

Master Builders Australia

Submission to the Senate Education and Employment Standing
Committee

on

*Building and Construction Industry (Improving Productivity) Bill
2013 and the Building and Construction Industry
(Consequential and Transitional Provisions) Bill 2013*

27 September 2016



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1 Introduction

- 1.1 This submission is made on behalf of Master Builders Australia Ltd.
- 1.2 Master Builders Australia (Master Builders) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder State and Territory Associations. Over 126 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

2 Summary/Overview

- 2.1 This submission sets out Master Builders' position in support of re-establishing the Australian Building and Construction Commission (ABCC). The Government mandate for reform is even greater in this Parliament than the previous Parliament and we urge the Committee to recommend that the Bills be passed as a matter of urgency.
- 2.2 The building and construction industry is diverse and a major contributor to the Australian economy. The overwhelming majority of business entities in the sector are defined as small business (around 98%).
- 2.3 The ABCC is necessary to ensure Australian building sites are lawful and productive. No other sector has the level of disputation, history of unlawfulness or a toxic culture that is ingrained and where disregard for the law is institutionalised.
- 2.4 Since the February 2016 submission to earlier inquiries before this Committee, evidence demonstrating a need for the ABCC has continued to grow. Unlawful behaviour and disputation levels remain and have become worse.
- 2.5 The ABCC is necessary to support and protect small business sub-contractors, reduce the cost of much needed community and public infrastructure, boost productivity, restore the integrity of the law and the ability for it to be appropriately enforced, and reduce levels of industrial disputation.

- 2.6 Debate surrounding the ABCC has become mired in untruths and misleading statements. These are outlined and clarified to assist the Committee make objective findings about the Bills.

3 Purpose of Submission

- 3.1 This submission is made to the Senate Standing Education and Employment Legislation Committee to assist in its inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (together, the Bills).
- 3.2 Master Builders supports the passage of the Bills.
- 3.3 Master Builders supports the re-establishment of the ABCC and has consistently argued that a strong regulator is crucial for the building and construction sector. The ABCC is necessary to ensure compliance with the rule of law on building sites, to protect small business, and to deliver economic and productivity benefits to both the sector and the community more broadly.
- 3.4 This submission relies on, and should be read in conjunction with, several previous Master Builders' submissions to this Committee. These earlier submissions are as follows:
- 3.4.1 Master Builders Australia – Submission to the Senate Standing Education and Employment Legislation Committee on the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* – 22 November 2013 (**Attachment A**);
- 3.4.2 Master Builders Australia – Supplementary Submission to the Senate Standing Education and Employment Legislation Committee on the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* – 27 November 2013 (**Attachment B**);
- 3.4.3 Master Builders Australia – Submission to the Senate Standing Education and Employment Legislation Committee on the *Building and Construction Industry (Improving Productivity) Bill 2013* and the

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 – 17 January 2014 (**Attachment C**);

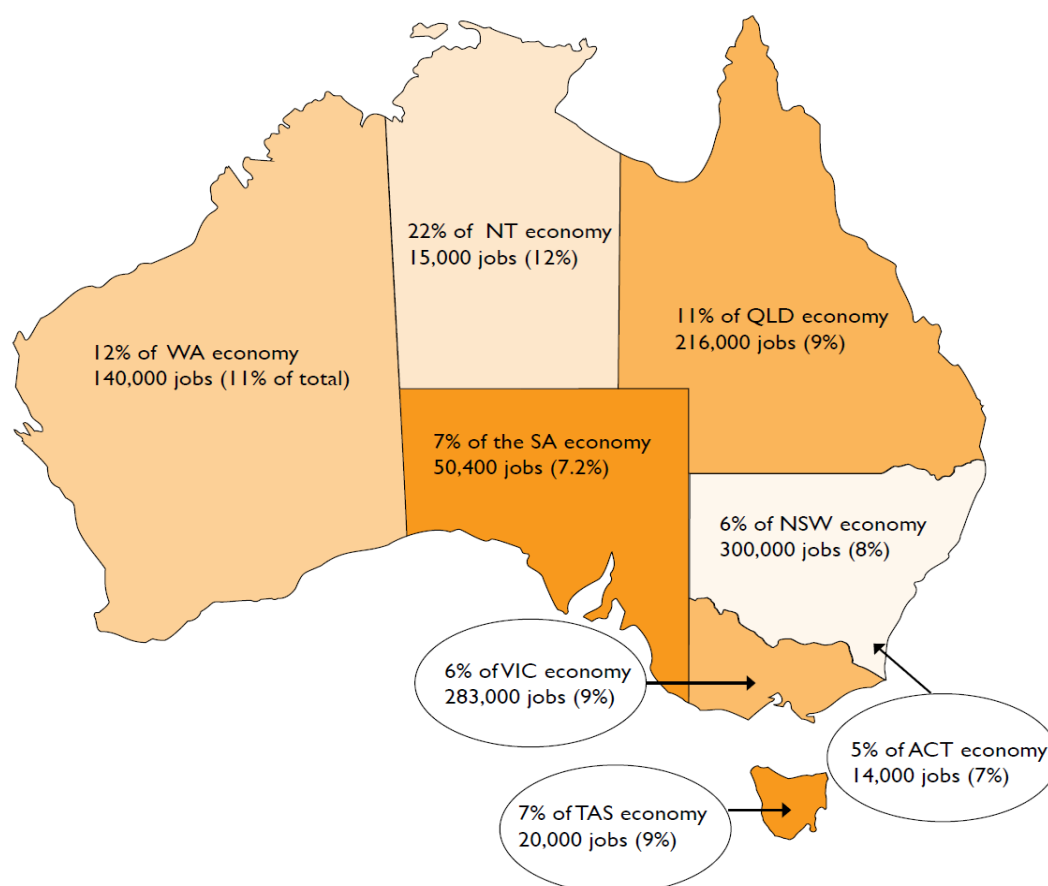
- 3.4.4 Master Builders Australia – Supplementary Submission to the Senate Standing Education and Employment Legislation Committee on the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* – 24 February 2014 (**Attachment D**);
- 3.4.5 Master Builders Australia – Second Supplementary Submission to the Senate Standing Education and Employment References Committee on the *Building and Construction Industry (Improving Productivity) Bill 2013* and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* – 14 March 2014 (**Attachment E**); and
- 3.4.6 Master Builders Australia – Submission to the Senate Standing Education and Employment Legislation Committee on 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]* – 19 February 2016 (**Attachment F**).

4 The Building and Construction Industry – Key Data

- 4.1 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.
- 4.2 The building and construction industry:
- Consists of over *340,000 business* entities, of which *98%* are considered *small* businesses (fewer than 20 employees);
 - *Employs over 1 million people* (around 1 in every 10 workers) representing the *third largest employing industry* behind retail and health services;
 - Represents over *8%* of GDP;

- *Trains more than half of the total number of trades based apprentices every year, being well over 50,000 apprentices; and*
- Performs building work each year to value that exceeds \$200 billion.

4.3 A graphical representation of the state by state breakdown of the economic and employment contributions attributable to the building and construction industry follows.



5 Government Mandate for Reform

5.1 Earlier Master Builders' submissions outlined our support for the notion that the Government has a mandate to implement its commitments insofar as they relate to re-establishing the ABCC. That support was given on the basis of the 2013 election commitment and the subsequent election of a Coalition Government.

- 5.2 The existence of a mandate to re-establish the ABCC should now be considered emphatic and absolute. The failure to gain successful passage of the ABCC Bills was a trigger for the dissolution of the last Parliament and the holding of an election. The re-election of a Coalition Government has reinforced the previous mandate and we urge the Committee to recommend that the Bills be passed as a matter of urgency.
- 5.3 There can be no clearer mandate than that which presently exists regarding the ABCC – it is a textbook example and we urge the Committee to find as such.

6 Why the ABCC is Necessary

Illegal behaviour continues and worsens

- 6.1 Earlier Master Builders' submissions established a basis on which the Bills should be supported through a detailed examination of the types of unlawful conduct frequently experienced in the building and construction sector. That conduct is unique to our sector and justifies the need for an industry specific industrial relations regulator.
- 6.2 Regrettably, the type of conduct referred to above has not subsided in the period subsequent to the lodgement of earlier submissions and has, in many respects, worsened. Although detailed later herein, a snapshot of relevant developments arising since February of 2016 is:
- Two additional sets of Australian Bureau of Statistics (ABS) data were released showing increased levels of days lost to industrial disputes. The most recent data showed the construction industry as having the highest number (16,200) representing two-thirds of the national total (24,500). This is a 400% increase over a twelve-month period, is six times worse than the next highest sector (manufacturing), and eighty times higher than the sector which traditionally experiences high numbers of days lost (mining).¹
 - Fair Work Building Construction (FWBC) has commenced 23 new proceedings for breaches of the law involving Adverse Action (six

¹ 6321.0.55.001 - Industrial Disputes, Australia, June 2016,

proceedings) Unlawful Industrial Action (five proceedings) Coercive Behaviour (eight proceedings) and Right of Entry (four proceedings).²

- The Federal Court issued over 25 separate decisions involving industrial law in the building and construction sector³ including one in which the Construction, Forestry, Mining and Energy Union (CFMEU) was labelled '*an embarrassment to the trade union movement*'.⁴
- Senior building industry union officials reportedly used the words '*We've got to get our hands dirty*' and '*You've got to break a few eggs to make an omelette*' at a union rally where it is alleged a non-union worker suffering a terminal disease was subsequently assaulted by a union official.⁵
- In March, a case in Queensland found building union officials entered a lunch shed, removed workers food from a fridge, then padlocked the door to the shed saying it was "*only for the use of union members*".⁶
- In August, the CFMEU in Melbourne was found to have not followed proper right of entry rules and refused to leave when asked. The Judge found this a "*demoralising lack of respect either for the law or their roles as officials*".⁷
- In April, the CFMEU and 15 union officials in Adelaide were fined for breaching entry laws, coercive conduct, and related breaches. These included unauthorised entry, accessing unsafe areas, becoming physical to force site entry, and coercion to force the flying of a union flag.⁸
- There are still over 100 building union officials before courts and tribunals facing over 1000 separate charges for alleged breaches of industrial law.

² <https://www.fwbc.gov.au/compliance-and-enforcement/outcomes-investigations/legal-cases>

³

<http://search2.fedcourt.gov.au/s/search.html?form=&collection=judgments&query=fair+work+building+inspectorate&f.Year%7CY=2016&f.Subject%7CS=industrial+law>

⁴ [2016] FCA 772 (1 July 2016)

⁵ "CUB Dispute: CFMEU boss John Setka urged workers to get 'hands dirty' at rally" Galloway A, Herald Sun, 16 September 2016

⁶ [2016] FCCA 488 (9 March 2016)

⁷ [2016] FCA 817

⁸ [2016] FCA 415 (22 April 2016), [2016] FCA 414 (22 April 2016), [2016] FCA 413 (22 April 2015)

- In the 2015–16 financial year, the courts issued \$1.826 million in penalties in FWBC cases. The vast majority were fines against the CFMEU (\$1.732 million). The CFMEU have been penalised over \$8.25 million in cases brought by the ABCC, the FWBC and their predecessors and building unions generally have been penalised over \$11 million in total. Despite this, the conduct continues.

It will help Small Business

- 6.3 Building and construction is one of the most important small business sectors; 95% of all businesses in the building and construction industry employ fewer than five people, while less than one per cent employ 20 or more. In broad terms small business accounts for around half of national employment and over one-third of GDP.
- 6.4 Reports regarding upcoming Sensis Business Index data suggest that small business is overwhelmingly in favour of the ABCC, with company owners almost three times more likely to support its restoration than not with well over half the respondents wanting it restored.⁹
- 6.5 The plight of small business and their experiences with illegal building union behaviour was a feature of the Final Report of the Heydon Royal Commission that cited numerous examples. These included being forced to pay cash, sign union EBAs, or pay for union memberships in order to get access to particular work or enter certain markets and when this was resisted the response was "*I don't give a f**ck about small business*".¹⁰
- 6.6 Other similar instances abound including one where a small business owner was cited as saying "*the CFMEU is crushing my small business*" and "*the union have had me sacked from five projects and stopped us winning two others. I believe we are black-banned by the union. We are a small player trying to grow, but we cannot get any work*" and "*All I see the CFMEU pushing upon me is money, money, money [and] memberships*".¹¹

⁹ "Small Business Overwhelmingly Wants Building Watchdog Back" Brown, G The Australian 21 September 2016

¹⁰ Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3, Chapter 6-3 at para 168

¹¹ Forget bias, CFMEU is out to 'destroy me': Site Service Group chief" Thomas, H – The Australian, 29 August 2016

- 6.7 The Final Report of the Heydon Royal Commission also noted that small business often fails to report or take action in response to building union behaviour, as they lack financial resources and fear ongoing consequences. The Royal Commission observed thus:

"But it is not difficult to imagine why a participant in the industry would not want to take action against the CFMEU. The participant might legitimately fear further disruption to their business as a result of litigation or involvement in it. The smear campaign planned by the CFMEU against witnesses to appear in this Commission, referred to later in this Report, suggests such fears would not be unfounded. There is the further point that, presently, the consequences for contravening many of the provisions of the Fair Work Act 2009 (Cth) are, for a union of the size and resources of the CFMEU, minimal. The consequences of litigation against the CFMEU for a small business can be fatal. The balance of financial power, considered as a source of the funds necessary to run complex litigation, greatly favours the CFMEU over small businesses."¹²

- 6.8 There are at least seven current instances where large building and construction businesses are subject to investigation and prosecution for refusing to engage small business building sub-contractors as they did not have a union approved enterprise agreement. Fines have been recorded against other builders and it is reported that additional further sanctions are being considered by the Minister for Employment.

- 6.9 In one recent decision, the following Judicial commentary was made in regarding the desire of small business sub-contractors wishing to obtain work with large construction companies:

"If the only way they can break into those circles is to have made an agreement with the CFMEU, then the whole fabric of our industrial relations system will disintegrate"¹³.

¹² Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 3, Chapter 6.1 at para 8

¹³ [2016]FCCA 2175

Community infrastructure costs will be reduced

- 6.10 It is estimated that the cost of delivering infrastructure in the absence of the ABCC is up to 30 per cent higher than it should be. A re-established ABCC will reduce the cost of much needed public infrastructure ensuring that taxpayers will achieve value for money and the community will receive more infrastructure delivered sooner.
- 6.11 A report from the Business Council of Australia (BCA) has broken down the extra costs of constructing different types of major projects in Australia versus the United States¹⁴. It found building in Australia attracted the following cost premiums:
- Hospitals – 62 per cent
 - Schools – 26 per cent
 - Airports – 90 per cent
 - Shopping centres – 43 per cent.
- 6.12 Infrastructure Australia commissioned research which found that Australian infrastructure projects were 40 per cent more expensive than the equivalent cost in the United States.¹⁵
- 6.13 Various Governments have announced an intention to invest and establish partnerships that will deliver in excess of \$125 billion investment into community and public infrastructure over the next ten years. 30 per cent of this \$125 billion equates to \$28.84 billion.
- 6.14 If this infrastructure investment occurs in the absence of the ABCC the cost to taxpayers will therefore be either:
- \$153.84 billion spent to deliver infrastructure worth \$125 billion; or
 - \$125 billion spent to deliver infrastructure worth \$96.16 billion.

¹⁴ Business Council of Australia, 'Pipeline or Pipe Dream? Securing Australia's Investment Future', June 2012

¹⁵ <http://theconversation.com/factcheck-does-building-hospitals-schools-and-airports-cost-more-in-australia-than-in-the-us-16540>

- 6.15 This means that governments around Australia will be spending \$2.88 billion each year that need not be spent. This is over \$55 million every week. Looked at another way, the absence of the ABCC costs almost \$2.30 (\$2.28) per week for every man, woman and child in Australia.

Productivity levels will benefit

- 6.16 Independent Economics continues to publish regular updates regarding the economic impact of the ABCC on productivity levels in the building and construction industry.

- 6.17 The June 2014 version of such a report (see link [here](#)) found that:

- In the private sector, the cost savings to industry from lower costs for building and engineering construction arising from the ABCC flow through to households in the form of lower consumer prices causing a gain of 0.3 per cent in consumer real wages.
- In the government sector, the budget saving from the lower cost of public investment in schools, hospitals, roads and other infrastructure is assumed to be passed on to households in the form of a cut in personal income tax. This boosts the gain in consumer real wages from 0.3 per cent on a pre-tax basis, to 0.9 per cent on a post-tax basis. Consumers are better off by \$7.3 billion on an annual basis, in current (2012/13) dollars. This result is similar in magnitude to the gain estimated in the 2013 report of \$7.5 billion.
- Higher productivity lowers construction costs resulting in lower prices for new construction, stimulating a demand for new construction. This leads to a permanent increase in construction activity of 2.1%.
- Around 75% of productivity improvements gained when the ABCC existed have been lost in the FWBC era. In the private sector, the additional construction costs flow through to households in the form of higher consumer prices, while in the government sector higher construction costs are paid for by raising personal income tax rates. These two effects combine to generate a loss in consumer real wages of 0.6 per cent on a post-tax basis. Lower real after-tax wages leave consumers worse off by \$5.3 billion on an annual basis.

- Higher construction costs also reduce demand for new construction, leading to a permanent loss in construction activity of 1.5 per cent.
- 6.18 Previous updates to the original report comprehensively addressed all of the issues raised by critics of earlier reports and this is reiterated at section 2.4.2 of the June 2014 Update Report.
- 6.19 Notwithstanding the report addresses earlier criticisms, we note that even if conclusions drawn by the report are inaccurate by 50 per cent, then improved construction productivity represents a \$3.885 billion boost to the Australian economy.
- 6.20 It cannot be claimed that the effect was a zero increase and if the labour productivity increase arising from the ABCC was only 1%, this still would represent:
- \$777 million in additional household welfare (each year);
 - a 0.1% boost to real consumption and consumer after-tax real wages; and
 - a 0.1% boost to GDP.
- 6.21 Independent Economics has published a 2016 Update examining data used for earlier reports that can be found [here](#).
- 6.22 The Update summarises the 2016 data in the following way:
- "The data shows that both before and after the period of official oversight, growth in construction industry productivity lagged behind growth in the economy generally. It is only during the 10-year period of official oversight, from 2002 to 2012, that productivity growth in the construction industry (of 24 per cent) exceeded productivity growth in the economy generally (of 9 per cent)."*¹⁶
- 6.23 When the ABCC existed, from 2005 to 2012, the economic and industrial performance of the building and construction sector improved. ABS data shows that from 2004-05 (the year before the ABCC started) to 2011-12 (its final year of operation):

¹⁶ <http://www.independenteconomics.com.au/Labour.aspx#2016Construction>

- The labour productivity index for the construction industry rose from 83 to 100 which represents a 20 per cent increase.
 - In contrast the 16 Market Sector industries index rose from 90 to 100, which represents an 11 per cent increase
- The multifactor productivity index for the construction industry rose from 89 to 100 which represents a 12 per cent increase
 - In contrast the 16 Market Sector industries index fell from 102 to 100. (Australian Bureau of Statistics data - Estimates of Industry Multifactor Productivity)

The law will be properly enforced by removing existing loopholes

- 6.24 Currently, after a dispute where the law has been breached, if the parties reach a commercial or industrial settlement, the FWBC cannot continue its proceedings over the breach of the law (Sect 73 and 73A). These provisions raise private commercial interests over the regulator's ability to enforce the law in the public interest.
- 6.25 It is the equivalent of an employer flagrantly ignoring the law and breaching an award, but 'settles' with the employee for a nominal sum of, say \$5, and the Fair Work Ombudsman being unable to prosecute the employer. Such a restriction does not appear in any other industry or with any other regulator. This restriction on the regulator would be removed under proposed legislation.
- 6.26 A further loophole to be closed by the Bills is the exemption granted to exclude industrially motivated "pickets". The Grocon dispute (detailed in earlier submissions attached) was a highly publicised example of where pickets were used to bring a Melbourne construction site to a halt for a significant period of time. This is a type of conduct which is frequently deployed in the building and construction sector.
- 6.27 The Royal Commission canvassed the notion of unlawful picketing. After considering evidence, the Royal Commissioner noted:

"...picketing – which may be an actionable nuisance at common law – is considerably more prevalent in the construction industry than in other industries. It may be argued that to prohibit certain pickets in the

building industry, as the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) endeavoured to do, simply reflects the fact that there are real differences between the building and construction industry and others."¹⁷

6.28 Insofar as ways to address unlawful picketing, the Royal Commission noted that it was highly anomalous that the Fair Work Commission could not stop this type of tortious conduct but it could make stop orders in relation to other types of industrial action.

6.29 The Royal Commission recommend that the Fair Work Act be amended “to provide that picketing by employees or employee associations is ‘industrial action’, and to deal specifically with the consequences of industrially motivated pickets.”¹⁸

6.30 The intention of this recommendation is reflected in the present Bill, albeit limited to participants in the building and construction sector, and supported by Master Builders.

Industrial dispute will normalise

6.31 Since the February 2016 Master Builders submission was lodged, two sets of ABS data regarding industrial disputes have been released.

- The first set of this data related to the March 2016 quarter¹⁹ and showed that:
 - the construction industry had the highest number of working days lost by industry (10,800) accounting for 39% of total working days lost in that quarter.
- The June 2016 Quarter²⁰ showed that:

¹⁷ Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8 at para 157

¹⁸ Ibid refer to Recommendation 66

¹⁹ 6321.0.55.001 - Industrial Disputes, Australia, March 2016

²⁰ 6321.0.55.001 - Industrial Disputes, Australia, June 2016

- the construction industry (16,200) had the highest number of working days lost by industry, accounting for 66% of total working days lost.
- the levels are rising – four times more days lost than this time last year (4200 in June 2015) – and a 500% increase from December 2014 quarter (3200).
- the level of days lost in construction is 80 times higher than mining, which has traditionally been the worst sector for days lost.
- The level of days lost in construction is 6 times greater than the next closest sector (manufacturing) where 2900 days were lost.

6.32 In the four years from March 2012 to March 2016, an average of 54,000 days a year were lost to industrial disputes. In the period from March 2004 and March 2008 when the BIT and ABCC were operating, fewer than 20,000 days a year were lost to industrial action.

6.33 It follows that a re-establishment of the ABCC will see a reduction in days lost to disputation as per earlier experiences during the ABCC era.

7 ABCC Commentary – Fact v Fiction

7.1 There has been a great deal of commentary in the public arena about the re-establishment of the ABCC and the effect thereof.

7.2 Regrettably, some of this commentary is untrue and often deliberately misleading. It is important that the Committee be aware of these myths in order to appropriately understand the effect of the Bills to ensure they are objectively considered. To assist the Committee, we set out below some of the common myths in circulation and provide the relevant related facts.

FICTION "the ABCC will have extreme and unprecedented powers"

7.3 FWBC already has compulsory examination powers and is already using them – the only change relates to who it is that can issue the notice. Under FWBC, an application must be made to the AAT, whereas under ABCC the

Commissioner can issue the notice at their own initiative – however, the head is responsible to Parliament.

7.4 The ACCC, APRA and ASIC have these powers and have held them for years – they are even held by the ATO, Medicare and Centrelink. If a person in the Australian community has paid tax, claimed from Medicare, or received a Centrelink payment, then they are subject to the same powers.

7.5 The Australian Government Department of Employment has said, in relation to the exercise of powers:

*"The ABCC Bill contains a number of safeguards to ensure that the process is implemented appropriately, including any information given by a witness cannot be used against the witness, witnesses are given written notice and can have a lawyer present, are paid conduct money, proceedings are recorded, and the process is subject to oversight by the Commonwealth Ombudsman."*²¹

FICTION "ice dealers have more rights than construction workers"

7.6 ABC Fact Check has examined this issue and found:

"The CFMEU's claim is nonsense."

FICTION "Construction workers can be randomly dragged off the street at any time and interrogated."

7.7 The ABCC must give at least 14 days' notice, in writing, if they want information or evidence.

²¹ (Australian Government Department of Employment, 19 February 2016)

- (2) The notice may require the person:
- (a) to give the information to the ABC Commissioner, or to an assistant, by the time, and in the manner and form, specified in the notice; or
 - (b) to produce the documents to the ABC Commissioner, or to an assistant, by the time, and in the manner, specified in the notice; or
 - (c) to attend before the ABC Commissioner, or an assistant, at the time and place specified in the notice, and answer questions relevant to the investigation.

The time specified under paragraph (a), (b) or (c) must be at least 14 days after the notice is given.

- 7.8 14 days' notice is in line with the same notice period that Medicare uses when exercising similar powers and longer than some notices issued by Centrelink (which can be as little as 2 days).

FICTION "the ABCC means that workers won't have rights to have their own lawyer"

- 7.9 Any person questioned by the ABCC using the powers available will have the right to have a lawyer present if they so choose.

Legal representation

- (4) A person attending before the ABC Commissioner, or before an assistant, as mentioned in paragraph (2)(c) may be represented by a lawyer if the person chooses.

FICTION "there is no transparency and workers have to pay their own costs"

- 7.10 Funds will be provided to cover reasonable travel expenses to appear at examinations. The Commonwealth Ombudsman will have a continuing oversight role of the examination notice process, as was the recommendation of Justice Wilcox. Interviews video-recorded, a transcript is made, a report is prepared, and it's given to the Commonwealth Ombudsman.

63 Payment for expenses incurred in attending an examination

- (1) A person who attends an examination as required by an examination notice is (subject to subsection (2)) entitled to be paid fees and allowances, fixed by or calculated in accordance with the rules, for reasonable expenses (other than legal expenses) incurred by the person in attending the examination.

- (a) a report about the examination; and
- (b) a video recording of the examination; and
- (c) a transcript of the examination.

FICTION "even a murderer gets the right to silence"

7.11 Criminals have a right to silence because anything they say can and will be used against them. Under the ABCC, workers have immunity – there is no need

65 Review and report by Commonwealth Ombudsman

ABC Commissioner to give report etc. to Commonwealth Ombudsman

(1) As soon as practicable after an examination of a person is completed, the ABC Commissioner must give the Commonwealth Ombudsman:

for a right to silence as nothing they say can ever be used against them unless they have deliberately or wilfully provided false evidence.

FICTION "The ABCC will make it harder for workers and their union to act on safety"

7.12 The ABCC only regulates industrial relations laws, not safety laws. The states and territories regulate safety laws, and regulators such as WorkSafe NSW, are answerable to the state government.

7.13 The Australian Government Department of Employment has said:

"The Building and Construction Industry Improvement Act 2005 then, and the ABCC Bills now, contain no provisions that would prevent legitimate safety issues in the building and construction industry from being raised and addressed by employees, unions, or work health and safety regulators."²²

FICTION "the ABCC will cause more workers to die"

7.14 In the building and construction industry:

- There has been a 31% decrease in the rate of serious claims in the construction industry between 2001–02 and 2011–12;
- There has been a 36% decrease in the rate of fatalities between 2002–03 and 2013–14; and

²² (Australian Government Department of Employment, 19 February 2016)

- Over the 11 years from 2003 to 2013 the fatality rate has decreased 68% from 5.71 per 100 000 workers to 1.85.

FICTION "during the last ABCC, the number of deaths on construction sites almost doubled"

7.15 The Australian Government Department of Employment has said:

"There is no truth in the claim that the rate of serious injuries and fatalities increased during the period it operated."

7.16 And later:

"the incidence rate of serious injuries (that is claims per 1000 employees) fell throughout the period of the ABCC (2005–12). While the number of fatalities did increase in 2006 and 2007 when compared to 2005, this reflected in part a particularly low number of fatalities in the construction industry in 2005 and a growing number of persons employed in the industry."²³

FICTION "following the abolition of the ABCC in 2012, the number of deaths fell significantly."

7.17 The Australian Government Department of Employment has said:

"The CFMEU has consistently and publicly claimed that that there was a significant rise in workplace fatalities during the years the ABCC operated and also a significant decrease in workplace fatalities the year it 'closed'. These statements incorrectly imply that the ABCC stopped workers and unions from raising safety issues. They also misrepresent the data on safety in the building and construction industry."²⁴

FICTION "The ABCC won't help productivity"

7.18 The productivity Commission has noted:

²³ (Australian Government Department of Employment, 19 February 2016)

²⁴ (Australian Government Department of Employment, 19 February 2016)

“There is no doubt that local productivity has been adversely affected by union (and associated employer) conduct on some building sites and that the ABCC is likely to have improved outcomes.”

7.19 The Australian Government Department of Employment has noted that:

“The ABS data, Estimates of Industry Multifactor Productivity, show that from 2004–05 (the year before the ABCC began operating) to 2011–12 (its final year of operation):

- the labour productivity index for the construction industry rose from 83 to 100 which represents a 20 per cent increase. In contrast, the 16 Market Sector industries index rose from 90 to 100, which represents an 11 per cent increase.
- the multifactor productivity index for the construction industry rose from 89 to 100 which represents a 12 per cent increase. In contrast, the 16 Market Sector industries index fell from 102 to 100.

The same data also show that, following the abolition of the ABCC, both labour productivity and multifactor productivity in the construction sector have remained flat”²⁵

FICTION “higher productivity and the ABCC means workers lose conditions and go backwards”

7.20 Deloitte Access Economics, in its updated report on the Victorian Construction sector – outlook, labour costs and productivity - found that that unskilled labourers are currently earning around \$151,000 per year and carpenters around \$163,000 per year – more than double the average police officer, fire fighter, soldier, teacher or nurse.²⁶

7.21 In Queensland, a separate Deloitte Access Economics report found that carpenters in that State had the highest base hourly rate in the Eastern seaboard of \$41.34 per hour. Based on the conventional industry working

²⁵ (Australian Government Department of Employment, 19 February 2016)

²⁶ Construction sector – outlook, labour costs and productivity – Victoria - Deloitte Access Economics 31 March 2016

week, the total value of wages and benefits paid to a carpenter in Queensland is \$167,835.72 per annum.²⁷

7.22 A report in 2013 by Allens Consulting²⁸, when referring to the period in which the ABCC operated, noted that:

"It would seem that the reduction in industrial disputes as well as the improvement in productivity in the construction industry did not occur at the expense of wages paid in the construction industry."

FICTION "the higher penalties under the ABCC bill are unfair and existing penalties are enough"

7.23 The false nature of this assertion can be demonstrated with reference to judicial commentary, of which some notable examples follow:

"The union has not displayed any contrition or remorse for its conduct. The contravention is serious... Substantial penalties for misconduct, prior to that presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct."

Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union
[2013] FCA 1243

"The circumstances of these cases ... nonetheless, bespeak a deplorable attitude, on the part of the CFMEU, to its legal obligations and the statutory processes which govern relations between unions and employers in this country. This ongoing willingness to engage in contravening conduct must weigh heavily when the need for both specific and general deterrence is brought to account."

Tracey J, 1 May 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2015] FCA 407

"There is clearly, as other judges have recorded, a strong record of noncompliance on the part of the Union through its officers with provisions of industrial relations legislation, although that does not mean that a

²⁷ Building Industry Outlook – Deloitte Access Economics – Queensland – 21 June 2016

²⁸ Allens Consulting - Economic impact of construction industrial relations arrangements and investment in infrastructure - A New South Wales perspective – 6 March 2013

disproportionate penalty can or should be imposed. I note that significant past penalties have not caused the Union to alter its apparent attitude to compliance with the entry provisions and restrictions under the FW Act."

Mansfield J, 14 August 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 3) [2015] FCA 845

FICTION "the level of lawlessness in the sector is exaggerated"

7.24 The false nature of this assertion can be demonstrated with reference to judicial commentary, of which some notable examples follow:

"The conduct has in common features of abuse of industrial power and the use of whatever means the individuals involved considered likely to achieve outcomes favourable to the interests of the CFMEU. The conduct occurs so regularly, in situations with the same kinds of features, that the only available inference is that there is a conscious and deliberate strategy employed by the CFMEU and its officers to engage in disruptive, threatening and abusive behaviour towards employers without regard to the lawfulness of that action, and impervious to the prospect of prosecution and penalties."

Mortimer J, 13 May 2016, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2) [2016] FCA 436

"In the period between 1 January 1999 and 31 March 2014, the CFMEU itself or through its officials had been dealt with for 17 contraventions of s 500 or its counterparts in earlier legislation, and for 194 contraventions of s 348 of the FW Act or other provisions proscribing forms of coercive conduct."

White J, 22 April 2016, Director of the Fair Work Building Industry Inspectorate v O'Connor [2016] FCA 415

"The schedule paints, one would have to say, a depressing picture. But it is more than that. I am bound to say that the conduct referred to in the schedule bespeaks an organisational culture in which contraventions of the law have become normalised."

Jessup J, 4 November 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (The Mitcham Rail Case) [2015] FCA 1173

FICTION "building unions are penalised just because they fight for members"

7.25 Building unions are by far the most penalised category of union in Australia and courts have observed, on a more than regular basis, a predisposition for them to break the law. Building unions are more than willing to take advantage of the considerable rights and benefits associated with being a Registered Organisation, however they demonstrate a serial reluctance to do so in a manner where rights are evenly balanced against associated relevant obligations.

7.26 This is important to note given trade unions in other sectors seem able to operate within existing rules and do not need to engage in illegal behaviour to represent members.

7.27 Again, judicial commentary is relevant in this regard:

“...the litany of contraventions...[and] the many prior contraventions of relevant statutory proscriptions by the Union...indicating a propensity, on the part of the Union, to engage in proscribed conduct.”

Goldberg, Jacobson and Tracey JJ, 10 September 2009, Draffin v CFMEU & Ors [2009]
FCAFC 120; (2009) 189 IR 145

“...the history tends to suggest that the Union has, with respect to anti-coercion and similar provisions of industrial laws, what the High Court in Veen described as ‘a continuing attitude of disobedience of the law’...”

Jessup J, 29 May 2009, Williams v Construction, Forestry, Mining and Energy Union (No 2)
[2009] FCA 548; (2009) 182 IR 327

“There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts.”

Burnett J, 28 February 2014, Director, Fair Work Building Industry Inspectorate v Myles & Ors
[2014] FCCA 1429

“The union has not displayed any contrition or remorse for its conduct. The contravention is serious... Substantial penalties for misconduct, prior to that

presently under consideration, have not caused the CFMEU to desist from similar unlawful conduct.”

Tracey J, 21 November 2013, Cozadinos v Construction, Forestry, Mining and Energy Union [2013] FCA 1243

“The overwhelming inference is that the CFMEU, not for the first time, decided that its wishes should prevail over the interests of the companies and that this end justified the means.”

Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226

“The CFMEU is to be regarded as a recidivist rather than as a first offender.”

Tracey J, 17 March 2015, Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2015] FCA 226

“The record indicates an attitude of indifference by the CFMEU to compliance with the requirements of the legislation regarding the exercise of rights of entry.”

White J, 23 December 2014, Director of the Fair Work Building Industry Inspectorate v Stephenson [2014] FCA 1432

“...the pattern of repeated defiance of court orders by the CFMEU revealed by those four cases is very troubling.”

Cavanough J, 31 March 2014, Grocon & Ors v Construction, Forestry, Mining and Energy Union & Ors (No 2) [2014] VSC 134

FICTION "there's no need for an ABCC or industry specific regulator"

7.28 The Final Report of the Heydon Royal Commission devoted some 1160 pages to building and construction sector alone. Of the six volumes in the Final Report, almost one and a half volumes were specific to the building and construction sector and the conduct of the CFMEU.

7.29 In respect of this conduct, the Royal Commissioner summarised:

“The conduct that has emerged discloses systemic corruption and unlawful conduct, including corrupt payments, physical and verbal violence, threats, intimidation, abuse of right of entry permits,

*secondary boycotts, breaches of fiduciary duty and contempt of court.*²⁹

7.30 Importantly, the Royal Commissioner observed:

*“The issues identified are not new. The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003.”*³⁰

7.31 And later:

*“The continuing corruption and lawlessness that has been revealed during the Commission suggests a need to revisit, once again, the regulation of the building and construction industry.”*³¹

7.32 And found that:

*“...it is recommended that there continue to be a separate industry-specific regulator for the building and construction industry.”*³²

7.33 Six of the seventy-nine recommendations made for law reform arising from the Final Report were specific to the building and construction sector.

8 Conclusion

8.1 Master Builders strongly supports the passage of the Bills.

8.2 It is evident from the content of this submission that the building and construction industry is a special case featuring particular types of unlawful

²⁹ Royal Commission into Trade Union Governance and Corruption Final Report, December 2015, Volume 5, Chapter 8, para 1

³⁰ Ibid at para 2

³¹ Ibid at para 3

³² Ibid at para 109

conduct. Sector specific laws to curtail unlawful behaviour and restore the rule of law on building sites are necessary and justified.

- 8.3 This view is supported by numerous Royal Commissions and other similar inquiries, most recently the Heydon Royal Commission Final Report and the Final Report of the Productivity Commission Review of the Fair Work Laws.
- 8.4 Master Builders urges the Committee to recommend that the Bills be passed as a matter of urgency.