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

Supplementary submission of the Australian Council of Trade Unions, 18 April 2018

Term of reference 1 – The performance of the ABCC's 'full service regulator' function

1. As our submission filed 10 April 2018 made clear, the Australian Building and Construction Commission (**ABCC**) is not performing its 'full service regulator' function in respect of enforcing building industry employers' compliance with wages and entitlements obligations and is instead disproportionately focussing its resources on prosecuting unions and workers. We wish to emphasise that the ABCC has a long history of targeting workers themselves, not only their unions:

   - One of the ABCC's most notorious prosecutions, in 2006, was the unprecedented prosecution of 107 individual workers for striking on the Perth to Mandurah railway construction project.[1] The workers took the strike action to protest the sacking of their union delegate. A total of 91 workers were fined up to $10,000 each.

   - The targeting of workers continued in 2008 when proceedings were bought against 117 workers for allegedly going on strike at the end of a project.[2]

   - In 2014, 76 workers were prosecuted who allegedly downed tools after the head contractor refused to provide an assurance that the workers would not have their pay docked because a prestart meeting attended by Construction Forestry Mining and Energy Union officials went four minutes over the scheduled work time.[3] The prosecution was brought one year after the event took place.

   - Also in 2014, 66 workers were prosecuted for stopping work for one hour in protest at their employer refusing to change the times that buses left the worksite each day to take the workers to their accommodation.[4] The prosecution was brought one year after the event occurred.

   - Another 21 workers were prosecuted in 2014 for taking industrial action following the sacking of their union delegate.[5] Proceedings were later discontinued against the individual workers.

   - The following year proceedings were also discontinued against one group of 51 workers[6] and another of approximately 40 workers[7] prosecuted for alleged industrial action.

   - With problems such as non-payment to subcontractors, pay disparity and safety issues rife across Perth construction sites, another 101 workers were prosecuted in 2015 for allegedly attending a union meeting almost two years earlier.[8] Charges against 28 of the workers were dropped 18 months later when the then Fair Work Building Commission realised that 28 of the workers were not rostered to work on the day in question. Ultimately findings were made against only 53 of the 101 workers.

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[1] *Hadgkiss v Aldin (No 2)* [2007] FCA 2069; 169 IR 76.
[2] *Australian Building & Construction Commissioner v Abbott (No 4)* [2011] FCA 950.
[3] *Director of the Fair Work Building Industry Inspectorate v Adams* [2015] FCA 828; *Adams v Director of the Fair Work Building Industry Inspectorate* [2017] FCAFC 228.
[4] *Australian Building and Construction Commissioner v Huddy* [2017] FCA 739.
[5] *Director of the Fair Work Building Industry Inspectorate v Bragdon & Ors* BRG318/2014.
[6] *Director of the Fair Work Building Industry Inspectorate v Hutchinson & Ors* BRG894/2014,
[7] *Director of the Fair Work Building Industry Inspectorate v Myles & Ors* BRG312/2015.
[8] *Australian Building and Construction Commission v McCullough & Ors* [2016] FCA 1291.

- In 2015, 51 workers were prosecuted for taking unlawful industrial action.[9] The workers were between seven and 22 minutes late to work after a union meeting to discuss being forced to work on a rostered day off. They were each docked four hours pay on top of the fines that were imposed on each of them.

- In 2015, the 23 workers prosecuted for a one day stoppage at a water treatment construction site.[10] The workers took the action after many examples of bullying and poor behaviour by the employer, who instead of using direct hire workers had a large labour hire presence on the site earning inferior money.

- In 2016, a further 52 workers were prosecuted, again for unlawful industrial action.[11]

2. The ABCC's willingness to prosecute individual workers for engaging in industrial action makes its unwillingness to prosecute employers for the types of misconduct that causes workers to take industrial action – such as a failure to pay proper wages and entitlements – even more shocking. We again note that the ILO has repeatedly criticised Australia's labour laws for not protecting the right to strike.[12]

3. It is important that the review appreciates the impact that legal proceedings have not only on the worker being prosecuted but on their family and home life as well. Legal proceedings are usually served to the person's home by a process server, often late in the evening, which can frighten and intimidate the worker's partner and children and cause unrest in the home. The legal process and threat of penalties is extremely stressful for the worker and their family.

4. We draw the review's attention to the ABCC's answer to a question on notice taken during the Senate Standing Committee on Education and Employment hearing on 28 February 2018. The question pertained to the 20 wages and entitlements obligations reported as being opened in the ABCC's quarterly report for the period first quarter of 2017-18. The ABCC has advised that of the 20 investigations: five remain open; four resulted in wage recoveries totalling $26,406 for nine employees from four employers; and 11 resulted in no wage recoveries.[13] We submit that these disappointing figures are further evidence of the unacceptably low level of investigation and compliance activity engaged in by the ABCC in enforcing compliance with wages and entitlements obligations in the building and construction industry.

Term of reference 4 – The application of the Building Code

5. This submission should be read in conjunction with our filed 10 April 2018. Paragraph [39] of that submission referred to clauses 11(1) and 11(3) of the *Code for the Tendering and Performance of Building Work 2016* (**Building Code**) causing reduced wages and entitlements for workers in the building and construction industry and called for those clauses to be repealed immediately. The purpose of this supplementary submission is to provide some specific examples of the ways in which that has occurred.

6. 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 terms that seek to bolster job security, such as clause requiring that labour hire workers receive equivalent or no less favourable terms and conditions to direct hire workers. The impact of the removal of these terms from enterprise agreements on wages and entitlements for workers in the building and construction industry has been immediate and dramatic.

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[9] *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 798.
[10] *Australian Building and Construction Commissioner v Mamudi* [2017] FCA 134.
[11] *Director of the Fair Work Building Industry Inspectorate v Ellen (The Longford Gas Plant Case)* [2016] FCA 1395.
[12] Geoffrey Giudice, 'The Right to Strike in Australia', has a useful summary of the ILO criticisms to 2015: <https://www.ilera2015.com/dynamic/full/IL126.pdf>.
[13] Department of Jobs and Small Business, Question No EMSQ18-000063.

Adelaide Medical Nursing School

7. The Adelaide Medical Nursing School was a $246m publicly-funded construction project. The electrical contractor on site was Nilsen (SA) Pty Ltd, a subsidiary of the national Nilsen Group.

8. Nilsen SA did directly engage some workers on this site. However, significant numbers were hired through labour hire company Red Appointments Pty Ltd. The differences in employment conditions were stark:

	Nilsen SA	Red Appointments
Overtime entitlements	1.5x for the first 3 hours 2x thereafter	None
RDOs	1 per fortnight	None
Personal or Sick leave	10 days per year	None
Annual Leave	20 days per year	None

9. Despite being engaged as casuals and therefore receiving a 25 percent loading, the take home pay of Red Appointments employees was $98 **less** than that of Nilsen SA employees in a typical week.

10. Both groups of workers were doing the exact same work, both were directed by Nilsen SA supervisors and both performed work for the ultimate benefit of Nilsen SA.

11. Absent the BCIIP Act and the Building Code, these workers would have been paid the same thanks to enterprise agreement terms that were prohibited by clauses 11(1) and 11(3).

Sydney Metro Northwest

12. The Sydney Metro Northwest is a $5b State Government-funded project building rail lines, stations and trains in Sydney's northwest.

13. The lead contractor onsite is MTCT, a subsidiary of United Group Ltd.

14. During negotiations for the MTCT enterprise agreement, there were 150 electricians engaged on the project, all working under MTCT's direction. Of these 150 electricians, only two were directly hired.

15. Through the course of bargaining, MTCT made clear that it was largely unconcerned with the rate of pay in its enterprise agreement. It was entirely flexible as to whether the work was performed via direct hire or via labour hire; it exercised the same control regardless. However, because of the BCIIP Act and the Building Code, it could refuse to agree to a clause that would require labour hire workers to be paid the same as direct hire workers. If the rate for direct workers under the enterprise agreement was higher, MTCT would simply not employ them and would use on labour hire instead.

16. The difference in rate between direct hire and labour hire workers was $18 per hour. Once overtime and rosters were factored in, direct hire workers would earn $20,000 per year more than the labour hire workers. Despite both groups of workers performing exactly the same work for the same company, most would earn $20,000 per year less.

17. Absent the BCIIP Act and the Building Code, these workers would have been paid the same.

18. Due to the fluctuations in the building and construction industry, most apprentices are engaged via group hire providers, which are essentially labour hire companies with a mentoring role for apprentices. Apprentices are the lowest paid electrical workers in the building and construction industry and the least able to effectively bargain.

19. Historically, the Electrical Trades Union has routinely negotiated enterprise agreements which require group training apprentices to be engaged on terms and conditions no less favourable than direct hire apprentices.

20. Since the commencement of the Building Code, this has been prohibited and group training apprentices are being engaged on Award terms. Again, the impact is dramatic:

Year	Award Rate	Union Agreement Rate	Award travel allowances	Union Agreement travel allowances	Weekly detriment *before* overtime
1st	$13.07	$21.98	$21.98	$33.90	-$191.84
2nd	$15.35	$22.56	$22.56	$37.70	-$357.28
3rd	$16.49	$22.85	$22.85	$41.50	-$646.15
4th	$19.24	$23.54	$23.54	$47.20	-$802.30

21. The differences are stark, particularly when considering the plight of a first year apprentice engaged under the Award. An hourly rate of $13.07 is below subsistence and effectively locks out whole classes of workers who cannot rely on support from their families from undertaking an apprenticeship.

22. Again, absent the BCIIP Act and the Building Code, these workers would have been paid the same.

23. These examples highlight the adverse impact the Building Code is having on wages and conditions in the building and construction industry.

ACTU D No. 81/2018