

STRONGER TOGETHER

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*The Building and Construction Industry (Improving Productivity)
Act 2016*

Submissions of
THE AUSTRALIAN WORKERS' UNION

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About the Australian Workers' Union

The Australian Workers' Union ('**AWU**') is the nation's oldest union, and also one of the largest. The AWU has wide coverage in the building and construction industry, specifically in civil construction – which includes the building of roads, bridges, tunnels, railway track, airports, sports and entertainment complexes, and dams.

The scheme introduced by the *Building and Construction Industry (Improving Productivity) Act 2016* ('**BCIIP Act**') promoted its uptake by utilising the threat of a contractor being prohibited from performing building work that is funded by the Federal Government unless that contractor is 'compliant' with the *Code for the Tendering and Performance of Building Work 2016* ('**Code**'). Unsurprisingly, employers scrambled to become Code compliant – including many that didn't actually perform building work and therefore had no legal need to comply with the code.

Owing to both the large scale of the projects that AWU members in the building and construction industry work on and the fact that such infrastructure is generally commissioned by a level of government – whether that be local, state, or federal – AWU members in the building and construction industry are in many cases working on projects that are at least partly funded by the Federal Government.

It follows, then, that the introduction of the BCIIP Act directly affects the AWU and its tens of thousands of members in the building and construction industry and the AWU is for all intents and purposes a relevant stakeholder in any discussion about the operation of the BCIIP Act.

Summary

The BCIIP Act is a partisan, hyper-politicised piece of legislation that established a partisan, hyper-politicised federal body – the *Australian Building and Construction Commission* ('**ABCC**').

Although the BCIIP Act is couched in terms that possibly make it more palatable for a person who is both outside of the industry and who has no memory of the last iteration of the ABCC – or perhaps is just willingly ignorant – the *actions* of the ABCC, once re-established, have betrayed the BCIIP Act's true purpose. Any observer or participant in this industry can now see this clearly.

The true purpose of the BCIIP Act is to attempt to silence and remove Unions from worksites, and any decisions and discussions with the company; creating a further imbalance between company and worker. The BCIIP Act is a sustained and ongoing attack on the men and women working in the building and construction industry.

With the above in mind, it is hardly surprising that the BCIIP Act has, since its introduction, failed dismally in reaching or even substantially working toward its own stated main object. Indeed, the introduction of the previous ABCC actually eroded elements of the building and construction industry that the BCIIP Act (at least outwardly) aspires to improve, such as workplace health and safety¹.

The current ABCC seems to be approaching its 'regulator' function with the same anti-Union sentiment of its previous iteration, and has at best failed to concern itself with, and at worst has blatantly ignored, the deaths of workers on construction sites. The ABCC has instead preferred to pursue matters of either absolutely no consequence to the industry at large, or matters in which the ABCC actively erodes current workplace health and safety protections.

The ABCC is marked by an undeniable bias against Unions with a commitment to prosecute Unions for their existence. The ABCC pursues these matters with an overzealous vigour and incurs great costs in doing so, all of which are conveniently absorbed by the Australian taxpayer.

The BCIIP Act has systematically failed to realise or even *begin* working towards the main object of the BCIIP Act². It is merely a front for the reintroduction of the ABCC. The BCIIP Act has neither caused nor promoted any improvement in the building and construction industry and in fact has shown to do the opposite. The BCIIP Act and the ABCC should be recognised for what they are: a partisan piece of political legislation and its product that champions big business interests and conveniently ignores construction workers dying on worksites.

The BCIIP Act must be repealed immediately.

¹ *Building and Construction Industry (Improving Productivity) Act 2016*, s.3(2)(f).

² *Building and Construction Industry (Improving Productivity) Act 2016*, s.3.

The Review

Section 119A was inserted into the BCIIP Act as an amendment in the Senate and mandates a review to be conducted “...*into the operation of [the BCIIP] Act.*³”

The AWU notes that the way in which this review has been conducted thus far has given the impression that even the *process* of the review itself is biased against Union interests. As discussed above, the AWU is intensely involved in the building and construction industry. When one considers the type of construction that AWU members are engaged in and the likelihood that such construction is at least partly funded by the Federal Government, the AWU is at the very least one of the main stakeholders affected by this legislation.

Despite the AWU’s relevance as a stakeholder, somewhat surprisingly, the AWU did not receive an invitation to make a submission to this review, and understands that the only party that represents Union interests invited to do so was the Australian Council of Trade Unions (‘ACTU’). It should be noted that the ACTU does not itself have members in the building and construction industry and is a peak body for unions in Australia. The exclusion from this review of Unions that have members in the building and construction industry raises questions about the true intent and motive of the review. Despite this oversight, the AWU has taken the time to prepare this brief submission for the benefit of the record.

The AWU also notes with concern the tight turnaround for submissions to this review. Any proper review of government legislation, particularly legislation of this importance, should allow for a lengthier consultation process.

Of equal concern are the terms of reference given for the review, which seem to be arbitrarily narrowed from what s.119A of the BCIIP Act requires. The terms of reference conveniently leave out direct mention of some of the most contentious aspects of the BCIIP Act and its resultant ABCC, including but not limited to: a focus on the zealous pursuit of Unions and their officials, extravagant and reckless spending of public funds, and a failure to divert any significant time or resources to actually *improving* conditions or practices within building and construction industry.

³ *Building and Construction Industry (Improving Productivity) Act 2016*, s.119A.

The Main Object of the BCIIP Act

Section 3 of the BCIIP Act set out the Act's main object, and eight means by which the Act intends to achieve that object⁴. The AWU submits that it is entirely relevant to a review of the operation of a piece of legislation to compare the legislation's stated objective to what its introduction has achieved in reality. The AWU makes the following observations from its experiences within the industry since the introduction of the BCIIP Act.

Overall, the AWU suggests that the BCIIP Act **has not** achieved the reason given for its passage, and the ABCC, which has been charged with achieving this object, has consistently shown that it is entirely disinterested in engaging with more than half of the means by which the BCIIP Act would ostensibly be able to attain its main object. The Act has failed in its intent and its operative arm has failed in its functions.

The main object of the BCIIP Act is as follows.

*“(1) The main object of this Act is to **provide an improved workplace relations framework for building work** to ensure that building work is carried out fairly, efficiently and productively, **without distinction between interests of building industry participants, and for the benefit of all building industry participants** and for the benefit of the Australian economy as a whole.” (AWU emphasis).*

The excerpts of particular contrast between the main object of the BCIIP Act as stated and what the actions of the ABCC in the past 12 months have shown have been emphasised by the AWU above.

As previously stated in this submission, the BCIIP Act and the ABCC have not provided nor facilitated **any** improvements – measureable or not – to the workplace relations framework for building work. Instead, the ABCC and its empowering legislation have caused confusion in the industry, reduced protections for workers, fostered further imbalance between employees and their employers, reduced conditions for workers, enabled unscrupulous employers to undermine direct employment far more easily, and unrelentingly punished Unions.

⁴ *Building and Construction Industry (Improving Productivity) Act 2016*, s.3(2)(a-h).

As emphasised above, the main object of the BCIIP Act contains two statements concerning bias. The first statement is that no one type of building industry participant's interests will matter more than the other, and the second is that the 'improved workplace relations framework' that the BCIIP Act sets out to achieve will benefit all building industry participants.

Evidence of bias

As even a casual observer would be able to tell, these 'non-bias' elements of the main object of the BCIIP Act are in stark contrast to what the ABCC has directed its resources to achieving for the past 12 months. Indeed, an incredible bias against Unions and Union Officials (who are 'building industry participants'⁵) has been present since the ABCC's re-introduction.

The AWU understands that the ABCC has recommended the imposition of only **one** sanction on a company since its re-introduction. This is in comparison to the numerous prosecutions the ABCC is pursuing against Unions and Union Officials. This is notable in terms of bias for two significant reasons.

Firstly, a 'sanction' merely prohibits a company from tendering for building work funded by the Federal Government for a period of 3 months. There are no fines associated with the sanction – it is merely a 'sin bin'. The penalties sought by the ABCC in prosecuting Unions and Union Officials are not so moderate. It is the understanding of the AWU that the ABCC pushes for the maximum available penalties every time.

Secondly, the only sanction that the ABCC recommended be imposed on a company since its re-introduction was a sanction against a company for, amongst other minor things, allowing a 'no ticket, no start' sign to be displayed at a worksite. In other words, the sanction was imposed because of Union activity. The AWU understands that the ABCC does not necessarily concern itself with investigating employers for anything actually substantial, such as unsafe workplaces. An example of such flagrant oversight can be seen in the former ABCC Commissioner stating that he would 'consider' writing a letter to an employer that was recently convicted of numerous breaches of safety laws involving a number of workplace deaths⁶.

⁵ *Building and Construction Industry (Improving Productivity) Act 2016*, s.5.

⁶ *Official Committee Hansard, Senate Estimates, Education and Employment Legislation Committee, 30 May 2017, p.120 per Hadgkiss, N.*

Evidence of waste

Despite having its own legal team and counsel, the ABCC has spent incredible amounts of public money on external legal services – over \$8.3 million in the previous financial year to April 2017⁷. Judging by the figures in the *ABCC Annual Report 2016-17* given that all of the proceedings commenced in the 2016-17 financial year were against Unions and Union Officials it is only fair to assume that the vast majority of these funds were expended for this purpose⁸.

One example of the recklessness of the ABCC in spending public funds is its failed prosecution of Union officials in the Australian Capital Territory⁹, in which the ABCC incurred \$625,000 of its own costs¹⁰. Despite the matter being dismissed by the Federal Court, and the ABCC's costs already being greater than the penalties sought in the case, the ABCC appealed the Decision, with the bill footed once again by the Australian taxpayer.

Another example is the ‘Cup of Tea Case’, where the ABCC has pursued Union Officials for alleged right of entry breaches in 2014. The prosecution was unsuccessful, widely criticised, and expensive for the Australian taxpayer. It has been reported that the ABCC incurred costs of \$100,000 in bringing the failed action¹¹.

Based on the above, it is impossible to say that the BCIIP Act is being applied “*without distinction of interests between building industry participants*” and “*for the benefit of all building industry participants*”. Of all the participants in the building and construction industry, only one has benefitted from the introduction of the BCIIP Act – big businesses looking to cut conditions and wages.

The Means

In addition to addressing the main object of the BCIIP Act itself at s.3(1) of the Act, for the purposes of completeness for the sake of the review, the AWU intends to briefly touch on a number of the ‘means’ by which the BCIIP Act is to achieve its

⁷ *Official Committee Hansard, Senate Estimates, Education and Employment Legislation Committee, 30 May 2017*, p.129 per Saeedi, S.

⁸ *ABCC Annual Report 2016-17, Table 14*.

⁹ *Commissioner, Australian Building & Construction Commission v Hall & Ors (No.2) [2017] FCCA 18.*

¹⁰ *Official Committee Hansard, Senate Estimates, Education and Employment Legislation Committee, 30 May 2017*, p.142 per Saeedi, S.

¹¹ *Marin-Guzman, D ‘Judge turns on ABCC for wasting time over ‘cup of tea’ CFMEU incident’ Financial Review 13 March 2017.*

objective. These ‘means’ number eight and are listed at s.3(2) of the Act, directly below the main objective.

The ABCC has categorically failed to engage with a number of these means, and has arguably behaved entirely inconsistently with them.

As stated above, the BCIIP Act has made no improvements in the bargaining framework, and has most certainly not encouraged “*genuine bargaining*¹²”. The introduction of the Code caused confusion and gave unscrupulous employers with low or no Union membership the rare opportunity to remove or reduce the conditions of employees in the building and construction industry.

The confusion regarding the introduction of the Code was twofold. Firstly, there was widespread confusion about the Code’s application. Secondly, there was widespread confusion about what clauses in enterprise agreements were and were not ‘Code compliant’. In both cases, the ABCC was completely unequipped to deal with such confusion, and completely under resourced to prevent the exploitation that occurred.

As a result of the former element of confusion, companies that do not perform “building work” as defined in the BCIIP Act¹³ were forcing Code compliance on their workforce, and head contractors were forcing Code compliance on sub-contractors that do not perform building work. Some of this can be attributed to genuine confusion and fear, the rest to pure opportunism.

The latter element of confusion promoted the attempted excision of entire tracts of enterprise agreements by employers in the name of ‘Code compliance’. Gone unchecked – and those agreements or sites without Union membership were left so – this resulted in the gutting of enterprise agreements and the removal of terms and conditions of employment and protections that employees had previously enjoyed. This process was in no way ‘genuine’ and occurred in complete bad faith.

The “rule of law¹⁴” argument that saturated the debate when the BCIIP Act was introduced, while heavily relied upon by the proponents of the Act, is arguably not entirely accurate (and even less so in practice). Firstly, the BCIIP Act is a law that is applied to only one sector of the workforce in Australia – those that perform “building work”. The AWU would suggest that a workplace law that not only refers to, but also

¹² *Building and Construction Industry (Improving Productivity) Act 2016*, s.3(2)(a).

¹³ *Building and Construction Industry (Improving Productivity) Act 2016*, s.6.

¹⁴ *Building and Construction Industry (Improving Productivity) Act 2016*, s.3(2)(b).

commits to “promoting” the rule of law, would apply to all sectors on a non-discriminatory basis. Secondly, and more importantly when considering if the BCIIP Act is achieving its object, is the way in which the law is *applied*.

As has already been discussed, the BCIIP Act has been applied in an uneven and capricious manner – completely counter to the rule and principles of law. This leads in to the following two means in the list at s.3(2) of the BCIIP Act – “ensuring respect¹⁵” and “ensuring responsibility¹⁶”.

The AWU strongly suggests that the ABCC has promoted respect for only certain building industry participants, while only holding the other building industry participants ‘accountable’. The AWU submits that the ABCC has so far been almost entirely disinterested in the unlawful conduct of employers – of which there are almost countless examples, from wage theft to sham contracting to phoenixing – while remaining keenly interested in any actions of Unions or their Officials.

The AWU suggests that laws should apply fairly to all participants and that all transgressions of the law should be punishable. A failure to apply laws fairly and evenly leads to an erosion in the standards of the justice system and undermines public confidence in the independence of legal institutions and practices.

Any well-intended attempts to reduce breaches of the law, reduce deaths or ensure compliance with the law itself have been lost in an embarrassing and partisan approach that can only be described as a bastardisation of good governance and justice principles.

Deaths on construction sites

An incredible and indefensible failure of the ABCC has been its apparent disregard for the safety of Australian men and women who work in the building and construction industry. To any outside observer of the ABCC, safety is not counted as a priority for the ABCC.

On the contrary, the attitude of the former ABCC Commissioner when faced with a question regarding an employer found guilty of breaching work health and safety laws resulting in a number of deaths arguably clearly shows what priority the ABCC

¹⁵ *Building and Construction Industry (Improving Productivity) Act 2016*, s.3(2)(c).

¹⁶ *Building and Construction Industry (Improving Productivity) Act 2016*, s3(2)(d).

gives to improving workplace health and safety. The former Commissioner stated, “I’m considering writing to [the company]”¹⁷.

On the ABCC website, there is a list of matters that the ABCC has or is currently pursuing in court. As at the time of writing, there are 69 matters in this list¹⁸. Not one of these matters is related to workplace health and safety, despite there already being seven deaths in the construction industry this year¹⁹. Based on its conduct and pursuit of matters within the industry there is nothing to indicate that the ABCC is concerned with the safety of people in the building and construction industry at all.

A Notable Failure

The BCIIP Act has entirely failed to achieve even a portion of its stated object. The actions of the Commission that the BCIIP Act established arguably at best ignores and at worst subverts the means by which the BCIIP Act was to achieve that object.

For Australians to have faith in their regulators and justice system, the institutions themselves and the practices they adopt must be seen to be above politics. Those involved must act in good faith and in an even-handed manner. To do otherwise serves to undermine the principles of Australian law and reduces the trust Australians can have in their government.

Laws should apply fairly to all participants and all transgressions of the law should be punishable irrespective of those who incur the breach. A failure to apply laws fairly and evenly leads to an erosion in the standards of the justice system and undermines public confidence in the independence of legal institutions and practices.

The BCIIP Act has had a purely negative impact on the building and construction industry. Targeting Unions and using huge sums of public money to secure penalties against actions allegedly taken by Unions and their Officials is not the proper basis for a federal Commission, nor for a piece of Australian legislation.

The BCIIP Act is a notable failure of the Australian Government and should be repealed immediately.

THE AUSTRALIAN WORKERS’ UNION

¹⁷ *Official Committee Hansard, Senate Estimates, Education and Employment Legislation Committee, 30 May 2017, p.120 per Hadgkiss, N.*

¹⁸ <https://www.abcc.gov.au/compliance-and-enforcement/outcomes-investigations/legal-cases>.

¹⁹ *Safe Work Australia, Year-to-date 2018: Preliminary worker deaths by industry of workplace.*