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

March 2018



Australian
Chamber of Commerce
and Industry

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1 Introduction

1. Section 119A of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (BCIIP Act) contains a provision requiring the Minister to cause it to be reviewed within 12 months of its coming into effect. We note that Jaguar Consulting has been appointed to conduct this review and the Australian Chamber thanks the reviewer for this opportunity to make submissions.
2. The Australian Chamber's core submission is that the infrastructure created by the BCIIP Act, i.e. the re-establishment of the Australian Building and Construction Commission (ABCC) with powers to enable a strong response to unlawful behaviour of the nature of nature uncovered by multiple royal commissions, must remain in place.
3. The improvements to industrial harmony and productivity from a dedicated regulator can be observed from the period when the predecessor ABCC was in place from 2005 to 2012, however even this period was not sufficient to implant a new culture. Cultural change will take time and the ABCC, while making some progress, has not been in place long enough to achieve lasting change. Its effectiveness will be dependent upon it being permitted to do its work over a much longer period than the period of operation subject of this review due to the entrenched culture of construction union lawlessness.
4. Since the BCIIP Act came into effect on 2 December 2016 we have seen ongoing validation of the need for the continuation of the ABCC. Without it we will see a continuous cultural problem in building and construction with growing disregard for the law, important and taxpayer funded projects costing more and taking longer to complete than they should, threats to the wellbeing of participants, damage to the performance of the industry and discouragement of investment and job-creation.
5. Submissions will be made by Australian Chamber members that address the terms of reference in greater detail based on their direct industry experience. The Australian Chamber commends these submissions to the reviewers. This submission is made without prejudice to specific interests and views advanced by our members.

2 What did the BCIIP Act do?

6. The BCIIP Act implemented a number of critical changes:
 - a. It replaced the Office of the Fair Work Building Industry Inspectorate with the ABCC;
 - b. It gave the ABCC functions and powers that proved strong and effective under the predecessor *Building and Construction Industry Improvement Act 2005* (Cth)(BCII Act). These functions and powers are intended to assist the regulator to monitor

- compliance, take enforcement action where necessary and promote appropriate standards by building industry participants;¹
- c. It enabled the Minister to issue a Building Code which prescribes the standards that building industry participants undertaking Commonwealth funded building work must comply with;
 - d. It introduced building and construction industry specific provisions relating to unlawful industrial action and coercion and restored higher penalties for contraventions of those provisions.
7. In reintroducing key aspects of the regulatory infrastructure established by the BCII Act, the BCIIIP Act was intended to address the culture of lawlessness persisting in the building and construction industry as can be seen in the voluminous evidence presented to the Heydon Royal Commission into Trade Union Governance and Corruption (2015 Royal Commission). The 2015 Royal Commission observed that the evidence presented to raised “*fundamental issues about the regulation of the building and construction industry, and the culture of wilful defiance of the law which appears to lie at the core of the CFMEU*”.
 8. The findings of the 2015 Royal Commission were not unique and reflected a culture that has been deeply embedded for a long period of time as unearthed by the multiple royal commissions and inquiries before it.

3 The performance of the regulator

9. On 2 December 2016 the ABCC commenced operations, transitioning from Fair Work Building and Construction. Despite the progress that has been made, cases take time to build and cultural change takes time to effect and there is clear evidence that the ABCC has unfinished business.
10. Earlier this month the CFMEU and 19 CFMEU officials were penalised \$817,500 for conduct taking place at the \$777 million Enoggera Army Barracks and \$60 million QUT Kelvin Grove Campus which saw work stoppages occurring over several months in 2013.² The conduct was described by the Court as involving “a sustained and flagrant disregard for the workplace rights and freedom of association guaranteed under the” *Fair Work Act 2009* (Cth)(FW Act) and was found to be intended to force the head contractor to sign an enterprise agreement on the CFMEU’s terms. Workers were prevented from accessing the site and labelled as “gutless grubs”, “scabs” and “dogs”.³ In addition to being found to be coercive the Court noted that the behaviour was “confronting, threatening and intimidatory”.⁴ Furthermore, the Court noted that despite the respondents admitting their contraventions they did not show “contrition or remorse for their actions” and said “[t]here is

¹ Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth), p. 3.

² *Australian Building and Construction Commissioner v Ingham (No 2) (The Enoggera Barracks Case)* [2018] FCA 263.

³ *Australian Building and Construction Commissioner v Ingham (No 2) (The Enoggera Barracks Case)* [2018] FCA 263 at [39].

⁴ *Australian Building and Construction Commissioner v Ingham (No 2) (The Enoggera Barracks Case)* [2018] FCA 263, at [69].

no evidence of any attempts by the CFMEU to take corrective steps to ensure that its officials and agents comply with the law”.⁵

11. There are multiple other examples of unlawful activity since the BCIP Act came into operation on 2 December 2016, including but not limited to:

- a. A recent case in which the Federal Circuit Court imposed penalties of \$58,500 on the CFMEU and its officials for encouraging workers to defy an employer’s safety policy and directions. Emmett J described the conduct as “nothing short of unconscionable”;⁶
- b. A recent case in which the Federal Court imposed penalties totalling \$105,000 against the CFMEU and a shop steward for stopping two workers from working because they had not paid union membership dues.⁷ The Court stated:

These were not isolated incidents. The Commissioner provided a list of cases in which the CFMEU and its officials had been found to have contravened the Act and its predecessors by insisting on financial union membership as a necessary pre-condition to working on construction sites. The contraventions in 14 of these cases had occurred over a 15 year period prior to the events presently under consideration. Liability and penalties in 13 of those cases had been judicially determined prior to 2014. At any point during that period the CFMEU could have, but did not, direct its officials not to enforce “no ticket no start” regimes, monitor the conduct of its officials in order to ensure that the directive was complied with and so advise the Court. It has not done so in the present proceeding. The irresistible inference is that the CFMEU, acting through its site-based officials, persists in insisting on union membership as a condition for working on construction sites which it regards as “union sites”. At the very least it condones the actions of its onsite officials. Such misconduct continues notwithstanding the CFMEU and its officials being aware, as a result of the various judgments, that it is proscribed by various provisions of the Act.⁸

- c. A 2017 decision where the CFMEU and two of its officials were penalised \$54,500 for attempting to force workers to join a union at a Central Queensland construction site. Jarret J stated that the contravention “involved a flagrant disregard of workplace rights and the freedoms of associations guaranteed under the Fair Work Act”.⁹

⁵ *Australian Building and Construction Commissioner v Ingham (No 2) (The Enoggera Barracks Case)* [2018] FCA 263, at [73].

⁶ *Australian Building and Construction Commissioner v Aumatagi & Anor* [2017] FCCA 1722 (28 July 2017) at [208].

⁷ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case) (No 2)* [2018] FCA 163

⁸ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case) (No 2)* [2018] FCA 163 at 31.

⁹ *Australian Building and Construction Commissioner v Moses & Ors* [2017] FCCA 738

- d. A 2017 decision where the CFMEU and one of its officials were penalised \$86,000 after attempting to force two Brisbane construction workers to join their union or be turned away from the site. Jarrett J said the penalties reflected: “the CFMEU’s deplorable history of compliance with industrial laws”;¹⁰
- e. A 2017 decision where a Brisbane firm was penalised \$40,800 for terminating the engagement of a contractor because it had “trouble” with the union when the contractor did not have a CFMEU EBA. The CFMEU was also fined \$47,175 and its site delegate fined \$7,650 with Vasta J stating “[i]t beggars belief that the CFMEU believe that they can act in a manner where they are the ones who dictate who can or cannot work on a construction site” and “[i]t seems that the CFMEU feel that they can usurp Parliament and that they can set the law in this country. There is no place for such an attitude in Australian society.”¹¹
- f. A 2017 decision where the CFMEU and seven of its officials were penalised \$277,000 for unlawful conduct which halted work at the \$1.2 billion Perth Children’s Hospital project.¹² In issuing the penalties, the Judge said that senior officials “clearly provided endorsements to the unlawful action and gave it what might be called a misplaced legitimacy in the minds of the CFMEU members”.

12. There are numerous other examples that could be cited here and the ABCC’s website suggests it has 38 current matters pending.¹³ It is clear that the work of the ABCC is necessary, is of critical importance and is far from finished.

4 Oversight of compulsory examination powers

13. The ABCC is a regulator that faces an exceptional degree of scrutiny by both formal and informal channels. It is required to comply with formal reporting and transparency mechanisms under the Act, is a frequent participant in Senate Estimates hearings and attracts the scrutiny of the Parliament, the public and its opponents.
14. Section 20 of the BCIIIP Act requires the ABCC to, as soon as practicable after the end of each quarter of each financial year, give to the Minister a quarterly report on the performance of the ABCC’s functions and exercise of its powers during that quarter. The quarterly report must include details of:
 - a. the number, and type, of matters that were investigated by the ABCC during the quarter; and the cost, during that quarter, of each such investigation;

¹⁰ *Australian Building and Construction Commissioner v Barker & Anor* [2017] FCCA 1143 (30 May 2017)

¹¹ *Australian Building and Construction Commissioner v Dig It Landscapes Pty Ltd & Ors* [2017] FCCA 2128 (5 September 2017)

¹² <https://www.abcc.gov.au/news-and-media/latest-news-and-media/court-penalises-cfmeu-leaders-277000-perth-children%E2%80%99s-hospital-decision>

¹³ <https://www.abcc.gov.au/compliance-and-enforcement/outcomes-investigations/legal-cases?sw=&status=2>

- b. assistance and advice provided during that quarter to building industry participants;
 - c. the extent to which the Building Code was complied with during that quarter;
 - d. the number, and type, of matters that were investigated by the ABCC during that quarter in relation to building employers; and the cost, during that quarter, of each such investigation;
 - e. the number of proceedings commenced in accordance with this Act in that quarter, both in total and by category of building industry participant; and the cost, during that quarter, of those proceedings (including legal expenses), both in total and by category of building industry participant;
 - f. the number, and total cost of such proceedings finalised in that quarter; the legal expenses incurred during that quarter as a result of enforcement action undertaken by the ABCC
 - g. industry conditions, during that quarter, based on complaints received by the ABCC during that quarter;
 - h. activities that the ABCC has undertaken during that quarter to monitor the compliance of products used in building work with relevant Australian standards published by, or on behalf of, Standards Australia; and
 - i. details of the number, and type, of matters for which examination notices were issued under the BCIP Act.
15. Subsection 20(5) of the BCIP Act requires the Minister to cause a copy of the report to be laid before each house of the Parliament within 15 sitting days of that House after its receipt.
16. Additionally, the ABCC is required, as soon as practicable after the end of each financial year to prepare and give to the Minister an annual report. This annual report is also required to include details of:
- a. The number, and type, of matters that were investigated by the ABCC during the year; and the cost, during that year, of each such investigation;
 - b. assistance and advice provided during that year to building industry participants;
 - c. the extent to which the Building Code was complied with during that year;
 - d. the number, and type, of matters that were investigated by the ABCC during that year in relation to building employers; and the cost, during that year, of each such investigation;
 - e. the number of proceedings commenced in accordance with this Act in that year, both in total and by category of building industry participant; and the cost, during that year, of those proceedings (including legal expenses), both in total and by category of building industry participant;
 - f. the number, and total cost, of such proceedings finalised in that year;
 - g. the legal expenses incurred during that year as a result of enforcement action undertaken by the ABCC;

- h. industry conditions, during that year, based on complaints received by the ABC Commissioner during that year;
 - i. activities that the ABCC has undertaken during that year to monitor the compliance of products used in building work with relevant Australian standards published by, or on behalf of, Standards Australia; and
 - j. details of the number, and type, of matters for which examination notices were issued under the BCIP Act.
17. The ABCC has made these reports available and we note from the Annual Report that the ABCC has implemented a new and tailored case management system from July 2017 and this will likely further enhance the reporting capability of the ABCC.¹⁴
18. Despite the apparent duplication in reporting requirements, the Australian Chamber considers the information presented in the reports prepared by the ABCC to be valuable in understanding the types of matters being investigated by the ABCC and compliance trends in the industry.
19. For example, the Annual Report covering the ABCC's operations from 2 December 2016 to 30 June 2017 shows that during the reporting period, the top three types of allegations investigated were allegations of:
- a. Coercion (32 investigations);
 - b. Unlawful industrial action (25 investigations);
 - c. Right of entry (24 investigations).¹⁵
20. This is entirely appropriate given that the top three complaints received by the ABCC also related to these areas:
- a. Coercion (26 complaints);
 - b. Right of entry (24 complaints);
 - c. Unlawful industrial action (21 complaints).¹⁶
21. There is a compelling need for the ABCC to be targeted in its activities and to focus on areas that are of the greatest concern and where it will have the greatest impact.
22. The most recent quarterly report of the ABCC shows that coercion still tops the list in terms of the number of investigations open during the reporting period (21 investigations).¹⁷ However this is closely followed by investigations relating to wages and entitlements (20 investigations).¹⁸ In this regard we submit that the ABCC needs to be understood in the

¹⁴ Annual Report, p 5.

¹⁵ Annual Report, p. 7.

¹⁶ Annual Report, p. 18.

¹⁷ Quarterly Report – First Quarter of 2017-18, p. 7.

¹⁸ Quarterly Report – First Quarter of 2017-18, p. 7.

context of a strong and well-resourced regulator, the Fair Work Ombudsman (FWO), which is effective in undertaking targeted compliance campaigns and enforcement activities with regard to wages and entitlements and we encourage the ABCC not to lose sight of the core problem of industrial lawlessness that gave rise to its formation. We also note that the ABCC and FWO actively cooperate in how they monitor and enforce compliance with wages and entitlements.

23. We also acknowledge that that the ABCC's reporting does not fully capture the full extent of non-compliance in the sector given the entrenched culture of industrial lawlessness and fear and intimidation that will likely influence the decisions of building industry participants about whether to come forward when construction unions breach industrial laws. As noted in previous submissions made by the Australian Chamber, multiple sources have noted the difficulties regulators have in obtaining evidence due to the reluctance of parties to speak against parties to illegal conduct because of the risk of retaliation, for example:

a. The 2015 Royal Commission (during the course of its Inquiry in 2014 and 2015):

- i. found "it is clear that public regulators are likely to have grave difficulties in obtaining evidence where witnesses are reluctant to speak against parties to illegal conduct in view of the risk of retaliation";¹⁹ and
- ii. revealed disrespect for the functions of the FWBC, finding that CFMEU officers engaged in aggressive and intimidatory conduct against a number of FWBC Inspectors.²⁰

b. An ABCC Report on the Exercise of Compliance Powers (2008) found:

*In the absence of the compliance powers many ABCC investigations would be thwarted due to the unwillingness of witnesses to cooperate. The fear of the consequences of being seen to cooperate with the ABCC is evident in parts of the industry. This is to be regretted.*²¹

c. The Wilcox Report (2006) described the effectiveness of information-gathering powers under the BCII Act, stating:

*The ABCC commenced operations on 1 October 2005. Between that date and 3 February 2009, it conducted 128 compulsory interrogations and launched 36 court proceedings seeking the imposition of a civil penalty upon one or more "building industry participants". Most of the completed proceedings have been successful; many because of information acquired by the ABCC at compulsory interrogations.*²²

¹⁹ Royal Commission into Trade Union Governance and Corruption 2014, 'Interim Report', p. 1114.

²⁰ Royal Commission into Trade Union Governance and Corruption 2014, 'Interim Report', pp. 1010, 1495.

²¹ Australian Building and Construction Commission, 'Report on the Exercise of Compliance Powers by the Australian Building and Construction Commission' (1 October 2005 to 30 September 2008), p. 6.

²² The Hon. M. Wilcox QC 2006, p. 1.

- d. A report of the Interim Building Industry Taskforce (2004) formed after the Cole Royal Commission stated:

The Final Report of the Royal Commission cited the possibility of retribution against persons who appeared before the Royal Commission as one of the reasons to establish an interim taskforce. This conclusion proved to be correct as the Taskforce has received information from subcontractors who have not been awarded any contracts since testifying before the Royal Commission. In every instance, it has been expressly indicated by the victim that they have been targeted as a consequence of their involvement with the Royal Commission, effectively being black-banned from the industry.

Unlike the Royal Commission, the Taskforce is unable to require persons to assist with many of its investigations. This severely restricts the ability of the Taskforce to conduct investigations to uncover any such attempts to take revenge upon subcontractors. Likewise, there have been frequent instances where subcontractors will not use the services of the Taskforce because they fear their businesses will be blackbanned.

Disturbingly, similar experiences have been reported across the country. In nearly all circumstances, the fear of losing future contracts overrides the need to support steps to enforce the law.²³

- e. The Interim Building Industry Taskforce (2004) described its challenges in investigating in the absence of such powers stating:

the Taskforce has investigated over 380 matters in its 17 months of operation. Of this number, the Taskforce has had to finalise approximately 50% of these investigations due to the lack of powers to gather information. These investigations have had to be finalised because witnesses will not make a statement or victims have simply given up...²⁴

- f. The information-gathering powers in the Bill were recommended by the Cole Royal Commission. The compulsory nature of the provisions was considered necessary to overcome the culture of silence in the industry, existent in part because witnesses are intimidated or pressured to not cooperate with law-enforcement authorities.

24. The existence of strong information gathering powers provides access to tools that will enable the ABCC to do its job more effectively and to help protect those providing information used to prosecute third parties from intimidation from those third parties.

²³ Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce, 25 March 2004 at <http://fwbc.gov.au/sites/default/files/UpholdingTheLawReport2004.pdf>

²⁴ Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce, 25 March 2004 at <http://fwbc.gov.au/sites/default/files/UpholdingTheLawReport2004.pdf>

Compulsory powers are widely used by many other Government agencies, such as the ACCC, APRA, ASIC and the ATO.

25. The Australian Chamber supports the use of compulsory examination notices, despite the Annual Report noting that no examination notices were issued during the reporting period.²⁵ While it is likely that these powers will continue to be used cautiously and sparingly, it does not make them any less important for the reasons stated above and we do not object to reporting regarding their use if considered a necessary condition to their continuation.

5 Higher penalties under the Act

26. The Australian Chamber submits that higher, industry specific penalties for unlawful industrial action and coercive behaviours remain warranted in order to deter militant construction unions from engaging in such conduct. Since the implementation of the BCIP Act, cases continue to emerge that highlight the persistent culture of lawlessness.
27. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113 the Full Court noted at [158] that the CFMEU's history of contraventions evidenced a "lamentable, if not disgraceful, record of deliberately flouting industrial laws". The Court went on to say:

*The most significant point to emerge from the schedules of past cases is that the CFMEU is a recidivist when it comes to contravening industrial laws. No penalties that have been imposed in the past have appeared to reduce its willingness to breach the law. It continues to thumb its nose at the industrial laws, including the BCII. The Court should nevertheless not shy away from imposing stern sentences with a view to attempting to deter the CFMEU from engaging in, or encouraging others to engage in, further unlawful industrial action. Considerations of deterrence, both specific and general, undoubtedly loom large in fixing the appropriate penalties.*²⁶

28. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case)* [2017] FCA 62, Jessup J stated:

It is now well-established that deterrence, both specific and general, is the predominant purpose of civil penalties in a statutory regime such as that of the FWA. The CFMEU is a registered organisation of substantial size, resources and influence. Any suggestion that it did not fully understand the operation of the provisions of the Act under which the Director proceeded could not be taken seriously. Indeed, its past record of encounters with these, or similar, provisions speaks loudly of its familiarity with them. That record, to which I refer further below,

²⁵ Annual Report, p. 18.

²⁶ *Australian Building and Construction Commissions v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113 at [159].

*justifies only one inference: that the CFMEU has done nothing, over the years, to cause its own staff to comply with the law. Indeed, the inference that the CFMEU will always prefer its own interests, whatever they may be from time to time, to compliance with the law is a compelling one. This case presented yet another instance of that pattern of behaviour.*²⁷

29. Jessup J also stated:

*The CFMEU's record of contravention has become so extensive that it presents a challenge to convey, both accurately and comprehensively, the substance of the findings made in particular cases.*²⁸

30. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No. 3)* [2017] FCA 10 Besanko J said:

*General deterrence is clearly a relevant consideration and, in light of the CFMEU's poor record, specific deterrence is an important consideration.*²⁹

31. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53 North, Dowsett and Rares JJ stated:

*In a liberal democracy, it is assumed that citizens, corporations and other organisations will comply with the law. Such compliance is not a matter of choice. The community does not accept that a citizen, corporation or other organisation may choose to break the law and simply pay the penalty. The courts certainly do not accept that proposition.*³⁰

and

*The CFMEU can be seen to have chosen to pay penalties in preference to obeying the law. It is not entitled to any leniency in the circumstances of the conduct complained of.*³¹

32. It is clear that given the CFMEU's extensive history of contravening conduct of a similar nature specific deterrence is important in considering the appropriate level of penalties.

²⁷ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case)* [2017] FCA 62 at [65].

²⁸ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (the Webb Dock case)* [2017] FCA 62 at [66].

²⁹ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No. 3)* [2017] FCA 10 at [46].

³⁰ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53 at [100].

³¹ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 53 at [102].

33. In driving the necessary cultural change it will also be important that those breaching industrial laws are held accountable for their actions and the High Court recently confirmed that the Court can order a union official to personally pay a penalty and not seek reimbursement or indemnity from the union.
34. This will be particularly important in light of the CFMEU, MUA and TCFU merger that took effect on 27 March 2018 creating the 'Construction, Forestry, Maritime and Energy Union' (CFMMEU). Despite approving the merger, Deputy President Gostencnik of the Fair Work Commission noted that his decision should not be seen as condoning the unlawful conduct of the unions and said:

..On no view can it be said that the conduct is acceptable and judicial officers have, particularly over recent years, been unanimous in the strong and unequivocal language used to describe and condemn some of the conduct.³²

35. Peak industry bodies have highlighted the CFMEU and MUA's history of lawbreaking and outstanding proceedings and noted that the new union would have more than \$310 million in assets and \$150 million in annual turnover which could fuel capacity for more lawlessness.

36. The 2015 Royal Commission noted:

Large national unions, such as the CFMEU, MUA and the AWU, have substantial assets. They have many thousands of members. They operate branches across different jurisdictions. They employ large numbers of employees. They generate tens of millions in membership dues annually. They generate millions in commercial enterprise and agreements with third parties. They are trading corporations in the constitutional sense. They are big businesses.³³

37. The Court has previously noted that CFMEU had shown a "strong disinclination to modify its business model" to comply with the law³⁴ and in that same case the Judge said "the CFMEU's record of non-compliance with legislation of this kind has now become notorious. That record ought to be an embarrassment to the trade union movement".³⁵

38. These findings are consistent with the findings made by the 2015 Royal Commission that:

The evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule

³² [2018] FWC 1017 at [238].

³³ Royal Commission into Trade Union Governance and Corruption 2014, Final Report, Volume 5, p.194.

³⁴ *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (The Yarra's Edge Case) [2016] FCA 772 (1 July 2016) at [48].

³⁵ *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* (The Yarra's Edge Case) [2016] FCA 772 (1 July 2016) at [48].

of law. That evidence is suggestive of the existence of a pervasive and unhealthy culture within the CFMEU, under which:

- (a) the law is to be deliberately evaded, or crashed through as an irrelevance, where it stands in the way of achieving the objectives of particular officials;*
- (b) officials prefer to lie rather than reveal the truth and betray the union;*
- (c) the reputations of those who speak out about union wrongdoing become the subjects of baseless slurs and vilification.³⁶*

39. The Australian Chamber is concerned that, absent a change in culture and sufficient penalties to compel that change, the recent merger could amount to the assembling a war chest to meet the cost of penalties for union lawlessness. In order for civil penalties to be an effective deterrent, the penalty levels must be appropriately set. Penalties for breaches of civil penalty provisions at a level commensurate with the industry-specific penalties previously applicable under the BCII Act are more important than ever.
40. As noted by Mortimer J in *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436:

Coercion and intimidation as methods of achieving desired ends can occur in many walks of life, not only in industrial activity. Such conduct involves abuse, and misuse, of power. Coercive and intimidatory conduct is part of an 'end justifies the means' way of thinking which is frequently inconsistent and incompatible with the rule of law. The Court by its civil penalty orders should make it clear that coercion and intimidation contrary to law will not be tolerated and will be the subject of sanctions. Significant penalties are required to give some public confidence that those who administer the law will not condone coercive and intimidatory conduct, in this case in the sphere of industrial activity, but also more generally.³⁷

6 Building Code

41. The *Code for the Tendering and Performance of Building Work 2016* (Building Code) commenced on 2 December 2016. Building contractors and building industry participants required by section 34 of the BCIIIP Act to comply with the Building Code are subject to the Building Code from the first time they submit an expression of interest or tender for Commonwealth funded building work on or after 2 December 2016.
42. The Building Code was the subject to further scrutiny in February 2017 when the Senate Standing Education and Employment Legislation Committee held an inquiry into the

³⁶ Royal Commission into Trade Union Governance and Corruption, Interim Report (2014), Vol 2, ch 8.1, p 1008.

³⁷ *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union (No 2)* [2016] FCA 436 at [136]:

Building and Construction Industry (Improving Productivity) Amendment Bill 2017 (Cth). The passage of this legislation addressed and pre-empted some of the problems arising from earlier amendments to the BCIIIP Act.

43. While the Building Code has the effect of imposing obligations and associated costs onto building industry participants, the Australian Chamber welcomes the use of the Government purchasing power to drive cultural change in the industry. It is an important aspect of the regime created by the BCI Act. Enforced by the ABCC, its importance has been canvassed during many parliamentary inquiries and Royal Commissions and the Australian Chamber supports its continuation.
44. The Annual Report shows that the overwhelming majority of enquiries for which the ABCC provided assistance were in relation to the Building Code, particularly in relation to code assessment.³⁸ We acknowledge that the Building Code is a technical legal document that remains subject of ongoing interpretation, particularly as new bargaining provisions emerge, and the Australian Chamber encourages the ABCC to continue its role in providing industry assistance to aid in compliance and to work closely with peak industry bodies in this regard.

7 Concluding comments

45. The BCIIIP Act and the conduct that gave rise for its need have been subject to a great degree of scrutiny over a long period of time. The Australian Chamber has identified the reasons for regulatory infrastructure of the nature provided for in the BCIIIP Act in various reviews and inquiries into industrial relations regulation of the building and construction industry, including the following across the last decade:
 - a. The Australian Chamber submission to the Senate Education and Employment Legislation Committee inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) and the *Building and Construction Industry (consequential and Transitional Provisions) Bill 2013* (Cth) in September 2016;
 - b. the Australian Chamber submission to the Senate Standing Committee on Education and Employment Legislation inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* (Cth) in February 2016;
 - c. the Australian Chamber submission to the Senate Standing Committee on Education and Employment Legislation inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) in November 2013;
 - d. the Australian Chamber submission to the then Senate Standing Committee on Education, Employment and Workplace Relations' inquiry into the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* (Cth) dated 20 January 2012;
 - e. the Australian Chamber submission to the then Senate Standing Committee on Education, Employment and Workplace Relations' inquiry into the *Building and*

³⁸ Annual Report, p. 10.

- Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* (Cth) in July 2009;
- f. the Australian Chamber response submission to the Wilcox Report Recommendations in May 2009;
 - g. the Australian Chamber submission to the Hon Murray Wilcox QC review into the proposed Building and Construction Division of Fair Work Australia dated 5 December 2008.
46. The BCIIIP Act and supporting policy has been subject of significant Parliamentary scrutiny. It was only 18 months ago (i.e. on 1 September 2016) that the Senate referred an inquiry into the *Building and Construction Industry (Improving Productivity) Bill 2013* and a related bill to the Education and Employment Legislation Committee for inquiry and report by 14 October 2016. Following the receipt of submissions and a public hearing in October 2016 the inquiry report was issued recommending passage.
47. This process followed the reintroduction of the bill into Parliament on 31 August 2016 being negated during the previous term of Government providing a trigger for a double dissolution election. Prior to the election, the Building Bills were subject to the following Parliamentary scrutiny:
- a. on 4 February 2016, the Senate referred *the Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* (Cth) and the *Building and Construction Industry(Consequential and Transitional Provisions) Bill 2013 [No. 2]* (Cth) to the Senate Education and Employment Legislation Committee (Committee) for inquiry and report. A public hearing was held on 4 March 2016 and the Committee reported on 11 March 2016;
 - b. referred to the Senate Education and Employment Legislation Committee on 14 November 2013, a public hearing was held on 26 November 2013 and the Committee reported on 2 December 2014;
 - c. referred to the Senate Education and Employment References Committee on 4 December 2013, public hearings were held on 6 February, 12 March and 17 March 2014 and the Committee reported on 27 March 2014;
 - d. commented on by the Senate Standing Committee for the Scrutiny of Bills on 11 December 2013 and 26 March 2014; and
 - e. commented on by the Joint Committee on Human Rights on 11 February, 26 August and 28 October 2014.
48. While the BCIIIP Act was ultimately passed in amended form, the Australian Chamber acknowledges the political context in which compromises occurred and submits that the replacement of the Fair Work Building Industry Inspectorate with the ABCC, prescription of higher penalties for lawlessness and restoration of the examination powers of the ABCC are important and necessary changes that are in the public interest. While the Australian Chamber would have preferred that the BCIIIP Act had passed unamended, the amendments did not fundamentally detract from the intent of the BCIIIP Act, the core function of the ABCC, and the policy outcome it seeks to achieve.

49. There have been few, if any, pieces of legislation that have been subject to such intense debate and scrutiny over a protracted period. Given this review takes place in such close proximity to this lengthy process of consideration and that the BCIIIP Act has had limited opportunity to do its important work, the Australian Chamber does not see any reason for disruption to the structure and provisions of the Act at this point in time.
50. It is clear that the culture of lawlessness in the building and construction industry persists and the ABCC needs more time to do its work. Industry participants should not have to put up with behaviours in their workplace which, among other things, present a risk to health and safety, discourage and prevent some subcontractors providing services on building sites and undermine principles of freedom of association
51. Aside from the direct negative impacts this damaging culture has for industry participants, the industry is a key part of the national economy and Australian taxpayers have a clear interest in ensuring that it operates as efficiently as it can to deliver much needed public infrastructure. It is important that the industry attracts investment to stimulate economic activity and job creation in Australia.

8 About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

Australian Chamber Members

AUSTRALIAN CHAMBER MEMBERS: BUSINESS SA CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE NORTHERN TERRITORY CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA NEW SOUTH WALES BUSINESS CHAMBER TASMANIAN CHAMBER OF COMMERCE & INDUSTRY VICTORIAN CHAMBER OF COMMERCE & INDUSTRY **MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY AGED AND COMMUNITY SERVICES AUSTRALIA ARAB CHAMBER OF COMMERCE AND INDUSTRY AUSTRALIA AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION ASSOCIATION OF FINANCIAL ADVISERS ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION AUSTRALIAN BEVERAGES COUNCIL LIMITED AUSTRALIAN DENTAL ASSOCIATION AUSTRALIAN DENTAL INDUSTRY ASSOCIATION AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES AUSTRALIAN FEDERATION OF TRAVEL AGENTS AUSTRALIAN HOTELS ASSOCIATION AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP AUSTRALIAN MADE CAMPAIGN LIMITED AUSTRALIAN MINES & METALS ASSOCIATION AUSTRALIAN PAINT MANUFACTURERS' FEDERATION AUSTRALIAN RECORDING INDUSTRY ASSOCIATION AUSTRALIAN RETAILERS' ASSOCIATION AUSTRALIAN SELF MEDICATION INDUSTRY AUSTRALIAN STEEL INSTITUTE AUSTRALIAN TOURISM INDUSTRY COUNCIL AUSTRALIAN VETERINARY ASSOCIATION BUS INDUSTRY CONFEDERATION BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS CARAVAN INDUSTRY ASSOCIATION OF AUSTRALIA CEMENT CONCRETE AND AGGREGATES AUSTRALIA CHIROPRACTORS' ASSOCIATION OF AUSTRALIA CONSULT AUSTRALIA CUSTOMER OWNED BANKING ASSOCIATION CRUISE LINES INTERNATIONAL ASSOCIATION DIRECT SELLING ASSOCIATION OF AUSTRALIA EXHIBITION AND EVENT ASSOCIATION OF AUSTRALASIA FITNESS AUSTRALIA HOUSING INDUSTRY ASSOCIATION HIRE AND RENTAL INDUSTRY ASSOCIATION LTD LARGE FORMAT RETAIL ASSOCIATION LIVE PERFORMANCE AUSTRALIA MASTER BUILDERS AUSTRALIA MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA MEDICINES AUSTRALIA NATIONAL DISABILITY SERVICES NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION NATIONAL EMPLOYMENT SERVICES ASSOCIATION NATIONAL FIRE INDUSTRY ASSOCIATION NATIONAL RETAIL ASSOCIATION NATIONAL ROAD AND MOTORISTS' ASSOCIATION NSW TAXI COUNCIL NATIONAL ONLINE RETAIL ASSOCIATION OIL INDUSTRY INDUSTRIAL ASSOCIATION OUTDOOR MEDIA ASSOCIATION PHARMACY GUILD OF AUSTRALIA PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA RESTAURANT & CATERING AUSTRALIA RECRUITMENT & CONSULTING SERVICES ASSOCIATION OF AUSTRALIA AND NEW ZEALAND SCREEN PRODUCERS AUSTRALIA THE TAX INSTITUTE VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE