clause 11F by writing to them all to ask what they are doing.[60] This information should be published so that the effectiveness of s 34(2D) of the BCIIP Act can be assessed. Similarly, the ABCC has indicated that it undertakes 'a lot of co-compliance activities around the migration issue'.[61] Further information needs to be provided about these 'co-compliance activities', including the number of referrals between agencies, the number, nature and outcome of resulting prosecutions and the number, nature and outcome of any compliance actions taken by the ABCC.

17. Second, there have been significant delays in the production of the reports. For the quarter ending 31 December 2016, the report was provided to the minister on 8 February 2017. For the quarter ending 31 March 2017, the report was provided on 19 May 2017. For the quarter ending 30 June 2017, the report was provided on 16 August 2017. For the quarter ending 30 September 2017, the report was provided on 8 January 2018 – three months and eight days after the end of the quarter. On 28 February 2018, Ms Cato, Deputy Commissioner Operations and Code of the ABCC, gave evidence at a Senate Estimates hearing that the report for the quarter ended 31 December 2017 had not yet, to the best of her knowledge, been provided to the Minister.[62] Certainly the report has not yet been publicly released. Given that it is now April 2018, it seems clear that the reporting delays cannot be attributed to staff leave or confusion about whom the responsible Minister was (as Ms Cato claimed).[63]

18. Section 20 of the BCIIP Act needs to be amended to ensure that the reporting requirements are sufficient to enable a proper assessment of the ABCC's performance in respect of the matters above and to ensure that the reporting occurs in a timely fashion. Commissioner Burney has indicated that he will not report on anything more than the minimum that he is required to report on under the BCIIP Act.[64]

Summary

19. The overwhelming majority of the ABCC's investigations and prosecutions concern the alleged conduct of unions and workers. This fact is not accidental; it is the result of a policy decision of the ABCC to direct its resources toward union-related matters. Yet the laws that the ABCC is enforcing against unions and workers are laws that the International Labour Organisation (**ILO**) has repeatedly found to be contrary to Australia's commitments to comply with international legal standards. This point was made by the ILO's Committee of Experts as early as February 2010:

> *The Committee considers that the prosecution of workers does not constitute part of the primary duties of inspectors and may not only seriously interfere with the effective discharge of their primary duties – which should be centred on the protection of workers under Article 3 of the Convention – but also prejudice the authority and impartiality necessary in the relations between inspectors and employers and workers. This is even more so when the laws on the basis of which the workers are prosecuted have been repeatedly found by this Committee to be*

[60] Evidence of Ms Cathy Cato, Deputy Commissioner Operations and Code, ABCC to the Senate Education and Employment Legislation Committee (Estimates), 28 February 2018, Proof Committee Hansard, 119.
[61] Ibid.
[62] Ibid, 116.
[63] Ibid, 117.
[64] Ibid, 120.

contrary to other international labour standards, notably Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).[65]

20. The focus on enforcing these broken laws is also concerning because it represents a diversion of resources away from tackling the widespread problems of wage theft and denial of employment entitlements that are endemic to the industry. In February 2011, the ILO's Committee of Experts said:

> *Noting with concern that the manner in which the ABCC carries out its activities seems to have led to the exclusion of workers in the building and construction industry from the protection that the labour inspection system ought to secure for these workers under the applicable laws, the Committee urges the Government to ensure that the priorities of the ABCC (or the Fair Work Building Industry Inspectorate) are effectively reoriented so that labour inspectors in the building and construction industry may focus on their main functions in full conformity with Article 3(1) and (2) of the Convention.*[66]

21. These comments echo the recommendations of the Royal Commission into the Building and Construction Industry in 2003. Commissioner Cole recommended that the ABCC adopt a greater role in the enforcement of employee entitlements,[67] provide representation for employees who had been underpaid[68] and monitor and report on mechanisms that would improve this process for employees.[69]

22. It is disappointing to say the least that the Government continues to ignore this mandate some seven or eight years after the ILO's recommendations and some 15 years after the Cole Royal Commission. The limited legislative amendments that were directed toward encouraging the ABCC to be a 'full service regulator' have failed spectacularly. It is important to remember that the myopic focus of the regulator on conduct involving unions is occurring in the context of an industry in which the FWO, responding to high rates of complaints from workers about not being paid their correct wages and entitlements, conducted a national audit and found that only 59 percent of employers comply with their obligations to employees. It is not that employer wrongdoing does not occur; it's that the regulator chooses not to see it.

2 – Independent oversight of the compulsory examination powers

23. Under the BCIIP Act, the Commissioner of the ABCC can inquire into and investigate any act or practice by a building industry participant that might be contrary to a designated building law, a safety net contractual entitlement or the Building Code. As part of such an investigation, the Commissioner can apply to a nominated presidential member of the Administrative Appeals Tribunal for an examination notice, which may require its recipient to: give information to the Commissioner; produce documents to the Commissioner; or attend before the Commissioner to answer questions relevant to an investigation. These are the 'compulsory examination powers'.

24. The Commissioner is required to notify the Commonwealth Ombudsman (**Ombudsman**) after an examination notice has been issued and provide copies of relevant documents. After the examination is completed, the Commissioner is required to give the Ombudsman a report about the examination, and a video recording and transcript of the examination. The Ombudsman is required to review the exercise of these powers by the Commissioner and any person assisting the Commissioner and to report quarterly to the Parliament about examinations conducted by the ABCC and the results of reviews conducted by the office of the Ombudsman.

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[65] ILO Observation (CEACR) - adopted 2009, published 99th ILC session (2010) Labour Inspection Convention, 1947 (No. 81).
[66] ILO Observation (CEACR) - adopted 2010, published 100th ILC session (2011) Labour Inspection Convention, 1947 (No. 81).
[67] Recommendation 157, Final Report, vol 1.
[68] Recommendation 159, Final Report, vol 1.
[69] Recommendation 163, Final Report, vol 1.

25. The Ombudsman's independent oversight is intended to provide safeguards and public accountability in the application of these compulsory examination powers. Such mechanisms are particularly important given that the compulsory examination powers limit the right to privacy contained in Article 17 of the International Covenant on Civil and Political Rights,[70] and given also the misuse of these and other investigative powers by the ABCC in the past. For example, in March 2017, Justice North was critical of the then Commissioner Mr Hadgkiss for adopting, during a compulsory examination, 'a partisan approach rather than the neutral approach proper for the investigative process'.[71] His Honour described Mr Hadgkiss' approach as 'really inexcusable, I have to say, for an investigator.'[72]

26. Additional problems have become evident or underscored since the compulsory examination powers came into operation. First, the Ombudsman can only make recommendations retrospectively, on review of the exercise of the powers *after* 'the liberties of an individual may have already been negatively impacted'.[73] The Ombudsman has no power to oversee the application of the powers in real time so as to correct problems as they arise. In contrast, a subpoena process is subject to the immediate supervision of a court.

27. Second, the Ombudsman has no power to enforce its recommendations. For example, the Ombudsman has repeatedly recommended that the Commissioner should not express a preference to an examinee that the examinee not disclose information or answers given at the examination or matters relating to the examination with any other person.[74] This recommendation has been made in the context that the BCIIP Act specifically prohibits the Commissioner from requiring such confidentiality. The prohibition was included in the BCIIP Act in response to significant concerns about secret interrogations raised by the community and the legal profession. Notwithstanding, the Commissioner has repeatedly refused to adopt this recommendation.

28. Third, the Ombudsman's reports are not readily accessible or easy to find, which inhibits their effectiveness in ensuring public accountability in the application of the compulsory examination powers. The reports should be made available through the ABCC website (and not only the Ombudsman website) and should be displayed in a more prominent manner so that they are easier to find by interested persons.

29. Fourth, the BCIIP Act requires that the reports be presented to Parliament 'as soon as practicable after the end of each quarter of each financial year' and report on examinations conducted during that quarter. The reports for the periods 1 July 2016 to 31 March 2017 (which was a transitional period following the reinstatement of the

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[70] Explanatory Memorandum to the *Building and Construction Industry (Improving Productivity) Bill 2013*, 2016, 60-62.

[71] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 197, [148]. Although the Full Court later commented that it 'would have been better had his Honour not described the Director's conduct in these pejorative terms', they accepted that Justice North engaged in a 'careful examination of the evidence'. The Full Court did not express an opinion as to whether or not they agreed with Justice North's concerns. See, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15, [82]-[84]. In 2007, Senior Deputy President Watson of the then Australian Industrial Relations Commission made similar criticism of ABCC Inspectors having conducted an investigation and interviews in a manner that 'cast Mr McLoughlin in the worst possible light, rather than to provide full evidence as to the manner in which Mr McLoughlin exercised his right of entry on to sites': *Australian Building and Construction Commission* [2007] AIRC 717, [79].

[72] *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Castlemaine Police Station Case)* [2018] FCAFC 15, [65].

[73] Law Council of Australia, submission to the Senate Education and Economics Legislation Committee, *Re-establishment of the Australian Building and Construction Commission*, 19 February 2016, 8.

[74] See, eg, Commonwealth Ombudsman, *Quarterly report by the Commonwealth Ombudsman under s 65(6) of the Building and Construction Industry (Improving Productivity) Act 2016*, for the period 1 July 2016 to 31 March 2017, 1; Commonwealth Ombudsman, *Annual report by the Commonwealth Ombudsman: In accordance with Chapter 7, Part I, Division 3 of the Fair Work (Building Industry) Act 2012*, for the period 1 July 2015 to 30 June 2016, 1.

ABCC) and 1 April 2017 to 30 June 2017 were not released until March 2018. According to the ABCC's quarterly reports, five examination notices were issued in the period 1 July to 30 September 2017,[75] but some six months later the Ombudsman is still yet to release it report in respect of this period. These delays again inhibit the effectiveness of the reports in ensuring public accountability in the application of the powers. The reports should be required to be publicly released, including on the ABCC website, as soon as practicable after the end of each quarter of each financial year.

30. The ACTU has already made extensive submissions about the inadequacies of the safeguards and public accountability in the application of the compulsory examination powers in the BCIIP Act.[76] We reiterate our earlier submissions on this issue, enclosed for ease of reference.

3 – Whether penalties are acting as a deterrent

31. The ACTU again refers the review to the disturbing rates of non-compliance with wages and entitlement obligations in the industry and, in particular, the industry's ongoing appalling safety record.

4 – Interaction with other Commonwealth legislation and application of the Building Code

***Migration Act 1958* (Cth)**

32. The application of the recruitment obligations regarding the employment of foreign workers in the BCIIP Act and the Building Code need to be clarified where they overlap with obligations in the Migration Act.

33. There is an error in s 34(2D) of the BCIIP Act. Section 34(2D) of the BCIIP Act provides that 'the Building Code must include provisions ensuring that no *person* is employed to undertake building work' unless certain labour market testing requirements set out in s 34(2D)(a)-(d) are met.[77]

34. The related provision of the Building Code attempts to correct this error. Clause 11F of the Building Code provides that 'A code covered entity must ensure that no person *that is not an Australian citizen or Australian permanent resident (within the meaning of the Migration Act 1958)* is employed to undertake building work for the code covered entity' unless the labour market testing requirements are met.[78] Section 34(2D) of the BCIIP Act should be amended to reflect the clarifying wording in clause 11F of the Building Code.

35. There is a Note at the end of clause 11F of the Building Code which reads: 'Note: The *Migration Act 1958* and its subordinate legislation contain requirements relating to the engagement of persons that are not Australian citizens or Australian permanent residents.' The Explanatory Statement for the Building Code says, 'The note directs the reader to obligations under the *Migration Act 1958* in relation to the engagement of persons that are not Australian citizens or Australian permanent residents.'

36. The Note and the Explanatory Statement are causing confusion. They appear to have been misinterpreted as meaning that a person who is not an Australian citizen or Australian permanent resident (within the meaning of

[75] ABCC, *Quarterly Report – First quarter of 2017-18: operations from 1 July to 30 September 2017 inclusive*, 15.
[76] See, eg, ACTU submission to the Senate Education and Employment Legislation Committee inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013*, 19 February 2016; ACTU submission to the Senate Standing Legislation Committee on Education and Employment inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, 22 November 2013, enclosing the ACTU submission to the Wilcox Consultations on the Proposed Building and Construction Division.
[77] Emphasis added.
[78] Emphasis added.

the Migration Act) can be employed to undertake building work without the labour market testing requirements in clause 11F of the Building Code being met if any exemptions from any labour market testing requirements apply under the Migration Act (for example, if the person is on a student or working holiday visa). The labour market testing requirements in clause 11F of the Building Code are arguably stronger than the equivalent requirements in the Migration Act. The Note should be amended to clarify that the labour market testing requirements in clause 11F of the Building Code must be complied with *in addition to* any requirements relating to the engagement of persons that are not Australian citizens or Australian permanent residents in the Migration Act.

***Fair Work Act 2009* (Cth)**

37. Clauses 11(1) and 11(3) of the Building Code have the effect of prohibiting code-covered entities from being covered by an enterprise agreement that includes clauses that would otherwise be permitted under the Fair Work Act. These include clauses that provide for union or worker participation in decision making about matters that affect them in the workplace, such as work health and safety or the introduction of major changes that are likely to have a significant effect on employees, or that seek to bolster employee job security, such as clauses requiring that labour hire and direct hire employees receive equivalent terms and conditions.

38. These sorts of clauses were expressly contemplated in the Explanatory Memorandum to the Fair Work Act[79] and their legitimacy under the Fair Work Act has been routinely upheld by the courts.[80] It is a nonsense that these clauses are permitted under the Fair Work Act but excluded for one part of the Australian workforce only under the Building Code.

39. Further, these clauses have attracted significant criticism as incompatible with Australia's commitments under international human rights law, from the Parliamentary Joint Committee on Human Rights, the UN Committee on Economic, Social and Cultural Rights and the ILO Committee of Experts on the Application of Conventions and Recommendations.[81] It is unsurprising therefore that the operation of clauses 11(1) and 11(3) is resulting in comparatively reduced wages and entitlements for workers in the building and construction industry.[82] These clauses should be repealed immediately.

40. In addition, we note that, when the bill to amend the BCIIP Act to its current form was being debated in Parliament on 15 February 2017, the then Minister for Employment, Senator Cash, was asked whether the following enterprise agreement clause would comply with the Building Code if the bill were enacted:

> *In the event of redundancies required during the life of the agreement, in occupational classifications where both Australian workers and temporary foreign workers are employed temporary foreign workers will be made redundant first, given that temporary foreign workers are intended to supplement the Australian workforce.*

41. The Minister's unequivocal answer was, 'Yes',[83] but the ABCC has released guidance on the Building Code which states that this enterprise agreement clause is not compliant with clauses 11(1)(a)-(b) and 11(3)(c) and (h) of the Building Code.[84] That the clauses are not operating in a manner consistent with the commitments made by

[79] See, eg, paragraph [672].
[80] See, eg, *AIG v Fair Work Australia* [2012] FCAFC 108; *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470.
[81] Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report*, Report 2 of 2018, 13 February 2018, 48-59.
[82] See, eg, the submission of the Electrical Trades Union to this review.
[83] Senate Hansard, debate on the *Building and Construction Industry (Improving Productivity) Amendment Bill 2017*, In Committee, 15 February 2017.
[84] ABCC, 'ABCC Agreement Clauses', 2017 <https://www.abcc.gov.au/building-code/eligibility-tender/preliminary-review/abcc-agreement-clauses?combine=foreign&field_code_reference_tid=All&field_advice_category_tid=All&items_per_page=10>.

the Minister about the legislation at the time that it was being debated in Parliament is further reason for the clauses to be repealed.

Freedom of association under international law

42. Recently the ABCC's interpretation of clause 13 of the Building Code has attracted significant controversy.[85] The clause has already attracted criticism as incompatible with the right to freedom of association and the right to freedom of expression under international laws to which Australia has committed itself.[86] The clause should be repealed.

5 – The operation of new provisions in the BCIIP Act

Security of Payments Working Group

43. 'Security of payments' relates to the right of subcontractors to be paid promptly for the work they do in the building and construction industry. The 2015 Senate Economic References Committee inquiry into insolvency in the construction industry identified that the current approach to security of payment in the industry was fragmented and disparate. The inquiry repeated the recommendation of several earlier inquiries, dating back to 1995, that:

> *…the completely unacceptable payment practices in the construction [industry] has to end. The continued viability of the industry in its current structure requires Commonwealth intervention to ensure that businesses, suppliers and employees that work in the industry's subcontracting chain get paid for the work they do.*[87]

44. The Security of Payments Working Group (**Working Group**) was established under the BCIIP Act as a result of amendments proposed by Senators Xenophon and Hinch in order to secure their support for the BCIIP Act being passed. In support of these amendments, Senator Xenophon said:

> *If we are to be serious about the issue of productivity and bad behaviour in the construction sector, the issue of security of payments is fundamental to that. We cannot simply talk about the behaviour of some in the union. We also need to talk about the behaviour of a number of principal contractors and the way that people have been left in the lurch, the way that many thousands of subcontractors have not been paid and have not been treated fairly and that many have been driven to either the brink of bankruptcy or actual bankruptcy.*[88]

[85] See, eg, Peter Fitzsimmons, 'Ban on the most Australian symbol of them all an outrage, *The Sydney Morning Herald*, 6 February 2018.
[86] Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report*, Report 2 of 2018, 13 February 2018, 59-72.
[87] Senate Economic References Committee, *'I just want to be paid': Insolvency in the Australian Construction Industry*, December 2015, *xviii*.
[88] Senator Nick Xenophon, *Building and Construction Industry (Improving Productivity) Bill 2013*, Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, Second Reading Speech, 28 November 2016.

45. Senator Hinch made similar comments:

> *One major area is the protection of sub-contractors—the subbies. Too often, they are left holding the bag. Confected disputes over supposedly shoddy work or missed completion deadlines can see money—earned money—going from A to B but not getting to C. Sometimes it is a case of robbing Peter to pay Paul in a stalling tactic which might otherwise see a boss guilty of trading while insolvent. A fast-track tribunal hearing with the disputed money held in trust is good idea and a possible solution, I believe.*[89]

46. The Working Group is charged with monitoring the impact that the ABCC has on improving compliance with security of payments obligations and making recommendations about policies, procedures or programs that could improve compliance.[90] In May 2017, the then Minister for Employment, Senator Cash, appointed 11 members to the group. There is only one employee representative, who was appointed from the ACTU (compared to four employer and five employee representatives). To date, the Working Group has met three times, with the next meeting scheduled for May 2018. The ACTU representative and the Subcontractors Alliance have raised serious concerns that the ABCC is not doing nearly enough to address the widespread problem of security of payments.

47. One of the main problems with the ABCC's approach is the way that it defines a 'disputed or delayed progress payment'. Under clauses 11(D)(1)f) and 11E(1)(d) of the Building Code, a code-covered entity must report any disputed or delayed progress payment to the Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due. The term 'disputed or delayed progress payment' is not defined in the Building Code. However, the ABCC has made an internal decision to define a 'disputed payment' as a payment that has been referred to adjudication, and a 'delayed payment' as a payment not paid in accordance with the timeline determined by the adjudicator.[91] The ACTU and the Subcontractors Alliance have repeatedly raised concerns that this approach excludes the vast majority of problems that the ABCC should be looking at – that is, payments which are genuinely disputed or delayed, but which have not yet been formally referred to adjudication.

48. In a discussion paper provided to the Working Group, the ABCC argued that they cannot monitor whether payments are made in a reasonable and timely manner as they do not have the expertise to resolve contractual disputes about payments. They claim that a trigger for intervention prior to adjudication would 'open the floodgates' and swamp the ABCC with so many complaints that it would be unmanageable for them. We do not accept that this is a sufficient reason for the regulator to fail to perform its statutory function. On the advice of the Working Group, the ABCC is developing an education package intended to explain to subcontractors their rights under security of payments laws. However, no moves have been made to change the definition of disputed or delayed progress payments. Until this happens, the ABCC cannot be said to be taking the problem seriously.

49. On 21 December 2016, the Government announced a national review of security of payment laws by John Murray AM to consider the different approaches taken to security of payment laws across Australian jurisdictions. Mr Murray provided his report to the Department of Jobs and Small Business on 22 December 2017. As at 28 February 2018, the Department was yet to provide a copy of the report to the Minister.[92] It has not yet been provided to the Working Group, nor has the Government confirmed whether it will be made public. We hope and expect that the report will recommend – and the Government will adopt – the long-overdue and wide-ranging reform necessary to harmonise national security of payments laws and improve compliance.

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[89] Senator Derryn Hinch, *Building and Construction Industry (Improving Productivity) Bill 2013*, Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, Second Reading Speech, 22 November 2016.
[90] BCIIP Act, s 32A(2).
[91] ABCC, 'Security of Payments', March 2017, < https://www.abcc.gov.au/building-code/security-payments>.
[92] Hansard, Senate Education and Employment Legislation Committee, Estimates, 28 February 2018, 40, 88.

Youth employment and engaging apprentices

50. The BCIIP Act aims to achieve its main object in partly by 'encouraging youth employment with an emphasis on engaging apprentices'.[93] This provision was introduced by way of a range of amendments to the 2013 bill introduced by the cross-bench that enabled the Government to have the bill passed. Yet there is not one mention of the word 'youth' or 'apprentice' in the ABCC's corporate plan for 2016-17 or 2017-18, its regulator performance framework, or any of the four quarterly reports that the ABCC has released to date. The ABCC's annual report for 2016-17 mentioned apprentices once, in a sentence which says that the ABCC gave targeted presentations at TAFEs. There is no transparent reporting by which to measure the BCIIP's Act performance against this object.

51. Clause 11(3)(a) of the Building Code prohibits enterprise agreement terms that prescribe 'the number of employees or subcontractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time'. Out of concern about the impact on apprentices, a note to the clause says, 'This does not prevent the inclusion of clauses in an enterprise agreement that encourage the employment of apprentices.'

52. Nonetheless, the ABCC has ruled that enterprise agreement terms which mandate a ratio of apprentices to tradespeople are not code compliant. For example, the ABCC has deemed the following term inconsistent with clauses 11(1)(a) and 11(3)(a) of the Building Code:

> *Apprentices are the future of our industry and the parties reaffirm their commitment to the training of apprentices. Further they shall make every endeavour to make full time apprenticeships available with the company. The employer will employ at least 1 apprentice for every 8 tradespeople employed.*

53. In contrast, we have no knowledge of the extent to which the ABCC is enforcing clauses 24(2)(d) of the Building Code, which requires companies when tendering, '…to demonstrate a positive commitment to the provision of appropriate training and skill development for their workforce', or clause 24(2)(e), which requires companies when tendering to, '… include details of the number of current apprentice and trainee employees … that are engaged by the respondent, and that are intended to be engaged by the respondent to undertake the Commonwealth funded building work'. In any event, even if the ABCC is enforcing these clauses, they are a poor substitute for the requirement of ratios in enterprise agreements (let alone a procurement policy that actively favours the use of apprentices).

The Federal Safety Commissioner

54. As outlined above, the most important issue facing workers in the building and construction industry is poor workplace safety.

55. The Federal Safety Commissioner has various statutory functions designed to promote work health and safety in the building and construction industry, including administering the voluntary Work Health and Safety Accreditation Scheme and auditing compliance with National Construction Code performance requirements in relation to building materials.

56. Our affiliates have reported to us that the presence of the Federal Safety Commissioner (and Federal Safety Officers) is invisible in the industry and that direct requests for assistance or intervention in particular safety issues of relevance to the Federal Safety Commissioner's remit have not been met.

[93] BCIIP Act, s 3(2)(g).

57. It is entirely appropriate that a company's work health and safety record and compliance with the National Construction Code be taken into account when awarding public contracts. However, for several reasons the Federal Safety Commissioner is not able to perform his statutory functions in s 38 of the BCIIP Act effectively or to bring about real change in the industry.

58. First, the Federal Safety Commissioner is not valued or resourced appropriately in order to be effective. The office of the Federal Safety Commissioner has only 28 staff, along with 27 consultants engaged as Federal Safety Officers.[94] This amount of personnel is insufficient to effect change, especially because the accreditation scheme is voluntary.

59. Second, an unaccredited company is only prevented from acting as a head contractor undertaking Commonwealth-funded projects, not as subcontractor (in contrast to an exclusion sanction under the Building Code). This limitation reduces the incentive to gain and maintain accreditation.

60. Third, the Federal Safety Commissioner will not publish the name of a company that loses accreditation (again, in contrast to an exclusion sanction under the Building Code). This protection reduces the incentive to maintain accreditation.

61. The recent Senate Standing Committee on Economics inquiry into non-conforming building products found that the Federal Safety Commissioner does not have adequate resources or expertise to carry out its new statutory function to audit compliance with the National Construction Code performance requirements into building materials.[95] The inquiry also found that loss of accreditation is not a strong enough penalty for non-compliance with the National Construction Code.[96]

62. The inquiry recommended that, 'the Commonwealth government ensure the Federal Safety Commissioner is adequately resourced to ensure the office is able to carry out its duties in line with the new audit function and projected work flow'.[97] The inquiry also recommended that, 'the Commonwealth government consider imposing a penalties regime for non-compliance with the National Construction Code such as revocation of accreditation or a ban from tendering for Commonwealth funded construction work and substantial financial penalties'.[98] We repeat these recommendations.

6 – The ABCC and work health and safety

63. The ABCC does not directly regulate work health and safety in the building and construction industry, but it has significant capacity to impact on workplace health and safety outcomes in the industry.

64. Clause 9(3) of the Building Code requires that code-covered entities comply with work health and safety laws, including work health and safety training requirements and asbestos safety requirements and strict compliance with procedures for the election of health and safety representatives and right of entry requirements.[99] The Commissioner of the ABCC is empowered to refer any code-covered entity that has failed to comply with the Building Code, including because of a failure to comply with work health and safety laws, to the Minister with

[94] Office of the Federal Safety Commissioner, *Regulator Performance Framework 2016-17 Report,* 7.
[95] Senate Economics References Committee, inqiry into non-conforming building products, *Interim report: aluminium composite cladding*, September 2017, *xii*.
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Clause 9(3) of the Building Code.

recommendations that a sanction be imposed.[100] As noted, the Commissioner has made one such recommendation, and that was in respect of a company that allowed a 'no ticket, no start' sign to be displayed on a worksite. The Commissioner has made no such recommendations in respect of companies that have failed to comply with work health and safety laws, despite there having been seven reported deaths in the industry this year alone.[101]

65. Part of the problem is that, rather than actively monitoring compliance with clause 9(3) as part of the inspection and audit regime, the ABCC will only act if there has been a court decision that a code-covered entity has contravened a work health and safety law. This approach contrasts the ABCC's approach in other areas where it will actively refer matters for enforcement. It significantly diminishes the potential for the Building Code to effect real change in improving work health and safety in the industry, as was recently explained by Ms Cato in a Senate Estimates hearing, '…As you can imagine, it takes some time for these matters to go through the courts, so, by the time there's a court outcome, it's usually two or three years after the event, so it will take a little while for the power of the code and the sanction that can also apply to the company to be able to be put in place for those OHS breaches.'[102]

66. Finally, there is significant Australian and international evidence that a union presence in a workplace is positively associated with improved work health and safety.[103] The operation of the BCIIP Act, and the ABCC, works to undermine the role of unions, which will have an adverse impact on work health and safety outcomes. This undermining happens in a range of ways, from the failure of the ABCC to act as a 'full service regulator'[104] to the application of the Building Code restricting the inclusion of clauses in enterprise agreements that facilitate union and worker participation in work health and safety matters.[105]

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[100] Clause 18(1)(a)(i) of the Building Code.

[101] Safe Work Australia, *Fatality Statistics by Industry* < https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>.

[102] Hansard, Senate Education and Employment Legislation Committee, Estimates, 28 February 2018, 118.

[103] See, eg, Maureen F Dollard*, Daniel Y Neser, 'Worker Health is Good for the Economy: Union Density and Psychosocial Safety Climate as Determinants of Country Differences in Worker Health and Productivity In 31 European Countries' (2013) 92 *Social Science & Medicine*; Andrew Robinson and Clive Smallman, 'Workplace Injury and Voice: A Comparison of Management and Union Perceptions' (2013) 27 *Work, Employment & Society* 4; Theo Nichols, David Walters, Ali C. Tasiran, 'Trade Unions, Institutional Mediation and Industrial Safety: Evidence from the UK' (2007) 49 *Journal of Industrial Relations* 2; S Grazier *Compensating Wage Differentials for Risk of Death in Great Britain: An Examination of the Trade Union and Health and Safety Committee Impact* (2007) Working Paper 2007/02, Welsh Economy Labour Market Evaluation and Research Centre, Swansea University; Department of Trade and Industry, *Workplace Representatives: A Review of Their Facilities and Facility Time*, Consultation Document, January 2007; Theo Nichols, David Walters, Ali C Tasiran, *The Relationship between Arrangements for Health and Safety and Injury Rates – The Evidence-Based Case Revisited*, (2004) Working Paper Series Paper 48, School of Social Sciences, Cardiff University; Kwan Hyung Yi, Hm Hak Cho, Jiyun Kim, 'An Empirical Analysis on Labor Unions and Occupational Safety and Health Committees' Activity, Their Relation to the Changes on Occupational Injury and Illness Rate' (2001) 2 *Safety and Health at Work* 4; Andrew Robinson and Clive Smallman, *The Healthy Workplace?* (2000) Working paper 2000/05, Judge Institute of Management; Barry Reilly, Pierella Paci and Peter Holl, 'Unions, Safety Committees and Workplace Injuries' (1995) 33 *British Journal of Industrial Relations* 2.

[104] Discussed under heading 1 above.

[105] Discussed under heading 4 above.

67. There was a significant increase in the rate of workplace deaths in the industry during the first iteration of the ABCC (October 2005-June 2012) and a decrease after the ABCC was closed:[106]

	Fatality rate (deaths per 100,000 workers)												
Industry of employer	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Construction	4.50	3.98	5.25	5.36	4.11	4.02	4.33	4.07	3.1	2.2	3.1	3.3	3.3
All industries	2.95	2.57	2.78	2.93	2.57	2.33	1.99	1.94	2.0	1.8	1.7	1.8	1.5

68. Professor David Peetz has explained:

> *There were 36 fatalities in the construction industry in 2007-08, twice as many as in 2004-05, immediately before the ABCC commenced operations in late 2005. Under the ABCC, construction became the industry with the highest number of deaths. As observance with occupational safety tends to be lower where unions are weaker, this trend is not surprising.*[107]

69. Laws which foster joint management of work health and safety have a positive effect on work health and safety outcomes. Laws which cause workers to fear raising safety issues or which compromise their ability to voice safety concerns – including via their union representatives – have a negative effect on work health and safety outcomes. The BCIIP Act has done nothing to improve work health and safety in building work and will inevtitably have the opposite effect.

Conclusion

70. The workplace relations framework for the building and construction industry established under the BCIIP Act fails workers. The ABCC continues to target unions and union officials whilst critical issues such as poor work health and safety, poor compliance with wages and entitlements obligations, subcontractors not being paid for work performed, and misclassification and sham contracting continue to plague the industry. The ABCC is not performing its full service regulator function – yet another example of Australia's workplace laws failing to meet international labour law standards. Concerns remain around the role of the Commissioner being performed in a partial and political manner. The Building Code imposes special rules on bargaining that are damaging for workers, particularly in respect of issues such as job security, engagement of apprentices, work health and safety and worker participation in decision making about matters that affect their working lives. For all of these reasons and many more, the Australian union movement rejects the legitimacy of the BCIIP Act in its entirety.

71. In terms of the specific issues raised by the terms of reference for this review, we note:

    1) The ABCC is not performing its full service regulator function. The ABCC continued to target unions and union officials and to fail to adequately enforce wages and entitlements obligations or deal with misclassification and sham contracting. Concerns remain about the role of the Commissioner being performed in a partial and political manner. The legislative amendments designed to address these issues have not been effective. In addition, the quarterly reporting requirements need to be strengthened to require detailed, timely reporting that enables a proper assessment of the ABCC and the Commissioner's

[106] Safe Work Australia, *Work Related Traumatic Injury Fatalities, Australia, 2012*, 2013 Table 9, quoted in Anne Holmes and Jean Murphy, *Building and Construction Industry (Improving Productivity) Bill 2013 [and] Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*, Parliamentary Library Bills Digest No 34, 2013-2014, 23 January 2014, 9, and Safe Work Australia, *Fatality Statistics by Industry* <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry>.

[107] David Peetz, 'Gillard's other ABCC dilemma: making it work', *Crikey*, 15 June 2009.

performance as a full service regulator and its performance in monitoring and enforcing compliance with the Building Code.

2) The oversight of the compulsory examination powers does not allow real time oversight with the ability to correct problems as they arise (rather than making unenforceable recommendations after the fact). It would be preferable if these powers were abolished and replaced with the usual discovery and subpoena powers supervised by the courts. In the interim, the Ombudsman reports should be more easily accessible via the ABCC's website and be required to be published in a timely fashion.

3) In terms of the effectiveness of the penalties regime, the ACTU again refers the review to the disturbing rates of non-compliance with wages and entitlement obligations in the industry and, in particular, the industry's ongoing appalling safety record.

4) There needs to be a wholesale review of the Building Code and its interaction with other laws. In the meantime, at the very least:
   a) Clauses 11(1) and 11(3) of the Building Code ought to be repealed, to ensure consistency with the Fair Work Act and Australia's international obligations and to promote genuine bargaining.
   b) The Note to clause 11F of the Building Code needs to be amended to clarify the relationship between the Building Code and the Migration Act; that is, to clarify that employers must comply with the requirements in cause 11F in addition to any requirements in the Migration Act.
   c) The ABCC needs to adopt a proactive role in monitoring and enforcing compliance with clause 9(3) of the Building Code and its reporting obligations need to be strengthened to enable a proper assessment of its performance of this function.
   d) Clause 13 of the Building Code ought to be repealed, to ensure consistency with Australia's international obligations.

5) In terms of the operation of new provisions, including the Federal Safety Commissioner's new audit functions:
   a) The potential effectiveness of the security of payments provisions has been significantly limited by the ABCC's interpretation of the term 'disputed or delayed progress payment'.
   b) Clauses 11(1) and 11(3) of the Building Code hinders the engagement of apprentices. The ABCC's reporting requirements need to be strengthened to enable a proper assessment of its performance in promoting the engagement of apprentices.
   c) The office of the Federal Safety Commissioner needs to be adequately resourced to carry out its new functions. An effective penalties regime for non-compliance with the National Construction Code ought to be introduced, such as revocation of accreditation or a ban from tendering for Commonwealth funded construction work and substantial financial penalties.