



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
PO Box 289
North Sydney NSW 2059
Australia
ABN 76 369 958 788

6 April 2018

Mr Rex Deighton-Smith
Jaguar Consulting
PO Box 522
Malvern Victoria 3144

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

Ai Group welcomes the opportunity to make a submission to the Review of the *Building and Construction Industry (Improving Productivity Act) 2016 (BCIIP Act)*.

Ai Group has a large membership in the construction industry including both major contractors and smaller subcontractors.

We note that the Review is to examine the operations of the BCIIP Act within its first year and to develop recommendations to enable it to better achieve its main objective, as set out in s.3 of the Act.

The terms of reference cover:

1. The performance by the Australian Building and Construction Commission (**ABCC**) of its 'full service regulator' function.
2. The independent oversight of the compulsory examination powers, including reporting requirements, safeguards and public accountability in the application of these powers.
3. Whether the higher penalties under the BCIIP Act are acting as a deterrent to prevent contraventions of workplace relations laws by industry participants.
4. Any need for amendments that will streamline and clarify the application of the BCIIP Act, when it interacts with other Commonwealth legislation.
5. The operation of the new provisions in the BCIIP Act including the provision which requires the Federal Safety Commissioner to audit Commonwealth funded building work against the National Construction Code's performance requirements in relation to building materials.



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

Ai Group's strong support for the BCIIIP Act, the Building Code and the ABCC

Ai Group strongly supports the BCIIIP Act and the Commonwealth *Code for the Tendering and Performance of Building Work 2016 (Building Code)* which has been made under the Act. Ai Group also strongly supports the ABCC.

We have been heavily involved in all of the legislative and other key developments relating to the ABCC, including the Royal Commission into the Building and Construction Industry (**Cole Royal Commission**), the Heydon Royal Commission, and numerous Senate, Productivity Commission and other inquiries. We have consistently advocated for the maintenance of a strong ABCC with the necessary powers to ensure that the law is complied with by all parties.

Ai Group's views on the BCIIIP Act are set out in detail in the [September 2016 submission](#) that we made to the Senate Committee inquiry into the Bill, and in the numerous earlier submissions that are referred to in our September 2016 submission.

The BCIIIP Act has delivered vital reforms to the building and construction industry. The case for reform was overwhelming. Unlawful and inappropriate conduct was (and still is) being constantly and widely displayed by the CFMEU and other construction unions.

The provisions in the BCIIIP Act are very similar to those that successfully operated between 2005 and 2009 following the Cole Royal Commission.

ABCC performance of its 'full service regulator' function

In Ai Group's view, the ABCC is a very effective regulator that is performing its functions in accordance with the Act.

The ABCC has been consistent in its approach in discharging its obligations under the BCIIIP Act. It has, in our view, implemented processes and systems to ensure that contractors meet their obligations under the Act as well as the Building Code.

This has been undertaken by a variety of means including:

- Information and assistance;
- Audit/investigations on sites with obligations on head contractors and subcontractors to provide information to demonstrate compliance;

- Investigations of complaints or notifications of breaches, with outcomes resulting in rectification or matters being referred to other appropriate authorities.

The combination of a vigilant regulator and possible sanctions has resulted in contractors taking more proactive steps to ensure compliance within their own businesses and within their supply chain.

With regard to the ABCC's role as a "full service regulator", it is of course important that breaches of awards are investigated. However, the Fair Work Ombudsman (**FWO**) has extensive systems and resources to deal with these matters, including in the construction industry. For this reason, the ABCC and its predecessors have worked closely with the FWO. The important thing is that these matters are handled properly (as is occurring), not whether the FWO or the ABCC handles a particular matter.

Independent oversight of compulsory examination powers

The compulsory examination powers have been in place since June 2005¹ and have operated fairly and appropriately throughout this whole period.

The examination powers are like those possessed by the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission, the Australian Taxation Office and the FWO. Accordingly, there is nothing particularly exceptional about the powers, and it vital that they be maintained.

The examination powers were a key recommendation of the Cole Royal Commission.²

History shows that the CFMEU will not cooperate with the Regulator unless the examination powers exist. Prior to the powers being implemented in June 2005, the CFMEU adopted a blanket policy of its officers, staff and delegates refusing to be interviewed by the Regulator, which frustrated many investigations into unlawful conduct.

¹ Originally the powers were given to the Building Industry Taskforce which was replaced by the ABCC on 1 October 2005 under the *Building and Construction Industry Improvement Act 2005*. The *Building and Construction Industry Improvement Act 2005* was replaced by the *Fair Work (Building Industry) Act 2012*, which was subsequently replaced by the BCIIIP Act.

² Final Report, Recommendation 184.

Many company witnesses prefer to be the subject of a compulsory examination by the Regulator to reduce union coercion and intimidation against them for giving evidence.

The current independent oversight and reporting requirements are adequate and provide sufficient protections.

Higher penalties acting as a deterrent

The higher penalties in the BCIIIP Act are consistent with the recommendations made in 2003 by the Cole Royal Commission. Commissioner Cole decided that *“unlawful conduct must attract serious consequences so that the rule of law may be re-established”*.³

Similar views were expressed by Commissioner Heydon:

“185. There is an obvious need for laws that ensure an effective deterrent against unlawful conduct. In an environment where union officials openly acknowledge that they will take industrial action to achieve the union objectives without regard to whether that action might break the laws governing protected and unprotected industrial action, there is a need for laws that expressly address what is prohibited conduct and provide strong penalties for contravention of them.”⁴

The Heydon Royal Commission supported the quantum of the penalties in the BCIIIP Act and commented that: *“There are strong arguments that even these penalties are too low, and that the increase should be much greater”*.⁵

The penalties in the BCIIIP Act are similar to those operated between 2005 and 2009 when there was a significant reduction in unlawful conduct in the construction industry.

Numerous judges in the Federal Court have found the egregious conduct of the CFMEU warrants large penalties.

³ *Royal Commission into the Building and Construction Industry*, February 2003, Final Report, Volume 1, page 155.

⁴ *Royal Commission into Trade Union Governance and Corruption*, December 2015, Volume 5, paragraph 185.

⁵ *Royal Commission into Trade Union Governance and Corruption*, December 2015, Volume 5, paragraph 188.



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

The Full Court of the Federal Court in 2017 noted that the CFMEU's past contraventions revealed a "lamentable, if not disgraceful, record of deliberately flouting industrial laws".⁶ The Court further noted:

"The most significant point to emerge from the schedules of past cases is that 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."⁷

Within the context of the short time the BCIIIP Act has been in place, it is difficult to provide an accurate picture as to whether the higher penalties have acted as a deterrent or not. The recent decisions have dealt with contraventions which occurred before the BCIIIP Act was in place. What is clear is that the lower penalties that were previously in place did not deter the CFMEU from breaking the law. Therefore, it is essential that the higher penalties remain in place.

A key reason why the CFMEU is able to continue to adopt a law-breaking business model, despite the higher penalties in the BCIIIP Act, is the millions of dollars of revenue that the union receives each year from inappropriate sources. These revenue sources dwarf the penalties that it pays for unlawful conduct. The Government has introduced the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017* into Parliament to address this issue. The Bill would ensure that money contributed to Worker Entitlement Funds by construction industry employers for the benefit of their employees, and the interest on the earnings, is not transferred to unions. Ai Group's strong support for the Bill is set out in the [submission](#) that we made to the Senate inquiry into the Bill.

We urge the current Review to recommend that the Proper Use of Worker Benefits Bill is passed without delay as this will result in the penalties in the BCIIIP Act providing a more effective deterrent.

⁶ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113 at [158] at [158],

⁷ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113 at [159],



The Australian Industry Group
51 Walker Street
North Sydney NSW 2060
Australia
ABN 76 369 958 788

Overlap of legislation

Subsection 34(2D) of the BCIIIP Act sets out specific requirements for employers when employing workers undertaking building work. In the main these provisions exclude any persons on a temporary working visa undertaking building work unless the “employer can demonstrate that no Australian citizen or permanent resident is suitable for the job”. This test, that the employer is required to meet prior to offering a non-citizen or non-permanent resident work, is very uncertain and far too broad. The test creates significant risks for construction industry employers.

Ideally s.34(2D) would be removed from the Act altogether. The provision imposes more onerous obligations on employers than are applicable in any other industry. The provision excludes the ability for employers in the sector to employ holiday workers for short term work without first going through an extensive recruitment process that may take longer to implement than the work to be undertaken.

At the very least, paragraph (d) needs to be removed from s.34(2D) to create a workable provision.

Federal Safety Commissioner audits regarding the National Construction Code's performance requirements in relation to building materials

In Ai Group’s experience, the Federal Safety Commissioner is carrying out the responsibilities assigned to the Commissioner under the BCIIIP Act effectively.

We would be happy to provide any further information that you may require about the above matters.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Smith'.

Stephen Smith

Head of National Workplace Relations Policy