



Australian Government

Department of Jobs and Small Business

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

Rex Deighton-Smith  
Jaguar Consulting Pty Ltd

October 2018

ISBN

978-1-76051-567-6 [PDF]

978-1-76051-568-3 [DOCX]



With the exception of the Commonwealth Coat of Arms, the Department's logo, any material protected by a trade mark and where otherwise noted all material presented in this document is provided under a [Creative Commons Attribution 3.0 Australia](http://creativecommons.org/licenses/by/3.0/au/) (<http://creativecommons.org/licenses/by/3.0/au/>) licence.

The details of the relevant licence conditions are available on the Creative Commons website (accessible using the links provided) as is the full legal code for the [CC BY 3.0 AU licence](http://creativecommons.org/licenses/by/3.0/au/legalcode) (<http://creativecommons.org/licenses/by/3.0/au/legalcode>).

The document must be attributed as the Review of the *Building and Construction Industry (Improving Productivity) Act 2016*.

Disclaimer:

The Review of the *Building and Construction Industry (Improving Productivity) Act 2016* was conducted by Mr Rex Deighton-Smith of Jaguar Consulting Pty Ltd with assistance from the Department. The views and opinions expressed in the materials do not necessarily reflect the views or have the endorsement of the Australian Government or of any minister, or indicate the Australian Government's commitment to a particular course of action. While care has been taken to ensure that information contained in this report is true and correct at the time of publication, changes in circumstances after the time of publication may impact on the accuracy of this information. The Australian Government, Jaguar Consulting and the Department give no warranty or assurance, and make no representation as to the accuracy of any information or advice contained, or that it is suitable for your intended use.

## Letter of transmittal



www.jaguarconsulting.com.au  
rex@jaguarconsulting.com.au  
ABN 56 089 615 636

The Hon Kelly O'Dwyer MP  
Minister for Jobs, Industrial Relations and Women  
PO Box 6022  
House of Representatives  
Parliament House  
CANBERRA ACT 2600

Dear Minister

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

I am pleased to present to you for tabling in Parliament my report on the Review of the *Building and Construction Industry (Improving Productivity) Act 2016*, which I have undertaken in accordance with the terms of reference established by the then Minister for Employment, Senator the Hon Michaelia Cash.

Yours sincerely

Rex Deighton-Smith  
Director  
Jaguar Consulting Pty Ltd

17 October 2018

## Contents

Letter of transmittal	i
Contents	ii
Acronyms and abbreviations	v
Summary and recommendations	1
Introduction	11
Background to the review	11
Background to the <i>Building and Construction Industry (Improving Productivity) Act 2016</i>	11
Comparing the BCIP Act and the FWBI Act	11
Terms of reference	14
Chapter 1: The performance by the Australian Building and Construction Commission (ABCC) of its 'full service regulator' function	15
Term of reference 1	15
1.1. Introduction	15
Designated building laws	15
1.2. Stakeholder views	17
Industry submissions	17
ACTU submission	17
Views expressed by the ABC Commissioner	19
1.3. Data on ABCC activities	21
1.4. Analysis	23
Finding and recommendations	25
Chapter 2: Independent oversight of the compulsory examination powers	26
Term of reference 2	26
2.1. Introduction	26
2.2. Stakeholder views	27
Views expressed by the ABC Commissioner	29
2.3. Views expressed by the Ombudsman	29
2.3.1. Reports on the exercise of the compulsory examination powers	29
2.3.2. Ombudsman's submission to the review	31
2.4. Analysis	32
Frequency of reporting	34
Conclusion	36
Finding and recommendations	36

Chapter 3: Higher penalties under the BCIP Act	37
Term of reference 3	37
3.1. Introduction	37
3.2. Stakeholder views	39
Views expressed by the ABC Commissioner	40
3.3. Analysis	41
Finding and recommendations	41
Chapter 4: Streamlining and clarification of the BCIP Act, particularly where it interacts with other legislation	42
Term of reference 4	42
Market testing requirements for non-resident workers	42
4.1. Stakeholder views	42
4.2. Comparison of market testing provisions – BCIP Act and 2016 Code vs Migration Act	44
4.3. Analysis	47
Findings and recommendations	48
Chapter 5: Operation of the new provisions of the BCIP Act	49
Term of reference 5	49
Compliance with NCC performance requirements – building materials	49
5.1. Introduction	49
5.1.1. Context for the NCC requirements	50
5.1.2. The FSC’s approach to carrying out its NCC function	51
5.1.3. Pilot audit program	52
5.1.4. Progress and key issues identified by the FSC	52
5.2. Stakeholder views	54
5.2.1. The pilot audits	56
5.3. Analysis	56
Appropriateness of the accreditation requirement	56
Appropriateness of auditing by the FSC	57
Recommendations	59
Security of payments	60
5.4. Introduction	60
Security of Payments Working Group	60
The 2016 Code – Security of Payment obligations	60
5.5. Stakeholder views	62

5.6. Analysis	64
Finding and recommendations	65
Chapter 6: Conclusions	66
Consultation	67
References	68
Appendix 1: ABCC summary data	70
Appendix 2: History of the BCIP Act and previous legislation	72
Appendix 3: Comparison of key provisions – BCIP Act, FWBI Act & BCII Act	73
Appendix 4: Comparison of compulsory examination powers – safeguards	77

## Acronyms and abbreviations

<b>AAT</b>	Administrative Appeals Tribunal
<b>ABCC</b>	Australian Building and Construction Commission
<b>ABC Commissioner</b>	Australian Building and Construction Commissioner
<b>ACCI</b>	Australian Chamber of Commerce and Industry
<b>ACTU</b>	Australian Council of Trade Unions
<b>Ai Group</b>	Australian Industry Group
<b>AMMA</b>	Australian Minerals and Metals Association
<b>ARC</b>	Administrative Review Council
<b>AWU</b>	Australian Workers Union
<b>BCII Act</b>	<i>Building and Construction Industry Improvement Act 2005</i>
<b>BCIIP Act</b>	<i>Building and Construction Industry (Improving Productivity) Act 2016</i>
<b>BCIIP Bill</b>	Building and Construction Industry (Improving Productivity) Bill 2013
<b>CCF</b>	Civil Contractors Federation
<b>CFMEU</b>	Construction, Forestry, Mining and Energy Union
<b>CFMMEU</b>	Construction, Forestry, Maritime, Mining and Energy Union
<b>FSC</b>	Federal Safety Commissioner
<b>FSC Scheme</b>	Work Health and Safety Accreditation Scheme
<b>FW Act</b>	<i>Fair Work Act 2009</i>
<b>FWBC</b>	Fair Work Building and Construction
<b>FWBI Act</b>	<i>Fair Work Building Industry Act 2012</i>
<b>FWO</b>	Fair Work Ombudsman
<b>GATS</b>	General Agreement on Trade in Services
<b>HIA</b>	Housing Industry Association
<b>MBA</b>	Master Builders Association
<b>Migration Act</b>	<i>Migration Act 1958</i>
<b>MoU</b>	Memorandum of Understanding
<b>Murray Review</b>	Review of Security of Payment Laws, conducted by Mr John Murray AM
<b>NECA</b>	National Electrical and Communications Association
<b>NCC</b>	National Construction Code
<b>NCP</b>	Non-compliant products
<b>Ombudsman</b>	Commonwealth Ombudsman
<b>2013 Code</b>	<i>Building Code 2013</i>
<b>2016 Code</b>	<i>Code for the Tendering and Performance of Building Work 2016</i>

## Summary and recommendations

The main object of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP 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 Australian economy as a whole.<sup>1</sup> The BCIIP Act came into effect on 2 December 2016.

Sub-section 119A(1) of the BCIIP Act states that ‘before the end of the period of 12 months after the commencement of this section, the Minister must cause to be conducted a review into the operation of this Act.’ Terms of reference for the review of the operation of the BCIIP Act were approved on 1 December 2017, thus formally commencing the review.

The terms of reference focus largely on the provisions in the BCIIP Act that arose from Senate amendments. These provisions created new functions for the Australian Building and Construction Commissioner (ABC Commissioner) and the Federal Safety Commissioner (FSC). Section 119A was also the product of a Senate amendment.

The BCIIP Act replaced the *Fair Work (Building Industry) Act 2012* (FWBI Act) and re-established the Australian Building and Construction Commission (ABCC), which existed between October 2005 and May 2012, prior to being replaced by the Office of the Fair Work Building Industry Inspectorate (known as Fair Work Building and Construction (FWBC)), established under the FWBI Act. Like the former FWBC, the ABCC is a dedicated workplace relations regulator for the building and construction industry. Both the BCIIP Act and the former FWBI Act establish building industry-specific workplace relations legislation. While this legislation is broadly similar, key differences include:

- a specific obligation for the ABC Commissioner to ensure that policies and procedures adopted and resources allocated are applied in a reasonable and proportionate manner to each of the categories of building industry participants
- the existence of specific civil remedy provisions relating to matters including picketing and unlawful industrial action in the BCIIP Act
- the availability of substantially higher maximum penalties for breaches of the BCIIP Act than for breaches of similar civil remedy provisions in the *Fair Work Act 2009* (FW Act)
- the adoption of a requirement for the Commonwealth Ombudsman to report quarterly on the use of the ABC Commissioner’s compulsory examination powers
- the broadening of the range of matters addressed by the 2016 Code, which must be complied with by certain building industry participants undertaking Commonwealth-funded building work.

In addition, the functions of the ABC Commissioner have been broadened (by comparison with those established under the FWBI Act).

---

<sup>1</sup> Section 5 of the BCIIP Act defines ‘building industry participant’ as a building employer, a building employee, a building contractor, a person who enters into a contract with a building contractor under which the building contractor agrees to carry out building work or to arrange for building work to be carried out, a building association, or an officer, delegate or other representative of a building association.



The following summary addresses each of the review's terms of reference in turn.

### **Term of reference 1**

The review will examine the performance by the Australian Building and Construction Commission (ABCC) of its 'full service regulator' function (that is, reviewing building industry employers' compliance with wages and entitlements obligations as well as regulating building industry participants' compliance with freedom of association, right of entry and similar laws).

Subsection 16(3) of the BCIP Act explicitly requires the ABCC to regulate a number of matters addressed by the FW Act, including wages and entitlements, sham contracting arrangements, and discrimination, while subsection 16(2) requires the ABC Commissioner to adopt policies and procedures and apply the resources of the ABCC in a reasonable and proportionate way, having regard to complaints received.

The full service regulator concept implies that the ABCC is seen to act impartially and be responsive to the concerns of all building industry participants.

Several industry submissions questioned the appropriateness of this concept, arguing that the result would be a diversion of ABCC resources into areas that they see as lying beyond its core functions, which were identified as addressing concerns over freedom of association, enterprise bargaining, right of entry, industrial action and coercion. It was argued that the effect of subsection 16(3) would be to require the ABCC to undertake roles which other regulators could better fulfil. However, the issue of the appropriateness of the full-service regulator function lies outside the scope of this term of reference.

The ACTU argued strongly that the ABCC is not functioning as a full-service regulator, instead showing a strong bias toward investigating and prosecuting unions and workers, while giving little attention to wages and entitlements issues. However, much of the evidence presented by the ACTU in support of this proposition related to the operations of the ABCC's predecessor organisations. Data on the activities of the ABCC indicates that a substantial, and progressively increasing, proportion of its resources have been devoted to wages and entitlements and sham contracting issues, while a recent recruitment process will further strengthen its capacities in this area. Analysis of investigations also found a near identical proportion of employers and employees/unions as the subjects of investigations. The ABC Commissioner also indicated in discussion with the review a clear focus on the need for the ABCC to be responsive to the concerns of all industry participants.

The full service regulator concept aims to ensure that the ABCC will, in future, have the support of all building industry participants, in contrast to its predecessor bodies. This will only occur if the level of activity of the ABCC in pursuing issues such as wages and entitlements and sham contracting is sufficient to overcome embedded scepticism as to its orientation and provide confidence that it will behave in an even-handed fashion. While this review is being undertaken at a very early stage in the operations of the ABCC, the available quantitative evidence regarding its activities indicates that it is acting consistently with this requirement, while the strategic orientations of the ABCC, as outlined by the ABC Commissioner, are also consistent with its obligations under section 16 of the BCIP Act.

## Finding and recommendations

**Finding:** The activities of the ABCC since its establishment, together with the strategic priorities identified by the ABC Commissioner, are consistent with its full-service regulator function.

**Recommendation 1.1:** That the ABCC should more clearly articulate its commitment to increase the confidence of all building industry participants as to its impartiality.

**Recommendation 1.2:** That, as a step toward this goal, the ABCC consider publishing additional material in its quarterly and annual reports which provides more detailed information on the matters investigated by it, including legal proceedings commenced.

**Recommendation 1.3:** That this additional information should be of a type that would assist building industry participants to better understand the allocation of ABCC resources and the focus of its activities. It should also include information on the ABCC's priorities and strategic approaches.

## Term of reference 2

The review will examine the independent oversight of the ABCC's compulsory examination powers, including reporting requirements (for example, the frequency these reports are required), and safeguards and public accountability in the application of these powers.

Several safeguards apply to the use of the compulsory examination powers of the ABC Commissioner. In particular, examinations can only be undertaken after a notice is issued by a nominated Administrative Appeals Tribunal (AAT) presidential member in response to an application by the ABC Commissioner; all examinations must be conducted by the ABC Commissioner, a Deputy Commissioner or a senior executive of the ABCC; the witness has a right to legal representation; the Commonwealth Ombudsman (Ombudsman) must report quarterly to Parliament on the use of the powers; and the ABC Commissioner is required to report quarterly to the Minister on the ABCC's performance of its functions, including the use of these powers.

While virtually all submissions to the review addressed this term of reference, most focused on the appropriateness of the compulsory examination powers, rather than the oversight provisions applying to them. Industry submissions supported the powers, while the ACTU argued for their removal and replacement with 'the usual discovery and subpoena powers supervised by the courts'. This issue is beyond the scope of the terms of reference for the review.

To the extent that the oversight powers were addressed, all submissions except for that of the ACTU argued that the powers were adequate and appropriate. Conversely, the ACTU highlighted questions in relation to both the timeliness and availability of the Ombudsman's reports. The ACTU argued that the current oversight mechanisms do not allow 'real time oversight', with the associated ability to address issues as they arise, rather than making unenforceable recommendations after the fact.

Assessment of the most recent Annual Report published by the Ombudsman indicates that only one recommendation was made.<sup>2</sup> This was that the then FWBC Director should not express a preference to examinees that they not disclose the matters discussed at examination. While this recommendation was not immediately accepted by the FWBC, the current ABC Commissioner has adopted a new approach in this area, which appears consistent with the recommendation. While the Ombudsman's reports have highlighted several smaller issues associated with the use of these powers, an overall assessment of these reports indicates that the powers have been used appropriately by the ABCC.

In a submission to the review, the Ombudsman argued that the current quarterly reporting frequency is unusually short, relative to similar requirements of other legislation, and that this creates practical difficulties for both the Ombudsman's office and the ABCC. The Ombudsman believes that biannual reporting would be preferable on practical grounds and would not compromise its ability to exercise effective scrutiny.

The review concludes that the current arrangements for exercising oversight of the compulsory examination powers are generally appropriate. However, it accepts the view put forward by the Ombudsman in relation to the difficulties caused by the current requirement for quarterly reporting.

The review believes that publication of these reports on the Ombudsman's website is appropriate. However, given the ACTU's suggestion that their publication on the ABCC website would enhance their effective accessibility, it notes that there appears to be no obvious impediment to access being available through both websites.

## Finding and recommendations

**Finding:** That the safeguards and public accountability mechanisms incorporated in the current oversight arrangements in respect of the ABCC's compulsory examination powers are adequate and appropriate.

**Recommendation 2.1:** That the current oversight arrangements should be retained, subject to the changes proposed in recommendations 2.2 and 2.3.

**Recommendation 2.2:** That the provisions of subsection 65(6) of the BCIP Act be amended to provide for the Ombudsman to report to Parliament on a biannual basis, rather than a quarterly basis.

**Recommendation 2.3:** That the Minister request that the ABCC incorporate a link to the Ombudsman's reports on its website.

---

<sup>2</sup> Commonwealth Ombudsman 2017, Annual Report by the Commonwealth Ombudsman under s 13(1) of the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* for the period 1 July 2015 to 30 June 2016, Commonwealth Ombudsman, Canberra.

### Term of reference 3

The review will examine whether the higher penalties under the BCIP Act are acting as a deterrent to prevent contraventions of workplace relations laws by industry participants.

The BCIP Act contains several building industry specific workplace relations civil remedy provisions. Some of these provide for higher maximum penalties for contraventions than those able to be imposed when the FWBI Act was in operation, which relied on the generally applicable penalties for contraventions of similar civil remedy provisions of the FW Act. The penalties contained in the BCIP Act are similar in size to those provided under the former *Building and Construction Industry Improvement Act 2005* (BCII Act). Thus, the BCIP Act has re-established a building industry-specific regime of higher penalties. This change was the result of concerns as to whether the previous penalty arrangements provided a sufficient disincentive to non-compliant behaviour.

Industry submissions generally argued that it was not yet possible to draw a clear conclusion as to the incentive effects of the higher penalty regime, although two submissions did argue that some evidence suggests a reduction in non-compliant behaviour within the industry. All argued for the retention of the penalties at their current level, while at least one argued that the government should be open to further increasing the level of penalties available.

Submissions from the AWU and the ACTU did not directly address whether the higher penalties were affecting compliance, but the ACTU argued that higher penalties should be extended to non-compliance with wages and entitlements obligations and contraventions of work health and safety laws.

The ABC Commissioner pointed out that no penalties have yet been imposed in a context in which the new higher penalties are available. This means that any incentive effects observed to date would necessarily be indirect in nature – that is, they would be the result of awareness of the availability of higher penalties, rather than their actual imposition.

In light of this, there is little reliable basis on which to draw a conclusion as to the probable deterrent effects of the higher penalties provided under the BCIP Act. This, in turn, suggests that there is no sound basis for recommending any change to the current penalty arrangements.

## Finding and recommendations

**Finding:** That little evidence as to the deterrent effects of the increased penalties provided under the BCIIIP Act is currently available. This largely reflects the fact that no penalties have been imposed under the BCIIIP Act. Limited evidence of reductions in the number of days lost to industrial disputes and the number of proceedings initiated by the ABCC since the commencement of the BCIIIP Act may suggest that some incentive effects have been felt. However, no confident conclusion can be drawn on this point.

**Recommendation 3.1:** That, in light of the above finding, no changes to the current penalties provisions of the BCIIIP Act should be adopted at this point.

**Recommendation 3.2:** That the impact of the BCIIIP Act's penalties provisions be monitored by the Department of Jobs and Small Business to enable the provision of further policy advice on this issue.

## Term of reference 4

The review will examine any need for amendments that will streamline and clarify the application of the BCIIIP Act, in particular when it interacts with other Commonwealth legislation (for example, where the recruitment obligations regarding the employment of foreign workers in the BCIIIP Act and the *Code for the Tendering and Performance of Building Work 2016* (2016 Code) overlap with obligations in the *Migration Act 1958* or Australia's international trade obligations). This should include consideration of whether technical amendments are required to the 2016 Code to clarify its application/improve its operation.

This term of reference establishes a general requirement for the review to identify any need for amendments to streamline and clarify the operation of the BCIIIP Act, and specifically identifies an overlap between the requirements of the BCIIIP Act and those of the *Migration Act 1958* (Migration Act). The issue of obligations regarding the employment of foreign workers was addressed in several submissions. Only a small number of other issues were raised in submissions in response to this term of reference, with each of these other issues being raised in only one or two submissions.

## Market testing requirements

As several submissions noted, the market testing requirements of the BCIIIP Act, while broadly similar to those of the Migration Act, differ in two important ways. One is the more onerous requirement of the BCIIIP Act to demonstrate that no Australian resident can do the job in question, while the second is that the BCIIIP Act does not include an exemption mechanism for circumstances in which undertaking market testing would be inconsistent with Australia's international trade obligations.

Review of legislative instruments made under the relevant Migration Act provisions (notably IMMI 17/109) indicates that inconsistencies between the Migration Act's market testing requirements and Australia's international trade obligations are acknowledged as being quite widespread. In this context, the absence of an exemption mechanism in respect of the broadly similar requirements of the BCIIIP Act appear to expose Australia to the risk of dispute proceedings being commenced by its

trading partners in the World Trade Organisation (WTO) context. In addition, at least one industry submission has highlighted efficiency costs borne by business in complying with the market testing requirements.

While the market testing requirements appear to have been adopted, at least in part, in response to concerns regarding the misuse of the former 457 visa class in the building industry, these have since been addressed at an economy-wide level via the abolition of this visa class and its replacement with the Temporary Skill Shortage 482 visa as of 18 March 2018. These considerations suggest that there is a clear argument for removing subsection 34(2D) from the BCIIIP Act and section 11F from the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code). Code-covered entities would remain subject to the market testing requirements of the Migration Act if this approach were adopted.

## Findings and recommendations

**Finding:** That the available evidence indicates that the provisions of subsection 34(2D) of the BCIIIP Act and section 11F of the 2016 Code are likely to be inconsistent with several of Australia's international trade obligations.

**Finding:** That the reforms undertaken to visa arrangements for non-resident workers are likely to have addressed the concerns that led to the inclusion of these provisions in the BCIIIP Act and 2016 Code, while the provisions of the Migration Act provide substantively similar market testing obligations without contravening Australia's international trade obligations.

**Recommendation 4.1:** That the market testing requirements of subsection 34(2D) of the BCIIIP Act and the associated requirements of the 2016 Code should be repealed.

**Recommendation 4.2:** That, alternatively, should the Australian Government wish to retain a market testing requirement under the BCIIIP Act and 2016 Code, the current provisions should be revised or replaced to ensure consistency between these provisions and Australia's international treaty obligations.

**Recommendation 4.3:** That, if subsection 34(2D) is retained, it should be modified to address the apparent inconsistency between subsection 34(2D) of the BCIIIP Act and section 11F of the 2016 Code.

## Term of reference 5

The review will examine the operation of the new provisions in the BCIIIP 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 Federal Safety Commissioner (FSC) was established in 2005 to promote and improve worker safety in the building and construction industry, via administration of the Australian Government's Work Health and Safety Accreditation Scheme (the FSC Scheme). The FSC Scheme aims to ensure building work is performed safely and the FSC is its accrediting authority. The only new function allocated to the FSC under the BCIIIP Act is that conferred by subsection 38(ca), which is to audit compliance with the National Construction Code's (NCC) performance requirements in relation to

building materials. This new function differs markedly from the FSC's existing functions, in that it extends the FSC's role beyond worker safety to include a regulatory function focussed on the built environment. The context for the expansion of the FSC's role is that of widespread concern regarding the use of flammable cladding materials and associated concerns about the potential for wider non-compliance with the NCC.

A key issue identified in this area is that of regulatory overlap. That is, responsibility for ensuring that building materials are used in a manner that is compliant with the NCC essentially lies with state and territory building regulators. The FSC's new role in this area in relation to NCC covered entities necessarily gives rise to potential regulatory overlap. The FSC has sought to avoid duplication of state and territory regulatory responsibilities in this area by adopting an approach to fulfilling its role which is based on a desktop, systems-based audit. It has completed a pilot audit program and is working to develop a workable audit scheme.

A small number of submissions addressed this issue. They acknowledged the importance of addressing the underlying issue of compliance with the NCC, but questioned whether the FSC had, or could readily develop, the expertise required to undertake this role effectively. The question of providing adequate resourcing to the FSC to undertake what was widely seen as a substantial additional function was raised in several submissions, while the FSC also indicated an expectation that undertaking its NCC function would be resource-intensive. A key concern raised in submissions was that the need for the FSC to undertake this additional function could divert its focus and efforts away from what was widely seen as its highly effective role in improving WHS standards.

The apparent effectiveness of the FSC Scheme in improving the WHS performance of building companies could be taken as evidence of the likely benefit of adopting a similar, systems-based audit approach in relation to compliance with NCC performance requirements in relation to building materials. However, to the extent that broadening the FSC's role to include this function reduces its focus on WHS issues, there could be a reduction in net benefits. This is a particular risk if additional resourcing is not provided to the FSC commensurate with its new responsibilities. That is, if resources had to be diverted from WHS-related functions to NCC-related functions, it is likely that their overall productivity would be reduced.

## Recommendations

**Recommendation 5.1:** That the Australian Government should keep the requirement for the FSC to address NCC issues under review as state and territory government responses to this issue evolve in the short to medium-term.

**Recommendation 5.2:** That there should be a presumption in favour of repealing subsection 38(ca) of the BCIIIP Act, provided that the Australian Government is satisfied with the state and territory government reforms in this area.

**Recommendation 5.3:** That the Government should ensure the FSC is adequately funded to undertake NCC-related activities to avoid compromising the effectiveness of its core functions in relation to workplace health and safety.

## Security of payment

The other issue raised in submissions in relation to term of reference 5 was that of security of payments. This term refers to a system that entitles contractors, subcontractors, consultants and suppliers in the construction industry contractual chain to receive payments for work undertaken under a construction contract. All states and territories have enacted specific security of payment legislation in recent years, providing statutory entitlements to progress payments and rapid, low-cost adjudication processes to deal with disputed payments.

Section 32A of the BCIP Act requires a Security of Payment Working Group to be established to advise the ABC Commissioner and monitor the ABCC's effectiveness in exercising its powers in relation to security of payments, advise and make recommendations to the ABC Commissioner and make recommendations to the Minister in response to any matters the Minister requests it to consider. This was not a requirement of the FWBI Act. In addition, Sections 11D and 11E of the 2016 Code address security of payments issues, placing a range of specific obligations on code-covered entities.

Only three submissions addressed this issue. The MBA argued that, while this issue is an important one, the ABCC is not the appropriate body to address it. Moreover, the need to do so could divert its focus away from its core functions. The MBA also questioned whether the successive changes and additions to the regulation of this issue in recent years had been effective and raised the prospect that further change could yield significant confusion. The ACTU supports the ABCC's involvement in this area but argued that it had performed poorly to date. The ACTU believes that an improved definition of a disputed or delayed payment is required which would enable the ABCC to become engaged in security of payments disputes at an earlier stage. The Civil Contractors' Federation also supported earlier involvement by ABCC in security of payment disputes.

The review believes that the focus of the Security of Payments Working Group on increasing awareness of the existing state and territory security of payments legislation is an appropriate response to the observed low level of awareness of this legislation among industry participants, as highlighted in the Murray Review. There may also be unexplored potential for better cooperation and data flows between the relevant state and territory government bodies and the ABCC in relation to security of payment issues.

However, security of payments is a further area in which the provisions of the BCIP Act and the 2016 Code extend to issues for which state and territory governments have primary responsibility. The fact that all states and territories have adopted legislation specifically addressing security of payments in the decade between 1999 and 2009 clearly indicates a general acceptance that this is an issue of major concern. As some submissions noted, this raises the question of whether ABCC can be expected to add substantial value.

It seems likely that the need for the ABCC to fulfil its responsibilities in this area could lead to a diversion of ABCC resources from other activities, as suggested by the MBA. To the extent that the recently developed education campaign is successful in raising awareness, a further increase in the number of delayed and disputed payments reported to regulators is also to be expected. Again, this may have implications for ABCC resourcing.



The Murray Review has addressed the issue of security of payments in detail. Its recommendations focus on the need to achieve greater consistency between state and territory laws and on identifying the preferred characteristics of security of payment legislation around which harmonisation should occur. The Australian Government is, at the time of writing, yet to provide its formal response to the Murray Review. This response could potentially be delayed for some time, pending consultation with state and territory governments regarding the nature and extent of any harmonisation initiatives to be adopted. In this context, any changes in the BCIP Act provisions in this area should await clarification of the expected outcomes in the broader policy environment.

### **Finding and recommendations**

**Finding:** There is relatively limited support among stakeholders for the role of the ABCC in relation to security of payment matters. However, the ABC Commissioner believes that the Security of Payments Working Group has, to date, worked effectively and achieved significant outcomes.

**Recommendation 5.4:** That the ABCC should continue to cooperate systematically with state and territory government bodies responsible for administering and enforcing security of payments laws, particularly in terms of data and intelligence sharing.

**Recommendation 5.5:** That the Australian Government further consider the nature of the ABCC's role in relation to any changes to security of payment arrangements, including in the context of its response to the Murray Review into this issue.

## Introduction

### Background to the review

The main object of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP 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, for the benefit of all building industry participants and the Australian economy as a whole.<sup>3</sup>

Additionally, the *Code for the Tendering and Performance of Building Work 2016* (2016 Code), made under the authority of the BCIIP Act, sets out the Australian Government's expected standards of conduct for certain building industry participants that seek to be, or are, undertaking Commonwealth-funded building work. Once a building industry participant becomes subject to the 2016 Code, it must comply with the 2016 Code in relation to all building work it undertakes.

Section 119A of the BCIIP Act states that '[b]efore the end of the period of 12 months after the commencement of this section, the Minister must cause to be conducted a review into the operation of this Act'. On 1 December 2017, terms of reference for the review were approved, thus formally commencing the review. The terms of reference focus largely on the provisions in the BCIIP Act that arose from Senate amendments. These provisions created new functions for the Australian Building and Construction Commissioner (ABC Commissioner) and the Federal Safety Commissioner (FSC). Section 119A was also the product of a Senate amendment.

### Background to the *Building and Construction Industry (Improving Productivity) Act 2016*

The BCIIP Act commenced on 2 December 2016. It replaced the *Fair Work (Building Industry) Act 2012* (FWBI Act) and re-established the Australian Building and Construction Commission (ABCC), which existed between October 2005 and May 2012, prior to being replaced by the Office of the Fair Work Building Industry Inspectorate (known as Fair Work Building and Construction (FWBC)), established under the FWBI Act.

### Comparing the BCIIP Act and the FWBI Act

In common with the FWBI Act, the BCIIP Act aims to achieve its objectives by establishing a dedicated workplace relations regulator, (now the ABCC), and building industry-specific workplace relations legislation. While some of the civil remedy provisions of this workplace relations legislation, such as prohibitions on coercion and discrimination, are similar to those established in the *Fair Work Act 2009* (FW Act), a key difference is that the BCIIP Act contains specific civil remedy provisions relating to matters including picketing and unlawful industrial action. In addition, the maximum penalties available under the BCIIP Act are three times higher than the similar civil remedy

---

<sup>3</sup> Section 5 of the BCIIP Act defines 'building industry participant' as a building employer, a building employee, a building contractor, a person who enters into a contract with a building contractor under which the building contractor agrees to carry out building work or to arrange for building work to be carried out, a building association, or an officer, delegate or other representative of a building association.

provisions under the FW Act. These higher penalties are similar in size to those provided under the former *Building and Construction Industry Improvement Act 2005* (BCII Act).

The examination powers of the ABC Commissioner established in the BCIIIP Act are similar to those available to the FWBC Director under the FWBI Act, as are the safeguards on the use of these powers. However, an additional requirement is that the Commonwealth Ombudsman (Ombudsman) report quarterly on their use.

Both the BCIIIP Act and FWBI Act provide for the issue of a code of practice that is to be complied with in respect of Commonwealth-funded building work. However, the BCIIIP Act mandates that a building code issued under its authority must address certain matters, including requiring funding entities to:

- ensure that preferred tenderers provide certain information, including in relation to use of domestically sourced materials
- require building industry participants to only use products in building work that comply with Australian standards.

The functions of the FWBC Director and ABC Commissioner are similar under the two Acts. However, Subsection 16(2) of the BCIIIP Act imposes specific obligations on the ABC Commissioner in carrying out his/her functions to ensure that (s)he acts impartially as between categories of building industry participants. It states:

In performing the functions referred to in subsection (1), the ABC Commissioner must ensure that the policies and procedures adopted and resources allocated for protecting and enforcing rights and obligations arising under this Act, designated building laws and the Building Code are, to the greatest extent practicable having regard to industry conditions based on complaints received by the ABC Commissioner, applied in a reasonable and proportionate manner to each of the categories of building industry participants.

In addition, subsection 16(3) explicitly requires the Commissioner to exercise his or her powers in relation to certain specific provisions of the FW Act. These include wages and entitlements, sham contracting, freedom of association, coercion and discrimination.

The 2016 Code also commenced on 2 December 2016. The 2016 Code sets out the Australian Government's expected workplace relations standards of conduct for building industry participants that seek to be, or are, undertaking Commonwealth-funded building work. Once a building industry participant becomes subject to the 2016 Code, it must comply with the 2016 Code in relation to all building work it undertakes.

The 2016 Code replaced the *Building Code 2013* (2013 Code) and the *Building Code 2013 – Supporting Guidelines* (April 2016), which similarly required that contractors demonstrate code-compliance to be eligible to tender for or be awarded Commonwealth-funded building work. The two eligibility requirements to tender for or be awarded Commonwealth-funded building work under the 2016 Code are:

- demonstrating that a contractor is not currently subject to an exclusion sanction

- demonstrating the contractor and its related entities meet the requirements of section 11 of the 2016 Code. Section 11 of the 2016 Code prohibits certain types of clauses from being included in enterprise agreements.

Similar to the Building Code 2013 – Supporting Guidelines (April 2016), the 2016 Code provides that, if a contractor is found to have breached the 2016 Code, they can be subject to an exclusion sanction. Where the ABC Commissioner is satisfied a code-covered entity has breached the 2016 Code, the matter can be referred to the Minister to decide whether to impose a sanction. The Minister can exclude a non-compliant entity for up to one year and the exclusion can extend to the contractor’s related entities. Excluded contractors cannot submit expressions of interest, tender for, or be awarded Commonwealth-funded building work during the exclusion period.

Appendix 2 sets out the history of the BCIP Act and relevant previous legislation in diagrammatic form, while Appendix 3 provides a more detailed comparison of key substantive provisions of the BCIP Act, FWBI Act and BCII Act.

## Terms of reference

The review will examine the following:

1. The performance by the Australian Building and Construction Commission (ABCC) of its 'full service regulator' function (that is, reviewing building industry employers' compliance with wages and entitlements obligations as well as regulating building industry participants' compliance with freedom of association, right of entry and similar laws).
2. The independent oversight of the ABCC's compulsory examination powers, including:
  - reporting requirements (for example, the frequency these reports are required); and
  - safeguards and public accountability in the application of these powers.
3. Whether the higher penalties under the BCIIIP 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 BCIIIP Act, in particular when it interacts with other Commonwealth legislation (for example, where the recruitment obligations regarding the employment of foreign workers in the BCIIIP Act and the *Code for the Tendering and Performance of Building Work 2016* (Building Code) overlap with obligations in the *Migration Act 1958* or Australia's international trade obligations). This should include consideration of whether technical amendments are required to the Building Code to clarify its application/improve its operation.
5. The Review will also examine the operation of the new provisions in the BCIIIP 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.

## Chapter 1: The performance by the Australian Building and Construction Commission (ABCC) of its 'full service regulator' function

### Term of reference 1

The review will examine the performance by the Australian Building and Construction Commission (ABCC) of its 'full service regulator' function (that is, reviewing building industry employers' compliance with wages and entitlements obligations as well as regulating building industry participants' compliance with freedom of association, right of entry and similar laws).

### 1.1. Introduction

Section 16 of the BCIIIP Act sets out the functions of the ABC Commissioner. The first of these (subsection 16(1)(aa)) is to promote the objects of the BCIIIP Act. The remaining functions of the ABC Commissioner, identified in subsection 16(1), are:

- monitoring and promoting appropriate standards of conduct by building industry participants
- investigating suspected contraventions of the BCIIIP Act, the 2016 Code and 'designated building laws' (see below)
- ensuring building employers and contractors comply with their obligations under the BCIIIP Act, 2016 Code and 'designated building laws'
- instituting or intervening in proceedings
- providing assistance and advice to building industry participants regarding their rights and obligations
- providing representation to a building industry participant in proceedings, where the Commissioner believes that this would promote the enforcement of the BCIIIP Act, the law or 2016 Code
- disseminating information about the BCIIIP Act, 2016 Code or designated building laws, or about other matters affecting building industry participants.

In addition, subsection 16(2) requires the ABC Commissioner, in carrying out these functions, to ensure that the policies and procedures adopted and resources allocated by it are applied in a reasonable and proportionate manner to each of the categories of building industry participants.

Subsection 16(3) also specifically requires the ABC Commissioner to perform his/her functions in relation to a number of identified provisions of the FW Act. These include provisions relating to wages and entitlements, sham contracting, freedom of association, coercion, right of entry and industrial action.

### Designated building laws

Section 5 of the BCIIIP Act specifies the *Fair Work Act 2009* (FW Act) as a 'designated building law'<sup>4</sup> and has the effect of requiring the ABC Commissioner to exercise his functions, as listed in

---

<sup>4</sup> The *Independent Contractors Act 2006*, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and 'a Commonwealth industrial agreement' are also defined in section 5 as designated building laws.

section 16, in respect of the FW Act as well as the BCIP Act and the 2016 Code. The FW Act was, similarly, listed as a designated building law under the former *Fair Work Building Industry Act 2012* (FWBI Act) and the former *Building and Construction Industry Improvement Act 2005* (BCII Act). Thus, the ABC Commissioner's role in enforcing compliance with the FW Act on the part of building industry participants was also shared by the former Fair Work Building and Construction (FWBC) and the ABCC.

In carrying out its responsibility to enforce compliance with the FW Act, the FWBC initially undertook significant activity in relation to complaints of underpayment of wages and entitlements and sham contracting. For example, in a 2012 speech, the then FWBC Director highlighted FWBC's activities in these areas and noted that it had retrieved over \$1.2 million in unpaid wages for building industry employees,<sup>5</sup> while over \$200,000 in sanctions were imposed in 2013-14 in respect of sham contracting.<sup>6</sup>

In late 2013, a new FWBC Director adopted a Memorandum of Understanding (MoU) with the Fair Work Ombudsman (FWO). This MoU provided that the FWBC would refer complaints relating to the payment of wages and entitlements and sham contracting in the building industry to the FWO for investigation and response. This change in approach appears to have been, in part, made in recognition of the FWO's greater expertise in regulating these matters across the whole economy. However, Mr Nigel Hadgkiss, the then new Director of the FWBC indicated a view that these matters constituted a lower priority for the organisation, stating in the FWBC Annual Report 2013-14 that:

Part of this agency's new emphasis is what I refer to as a return to 'core business'. This has seen wages and entitlements work returned to the Fair Work Ombudsman. These investigations previously made up a large component of our work. In fact, more than 40% of investigations related to wages and entitlements when I took over.

The MoU between the FWBC and the FWO effectively re-established a similar arrangement adopted by the former ABCC when the BCII Act was in operation. Of note is the fact that this previous MoU had been commented on by Justice Murray Wilcox in his 2009 Report 'Transition to Fair Work Australia for the Building and Construction Industry'. The Wilcox report stated that:

I understand the reasoning, but the ABCC's practice has had the unfortunate effect of compounding the belief, of many on the employee side, that the ABCC is a politically inspired worker-bashing agency. Although it may be preferable to use different individuals for the task, I think it will be critically important for the BCD [Building and Construction Division] to actively investigate and prosecute employees' claims and be seen to do so.<sup>7</sup>

However, as noted above, subsection 16(2) of the BCIP Act establishes specific requirements in relation to the disposition of the ABCC's resources which explicitly require the ABC Commissioner in carrying out his/her functions to ensure that (s)he applies them in a reasonable and proportionate

---

<sup>5</sup> Johns, Leigh 2012, Regulation in the Building and Construction Industry: Then, Now, and the Future, speech, Address to the 2012 AMMA West Coast Conference, Perth, WA, 24 October, viewed 3 October 2018, ([web.archive.org/web/20180323042005/https://www.abcc.gov.au/address-2012-amma-west-coast-conference](http://web.archive.org/web/20180323042005/https://www.abcc.gov.au/address-2012-amma-west-coast-conference)).

<sup>6</sup> Fair Work Building and Construction 2014, Annual Report 2013-14, FWBC, Melbourne, p. 48.

<sup>7</sup> Wilcox, M 2009, Transition to Fair Work Australia for the Building and Construction Industry: Report, Department of Jobs and Small Business, Canberra, p. 94.

manner to each of the categories of building industry participants. This is to be reflected in the policies and procedures adopted and the disposition of the ABCC's resources.

Accordingly, since January 2017<sup>8</sup> the ABCC has directed workers with general queries regarding awards, wages and entitlements for the building industry to the FWO's website or helpline, given that the FWO holds detailed and up to date information and 'ready reckoners' on wages and entitlements and protections for all industries. However, where queries concern underpayment of wages, breaches of conditions or suspected sham contracting, the ABCC deals with the matter. Where the FWO receives complaints about underpayment of wages or entitlements within the building industry, the complainant is referred to the ABCC.

## **1.2. Stakeholder views**

### **Industry submissions**

While this term of reference requires the review to report on the performance of the ABCC in carrying out its full-service regulator function, several submissions received from industry associations questioned the appropriateness of this obligation. The key concern expressed was that the insertion into section 16 of specific obligations in relation to the enforcement of the FW Act's provisions in relation to wages and entitlements, and in relation to the 'proportionate' distribution of the ABCC's resources, could lead to a reduced focus on what were seen as the ABCC's core functions. It was also suggested that the ABCC was likely to be less effective in carrying out some of these additional functions, notably in relation to wages and entitlements, than other entities such as the FWO. Thus, it was argued that these functions should, instead, be allocated to other, 'more appropriate' regulators, with the role of the ABCC being restricted to those functions that derive specifically from the BCIIIP Act and 2016 Code, including those relating to freedom of association, enterprise bargaining, right of entry, industrial action and coercion.

As noted above, the terms of reference for the review require an assessment of the performance of the ABCC as a full-service regulator, rather than of the policy merits of this function. This latter issue is therefore beyond the scope of the review and, consequently, will not be discussed further.

### **ACTU submission**

The ACTU submission argued strongly that the ABCC has not properly carried out its full-service regulator functions, instead showing a strong bias toward investigating and prosecuting unions and workers, while giving little attention to wages and entitlements issues. The ACTU argues that legislative changes made at the time of the re-establishment of the ABCC in 2016 were intended to 'address its partisan and politicised operation.' Three non-Government amendments agreed to during the passage of the BCIIIP Act were nominated in this regard, as follows:

- the requirement that the policies and procedures adopted and resources allocated by the ABCC for protecting and enforcing relevant rights and obligations should be 'reasonable and proportionate' in relation to the complaints received (subsection 16(2))

---

<sup>8</sup> Australia, Senate Education and Employment Committee, Additional Estimates 2016-17, Hansard transcript, 2 March 2017, pp. 53-54.



- the requirement for the Minister to be satisfied that a person he or she proposes to appoint as ABC Commissioner will perform his or her functions in an apolitical manner and act impartially and professionally (subsection 21(3)(c)<sup>9</sup>)
- additional reporting requirements to enable assessments to be made of the ABCC and the ABC Commissioner's performance against these requirements

The ACTU argues that, despite these amendments, the ABCC continues to prioritise the interests of building employers ahead of unions and workers and is, therefore, manifestly failing to perform its full-service regulator function.

In relation to the 'reasonable and proportionate balance' requirement, the ACTU argued that wages and entitlements and misclassification/sham contracting investigations together constitute only a minority of open investigations identified in the most recent ABCC quarterly report (covering 1 July – 30 September 2017), accounting for 24.39 per cent and 7.32 per cent respectively of the total number of examinations underway. Moreover, none of the five examination notices issued during the period related to these issues, while both proceedings commenced during the period were issued against Construction, Forestry, Mining and Energy Union (CFMEU) officials. This was said to constitute a consistent trend and equivalent figures for the previous quarter were also cited, as was a statement by the then ABC Commissioner (Mr Hadgkiss) at a Senate Estimates hearing on 2 March 2017, which indicated that the CFMEU was the respondent in 57 of 62 proceedings brought by the ABCC that were currently before the courts.

The ACTU also noted that, in response to a question on notice in the Parliament, the ABCC stated that, of the 20 investigations into wages and entitlements issues listed in its most recent quarterly report as being open as at 30 September 2017, five remain open, four resulted in wage recoveries totalling \$26,406 for nine employees from four employers and 11 resulted in no wage recoveries. The ACTU argued that this represents an unacceptably low level of investigation and compliance activity in this area.<sup>10</sup>

In relation to the BCIIIP Act's requirement for the ABC Commissioner to perform their functions in an impartial and apolitical manner, the ACTU submission highlighted judicial criticisms of the then ABC Commissioner made in the context of the 'cup of tea case.'<sup>11</sup> These concerned the presiding judge's view that the proceedings had been brought against a union official over a trivial matter and should not have been pursued. In addition, the circumstances of another case successfully brought by the CFMEU against the former ABC Commissioner, which was followed by his resignation, were highlighted.<sup>12</sup> The ACTU submission questions whether any change in approach is likely to occur

---

<sup>9</sup> As noted in the Australian Council of Trade Unions 2018, written submission, subsection 21(3)(c) specifically requires the Minister to appoint a person as ABC Commissioner if satisfied that they will 'uphold the APS values,' including by performing their functions in an apolitical manner and acting impartially and professionally.

<sup>10</sup> Australian Council of Trade Unions 2018, supplementary written submission, p. 2.

<sup>11</sup> Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (The Cup of Tea Case) [2018] FCA 402.

<sup>12</sup> Mr Hadgkiss was found (on his own admission) to have contravened section 503 of the FW Act, which prohibits misrepresentations about provisions of the Act. Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate [2017] FCA 1166.

under the current Commissioner, citing recent comments regarding his priorities and noting, incorrectly, that ‘Mr McBurney was previously Deputy Commissioner to Mr Hadgkiss.’<sup>13</sup>

The ACTU also argues that the reports produced by the ABCC do not incorporate the requisite level of detail to enable proper scrutiny of its conduct to be exercised. In particular, reports on wages and entitlements contraventions do not provide detail on the total amount of alleged underpayments or the number of affected employers and workers. Similarly, the ACTU argues that the ABCC’s quarterly reports fail to provide sufficient detail to enable assessments to be made as to whether the ABCC is enforcing compliance with the 2016 Code in a fair and unbiased manner.

### **Views expressed by the ABC Commissioner**

As the review is occurring within a very short period of the commencement of the BCIP Act, limited practical experience of the ABCC’s operations under the legislation has accumulated and limited data are available. Moreover, a new ABC Commissioner took up his duties on 6 February 2018. Given these factors, unpublished data was sought to enable a more up-to-date analysis of quantitative indicators to be undertaken. This data is discussed in the next chapter. In addition, consultation was undertaken with the ABC Commissioner to seek information on the ABCC’s current strategic orientations and intentions.

### **Wages and entitlements**

The data received indicates that 27.6 per cent of enquiries in relation to workplace laws received by the ABCC in the first half of 2017-18 related to wages and entitlements, while 40 per cent of investigations commenced during the same period also related to wages and entitlements. The ABC Commissioner noted that the volume of enquiries received in relation to wages and entitlements has risen progressively since the ABCC commenced operations and took over responsibility for this issue, as it relates to the building sector, from the FWO. He expressed the view that this increase was likely largely to reflect increasing awareness among industry participants of the fact that the ABCC was now exercising this responsibility. However, he also stated that enquiry activity rose noticeably after the ABCC commenced undertaking wage audits, apparently because this contributed to a view on the part of industry participants that the ABCC was more engaged with this issue. Given this, the ABC Commissioner expects that the ABCC’s planned further increase in wages and entitlements-related activities would, in turn, increase the volume of enquiries received in this area.

The ABC Commissioner believes that, given the high and increasing level of enquiries and complaints about wages and entitlements being received and the ABCC’s statutory obligation to allocate its resources in a proportionate fashion, the ABCC must increase its activities in the wages and entitlements field. To enable it to do so, the ABCC has recently engaged five additional staff to undertake wages and entitlements related functions and is seeking to fill two further positions.

The ABC Commissioner noted criticism from the ACTU, and the union movement more broadly, that the ABCC has been insufficiently active in commencing proceedings in cases of non-compliance with wages and entitlements laws. He argued that a key future focus for the ABCC will be on obtaining

---

<sup>13</sup> Mr McBurney served as Assistant Commissioner of the ABCC from 2006-2008, while Mr Hadgkiss was not appointed FWBC Director until 2013.

restitution for the affected workers. However, where he is convinced that the non-compliance is not systematic or egregious and the company accepts that there has been non-compliance and provides restitution, he will not typically pursue proceedings. Conversely, the ABCC will commence proceedings in cases of sustained and serious non-compliance.

In this context, the ABC Commissioner highlighted the fact that the ABCC is bound by the Attorney-General's legal service guidelines when determining whether to launch proceedings, arguing that they address the importance of ensuring that there is adequate evidence to support the taking of legal action and that the public interest would be served by doing so.<sup>14</sup>

The ABC Commissioner also indicated an intent to focus a significant proportion of the ABCC's efforts in this area on proactive initiatives, with a focus on vulnerable workers, which research indicates are most likely to be affected by wages and entitlements issues.

### **Sham contracting and security of payments**

Sham contracting and security of payments were also identified by the ABC Commissioner as issues to which the ABCC would need to devote more resources in order to adequately acquit its obligation to act as a 'full service regulator.' He indicated a belief that sham contracting is a substantial issue in certain segments of the industry and that it would be necessary for the ABCC to develop a strategic and proactive approach to address this issue in future.

In relation to security of payments, he noted that the release of the Murray Review, and any future government response, may have a substantial impact on the appropriate approach for the ABCC to take in this area.

### **The Code for the Tendering and Performance of Building Work 2016**

The ABC Commissioner noted that code-related issues have become increasingly prominent, with around 75 per cent of enquiries made in the first half of 2017-18 related to the 2016 Code and 40 per cent of the ABCC's staff resources currently devoted to addressing code-related issues. He believes that both the significant increases in the amount of Commonwealth-funded building work being undertaken in recent times and a greater concern on the part of code-covered entities to ensure that they are fully compliant have contributed to this increase in code-related work. The implication of this increase in code-related enquiries and associated activity is that this area will necessarily constitute a significant element of ABCC's future work.

### **Full service regulator function**

The ABC Commissioner indicated a view that the need for the ABCC to act as a 'full service regulator' implies that it must ensure it is available to assist all industry participants. This includes ensuring that the ABCC can respond to requests for advice and assistance in a timely manner and ensuring that key information is made available in a readily understandable format, both on the ABCC website and through other platforms. The recent relaunch of a phone app providing summary information on key issues, such as right of entry, was noted as an example of the latter.

---

<sup>14</sup> Attorney-General 2017, Legal Services Directions 2017 [F2018C00409], Canberra. In particular s. 4.7 and Appendix B.

The ABC Commissioner was given the opportunity to respond to the criticisms contained in the ACTU submission (see above). He noted that many of the matters raised are beyond the scope of the review, particularly in that many address the activities of the ABCC's predecessor organisations. As such, he declined to offer comment on these matters. However, responses were provided in respect of several specific issues raised by the ACTU. These included comments in relation to the exercise of the compulsory examination powers, the market testing requirements of the BCIP Act and 2016 Code and the Security of Payments Working Group, which are addressed in subsequent chapters of this report.

### **1.3. Data on ABCC activities**

To obtain the most up-to-date data available regarding the ABCC's activities, the review sought unpublished data from the ABCC on enquiries received and investigations commenced during the first half of 2017-18.<sup>15</sup> The key data provided are summarised below, while further detail is provided in additional tables in Appendix 1.

#### **Enquiries received<sup>16</sup>**

Almost 4,000 enquiries were received by the ABCC over the six-months to 31 December 2017, of which approximately three quarters related to the 2016 Code. Almost half of the code-related enquiries related to code assessments, with requests for general information on the 2016 Code and for code advice accounting for most of the remaining enquiries.

A total of 431 enquiries were made in relation to workplace laws,<sup>17</sup> equivalent to around 10.9% of all enquiries received. Right of entry enquiries accounted for almost one third of these (33.2%), while wages and entitlements enquiries accounted for more than one quarter (27.6%). These were easily the two main sources of enquiries, followed by unlawful industrial action (15.1%) and coercion (11.8%). Freedom of association enquiries accounted for 5.8% of the total, while sham contracting enquiries accounted for 5.6%.

Employers were by far the most likely group to make enquiries, accounting for 60.8% total, while employees made 23.2% of enquiries in relation to workplace laws.

#### **Investigations<sup>18</sup>**

Issues related to wages and entitlements were by far the most common matters to be investigated during the period, accounting for 40% of all investigations commenced, twice as many as the next category of investigation. Complaints of coercion accounted for 20% of investigations commenced, while unlawful industrial action and right of entry accounted for 13.3% each. Sham contracting accounted for 6.7% of investigations commenced during the period.

The proportions of subjects of investigations who are employers (48.0%) was very similar to the proportion that are unions or employees (36.0% + 14.7% = 50.7%).

---

<sup>15</sup> The data request was made prior to the end of 2017-18.

<sup>16</sup> Appendix 1, Table A.1.

<sup>17</sup> Appendix 1, Table A.2.

<sup>18</sup> Appendix 1, Table A.3.

It is not possible to directly compare this data on the different types of investigations commenced by the ABCC during the latter half of 2017 with equivalent data for earlier periods, since the ABCC Quarterly and Annual Reports do not provide data on the number of investigations commenced during the reporting period. However, data on the number of investigations that were current during the reporting period are provided in these reports, which cover the first three quarters of 2017.

The proportions of current investigations relating to right of entry, freedom of association and unlawful industrial action were relatively stable across the three quarters for which data are published.<sup>19</sup> By contrast, there was a progressive increase in the proportion of investigations relating to wages and entitlements. The percentage of current investigations relating to this issue in the third quarter of 2017 was almost double that of the first quarter (that is, 24.4% vs 12.3%). A similar, though less marked, trend appears evident in relation to misclassification/sham contracting, with the proportion of investigations related to this topic rising from 4.9% to 7.3% over the period.

Comparison of this data with the unpublished data cited above suggests that the progressive increase in focus on wages and entitlements investigations has continued: while the proportion of current investigations relating to this issue in the third quarter of 2017 was 24.4%, a total of 40% of investigations opened during the second half of 2017 related to this topic. In numerical terms, the number of current wages and entitlements investigations increased from 20, in the first quarter of 2017-18, to 34 in the second quarter.<sup>20</sup> In contrast to the observed trend in relation to wages and entitlements, there was little change in the proportion of investigations relating to misclassification/sham contracting.

A total of 17 wages and entitlements investigations were finalised<sup>21</sup> during the first 13 months of ABCC's operations. None of these resulted in the application of a penalty. The ABCC issued a letter of caution in one case while, in five further cases (29.4% of the total) a voluntary settlement was reached between the parties. In one case, the matter was finalised because the employer became insolvent. In seven of the 17 cases (41.2%) the investigation did not result in the identification of a breach of the relevant workplace laws.

Finally, Table 1 summarises the penalties imposed as a result of the ABCC and FWBC-initiated proceedings since 2011-12, disaggregated according to the nature of the legislative breach identified. Table 1 suggests that the total penalties imposed as a result of such actions have increased somewhat since 2013-14, while the total amount of penalties imposed in respect of specific types of legislative breaches have varied substantially from year to year. For example, penalties imposed in respect of right of entry breaches varied from zero to \$915,050, while those imposed in respect of coercion varied from \$32,000 to \$710,000. Even in the case of unlawful industrial action, while penalties imposed totalled more than \$1 million in three of the six years reported, they totalled less than \$150,000 in the remaining three years.

---

<sup>19</sup> Appendix 1, Table A.4.

<sup>20</sup> Unpublished data supplied by the ABCC.

<sup>21</sup> Appendix 1, Table A.5.

**Table 1: Penalties imposed as a result of ABCC/FWBC proceedings**

Type of Penalty	2011-12 <sup>22</sup>	2012-13	2013-14	2014-15	2015-16	2016-17
Right of entry	\$60,500	0	\$38,500	\$359,700	\$915,050	\$144,200
Coercion	\$32,000	\$175,000	\$405,960	\$665,500	\$599,775	\$710,000
Unlawful industrial action	\$1,061,660	\$91,400	\$1,419,610	\$22,000	\$146,600	\$1,157,150
Freedom of association	\$22,740	\$8,580	0	\$7,500	\$133,500	\$135,175
Wages and entitlements <sup>23</sup>	0	\$1,800	\$189,720	\$147,500	\$19,250	0
Sham contracting	\$73,500	\$21,880	\$200,640	\$39,600	0	0
Non-compliance with notices	\$19,000	0	0	0	0	0
Other	0	\$150,000	\$7,920	\$155,000	\$12,000	0
<b>Total</b>	<b>\$1,269,400</b>	<b>\$448,660</b>	<b>\$2,262,350</b>	<b>\$1,396,800</b>	<b>\$1,826,175</b>	<b>\$2,146,525</b>
Suspended	0	0	\$387,250	0	\$98,000	0
Subject to appeal	0	0	0	0	0	\$374,000

Source: ABCC/FWBC Annual Reports

#### 1.4. Analysis

The above discussion might be summarised as indicating that the union movement is unconvinced that the ABCC is acting as a full-service regulator, while industry associations are generally unconvinced that it should act as a full-service regulator. As noted above, the issue of whether the ABCC should function as a full-service regulator lies beyond the terms of reference for this review. Hence, the views on this issue contained in some industry submissions have been reported simply to provide a complete view of the stakeholder comments received.<sup>24</sup>

Importantly, while some industry submissions expressed the concern that the requirement for the ABCC to address breaches of the relevant laws by all industry participants could potentially reduce its focus on what were seen as its core functions (essentially those requirements that are established directly via the BCIP Act, rather than those addressed in other laws which are 'designated' in the BCIP Act), these submissions made clear that it was not being argued that this had occurred to date. That is, they indicated a view that the ABCC is, to date, currently carrying out its full-service regulator function appropriately, in accordance with its legal obligations.

The ACTU submission expressed an opposite view. This view is consistent with the strongly held position of the ACTU and relevant member unions in relation to the previous legislation in this area

<sup>22</sup> Two annual reports were published for the 2011-12 financial year. As the former ABCC was replaced by the FWBC during the course of the year, each organisation published a report covering its operations during the year. The figures given in this column sum those provided in the two reports.

<sup>23</sup> Between 3 December 2013 and 1 December 2016 arrangements were in place for the Fair Work Ombudsman to investigate and commence civil proceedings in relation to wages and entitlements matters.

<sup>24</sup> That said, it can be noted that these submissions make the case for an industry-specific regulator on the basis of the particular industrial history of the building and construction industry. If the case for an industry-specific regulator is accepted, it would appear difficult to argue that such a regulator should focus only on the activities of certain industry participants, while leaving issues arising from the behaviours of other industry participants to cross-sectoral regulators. The evidence (albeit less than comprehensive) of significant problems in the areas of underpayment of wages and entitlements and misclassification/sham contracting, as well as the ABC Commissioner's expressed view that these are areas of significant concern requiring sustained action, necessarily support the view that these are appropriate areas for the involvement of an industry-specific regulator.

and the predecessor organisations of the current ABCC<sup>25</sup>. The ACTU submission largely made reference to the actions of the ABCC's predecessor organisations in supporting its view on this issue.

That the ACTU submission draws heavily on the history of the ABCC's predecessors is unsurprising, given the very recent reconstitution of the ABCC under new legislation. However, the terms of reference clearly ask the review to consider the performance of the current ABCC, operating under the BCIP Act.

The ACTU submission contained relatively little material that could be regarded as supporting its contention that the ABCC is currently failing to perform its full-service regulator function appropriately. The review does not accept the suggestion that the fact that only a little over 30 per cent of the investigations currently being undertaken by the ABCC relate to either wages and conditions or sham contracting issues can be taken as evidence of a lack of even-handedness, for two reasons.

First, an even-handed approach does not necessarily imply that the numbers of investigations relating to employers, on the one hand, and employees/unions on the other should be near-identical, as this point apparently suggests. Rather, it suggests that all matters brought to the attention of the regulator are dealt with in a consistent and unbiased fashion.

Second, as discussed above, the published data indicate that the percentage of current ABCC investigations that relate to wages and conditions or sham contracting has increased progressively since the ABCC commenced operations, while the unpublished data provided by the ABCC in relation to July–December 2017, discussed above, indicates that approximately half of newly commenced investigations related to wages and entitlements or misclassification/sham contracting issues. Moreover, almost half (48 per cent) of the subjects of investigations commenced by the ABCC during this period were employers.<sup>26</sup>

The results of completed wages and entitlements investigations, cited by the ACTU,<sup>27</sup> do indicate very limited outcomes, in terms of payments obtained for underpaid workers. However, the available quantitative data – particularly the unpublished data supplied by the ABCC – suggest a clear trend toward an increasing focus on wages and entitlements and sham contracting issues since the re-establishment of the ABCC, while the strategic orientations set out by the ABC Commissioner in discussion with the review indicate an intention to continue to increase the ABCC's focus on this area in the short to medium-term.

These factors clearly suggest that the ABCC is cognisant of the need to act in accordance with its 'full service regulator' function. However, it will be important for the ABCC to ensure that it consistently demonstrates that this is the case if it is to obtain the confidence of all building industry participants. Its ability to do so may be enhanced by the provision in its key publications and on its website of additional summary material describing its key activities, analysing them in greater detail and providing an explanation of its strategic orientations. The review notes that the ABC Commissioner

---

<sup>25</sup> That is, the BCII Act and the FWBI Act, the (former) ABCC and FWBC.

<sup>26</sup> The ABC Commissioner also indicated to the review that he would shortly be intervening in a court matter relating to right of entry, substantively in support of the CFMEU.

<sup>27</sup> Australian Council of Trade Unions 2018, written submission, p. 5.

has indicated that, while he believes that the current ABCC Annual Report is comprehensive in nature, he is actively considering how to improve future annual reports.

The 'full service regulator' concept aims to ensure that the ABCC will, in future, have the support of all building industry participants, in contrast to its predecessor bodies. This will only occur if the level of activity of the ABCC in pursuing issues such as wages and entitlements and sham contracting is sufficient to overcome embedded scepticism as to its orientation and provide confidence that it will behave in an even-handed fashion. While this review is being undertaken at a very early stage in the operations of the ABCC, the available quantitative evidence regarding its activities indicates that it is acting consistently with this requirement, while the strategic orientations of the ABCC, as outlined by the ABC Commissioner, are also consistent with its obligations under section 16 of the BCIP Act.

### **Finding and recommendations**

**Finding:** The activities of the ABCC since its establishment, together with the strategic priorities identified by the ABC Commissioner, are consistent with its full-service regulator function.

**Recommendation 1.1:** That the ABCC should more clearly articulate its commitment to increase the confidence of all building industry participants as to its impartiality.

**Recommendation 1.2:** That, as a step toward this goal, the ABCC consider publishing additional material in its quarterly and annual reports which provides more detailed information on the matters investigated by it, including proceedings commenced.

**Recommendation 1.3:** That this additional information should be of a type that would assist building industry participants to better understand the allocation of ABCC resources and the focus of its activities. It should also include information on the ABCC's priorities and strategic approaches.



## Chapter 2: Independent oversight of the compulsory examination powers

### Term of reference 2

The review will examine the independent oversight of the ABCC's compulsory examination powers, including:

- reporting requirements (for example, the frequency these reports are required); and
- safeguards and public accountability in the application of these powers.

### 2.1. Introduction

Section 61B of the BCIP Act empowers the ABC Commissioner or his delegate<sup>28</sup> to apply to a nominated Administrative Appeals Tribunal (AAT) presidential member for an examination notice to be issued to compel witnesses to give information or to produce documents to the ABC Commissioner or to attend an examination before the ABC Commissioner. Such a notice must be issued where, among other things, it is reasonably believed that the person has information or documents relevant to an investigation into a suspected contravention of the BCIP Act or a designated building law. The examination notice can only be issued if the nominated AAT presidential member is satisfied that any other method of obtaining this material has been attempted and has been unsuccessful or is not appropriate.

The BCIP Act includes several safeguards to protect individuals subject to questioning and to ensure the compulsory examination powers are used appropriately. In particular:

- only the ABC Commissioner or his delegate can conduct an examination
- the witness has a right to legal representation and reimbursement for reasonable expenses (excluding legal expenses) incurred in attending the examination
- the Commonwealth Ombudsman (Ombudsman) undertakes quarterly oversight and reporting of the conduct of each compulsory examination and present these quarterly reports to the Parliament. The Ombudsman's powers under the *Ombudsman Act 1976* extend to a review by the Ombudsman under section 65 of the BCIP Act as if the review were an investigation by the Ombudsman under the *Ombudsman Act 1976*.

In addition, the BCIP Act provides that information, answers, documents and records obtained from an individual during a compulsory examination, or obtained as a direct or indirect consequence of something given during an examination, cannot be used in evidence against them in criminal or civil proceedings.<sup>29</sup>

<sup>28</sup> The BCIP Act allows this function to be delegated to a Deputy ABC Commissioner or, if no Deputy Commissioner is currently appointed, to a Senior Executive Service (SES) or acting SES employee. There are currently two Deputy ABC Commissioners.

<sup>29</sup> The exceptions to this otherwise complete immunity relate to failure to comply with an examination notice, a witness knowingly perjuring themselves by giving false testimony or refusing to answer questions or obstructing Commonwealth public officials (ss. 102(2) of the BCIP Act).

The safeguards contained in the BCIP Act in relation to compulsory examination powers are essentially similar to those contained in the former FWBI Act, as shown in detail in Appendix 4. The key differences are that:

- section 20 of the BCIP Act requires that the ABC Commissioner prepare and give to the Minister a quarterly report on the performance of the ABC Commissioner's functions and the exercise of the ABC Commissioner's powers, including those relating to compulsory examinations, during that quarter. The Minister must present a copy of each quarterly report (and each annual report) before each House of the Parliament within 15 sitting days of receiving it
- the Commonwealth Ombudsman is also required to produce quarterly reports on the use of these powers
- witnesses are not entitled to reimbursement of reasonable legal expenses.

## 2.2. Stakeholder views

Most of the submissions received addressed this term of reference. However, many submissions focused on the merits of the compulsory examination powers, while providing little or no commentary on the specific issue of the oversight provisions to which term of reference 2 directs the review. Thus, relatively few of the comments received fall within the review's terms of reference. However, the views expressed are summarised below for the sake of transparency.

Several industry submissions argued strongly that the compulsory examination powers wielded by the ABCC are unremarkable in their nature and extent. That is, it was argued that several other Australian Government agencies exercise similar or stronger powers. Moreover, it was argued that the use of these powers by the ABCC is now subject to far more extensive and rigorous scrutiny than is generally the case where equivalent powers are exercised. These scrutiny mechanisms were said to be at least adequate to ensure that the compulsory examination powers are exercised appropriately.

Conversely, the ACTU submission advocated the abolition of the compulsory examination powers and their replacement with 'the usual discovery and subpoena powers supervised by the courts'.

In relation to the oversight powers, the MBA noted that the Heydon Royal Commission had endorsed the appropriateness of the oversight of the compulsory examination powers by the Ombudsman, as initially proposed in the BCIP Bill and, in this context, recommended the current oversight arrangements should continue unchanged. The Ai Group stated that the current independent oversight and reporting requirements are adequate and provide sufficient protections.

The ACTU submission was the only submission to identify concerns with the current oversight arrangements, highlighting questions in relation to both timeliness and the availability of the Ombudsman reports. The ACTU argued that the current oversight mechanisms do not allow 'real time oversight', with the associated ability to address issues as they arise, instead requiring reliance on unenforceable recommendations made after the fact. It also argued that the Ombudsman's reports should be made more readily accessible via publication on the ABCC website, in a timelier fashion.

The ACTU argued, that the oversight mechanisms are particularly important because, in its view:

- the compulsory examination powers limit the right to privacy contained in Article 17 of the International Covenant on Civil and Political Rights
- the ABCC has misused these and other investigative powers in the past.

In relation to the latter point, the ACTU cited criticism by Justice North of the then ABC Commissioner Mr Hadgkiss for adopting a partisan approach during a compulsory examination.<sup>30</sup>

The ACTU also argued that the oversight powers were deficient in that the Ombudsman cannot enforce his recommendations. In this context, they cited the single recommendation made in both of the Ombudsman's reports published to date in relation to the use of the compulsory examination powers. This was that, given the BCIP Act's explicit prohibition on the ABC Commissioner requiring an examinee not to disclose the matters discussed during an examination, the ABC Commissioner should also refrain from expressing a preference in this regard.<sup>31</sup> The ACTU noted that the Ombudsman had repeated this recommendation in a subsequent report as the ABC Commissioner had not accepted the recommendation when it was initially made and that the Ombudsman has no power to enforce its adoption.

The ACTU submission also referenced previous statements made by it in respect of the safeguards issue in other fora, including its submission to the Senate Standing Legislation Committee on Education and Employment inquiry into the 2013 version of the BCIP Bill. In this submission, the ACTU stated that it objected to the removal of certain safeguards on the use of the compulsory examination powers that had been contained in the previous *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012*, citing:

- the requirement for an application for an examination notice to be made to a Presidential Member of the Administrative Appeals Tribunal
- the requirement that the Presidential Member be satisfied that the case had been made out for the use of the powers, having regard to a number of factors
- the capacity under the FWBI Act for certain building industry participants to make an application to an independent assessor to have the compulsory examination powers 'switched off', in respect of a particular building project
- the prohibition on the FWBC Director requiring a person attending an examination to enter into a confidentiality undertaking in relation to the examination
- the sunset of the use of the coercive powers after three years, with a decision to be made at that time as to their continuation
- the removal of the provisions for the payment of legal expenses incurred as a result of attending a compulsory examination.

---

<sup>30</sup> In respect of the former claim, the Australian Council of Trade Unions 2018, written submission, cites the human rights compatibility statement from the explanatory memorandum for the 2013 version of the BCIP Bill. In relation to the latter, it cites *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 197, [148].

<sup>31</sup> Commonwealth Ombudsman 2017, Annual Report by the Commonwealth Ombudsman under s 13(1) of the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* for the period 1 July 2015 to 30 June 2016, Commonwealth Ombudsman, Canberra, p. 9.

The ACTU argued, in the 2013 submission, that there was no evidence that the existence of these safeguards had in any way impeded the work of the then FWBC.

However, as discussed below, while these provisions were not contained in the BCIIIP Bill introduced in 2013, the majority were included in the BCIIIP Act as passed.

### **Views expressed by the ABC Commissioner**

The ABC Commissioner provided comment to the review in response to the proposals put forward by the ACTU in relation to the oversight provisions. He noted that the discovery and subpoena powers suggested by the ACTU as an alternative to the use of the compulsory examination powers are not applicable in respect of investigations occurring prior to the commencement of litigation. By contrast, the use of the compulsory examination powers involves an inquisitorial process, designed to elicit information, documents and evidence which may potentially be used in subsequent court proceedings, should these be commenced.

In relation to the reports of the Ombudsman on the exercise of the powers, the Commissioner argued that it is appropriate that these be published on the Ombudsman's own website, as at present.

## **2.3. Views expressed by the Ombudsman**

Assessment of the content of the reports produced by the Ombudsman provides an important insight into the functioning of the independent oversight process. In addition, the review received a submission from the Ombudsman which specifically addressed this term of reference.

### **2.3.1. Reports on the exercise of the compulsory examination powers**

The three most recently published Ombudsman's reviews of the use of the compulsory examination powers are:<sup>32</sup>

- the annual review report, covering examinations conducted in 2015-16, which was published in November 2017<sup>33</sup>
- the quarterly review report, covering examinations conducted in the first three quarters of 2016-17, which was published in March 2018<sup>34</sup>
- the quarterly review report covering examinations conducted in the first quarter of 2017-18, which was published in July 2018.<sup>35</sup>

---

<sup>32</sup> Note that a report covering the period 1 April – 30 June 2017 was published in March 2018. However, it reported that the compulsory examination powers had not been used during the relevant period.

<sup>33</sup> Commonwealth Ombudsman (November) 2017, Annual Report by the Commonwealth Ombudsman under s 13(1) of the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* for the period 1 July 2015 to 30 June 2016, Commonwealth Ombudsman, Canberra.

<sup>34</sup> Commonwealth Ombudsman (March) 2018, Quarterly report by the Commonwealth Ombudsman under s 65(6) of the *Building and Construction Industry (Improving Productivity) Act 2016* for the period 1 July 2016 to 31 March 2017, Commonwealth Ombudsman, Canberra.

<sup>35</sup> Commonwealth Ombudsman (July) 2018, Quarterly report by the Commonwealth Ombudsman under s 65(6) of the *Building and Construction Industry (Improving Productivity) Act 2016* for the period 1 July to 30 September 2017, Commonwealth Ombudsman, Canberra.

The first of these reports covers the exercise of the compulsory examination powers by FWBC under the FWBI Act, while the second of these reports covers examinations conducted by both the FWBC and the ABCC and the third covers examinations conducted by the ABCC.

The November 2017 report sets out the five criteria used by the Ombudsman in carrying out his review function. These are:

1. Were the applications for examination notices made in accordance with the requirements of the BCIP Act and the Regulations?
2. Did the examination notice comply with the requirements of the BCIP Act, the Regulations, and relevant best practice principles set out by the Administrative Review Council?
3. Was the examination notice given in accordance with the requirements of the BCIP Act and were claims of privilege properly dealt with?
4. Was the examination conducted in accordance with the requirements of the BCIP Act, relevant best-practice principles, standards and the ABCC's internal policies and guidelines?
5. Where directions were issued by the Minister, were these complied with?

Appendix B to the Ombudsman report provides detailed assessments against each of these criteria. The November 2017 report assessed the FWBC as fully compliant with criteria 3 and 4 and as being generally compliant with criteria 1 and 2, with minor exceptions noted.<sup>36</sup> In relation to the fifth criterion, the Ombudsman highlighted the fact that the FWBC Director expressed a preference to examinees that they not disclose the subject of the examination in all but one case and argued that this approach was contrary to the intent of subsection 51(6) of the FWBI Act, which explicitly prohibited the Director from requiring a witness to undertake not to disclose matters discussed in the examination.<sup>37</sup> As a result of this finding, a single recommendation was included in the November 2017 report. This was as follows:

Under s 51(6) of the Fair Work (Building Industry) Act 2012, the Director of Fair Work Building and Construction must not require an examinee to undertake not to disclose information or answers given at the examination or not to discuss matters relating to the examination with any other person and should not express a preference in this regard.<sup>38</sup>

The report notes that the same recommendation had been included in the Ombudsman's review report covering the FWBC's use of the compulsory examination powers during 2014-15, and that it had been rejected by the FWBC Director, who argued that any request that an examinee not disclose the subject matter of an examination was reasonable when balanced by a clear statement that there was no prohibition on information disclosure, and that the Ombudsman's oversight provided examinees with sufficient protection. However, the report also noted that the acting ABC Commissioner had informed the Ombudsman that the practice of expressing a preference that witnesses do not disclose the content of their examinations has been reviewed and is no longer expressed to witnesses as a matter of course.

---

<sup>36</sup> In relation to criterion 1, it was noted that the FWBC Director had, on three occasions, sought an examination notice that related to more than one person. In relation to criterion 2, five examination notices were issued in the form required by the previous regulations, rather than by the current regulations.

<sup>37</sup> Subsection 61F(6) of the BCIP Act incorporates an equivalent prohibition.

<sup>38</sup> Commonwealth Ombudsman (November) 2017, *op. cit.*, p. 1.

In addition to this one recommendation, the November 2017 report makes three ‘suggestions’ for improvement in the use of the compulsory examination powers, which it noted continued to be applicable to the use of the equivalent powers under the BCIP Act by the ABCC. These suggestions were that the ABC Commissioner should:

- ensure that questioning of examinees is limited to the investigation or investigations for which the examination notice was issued
- inform examinees that they are not required to give evidence on matters outside the scope of the examination notice
- should allow an examinee time to answer questions in their own words and from their own experiences.<sup>39</sup>

The March 2018 Ombudsman’s report highlights the previous report’s recommendation, in relation to the ABC Commissioner expressing a preference to examinees for matters discussed not to be disclosed, and reports that there had been a change in the practice of the ABC Commissioner during the reporting period. This was that during the most recent review period, the FWBC Director only appeared to state a preference for the examinee not to discuss the examination if the examinee was a union member.<sup>40</sup>

The report indicates that, because of this apparent change in approach, the preference for nondisclosure had been expressed in only two of nine examinations. However, the Ombudsman expressed the view that the practice of expressing this preference should be ceased in all cases and, as a result, repeated its previous recommendation in this regard in its March 2018 report.

The March 2018 report notes that the FWBC was not assessed against criteria 1, 2 or 3, and that criterion 5 was not applicable during the period. The FWBC was assessed as being compliant with criterion 4, albeit that the above recommendation relates to this criterion.

The July 2018 quarterly report notes that no examinations were conducted during the relevant quarter and states that ‘[a]s no reviews were conducted during the quarter, we will assess the ABCC’s progress in addressing the issues identified in our previous report, during the next round of reviews.’<sup>41</sup>

### **2.3.2. Ombudsman’s submission to the review**

The Ombudsman’s submission to the review stated that his office had reviewed seven examinations since the commencement of the BCIP Act and that this number was consistent with its experience in reviewing examinations under the FWBI Act. The submission noted that there is generally a limited degree of variation in the number of examination notices issued and examinations conducted from one period to another. The Ombudsman set out key aspects of the process for reviewing the conduct of examinations, in order to highlight factors which inevitably lead to some delay in completing these reviews. In particular, before the Ombudsman can commence a review, the BCIP Act requires the ABCC to provide an information package to the Ombudsman containing the report on the examination, the video recording of the examination and the transcript. While these

---

<sup>39</sup> Ibid., p. 2.

<sup>40</sup> Commonwealth Ombudsman (March) 2018, op. cit., p. 4.

<sup>41</sup> Commonwealth Ombudsman (July) 2018, op. cit., p. 1.

must be provided as soon as practicable after the completion of an examination, several factors mean that some time may elapse before the ABC Commissioner is able to provide all the relevant materials. A key one is the procedural fairness requirement that the transcript be provided to the examinee to enable any amendments to be made to ensure accuracy.<sup>42</sup>

Other, operational necessities are also relevant. These include the fact that the ABC Commissioner may group scheduled examinations, for planning and operational reasons, and the fact that the Ombudsman's office may also review examinations in batches, for reasons of efficiency, practicality and to favour the effective identification of any systemic issues. The Ombudsman argues that the delays that necessarily arise due to these factors typically preclude his office from reviewing and reporting on an examination within a single quarter. As a result, some reports only provide statistical information on the number of examinations that have taken place during the reporting period.

The Ombudsman believes that this, in turn, means that the current reporting arrangements do not provide the 'optimum level of assurance as to the Australian Building and Construction Commission's (ABCC's) use of coercive examination powers'.<sup>43</sup>

As a result, he recommends that the current, quarterly reporting requirement be replaced by a reporting period of at least six months, since this could enable reports to more adequately capture an examination and a review within a single reporting period. He argued that this consolidated approach would permit the reports to comprehensively address any systemic and previously identified issues, which currently may be staggered across a series of quarterly reports.

## **2.4. Analysis**

As discussed above, all submissions received from industry associations argued that the current oversight powers are adequate and appropriate. In this context, some submissions noted that the compulsory examination powers are frequently used to require company officials to give evidence.

The most recent Ombudsman's reports on the use of the powers have generally found that the ABC Commissioner has exercised them appropriately. The key recommendation made, which has now been included successively in two annual reports and a subsequent quarterly report, is for the ABC Commissioner (and, previously, the FWBC Director) to cease the practice of expressing a preference for nondisclosure of the subject matter of examinations to examinees.

The Ombudsman noted, in his November 2017 report, that the ABCC had not accepted this recommendation, arguing that expression of this preference was reasonable, when balanced by a clear statement that there was no prohibition on disclosure and that the Ombudsman's oversight provided adequate protections.<sup>44</sup> The FWBC Director also stated that witnesses fully comprehended the basis for maintaining the confidentiality of an investigation.

However, while the recommendation made was rejected by the previous ABC Commissioner, the Ombudsman's reports have documented changes of policy and practice over time. More recently, in correspondence to the review, the current ABC Commissioner stated that, since taking up his office on 6 February 2018, he has reviewed the introductory and concluding remarks made at an examination, the way rights and obligations are communicated and the issue pertaining to a

---

<sup>42</sup> Commonwealth Ombudsman 2018, written submission, p. 2.

<sup>43</sup> *ibid.*, p. 1.

<sup>44</sup> Commonwealth Ombudsman (November) 2017, *op. cit.*, pp. 5-6.

preference for nondisclosure being communicated to examinees. As a result, he has amended the process as follows:

Rather than expressing a preference, I indicate to the examinee that it is entirely a matter for the examinee as to who they communicate with and what they say concerning the examination. I advise the examinee of the confidentiality provisions applying to members of staff of the ABCC and that the ABCC will not advise other witnesses of the fact that the examinee has given evidence or the evidence given by the examinee.<sup>45</sup>

This change appears to address fully the only recommendation made by the Ombudsman in relation to the use of the compulsory examination powers by the ABCC.

The only specific proposals made for improvement to the current oversight powers, other than those of the Ombudsman himself (noted above), were those of the ACTU. Specifically, the ACTU argued for the Ombudsman's reports to be published on the ABCC website, as this was seen as making them more readily available than having them published only on the Ombudsman's own website, as at present.

It is clearly appropriate for the Ombudsman, as the body exercising the review function, to publish its reports on its own website. However, there is no apparent impediment to *also* publishing these reports on the ABCC website. The inclusion of the relevant reports by the Ombudsman on the ABCC website may be an appropriate addition to the BCIIIP Act's requirement that the ABCC report on the use made by it of the compulsory examination powers. An alternative approach would be for the ABCC website to provide a direct link to the relevant page of the Ombudsman's website. This option would have the advantage of ensuring that up to date information is always available from either source, whilst entailing a lower compliance burden on the ABCC.

As noted above, the ACTU also provided a copy of a previous submission in relation to the 2013 version of the BCIIIP Bill, which highlighted the fact that this version of the Bill did not incorporate a number of safeguards on the use of the examination powers previously included in the FWBI Act. However, three of these six safeguards were subsequently incorporated in the BCIIIP Act as passed. These were:

- section 61B, which requires that applications for examination notices must be made to nominated Administrative Appeals Tribunal Presidential Members
- section 61C, which requires that the nominated Presidential Member must be satisfied on several points before issuing an examination notice
- subsection 61F(6), which prohibits the ABC Commissioner requiring an examinee to enter into a confidentiality undertaking.

The three 'safeguards' identified by the ACTU that have not been incorporated into the BCIIIP Act are:

- the capacity for certain building industry participants to make an application to an independent assessor to have the compulsory examination powers 'switched off', in respect of a particular building project

---

<sup>45</sup> Correspondence from ABC Commissioner to Rex Deighton-Smith, 23 April 2018.



- the sunseting of the use of the coercive powers after three years, with a decision to be made at that time as to their continuation
- payment of legal expenses incurred as a result of attending a compulsory examination.

It is questionable whether the first two provisions can reasonably be characterised as being safeguards, and therefore as falling within this term of reference. The second point, in particular, is clearly the fundamental one of whether the use of the compulsory examination powers should continue permanently, rather than a question of how appropriate oversight of their use should be maintained. The sunseting proposal was initially recommended by the Wilcox Report<sup>46</sup> of 2009, in the context of a proposed review of the need to retain the compulsory examination powers. However, given the decisions of successive governments to retain these powers, this issue does not fall within the scope of the current review. The question of ‘switching off’ the powers in respect of a particular building site also effectively addresses the potential merits of limiting the scope of the use of the powers, rather than the oversight to be applied to their use. Thus, it is also considered to be beyond the scope of the review.

The fact that the former provision for the reimbursement of the legal expenses of persons subject to compulsory examinations has not been reinstated in the BCIP Act can clearly be seen as reducing safeguards on the use of this power, in that it may effectively constrain the ability of some examination subjects to obtain adequate legal representation. Conversely, the former provision for the reimbursement of legal expenses in this context appears to be an unusual one.

As discussed above, the Ombudsman has generally concluded that the ABCC and FWBC have exercised these powers appropriately. The key issue identified – that of expressing a preference for non-disclosure by examinees – appears now to have been addressed.

The oversight mechanisms in place are broadly similar to those adopted in relation to the exercise of other, similar powers. The Ombudsman is clearly an appropriate body to exercise this function, being widely regarded as impartial, as well as being highly experienced, given that the office exercises similar functions in a range of other specific contexts. The elaboration and publication of explicit assessment criteria and their consistent use in successive review reports is also consistent with good practice, while the criteria used appear to be appropriate. While the ACTU has argued that the inability of the Ombudsman to enforce its recommendations constitutes a weakness of the mechanism, it is not usual for such an oversight body to have coercive powers in this regard. Moreover, the Ombudsman’s reports are tabled in Parliament so that the Ombudsman’s findings and recommendations can be publicly scrutinised.

### **Frequency of reporting**

However, the Ombudsman has pointed to problems arising as a result of the legislative requirement to provide quarterly reports on this issue. In particular, it is typically not possible to provide a substantive assessment of the use of the powers in a particular case at the same time as that case is reported. Thus, quarterly reports often contain only a notification that a compulsory examination or examinations have been conducted, without any assessment of the manner of their conduct. In such

---

<sup>46</sup> Wilcox, M 2009, *Transition to Fair Work Australia for the Building and Construction Industry: Report*, Department of Jobs and Small Business, Canberra, p. 60.

circumstances, these reports provide no more information than that provided in the ABCC's own quarterly reports.

The Ombudsman's office notes that it is not required to report on a quarterly basis in respect of any of the other, equivalent oversight functions which it performs. Even in the case of the scrutiny it undertakes of powers exercised under the *Surveillance Devices Act 2004*, reporting occurs on a biannual basis. The Ombudsman proposes that the required reporting frequency in relation to the BCIP Act should be reduced, with reporting to be no more than biannual. The Ombudsman's view is that this change would not reduce the effective degree of scrutiny of the ABCC's use of its powers, compared with current practice.

It is notable that the concerns as to the practical problems arising from quarterly reporting in this case have been raised by the Ombudsman, rather than by the ABCC as the reviewed entity. Particularly in the context of the reviewer reporting consistently that there has been a high level of compliance with the relevant legislation by the ABCC and its predecessor organisation in exercising these powers, there appears to be a strong case in favour of adopting the Ombudsman's suggested reduction in reporting frequency. The relatively infrequent use made of the compulsory examination powers underlines this point.

The review considered an alternative approach to this issue, which could potentially address the specific practical concern highlighted by the Ombudsman. This would involve changes to the package of materials required to be provided to the Ombudsman by the ABCC. As noted in the Ombudsman's submission, section 65 of the BCIP Act requires the ABCC to provide the Ombudsman with a report about the examination, a video recording of the examination and a transcript of the examination. The Ombudsman notes that it is the latter requirement that typically leads to delays in the provision of these materials, as examinees must be provided with the opportunity to correct the transcript.

This being so, a potential change would involve repealing the requirement in subsection 65(1)(c) that a transcript be provided. If this change were adopted, the Ombudsman would proceed to assess the use of the examination power on the basis of the report and the video recording. This would appear to be a sufficient basis for the assessment in most cases. However, in cases where the dialogue contained in the examination was not clear in the video recording, the Ombudsman could delay the assessment pending a request to the ABCC for provision of a transcript.

The review sought the views of the Ombudsman's office on this issue. The office indicated that the Administrative Review Council (ARC) considered this issue in its 2008 report on the coercive information gathering powers of government agencies.<sup>47</sup> Among the principles put forward by the ARC in this report as a guide to government agencies, to ensure fair, efficient and effective use of coercive information-gathering powers, principle 16 states that an examinee should be given an opportunity to view and correct a transcript of the examination. The Ombudsman's office indicated that it generally relies on this ARC report to guide the methodology that it uses in undertaking reviews. Consequently, it believes it appropriate that the BCIP Act should continue to require that a transcript be provided to it as part of the package of materials on which it should base its review of the use of the compulsory examination powers.

---

<sup>47</sup> Administrative Review Council 2008, *Coercive Information-Gathering Powers of Government Agencies*, Report No. 48, ARC, Canberra, p. xvi.

## Conclusion

The review concludes that the current arrangements for exercising oversight of the compulsory examination powers are generally appropriate. However, it accepts the view put forward by the Ombudsman in relation to the difficulties caused by the current requirement for quarterly reporting. There appears to be little merit in continuing with the current frequency of reporting, particularly given the ABCC's record of exercising its compulsory examination powers in an appropriate manner, consistent with the requirements of the legislation.

The review believes that publication of these reports on the Ombudsman's website is generally appropriate. However, in light of the ACTU's suggestion that their publication would enhance their effective accessibility, it notes that there appears to be no obvious impediment to access being available through both websites.

## Finding and recommendations

**Finding:** That the safeguards and public accountability mechanisms incorporated in the current oversight arrangements in respect of the ABCC's compulsory examination powers are adequate and appropriate.

**Recommendation 2.1:** That the current oversight arrangements should be retained, subject to the changes proposed in recommendations 2.2 and 2.3.

**Recommendation 2.2:** That the provisions of subsection 65(6) of the BCIP Act be amended to provide for the Ombudsman to report to Parliament on a biannual basis, rather than a quarterly basis.

**Recommendation 2.3:** That the Minister request that the ABCC incorporate a link to the Ombudsman's reports on its website.

## Chapter 3: Higher penalties under the BCIP Act

### Term of reference 3

The review will examine whether the higher penalties under the BCIP Act are acting as a deterrent to prevent contraventions of workplace relations laws by industry participants.

### 3.1. Introduction

The BCIP Act identifies a range of workplace relations legislation as ‘designated building laws’. Designated building laws include the *Fair Work Act 2009* (FW Act), *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, the *Independent Contractors Act 2006* and certain Commonwealth industrial instruments. The ABC Commissioner is responsible for ensuring compliance with these designated building laws, to the extent that those laws relate to building work and the operation of the 2016 Code.

The BCIP Act contains a number of building industry specific workplace relations civil remedy provisions. Some of these provide for higher maximum penalties for contraventions than those able to be imposed for contraventions of similar provisions of the FW Act. The higher penalty caps are only available if there is a breach of the BCIP Act provisions.

The penalties contained in the BCIP Act are similar in size to those provided under the former *Building and Construction Industry Improvement Act 2005* (BCII Act), which was introduced in response to the recommendations of the 2003 Cole Royal Commission into the Building and Construction Industry. The Cole Royal Commission concluded that the penalties then available for breaches of workplace laws were insufficient to adequately deter non-compliant behaviour and recommended that significantly higher penalties should be adopted to improve compliance with relevant laws.

However, the *Fair Work (Building Industry) Act 2012* (FWBI Act), which replaced the BCII Act, did not contain any building industry specific workplace relations civil remedy provisions. Therefore, proceedings initiated by the FWBC Director of building industry participants who contravened freedom of association, right of entry, coercion, discrimination, industrial action and other workplace relations laws were undertaken pursuant to the FW Act. This had the effect of significantly reducing the maximum penalties available for breaches of certain workplace relations laws in the building industry.

The BCIP Act has re-established a building industry-specific regime of higher penalties, with the maximum penalties available being similar to those established in the BCII Act. This change responded, in substantial part, to concerns that the lower penalties applicable under the FWBI Act (that is, those in the FW Act) were proving inadequate to provide strong incentives for compliance with the relevant workplace laws. In particular, a number of court judgements had pointed to this issue, with some examples shown in Box 3.1.

### Box 3.1: Judicial commentary on the incentive effects of FWBI Act penalties

In **Australian Building and Construction Commissioner v Parker (No 2) [2017] FCA 1082**, Justice Flick imposed record fines of more than \$2.4 million on the CFMEU in respect of unlawful conduct which occurred principally on 24 July 2014. Justice Flick found:

‘The CFMEU is to be regarded as a recidivist offender...it is difficult, if not impossible, to envisage any worse conduct than that pursued by the CFMEU. The CFMEU’s conduct exposes a cavalier disregard for the prior penalties imposed by this Court and exposes the fact that such prior impositions have failed to act as deterrent against further unlawful industrial action.’

In **Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCA 1235**, Justice Tracey, in fining the CFMEU and a branch delegate for preventing a subcontractor’s non-union member employee from working on a building site on 4 August 2015 contrary to the FW Act, noted in his judgement:

‘Any penalty will be paid and treated as a necessary cost of enforcing the CFMEU’s demand that all workers on certain classes of construction sites be union members.’

In **Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCA 1555**, Justice Tracey penalised the CFMEU for contraventions of the FW Act arising out of the disruption of a concrete pour on a major rail project and noted the case ‘falls into a pattern of repeated disregard for the law.’

‘At no point has the CFMEU expressed any remorse for the misconduct of its officials. Nor has it undertaken to take any steps to ensure that there will be no repetition of the contravening conduct.’

In **Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] FCA 163**, the CFMEU and an official were penalised under the FW Act for enforcing a ‘no-ticket, no start’ regime on a site during March 2014. Justice Tracey held: ‘[T]he CFMEU has accumulated a deplorable record of contravening civil remedy provisions of the Act and its predecessors.’

In **Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3** the majority of the High Court of Australia held – for contraventions of the FW Act which occurred on 16 and 17 May 2013 – [individual union officials can be required to pay their own fines]: ‘Ultimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the *raison d’être* of its imposition.’

Further evidence produced after the introduction of the BCIIIP Bill also supported the case for higher maximum penalties. In 2014 the Productivity Commission, the Government’s independent economic research and advisory body, released the Public Infrastructure Inquiry Report, which examined competitiveness and productivity in the provision of nationally significant economic infrastructure. This report recommended the adoption of higher penalty levels in the building and construction industry as a means of dissuading repeat offenders and signalling to the courts ‘how seriously society considers the worst level of unlawful conduct.’<sup>48</sup>

The final report of the *Royal Commission into Trade Union Governance and Corruption*, conducted by Justice Dyson Heydon AC QC, published in December 2015, also concluded that the penalties that could be imposed under the FW Act were insufficient to deter unlawful behaviour by the key building unions. Therefore, Justice Heydon made several recommendations for increased penalties in a range of areas. However, he recommended that the higher penalty caps be incorporated into

---

<sup>48</sup> Productivity Commission 2014, Public Infrastructure: Inquiry Report No. 71, Productivity Commission, Canberra, p. 547-549.

the FW Act, which would have the effect that they would be applicable to all industries, rather than subjecting the building industry to a specific penalty regime.<sup>49</sup>

### 3.2. Stakeholder views

Industry submissions generally acknowledged that, as the BCIP Act has been in operation for less than two years, there is little basis for drawing conclusions as to whether the re-establishment of the regime of higher, building industry-specific penalties is better deterring unlawful activity. However, most of these submissions argued strongly for the maintenance of the penalties at their current levels. For example, ACCI argued that higher, industry-specific penalties remain warranted, as '[s]ince the implementation of the BCIP Act, cases continue to emerge that highlight the persistent culture of lawlessness'.<sup>50</sup>

Similarly, the MBA supported the current penalty provisions of the BCIP Act and recommended that they continue at 'at least this level', citing both the Heydon Royal Commission and the Productivity Commission in support of this view. The MBA argued that sufficient time had not yet elapsed to enable an 'objective assessment of the deterrent value' of the higher penalties but that there had, to date, been no discernible improvement in the attitudes and conduct of building unions. Moreover, the government should stand ready to increase the current penalties still further, if necessary.

The Housing Industry Association (HIA) argued that 'despite the increased penalties under the BCIP Act and the imposition of significant penalties by the Federal Court the inappropriate behaviour of some industry bodies continues'.<sup>51</sup> Ai Group expressed the view that the BCIP Act has not been in place for long enough to enable a judgement to be made as to the effectiveness of the current penalty regime in improving compliance, but argued that it was clear that the previously available penalties were insufficient in this regard.

Two submissions from industry associations did suggest there has been some change in behaviour in the industry since the commencement of the BCIP Act and argued that this could be the result of the incentive effects of the increased penalties. The National Electrical Contractors' Association (NECA) stated that, while the BCIP Act has only been in operation for a little over 12 months, its members have witnessed a general improvement in the industrial climate and that there has been a clear decrease in the number of disputes in the industry. However it believes that more time must elapse before a clear picture of the overall impact of the higher penalties can be obtained.

Similarly, the MBA pointed to ABS-published data showing substantial reductions in the number of days lost to industrial disputes in the building and construction sector since the commencement of the BCIP Act. For example, the number of days lost in the December 2017 quarter was less than one third of days lost in the December 2016 quarter.

---

<sup>49</sup> Royal Commission into Trade Union Governance and Corruption 2015, Final Report, Canberra. For example, p. 102 '[t]he Report also finds that the maximum penalties that may be imposed on registered organisations such as the CFMEU, and their officers, for breach of an order of the Fair Work Commission are grossly deficient. They do not deter behaviour of the kind revealed in this case study. Penalties should be substantially increased.'

<sup>50</sup> Australian Chamber of Commerce and Industry 2018, written submission, p. 9.

<sup>51</sup> Housing Industry Association 2018, written submission, p. 2.

However, despite highlighting this data, the MBA cautioned against the drawing of firm conclusions on the basis of data covering only a very short period and indicated its belief that there was little other evidence of an improved attitude among unions.

Submissions from the AWU and the ACTU did not directly address the possible impact of higher penalties on compliance. However, the ACTU argued that higher penalties should be extended to non-compliance with wages and entitlements obligations and contraventions of work health and safety laws.

Several submissions from industry bodies argued that the issue of the incentive effects of the available penalties should be considered in the light of the recent merger of the CFMEU and the Maritime Union of Australia to form the new Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).<sup>52</sup> It was suggested that the increased resources available to the merged entity would imply a degree of blunting of whatever disincentive effects the higher penalties available under the BCIP Act would otherwise have.

### **Views expressed by the ABC Commissioner**

The ABC Commissioner briefly addressed the penalties issue in correspondence to the review. A key point made was that the higher penalties established under the BCIP Act are applicable only to breaches of that Act and that none of the proceedings issued to that time<sup>53</sup> by the ABCC relate to breaches of the BCIP Act, given the time taken to investigate contraventions, prepare matters for litigation and obtain court judgements. This means that the new, higher penalties under the BCIP Act have not been available to a judge in any of the proceedings finalised since the BCIP Act came into effect. The ABC Commissioner notes that, given this fact, it is not possible to determine whether the higher penalties provided for under the BCIP Act will have a specific deterrent effect.

Given the amount of time typically elapsed between the issue of proceedings and judgement being rendered, together with the fact that no proceedings have been issued as yet under the BCIP Act, this is likely to remain the position for some time. That said, the ABC Commissioner noted the potential general deterrence impact of awareness of the existence of the higher penalties.

### **Data on penalties imposed**

Table 1 above summarises the penalties imposed in successful proceedings brought by FWBC and the ABCC over the six years to 2016-17. It shows that the amount imposed in monetary penalties each year as a result of actions concluded by FWBC and ABCC over the past six years has varied from a low of \$448,660 in 2012-13 to a high of \$2,262,350 in 2013-14. However, despite the impact of the former FWBI Act in removing the regime of higher penalties previously available under the BCII Act, there is no obvious trend in the data. In fact, two of the three years in which the total amount of penalties levied were highest were 2015-16 and 2016-17, years in which it is likely that most or all of the proceedings finalised would have been determined under the lower penalty regime. This observation suggests that assessment of the incentive effects of adopting a higher penalty regime is

---

<sup>52</sup> In March 2018, the CFMEU merged with the Maritime Union of Australia and the Textile, Clothing and Footwear Union of Australia to form the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU).

<sup>53</sup> As at 27 April 2018, when the review consulted with the ABC Commissioner. While proceedings have subsequently been commenced pursuant to the BCIP Act, they have yet to be finalised.

complicated by the fact that the impact of legislating substantially higher *maximum* penalties on actual penalty imposition practices may be less substantial than anticipated.

Table 1 also shows that substantially higher penalties have been imposed in respect of right of entry and coercion in the past three years than was previously the case, while no penalties have been imposed in respect of sham contracting over the past two years. Unlawful industrial action has remained the largest single source of penalties during the period, although there has been significant variation from year to year. Such variation may indicate changes over time in the priorities of the regulator and suggests a further degree of complexity in assessing the likely incentive impacts of changes in legislated penalty provisions.

### 3.3. Analysis

A fundamental factor in assessing the deterrent effects of the penalties contained in the BCIP Act is that, to date, there have been no proceedings finalised in which these penalties are available to the court. That is, the penalties imposed in all cases finalised in recent times have been determined in accordance with the provisions of the FW Act.

This implies that any deterrent effects of the new, higher penalties provided for under the BCIP Act can, to date, only have been general, or prospective in nature. That is, they could only arise from consciousness of the potential for significantly higher penalties to be imposed than previously, rather than the reality of courts imposing the higher penalties authorised by the BCIP Act. Thus, any disincentive effects operating to date are likely to be limited. The full effects of the higher maximum penalties available under the BCIP Act are unlikely to be observable until sufficient enforcement actions have been finalised and penalties imposed pursuant to the BCIP Act, thus enabling industry participants to observe the practical impact of the new penalties arrangements on sentencing outcomes.

In light of this, there is little reliable basis on which to draw a conclusion as to the probable deterrent effects of the higher penalties provided under the BCIP Act. This, in turn, suggests that there is no sound basis for recommending any change to the current penalty arrangements.

#### **Finding and recommendations**

**Finding:** That little evidence as to the deterrent effects of the increased penalties provided under the BCIP Act is currently available. This largely reflects the fact that no penalties have been imposed under the BCIP Act. Limited evidence of reductions in the number of days lost to industrial disputes and the number of proceedings initiated by the ABCC since the commencement of the BCIP Act may suggest that some incentive effects have been felt. However, no confident conclusion can be drawn on this point.

**Recommendation 3.1:** That, in light of the above finding, no changes to the current penalties provisions of the BCIP Act should be adopted at this point.

**Recommendation 3.2:** That the impact of the BCIP Act's penalties provisions be monitored by the Department of Jobs and Small Business to enable the provision of further policy advice on this issue.



## Chapter 4: Streamlining and clarification of the BCIP Act, particularly where it interacts with other legislation

### Term of reference 4

The review will examine any need for amendments that will streamline and clarify the application of the BCIP Act, in particular when it interacts with other Commonwealth legislation (for example, where the recruitment obligations regarding the employment of foreign workers in the BCIP Act and the *Code for the Tendering and Performance of Building Work 2016* (2016 Code) overlap with obligations in the *Migration Act 1958* or Australia's international trade obligations). This should include consideration of whether technical amendments are required to the 2016 Code to clarify its application/improve its operation.

Term of reference 4 establishes a general requirement for the review to identify any need for amendments to streamline and clarify the operation of the BCIP Act, and specifically identifies an overlap between the requirements of the BCIP Act and those of the *Migration Act 1958* (Migration Act). The issue of obligations regarding the employment of foreign workers was addressed in several submissions.

### Market testing requirements for non-resident workers

#### 4.1. Stakeholder views

Several submissions argued that the obligations contained in subsection 34(2D) of the BCIP Act in relation to the employment of a person who is not an Australian citizen or permanent resident differ substantively from the obligations in respect of the employment of specific categories of visa holders imposed by section 140GBA of the Migration Act.

The ACTU argues that the labour market testing requirements in section 11F of the 2016 Code are stronger than those of the Migration Act and that the requirements of the 2016 Code must be complied with in addition to those contained in the Migration Act when a code-covered entity seeks to employ a person who is not an Australian citizen or permanent resident. It was argued that the differences between the provisions of the two Acts had caused confusion in interpreting and applying these provisions of the BCIP Act.

The ACTU submission also highlights an apparent drafting error contained in subsection 34(2D) of the BCIP Act. The subsection states 'the Building Code must include provisions ensuring no person is employed to undertake building work' without market testing being undertaken, while section 11F of the 2016 Code states that this provision applies only to the employment of people who are not Australian citizens or Australian permanent residents within the meaning of the Migration Act. The ACTU is of the view this discrepancy requires correction.

A supplementary submission from the Ai Group also argued that the provisions of subsection 34(2D) differ substantively from those of the Migration Act, stating that:

The standard set by these provisions is higher than that required for employers engaging workers on working visas in other industries.<sup>54</sup>

The MBA submission did not argue that the market testing provisions of the 2016 Code and the Migration Act were inconsistent. Indeed, it characterised the effect of the 2016 Code as largely being to restate the need to comply with existing laws, including ‘building laws, OHS laws, migration laws, and competition laws’. However, the MBA argued that those elements of the 2016 Code that restate the need to comply with other laws in policy areas not directly related to the objectives of the BCIIIP Act, including migration related matters, should be reconsidered, preferring these elements of the 2016 Code to be the responsibility of ‘traditional and conventional regulators’, rather than the ABCC.<sup>55</sup>

The Ai Group also highlighted the costs to employers of complying with the market testing provisions, citing anecdotal evidence, provided by its members, of the existence of two types of associated costs. First, it was noted that some forms of building work, particularly of a ‘non-trades’ type, are temporary in nature and can be readily undertaken by temporary visa holders. However, there are practical impediments to undertaking the required market testing in this context. This includes the fact that the need for the worker is often immediate and, at the same time, transient.<sup>56</sup>

Second, it was argued that the market testing requirements of section 11F of the 2016 Code impede companies’ ability to use their own foreign-based employees on Australian projects. The Ai Group argued that impeding global businesses’ ability to utilise senior staff, such as designers and project managers, in their Australian operations has adverse impacts on efficiency, including reducing opportunities for Australian employees to learn from overseas experience.<sup>57</sup>

The Ai Group also questioned the impact of the provisions on some types of temporary visa-holders, noting that the prohibition on the engagement of workers who hold temporary visas (unless the market testing requirements have been met) extends as far as persons on working holiday visas and some special working visas provided to New Zealanders.<sup>58</sup> This raises the question of the appropriateness of placing barriers in the way of employment opportunities for people who already have the right to work in Australia, independently of securing a job, albeit on a temporary basis.

---

<sup>54</sup> Australian Industry Group 2018, supplementary written submission, p. 7.

<sup>55</sup> Master Builders Australia 2018, written submission, p. 30.

<sup>56</sup> Australian Industry Group 2018, *op. cit.*, p. 4.

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

## 4.2. Comparison of market testing provisions – BCIP Act and 2016 Code vs Migration Act

Subsection 34(2D) of the BCIP Act requires the 2016 Code to include the following content in relation to the employment of persons<sup>59</sup> by code-covered entities in the building industry:

Without limiting subsection (1), the Building Code must include provisions ensuring that no person is employed to undertake building work unless:

- a) the position is first advertised in Australia; and
- b) the advertising was targeted in such a way that a significant proportion of suitably qualified and experienced Australian citizens and Australian permanent residents (within the meaning of the *Migration Act 1958*) would be likely to be informed about the position; and
- c) any skills or experience requirements set out in the advertising were appropriate to the position; and
- d) the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job.

Section 11F of the 2016 Code includes drafting that is generally consistent with subsection 34(2D), although section 11F(1) differs from the drafting of the BCIP Act in that it states:

A code covered entity must ensure that no person **that is not an Australian citizen or Australian permanent resident (within the meaning of the *Migration Act 1958*)** is employed to undertake building work for the code covered entity unless... [emphasis added].

The ACTU suggested in its submission that this difference between the two market testing provisions has arisen from a drafting error. This appears to be the case, with the version of the provision contained in the 2016 Code reflecting the apparent legislative intent, noting that it is more consistent with the equivalent requirement of the Migration Act.

This is clearly a strong market testing requirement which, in effect, states that temporary work permit holders can only be employed in the building industry if the employer can demonstrate, on reasonable grounds, that no 'Australian citizen or Australian permanent resident' is suitable for the job.

Section 140GBA of the Migration Act establishes generally applicable labour market testing requirements in relation to the employment of certain categories of workers who are not Australian citizens or residents. Subsections (5) and (6) set out requirements in relation to the provision of evidence of labour market testing having been carried out, in order to satisfy the Minister that:

[A] suitably qualified and experienced Australian citizen or Australian permanent resident is not readily available to fill the nominated position

Subsection (6) provides that the Minister may determine:

- (a) the language to be used for any advertising (paid or unpaid) of the position, and any similar positions, commissioned or authorised by the approved sponsor;

---

<sup>59</sup> As highlighted in the Australian Council of Trade Unions 2018, written submission, noted above, this provision is apparently intended to cover only the employment of persons who are not Australian citizens or permanent residents. However, as drafted, it would appear to cover employment of any person by a code-covered entity.

- (b) the method of any such advertising;
- (c) the period during which any such advertising must occur;
- (d) the duration of any such advertising.

Subsection (6) also provides that the Minister may prescribe different manners or evidence for different nominated positions or classes of nominated positions.

These requirements are generally similar to those contained in section 11F of the 2016 Code. However, subsection 140GBA(1)(c) of the Migration Act limits the application of the labour market testing requirements to circumstances in which:

[I]t would not be inconsistent with any international trade obligation of Australia determined under subsection (2) to require the person to satisfy the labour market testing condition in this section, in relation to the nominated position.

Several legislative instruments have been made under the authority of subsection 140GBA(2) in recent years which explicitly identify circumstances in which such conflicts arise and, as a result, clarify that the labour market testing requirements do not apply in those circumstances. For example, the *Japan Australia Economic Partnership Agreement Determination 2014 [IMMI 14/113]* declared that the market testing requirements would be inconsistent with the Japan-Australia Economic Partnership Agreement, to the extent that they were applied to:

- (i) Executives and Senior Managers as Intra-Corporate Transferees;
- (ii) Specialists as Intra-Corporate Transferees;
- (iii) Investors of Japan;
- (iv) Contractual Service Suppliers.<sup>60</sup>

The instrument came into effect immediately after the Japan Australia Economic Partnership Agreement came into force and had the effect of explicitly removing the requirement for market testing to be undertaken in these circumstances.

More recently, a substantially wider-ranging legislative instrument has been made under the authority of subsection 140GBA(2). This is the *Determination of International Trade Obligations Relating to Labour Market Testing Instrument 2017 (IMMI 17/109)*, which was adopted on 22 November 2017. This instrument identifies ten of Australia's international trade agreements in respect of which applying the market testing requirements would be inconsistent in at least some circumstances.<sup>61</sup> These identified agreements include eight bilateral trade agreements, plus two multi-lateral agreements. The latter are:

- The ASEAN-Australia-New Zealand Free Trade Agreement
- The General Agreement on Trade in Services (GATS) at Annex 1B to the Marrakesh Agreement Establishing the World Trade Organisation (WTO).

---

<sup>60</sup> Department of Home Affairs 2014, Migration Act 1958 - Determination of Japan Australia Economic Partnership Agreement - IMMI 14/113 [F2014L01676], Canberra.

<sup>61</sup> Department of Home Affairs 2017, Migration (IMMI 17/109: Determination of International Trade Obligations Relating to Labour Market Testing) Instrument 2017 [F2017L01533], Canberra, ss. 6(1).

The inclusion of the GATS is of particular note, as it sets out obligations with which Australia must comply in relation to all 140 WTO member countries.<sup>62</sup> The impact of IMMI 17/109 is summarised on the website of the Department of Foreign Affairs and Trade in the following terms:

**International trade obligations (ITOs)**

LMT [Labour Market Testing] is not required where it would conflict with Australia's international trade obligations, in any of the following circumstances:

- the worker you nominate is a citizen/national of China, Japan or Thailand, or is a citizen/national/permanent resident of Chile, South Korea, New Zealand or Singapore
- the worker you nominate is a current employee of a business that is an associated entity of your business and the associated entity is located in an Association of South-East Asian Nations (ASEAN) country (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam), Chile, China, Japan, South Korea or New Zealand
- the worker you nominate is a current employee of an associated entity of your business and that associated entity operates in a country that is a member of the World Trade Organisation (WTO), and the nominated occupation is an Executive or Senior Manager occupation for the purposes of international trade obligations and the nominee will be responsible for the entire or a substantial part of your company's operations in Australia
- your business currently operates in a WTO member country or territory and is seeking to set up a business in Australia, and the nominated occupation is an Executive or Senior Manager occupation for the purposes of international trade obligations
- the worker you nominate is a citizen of a WTO member country or territory and has worked for you in the nominated position in Australia on a full-time basis for the last two years.<sup>63</sup>

That is, the labour market testing requirements of subsection 140GBA are completely void with respect to citizens/nationals of China, Japan Thailand, Chile, South Korea, New Zealand and Singapore, while several other partial exemptions exist. Conversely, no such exemption from the equivalent market testing requirements, based on the need to avoid inconsistencies with Australia's international trade obligations, exists in either the BCIIIP Act or the 2016 Code.

**Policy rationale for the market testing requirements of the BCIIIP Act and 2016 Code**

Where the Migration Act and Temporary Skills Shortage (482) visa set out market testing requirements that are intended to apply throughout the economy, the question of the policy merits of establishing a separate, and more onerous, requirement in respect of a subset of the building and construction industry (that is, companies that undertake Commonwealth-funded work – or seek to do so) necessarily arises.

The inclusion of subsection 34(2D) in the BCIIIP Act was the result of a Senate amendment, moved by the Opposition and not supported by the government. The parliamentary record indicates that it was not discussed extensively, but that the underlying rationale was apparently that of addressing

---

<sup>62</sup> WTO members are, at the same time, members of the GATS. World Trade Organization, The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines, World Trade Organization, Vienna, viewed 3 October 2018, ([wto.org/english/Tratop\\_e/serv\\_e/gatsqa\\_e.htm](http://wto.org/english/Tratop_e/serv_e/gatsqa_e.htm)).

<sup>63</sup> Department of Home Affairs 2018, Temporary Skill Shortage (TSS) visa – Labour Market Testing requirement: LMT for the short term stream and medium term streams, Department of Home Affairs, Canberra, viewed 3 October 2018, ([homeaffairs.gov.au/trav/work/empl/tss-labour-market-testing](http://homeaffairs.gov.au/trav/work/empl/tss-labour-market-testing)).

abuse of the (subsequently abolished) 457 visa class within the building industry.<sup>64</sup> The context is one in which, immediately prior to the commencement of the BCIIIP Act, the construction industry was the sixth largest user of 457 visas, accounting for 7.0 per cent of applications and 6.4 per cent of grants of 457 visas in the period July-December 2016. A total of 1,560 visas were granted within this period, while a total of 5,620 building workers held current 457 visas as of 31 December 2016.<sup>65</sup> It appears that this relatively high rate of use of non-resident workers in the building industry gave rise to pressure for a more restrictive approach to be taken in this industry-specific context.

### **4.3. Analysis**

As discussed above, given the existence in the Migration Act of a generally applicable market testing requirement, it is difficult to identify a sound argument for applying a substantively different requirement to a sub-set of the building industry. Sound policy principles suggest a presumption in favour of adopting consistent regulatory approaches to all industries, to avoid the likelihood of significant economic distortions arising. This presumption should be overturned only where a clear and substantial rationale can be identified.

Subsection 34(2D) appears to have been adopted in a context in which there was concern that abuse of the 457 visa system was widespread within the building industry, with the result that non-residents were frequently employed despite the availability of Australian residents. Regardless of the merits of this policy response at that time, the subsequent abolition and replacement of the former 457 visa class with the new Temporary Skills Shortage (482) visa class necessarily raises a question as to the continuing benefits of subsection 34(2D) of the BCIIIP Act and section 11F of the 2016 Code. That is, given that the Government has acted at an economy-wide level to address the previous concerns regarding the integrity of the former 457 visa class, the benefits of retaining a strong market testing requirement with application within only one part of one industry are unclear.

Conversely, the costs associated with these provisions may be significant. As discussed above, the Ai Group's submission identified a range of specific contexts in which the provisions would impose tangible efficiency costs on major employers. The fact that the formal requirement under the market testing provisions is particularly onerous – being to demonstrate 'that no Australian citizen or Australian permanent resident is suitable for the job' underlines the difficulties faced by employers in complying with the provisions.

However, a cost likely to prove more significant in the medium-term is that of the absence in the BCIIIP Act of a provision which exempts employers from the market testing requirements in circumstances in which they would be inconsistent with Australia's international trade obligations. As shown above in relation to the equivalent provisions of the Migration Act, such inconsistencies have been identified as arising in a wide range of contexts. They preclude market testing entirely in relation to citizens of several countries with which Australia has international trade agreements. For

---

<sup>64</sup> Hansard of 29 November 2016 records Senator Cameron, who moved the relevant amendment, stating 'I have seen the rip-offs that have been taking place with some of these workers coming in from overseas—absolute rip-offs. I think first of all we should be ensuring that Australian workers get access to the jobs that are available if they are qualified and willing to do the work.' Australia, Senate 2016, Debates, No. 6, p. 3646.

<sup>65</sup> Department of Immigration and Border Protection, Subclass 457 Quarterly Report: Quarter Ending at 31 December 2016, Department of Home Affairs, Canberra.

citizens of many other countries, market testing is prohibited in more limited contexts, involving employees of related entities of Australian companies and certain job categories.

The absence from the BCIP Act of exclusions from the market testing requirement in these circumstances effectively requires code-covered entities to act in ways that contravene Australia's international trade obligations in order to comply with domestic law. There is a consequent risk that other countries will take action against Australia using the dispute-resolution processes of the WTO/GATS and the prospect that such action will be successful.

From a policy perspective, the fact that the concerns regarding abuses of 457 visas that appear to have led to the adoption of these provisions have been addressed at an economy-wide level calls their continued relevance into question. The apparent inconsistency of these provisions with several of Australia's international trade obligations creates a risk of adverse action being taken by one or more of Australia's trading partners.

These considerations suggest that there is a strong argument for removing subsection 34(2D) from the BCIP Act and section 11F from the 2016 Code. Code-covered entities would remain subject to the market testing requirements of the Migration Act if this approach were adopted.

A further factor supporting this view is that the relevant provisions of the Migration Act have been amended frequently in recent years. Indeed, changes have come into effect since the commencement of this review. Thus, even were the BCIP Act and the Code to be amended to achieve consistency with the Migration Act at a particular point in time, it is highly likely that differences could again arise in the near future.

## Findings and recommendations

**Finding:** That the available evidence indicates that the provisions of subsection 34(2D) of the BCIP Act and section 11F of the 2016 Code are likely to be inconsistent with several of Australia's international trade obligations.

**Finding:** That the reforms undertaken to visa arrangements for non-resident workers are likely to have addressed the concerns that led to the inclusion of these provisions in the BCIP Act and 2016 Code, while the provisions of the Migration Act provide substantively similar market testing obligations without contravening Australia's international trade obligations.

**Recommendation 4.1:** That the market testing requirements of subsection 34(2D) of the BCIP Act and the associated requirements of the 2016 Code should be repealed.

**Recommendation 4.2:** That, alternatively, should the Australian Government wish to retain a market testing requirement under the BCIP Act and 2016 Code, the current provisions should be revised or replaced to ensure consistency between these provisions and Australia's international treaty obligations.

**Recommendation 4.3:** That, if subsection 34(2D) is retained, it should be modified to address the apparent inconsistency between subsection 34(2D) of the BCIP Act and section 11F of the 2016 Code.

## Chapter 5: Operation of the new provisions of the BCIIIP Act

### Term of reference 5

The review will examine the operation of the new provisions in the BCIIIP 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.

### Compliance with NCC performance requirements – building materials

#### 5.1. Introduction

The Federal Safety Commissioner (FSC) was established in 2005, with its primary role being to promote and improve worker safety in the building and construction industry, via administration of the Australian Government's Work Health and Safety Accreditation Scheme (the FSC Scheme).

The FSC Scheme aims to ensure building work is performed safely, as such it focusses on the health and safety of the *people* undertaking the building work. The FSC is the accrediting authority responsible for ensuring that accredited persons meet the systems and safety standards required to achieve and maintain accreditation under the FSC Scheme, enabling those persons to be awarded Commonwealth-funded construction contracts.

The BCIIIP Act makes only one significant change to the functions exercised by the Federal Safety Commissioner pursuant to section 30 of the former FWBI Act.<sup>66</sup> While section 38 largely mirrors the provisions of section 30 of the FWBI Act, a cross-bench amendment to this section inserted subsection 38(ca), which expanded the FSC's functions to include:

[A]uditing compliance with National Construction Code performance requirements in relation to building materials.

This new function differs markedly from the FSC's existing functions, in that it extends the FSC's role beyond worker safety to include a regulatory function focussed on the built environment. The National Construction Code (NCC) sets minimum regulatory requirements for safety, health and sustainability in the design, materials and construction methods of a building. The NCC is performance-based, meaning that it generally prescribes the outcomes to be achieved, rather than the particular materials, designs or construction methods to be used.

The administration of the NCC, including the evolution of its regulatory standards and the role of ensuring compliance with them, is the responsibility of the states and territories. Each has adopted the NCC within their building legislation. The Australian Government does not have a role in certifying the compliance of building materials with the NCC. As such, the new function accorded to the FSC effectively requires it to adopt a new and distinct implementation approach. That is, it is not possible to simply add ensuring 'compliance with National Construction Code performance

---

<sup>66</sup> The only difference in the provisions regarding the FSC, other than the content of ss. 38(ca), is that the FSC's former function of 'monitoring and promoting compliance with the 2016 Code, so far as the 2016 Code deals with occupational health and safety', established in ss. 30(b) of the FWBI Act, is not included in the BCIIIP Act.



requirements in relation to building materials' to the scope of the FSC's existing audit activities in administering the FSC Scheme.

### 5.1.1. Context for the NCC requirements

The context for the broadening of the FSC's role to include auditing compliance with NCC performance requirements is one in which the fire safety issues arising from the use of flammable cladding materials has very rapidly become an issue of major public concern. This initially arose following the discovery of the significant contribution of non-compliant aluminium composite cladding to the rapid spread of the fire in the Lacrosse building in Melbourne's Docklands in November 2014. It was underlined by the results of subsequent investigations which found that similar, non-compliant cladding material has been installed in a wide range of buildings throughout Australia. Moreover, while the Lacrosse fire did not result in any fatalities or serious injuries, the safety risks posed by non-compliant cladding were demonstrated clearly via the tragic consequences of the Grenfell tower fire in London in June 2017, which was also substantially attributable to the use of flammable cladding materials.

Reviews of the use of non-compliant products (NCPs) have concluded that action addressing these issues will be complex and take significant time to implement, due to the complexities of Australia's system of building regulation. For example, the Interim Report of the Victorian Cladding Taskforce highlights system failures that have led to the widespread non-compliant use of combustible cladding and 'are symptomatic of broader non-compliance across a range of areas within the industry.'<sup>67</sup> It notes that:

Ultimately, it appears that there have been system failures at three levels: Firstly, in the product supply chain from manufacturing, marketing, import, supply, sale and purchase

Secondly, in the building and construction process from design, specification, procurement, installation, building and construction and maintenance and

Thirdly, in regulation itself, particularly in compliance and enforcement.<sup>68</sup>

The interim report makes recommendations for short, medium and long-term action to address the widespread use of NCPs in existing buildings. The recommendations also address the need for systemic improvements, both at state level and through nationally coordinated action, to minimise the risks of NCPs being used in newly constructed buildings. In doing so, it references *inter alia* work currently being undertaken by Building Ministers' Forum and by the Queensland Government to address this issue.

Although this is an interim report, it is clear that significant review and reform activity is in train. However, while the Lacrosse fire occurred in late 2014, government regulatory responses remain very much under development, almost four years later. This reflects the complexity of the issue and the regulatory environment within which it has arisen. Importantly, reviews undertaken in this area have highlighted the fact that the concerns regarding widespread non-compliance with the NCC are

---

<sup>67</sup> Victorian Cladding Taskforce 2017, Interim Report November 2017, State of Victoria Department of Environment, Land, Water and Planning, Melbourne, p. 4.

<sup>68</sup> *ibid.*, p. 27.

much broader than the cladding issue. The report of the Shergold and Weir inquiry summarised the main areas of concern as follows:

We have read numerous reports which identify the prevalence of serious compliance failures in recently constructed buildings. These include non-compliant cladding, water ingress leading to mould and structural compromise, structurally unsound roof construction and poorly constructed fire resisting elements.<sup>69</sup>

Consistent with this broader view of the problem, the recommendations made by Shergold and Weir cover a wide range of issues, including the registration and training of practitioners, cooperation between state and local governments, the role of fire authorities in relation to performance-based solutions, the integrity of private building surveyors, improved inspection arrangements and building product safety and certification.

### **5.1.2. The FSC's approach to carrying out its NCC function**

As discussed above, the fact that the new FSC role involves carrying out a regulatory function focused on the built environment, as opposed to worker safety, implies that it has been required to develop an implementation approach that is separate and distinct from its existing auditing practices.

Importantly, the FSC's power to undertake audits is limited to the approximately 450 companies accredited to undertake Commonwealth-funded building work and, within this group, only the 200-300 companies undertaking non-civil work.<sup>70</sup> Moreover, given that the regulation of Australia's built environment is essentially the responsibility of state and territory governments, the FSC has been cognisant of the need to avoid duplication of state and territory efforts as far as possible when developing its approach to auditing.

The FSC's initial approach to carrying out this new responsibility has included:

- introducing a new condition of accreditation for all FSC accredited companies, requiring them to comply with NCC performance requirements in relation to building materials
- issuing new model clauses for use in tenders and funding agreements for all Commonwealth-funded building work covered by the FSC Scheme, requiring contractor compliance with NCC performance requirements
- conducting a pilot audit program focussing on an example high-risk product (aluminium composite cladding) to ascertain how the FSC may implement the requirements of this new function without duplicating the role and work of state and territory regulators
- engaging with the Building Ministers' Forum and Building Regulators' Forum to identify how the FSC's approach to NCC auditing can best be accommodated within the broader regulatory framework.

---

<sup>69</sup> Shergold, P & Weir, B 2018, *Building Confidence: Improving the Effectiveness of Compliance and Enforcement Systems for the Building and Construction Industry Across Australia*, report to the Building Ministers' Forum, Department of Industry, Innovation and Science, p. 3.

<sup>70</sup> Note that the NCC does not apply to civil construction, as it exclusively addresses buildings.

### **5.1.3. Pilot audit program**

The FSC provided documents to the review which summarised key aspects of the pilot audit program that it conducted between July 2017 and February 2018. The program was based on a combination of on-site and desktop audits, with the following four systems-based audit criteria developed and reviewed by the FSC:

1. There is a documented process to ensure a competent person identifies all building materials required for the project that have performance requirements specified in the NCC.
2. There is a documented process to ensure the procurement of building materials (as identified via criterion 1) that meet the NCC performance requirements.
3. There is a documented process to ensure that building materials delivered to site are compliant with the NCC.
4. There is a documented process to ensure that the building materials identified via criterion 1 and procured in accordance with criterion 2 are used in accordance with the NCC.

The pilot audit design also included the identification of acceptable sources of evidence of compliance with the criteria. The results of the pilot audit will be utilised to develop audit criteria and processes related to building materials covered by the NCC.

### **5.1.4. Progress and key issues identified by the FSC<sup>71</sup>**

The FSC stated that the pilot audits have, overall, given rise to a substantial number of questions and issues regarding the design and implementation of a full audit program for NCC compliance. Consequently, it intends to undertake considerable further engagement with industry, via its reference group, to assist it in addressing outstanding issues. It has identified four key challenges in developing its audit framework regarding building materials covered by the NCC performance requirements:

- The need to avoid duplication of existing regulatory requirements.
- Ensuring the availability of adequate technical expertise within the FSC to carry out its new role.
- The resource implications of the requirements, for both the FSC and accredited companies.
- Equity issues in the accreditation context.

These are discussed briefly below.

#### **Avoiding duplication of existing regulatory requirements**

As noted, the primary responsibility for ensuring NCC compliance in respect of building materials lies with state and territory building regulators. State and territory legislation sets out detailed processes for the verification of compliance, which cover the key stages of the building process.

Consequently, the FSC has taken a number of steps to minimise regulatory duplication, overlap and/or inconsistency arising from its involvement in this area, including:

---

<sup>71</sup> Views attributed to the FSC in the following sections were largely expressed during a telephone interview conducted on 25 May 2018.

- a preference for a systems-based approach to the audit task and a stated intention to develop this approach in consultation with state and territory building regulators
- engaging in broader consultation and interactions with state and territory building regulators on issues related to NCC compliance, including through the Building Regulators Forum.<sup>72</sup>

### **Ensuring the availability of adequate technical expertise**

The FSC has sought to ensure that the audit approach it is developing is not overly complex and demanding and that, as a corollary, its administration will not require the FSC itself to develop substantial technical expertise in this area. However, the nature of the NCC and the legislative context in which it operates itself gives rise to difficulties in this regard.

In particular, the performance-based nature of the NCC implies that determinations as to whether building materials are compliant require consideration of the broader design context within which they are specified. For example, in the case of polyethylene core aluminium cladding, assessments of whether the use of the material is compliant in a particular context can involve consideration of the backing material employed with it and whether a sprinkler system is present, as well as considering the fire engineering assessment. Also relevant is the fact that the building regulatory system includes approval requirements at both design and construction stages. The audit process will need to be broad and detailed enough to encompass the full scope of the FSC's responsibility to audit accredited persons' compliance with NCC performance requirements in relation to building materials. Moreover, the FSC noted that its staff typically have a workplace health and safety background and lack substantial expertise in building materials issues and systems.

### **Resource implications**

The FSC is working towards an estimate of the likely compliance costs to accredited building companies of expanding the accreditation process to include verification of NCC compliance. It believes that larger companies are likely to have systems in place that can be adapted to serve as the basis for meeting the expanded accreditation arrangements it expects to adopt. However, the 20 per cent of accredited building companies that are classified as small businesses are much less likely to have such systems and, as a result, are likely to face higher compliance costs.

The FSC currently has 25 consultant Federal Safety Officers (FSOs) and about 35 in-house staff (including administration and support staff), who effectively act as audit managers in respect of more than 440 accredited companies, each of which is currently audited at least annually.

The FSC believes that the cost implications for its own operations will be significant, albeit they will be determined to some extent by the specific design of the accreditation and auditing requirements adopted in relation to the NCC function. As an indicative estimate, the FSC believes that its resource requirements could approximately double over the first two years of implementation of the new arrangements, with some reduction in following years once the new arrangements are fully

---

<sup>72</sup> The terms of reference for the Building Regulators' Forum state that '[s]tate and territory building regulators and relevant Commonwealth agencies require an effective mechanism for the exchange of information, to establish coordinated responses to building industry issues that affect the building industry, building occupants and the community.' Building Regulators' Forum, Terms of Reference, Department of Industry, Innovation and Science, viewed 3 October 2018, ([industry.gov.au/sites/g/files/net3906/f/July%202018/document/extra/building\\_regulators\\_forum\\_-\\_terms-of-reference.pdf](http://industry.gov.au/sites/g/files/net3906/f/July%202018/document/extra/building_regulators_forum_-_terms-of-reference.pdf)).

established and a high level of compliance has been achieved. It also expects it will need to draw on external expertise in developing accreditation/auditing criteria and evidence requirements.

### **Ensuring equity in the auditing context**

As noted above, the FSC believes that relatively few smaller accredited entities will have systems in place that can be adapted to form the basis of an audit compliance system and that the burden of compliance of subsection 38(ca) is likely to be significantly greater for this group. It intends to factor this insight into the detailed design of the audit compliance arrangements, to minimise any inequity arising.

A second possible equity issue is that accredited persons that undertake only civil construction will be unaffected by the expansion of the scope of the FSC's audits, while competing companies that also construct buildings will be subject to the broader audit requirements, thus facing a higher regulatory burden.

The FSC's consideration of the issue of equity in relation to the design of the audit process also includes the issue of the relationship between indicators of the risk posed by a company and its audit frequency. This includes consideration of both its compliance history and the amount of building work being undertaken.

### **Broader regulatory context**

The FSC is clearly cognisant of the broader context within which it is implementing its new obligations. That is, state and territory building regulators, and governments more broadly, are still developing their responses to the issues of flammable cladding materials and the broader question of the adequacy of NCC compliance systems. The FSC has indicated that a range of perspectives appear to exist as to how these issues should be addressed, with some jurisdictions favouring systems-based approaches and others considering more prescriptive approaches, including possible changes to building certification arrangements. The FSC notes that a significant degree of coordination and agreement will need to be achieved, both amongst state and territory building regulators and between these regulators and the FSC itself, given the closely harmonised nature of much of the building regulatory system.

Given this situation, there are substantial uncertainties as to the broader regulatory environment within which the NCC auditing requirements currently being developed by the FSC will operate.

## **5.2. Stakeholder views**

A small number of stakeholder submissions addressed the requirement for the FSC to audit accredited building companies' compliance with the NCC, with a range of views being expressed. ACCI's submission did not directly address the new requirements of subsection 38(ca) of the BCIP Act. However, it did include a general statement that, while the FSC Scheme has the effect of imposing obligations and associated costs on building industry participants, ACCI welcomes the use of the Government purchasing power to drive cultural change in the industry and sees this as an important aspect of the regime created by the BCIP Act.

The Ai Group, in its supplementary submission, expressed general support for this addition to the FSC's responsibilities, stating that the FSC constitutes an appropriate component of the regulatory regime to address issues relating to non-conforming building products and the non-compliant use of compliant products. However, it noted that the primary regulatory responsibility in relation to product conformity lies with state and territory governments and, specifically, their building regulatory agencies. It argued that the role of the FSC should not incorporate functions or activities that would duplicate, or run parallel to, the activities of state and territory regulators. Rather, it suggested that it would be appropriate that the FSC establish and maintain relationships with state regulators to help to ensure the ongoing compliance of businesses accredited under the FSC Scheme.

Conversely, the MBA submission indicated a clear view that the FSC should not retain the additional functions in respect of compliance with the NCC conferred upon it by subsection 38(ca). The MBA is concerned that this additional function will detract from what it sees as the major role and purpose of the FSC, that is, to work with industry and government stakeholders so the sector can achieve the highest possible occupational health and safety standards. The MBA argued that:

Not only does the existing function confuse otherwise clear lines between what is a workplace health and safety matter and what is a building regulation matter, we hold the view that it brings no practical benefit on building sites in terms of industry OHS outcomes and, indeed, are concerned to ensure the contrary does not occur.<sup>73</sup>

The MBA indicated that it was aware of the context, noted above, of substantial community concern regarding non-conforming cladding materials and expressed the view that effectively addressing the issue of non-conforming building materials, or the use of building products in a non-compliant way should be given high priority. It also noted that the use of Government procurement policies to drive outcomes that complement related policy positions is a common practice of all governments.

However, notwithstanding these factors, the MBA believes that the attempt to address this issue through the FSC's audit function is inappropriate, due to both the limited jurisdiction of the Australian Government in respect of non-compliant building materials and the fact that the Government lacks regulatory agencies with specific technical expertise in this area. Moreover, the MBA argued that the genesis of the NCP problem lies, in part, with the varying approaches to the approvals and enforcement processes associated with the NCC, another factor over which the Government has little influence.

Therefore, the MBA believes that attempts to address NCPs should remain the responsibility of state and territory governments, with the Australian Government restricting itself to playing an oversight or coordination role. The MBA expressed concern at the potential for the FSC's involvement in this area to have negative overall consequences, by exacerbating what it believes is a pre-existing level of confusion among regulators, policymakers, industry participants and the community as to what responsibilities lie with whom in this area.<sup>74</sup>

The ACTU submission expressed general agreement with the concept of the FSC having responsibilities to ensure compliance with the NCC, arguing that it is appropriate for a company's

---

<sup>73</sup> Master Builders Australia 2018, written submission, p. 29.

<sup>74</sup> *ibid.*

work health and safety record and compliance with the NCC to be taken into account when awarding public contracts. However, it argued that the FSC has very limited effectiveness in these areas, as it lacks adequate resources and expertise. In this context, the ACTU highlighted the September 2017 interim report of the Senate Economics References Committee on non-compliant building materials. This report concludes that the FSC has expertise in workplace health and safety on construction sites but has no expertise in the regulation of building design, engineering, planning approval, material procurement processes or certifier processes. Moreover, its powers are limited to those companies that choose to become accredited in order to undertake Commonwealth-funded work.

### **5.2.1. The pilot audits**

The above views were contained in submissions received from peak industry bodies and are based largely on a high-level consideration of the issues involved, including reference to general principles of good regulation. By contrast, the participants in the FSC's pilot audit program have had a more direct exposure to the likely practical impact of the expansion of the FSC's functions under subsection 38(ca), albeit that the scope of the pilot audit program is substantially narrower than that which will ultimately need to be adopted.

The FSC provided high-level feedback on the views of this group to the review, indicating that there is already some concern among accredited building companies about the likely compliance cost impact of these provisions, given the breadth of the NCC. It noted that it has not yet published a proposed approach to auditing NCC compliance and that, as a result, it believes that even those businesses who participated in the pilot audit program have given relatively little consideration to the size of the compliance costs they are likely to face. Thus, the level of concern about this issue among code-covered entities was considered likely to increase as the compliance program is further developed.

Given this, the FSC highlighted its intent to adopt a consultative approach when it initially publishes its proposals in relation to the expanded audit program.

## **5.3. Analysis**

The submissions that address the issues of NCC compliance raise two distinct issues, which are:

- whether seeking to ensure the compliant use of building products by accredited companies is an appropriate accreditation requirement
- whether the FSC is the appropriate body to carry out this function, including whether it can do so in a cost-effective manner.

While there are clear connections between these issues, they should be assessed separately.

### **Appropriateness of the accreditation requirement**

In addressing this question, the MBA submission highlighted the fact that the Australian Government has very limited jurisdiction in relation to the regulation of building products, implicitly suggesting that it is therefore inappropriate that Commonwealth laws should address the question of compliance with state and territory legislation.

Conversely, it was seen by both the Ai Group and the ACTU as entirely appropriate that the Government should seek, via its own institutions, to verify compliance with certain legal requirements, albeit that they are established by another level of government, as a condition of businesses being able to supply it with goods and services. The ACCI regarded this dynamic positively, in that they saw potential for the exercise of the Commonwealth's large-scale purchasing power in this way to help drive 'cultural change' within the building and construction industry.

This identified dynamic, of a purchaser seeking commitments from a supplier that they will continue to behave in a certain way, and will verify that they have met these commitments, is a common one. Indeed, the clearest example of this is the core requirement of the accreditation process established under the BCIP Act and the former FWBI Act, to achieve the higher WHS standards set by the FSC, moving beyond the specific requirements of state and territory legislation, via the accreditation process.<sup>75</sup>

While a relatively small number of submissions explicitly addressed the NCC issue, all accepted, at least in principle, the legitimacy of the Australian Government using its purchasing power in this way. Thus, the central issue is arguably that of the likely effectiveness of seeking to pursue goals related to the NCC by giving the FSC the legislative obligations set out in subsection 38(ca).

### **Appropriateness of auditing by the FSC**

As noted above, the MBA saw the FSC's lack of technical expertise in relation to building products as being likely to considerably limit its ability to add significant value, given that state and territory governments have more specialised and technically competent regulatory agencies with mandates to address these issues.

The context is one in which the current building regulatory system is widely regarded as having performed unsatisfactorily in ensuring NCC compliance, at least with respect to flammable cladding, with significant public safety concerns resulting. However, significant review and reform action is being taken by the states and territories. This poses challenges for the FSC in carrying out its legislated role while avoiding regulatory duplication and overlap. That is, it is foreseeable that future actions taken either through the Building Ministers' Forum or at the level of individual states and territories could overlap significantly with the audit program that the FSC is currently seeking to develop. More generally, while the states and territories may adopt different regulatory approaches to that which the FSC is developing, it is plausible that these regulatory responses will largely obviate the need for, and undercut the potential benefits of, action by the FSC.

A key question is whether the FSC can perform a complementary function, in the light of the changes taking place at state and territory government levels, or whether the FSC's involvement in this area will add little value. Indeed, it may impose costs in terms of confusion and overlap as to responsibilities and requirements. Further costs could arise from the diversion of the FSC's resources from its WHS related activities, which are widely regarded as highly effective.

As noted, further work is needed to identify the potential additional costs to accredited building companies of complying with a broader audit program embracing NCC compliance. Nonetheless, the

---

<sup>75</sup> The discussion of the provisions of the BCIP Act in relation to security of payments matters set out below provides a further example of this dynamic, given that the key legislation addressing to security of payments, once again, has been adopted by state and territory governments.



FSC has identified a degree of concern among affected parties. The likely adoption of a systems-based approach by the FSC implies that these additional costs will be incurred via a need to be able to *demonstrate* compliance, rather than being a result of increased compliance as such.

To the extent that significant compliance costs do follow from the FSC's implementation of the requirements of subsection 38(ca), the fact that these additional regulatory obligations are performed only in relation to accredited building companies has two implications:

1. The costs will be confined to companies undertaking non-civil Commonwealth-funded building work. At present, this group is estimated to comprise 200-300 companies. This is, numerically, a small subset of the Australian building industry, albeit that it necessarily includes a high proportion of the largest companies.
2. Any additional regulatory costs will necessarily be reflected in the cost of Commonwealth-funded building work. That is, the additional regulatory costs imposed will largely be borne by the taxpayer.

Importantly, the approach taken by the FSC in developing its pilot audit program is a systems-based one, predicated on the concept of 'process-based regulation'. This is consistent with the FSC's approach to implementing its WHS-related responsibilities. In terms of general principle, process-based regulation is likely to constitute a best practice approach in situations in which there are both multiple risk sources and multiple potential means of addressing them. Moreover, adopting such an approach also significantly reduces the level of technical expertise required to effectively oversee this requirement. That is, process-based regulation focuses (as the name suggests) on ensuring that processes are in place to systematically ensure that risks are identified and appropriately managed, rather than on verification of technical standards *per se*. This approach seems likely to minimise the impediment to achieving effective outcomes created by the FSC's lack of technical expertise in this field.

The design of the FSC's pilot audit program appears to be a sound one. However, as relatively little information is currently available to the review as to the results of the pilot audit program, it is difficult to draw clear conclusions as to the FSC's likely effectiveness in relation to the NCC. Ensuring effective coordination between relevant state and territory government authorities and the FSC will be a key requirement if the benefits of the FSC's involvement in this area are to be maximised and the associated costs minimised. The fact that the FSC has deliberately sought to avoid duplication of, and overlap with, state and territory government initiatives is a positive indicator in this respect, indicating a focus on ensuring that its involvement in this area adds value.

The question of the likely benefit of the FSC undertaking this function must also be considered more broadly. As several submissions noted, the FSC has been given a significant additional legislative responsibility without, to date, receiving a commensurate increase in resourcing. A recent Senate Standing Committee on Economics inquiry concluded that the FSC does not have adequate resources to carry out this new function.<sup>76</sup> Consistent with this view, several submissions to the review argued that the FSC will be unable to divert existing resources to this new responsibility without compromising its ability to carry out its pre-existing WHS-related functions.

---

<sup>76</sup> Senate Economics References Committee 2017, *Non-Conforming Building Products; Interim Report: Aluminium Composite Cladding*, Canberra, p. 52.

Importantly, while the ability of the FSC to add value through its new role in relation to the NCC remains uncertain, there is good evidence that the FSC Scheme, for which it has long been responsible, has been effective in improving the performance of accredited entities. In particular:

- In 2016, only four of the 35 industry fatalities were associated with accredited companies, while in 2015 only three of the 34 industry fatalities were associated with accredited companies. This represents a substantially lower fatality rate than the industry average, given that it is estimated that accredited companies account for 40-50 per cent of construction industry turnover.<sup>77</sup>
- Accredited companies have workers' compensation premium rates that are approximately 25 per cent lower than the industry average.<sup>78</sup>
- Sixty five per cent of accredited companies have reduced their lost time injury frequency rates after six years of accreditation.<sup>79</sup>
- Companies seeking accreditation must meet over 100 criteria covering WHS Management, construction specific hazards and senior management responsibilities and commitment. On average, companies seeking accreditation for the first time are required to take around 33 corrective actions.

The apparent effectiveness of FSC accreditation in improving the WHS performance of building companies could be taken as evidence of the likely benefit of adopting a similar, systems-based audit approach in relation to NCC compliance. However, to the extent that broadening the FSC's role to include NCC reduces the focus on WHS issues, there is a clear risk that a reduction in net benefits would result. This is a particular risk if additional resourcing is not provided to the FSC commensurate with its new responsibilities. That is, it is likely that, if resources had to be diverted from WHS-related functions to NCC-related functions, their overall productivity would be reduced.

## Recommendations

**Recommendation 5.1:** That the Australian Government should keep the requirement for the FSC to address NCC issues under review as state and territory government responses to this issue evolve in the short to medium-term.

**Recommendation 5.2:** That there should be a presumption in favour of repealing subsection 38(ca) of the BCIP Act, provided that the Australian Government is satisfied with the state and territory government reforms in this area.

**Recommendation 5.3:** That the Government should ensure the FSC is adequately funded to undertake NCC-related activities to avoid compromising the effectiveness of its core functions in relation to workplace health and safety.

<sup>77</sup> Safe Work Australia 2017, *Work-related Traumatic Injury Fatalities Australia 2016*, SWA, Canberra, p. 13. Note: This is the most current fatality report released by Safe Work Australia and includes bystanders.

<sup>78</sup> Premium rates for accredited companies are reported bi-annually to the FSC. Industry averages are published by Safe Work Australia. Refer: Safe Work Australia 2016, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand: October 2016*, SWA, Canberra, pp. 222-224.

<sup>79</sup> Source: FSC. The lost time injury frequency rate for an accredited company is reported to the FSC when the company first applies for accreditation and then bi-annually. Data shows that the majority of companies demonstrate a reduction in the frequency of lost time injuries over each year of accreditation.

## **Security of payments**

### **5.4. Introduction**

‘Security of payment’ refers to a system that entitles contractors, subcontractors, consultants and suppliers in the construction industry contractual chain to receive progress payments for construction work undertaken under a construction contract.

State and territory governments are responsible for regulating payment arrangements in the building industry. Between 1999 and 2009 all jurisdictions enacted specific security of payment legislation to address poor payment practices in the construction industry. These laws all provide a statutory entitlement to progress payments and a rapid, low-cost adjudication process where parties dispute payments, intended to help to preserve the cash flow of small business contractors and subcontractors.

#### **Security of Payments Working Group**

Section 32A of the BCIP Act establishes a Security of Payments Working Group to advise the ABC Commissioner and monitor the ABCC’s effectiveness in exercising its powers in relation to security of payment. This was not a requirement of the FWBI Act.

The Security of Payments Working Group has responsibilities to:

- monitor the impact of the ABCC’s activities on the conduct and practices of building industry participants in relation to the Australian Government and state and territory governments’ security of payment laws
- make recommendations to the ABC Commissioner about policies, procedures and programs that could be implemented to improve compliance with security of payment laws
- make recommendations to the Minister about any matter the Minister requests the Working Group to consider.

#### **The 2016 Code – Security of Payment obligations**

Section 21 of the 2013 Code placed specific obligations in relation to compliance with state and territory security of payment laws on those building contractors or building industry participants to which it applied, namely:

A building contractor or building industry participant must:

- a) Comply with all applicable laws and other requirements relating to the security of payments that are due to persons;
- b) Ensure that payments made by the contractor or building industry participant are made in a timely manner; and
- c) As far as practicable, ensure that disputes about payments are resolved in a reasonable, timely and cooperative way.

The 2016 Code replicates these obligations in subsection 11D(1) and subsection 11E and also requires code-covered entities to:

- ensure that payments that are due and payable by the code-covered entity are not unreasonably withheld
- have a documented dispute settlement process that details how disputes about payments to subcontractors will be resolved, including a referral process to an independent adjudicator for determination if the dispute cannot be resolved between the parties, and to comply with that process and any determination of the independent adjudicator
- comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code-covered entity in relation to Commonwealth-funded building work
- report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due.

Subsections 11D(2) and (3) also prohibit code-covered entities from engaging in illegal or fraudulent phoenix activities to avoid making payments that are due, and from taking action with intent to coerce a contractor, subcontractor or consultant, or apply undue influence or pressure on them in relation to the exercise of their rights under security of payment laws.

If the ABC Commissioner is satisfied that a code-covered entity has failed to comply with state and territory security of payment laws or with the additional requirements in section 11D and section 11E, he or she may refer the matter to the Minister and may include recommendations as to the imposition of sanctions with that reference.

The ABCC's 2016-17 Annual Report indicates that its approach to dealing with security of payments under the 2016 Code was developed following extensive consultation with the responsible state and territory government agencies. The ABCC has also been in regular dialogue with Mr John Murray AM, who recently completed a review of the state and territory security of payments laws in the building and construction industry.

The ABC Commissioner has advised the review that the Security of Payments Working Group is an important ABCC priority and that the ABCC has been 'greatly assisted by the input and feedback of all members of the working party'. Following consultation with the Working Group the ABCC launched an education campaign in July 2018,<sup>80</sup> which seeks to increase the current, relatively low level of awareness among industry participants of their rights under state and territory security of payments laws and the specific means of redress available to them.<sup>81</sup>

Data provided by the ABCC<sup>82</sup> indicates that it received a total of 43 enquiries and notifications related to security of payment matters in the first half of 2017-18. This represented only 0.8 per cent of the 2,901 code-related enquiries received during this period. However, given the relatively recent

---

<sup>80</sup> Australian Building and Construction Commission 2018, ABCC launches campaign to help secure subcontractors' payments, media release, 17 July, ABCC, Melbourne, viewed 3 October 2018, ([abcc.gov.au/sites/g/files/net2406/f/180717\\_abcc\\_launches\\_campaign\\_to\\_help\\_secure\\_subcontractors\\_payments.pdf](http://abcc.gov.au/sites/g/files/net2406/f/180717_abcc_launches_campaign_to_help_secure_subcontractors_payments.pdf)).

<sup>81</sup> Murray, J 2017, Review of Security of Payment Laws: Building Trust and Harmony, Department of Jobs and Small Business, Canberra, p. 39. Citing previous reviews of individual states' security of payment laws, the report notes that 'Professor Evans echoed the sentiments expressed by Collins and Moss when he said that there was a lack of awareness of the legislation by industry stakeholders and that there was a need for a widespread education and training campaign to address these concerns.'

<sup>82</sup> See discussion in Chapter 1.

addition of the requirement that code-covered entities notify funding entities and the ABCC of late payments (even prior to undertaking any action or receiving an adjudication for late payment under state and territory legislation) this proportion is likely to increase in the future.

## 5.5. Stakeholder views

Three submissions addressed security of payments issues. The most extensive discussion is contained in the MBA submission. The MBA's general view is that many of the additional functions conferred upon the ABCC by the BCIIIP Act, including security of payments,<sup>83</sup> should be reconsidered, as they could detract from the ABCC's ability to carry out what the MBA sees as its core role. The submission states:

It follows that the remaining additional policy outcomes sought via amendments made to the Act and 2016 Code pertaining to any matter other than workplace industrial or safety issues should be actively reconsidered. These include the functions that relate to (a) security of payment laws, (b) use of non-citizen labour and (c) building regulation (as mentioned above).

The MBA states that, while these issues are important, they can be more effectively addressed in contexts other than the BCIIIP Act. The submission highlights the fact that all eight states and territories adopted security of payments legislation between 1999 and 2009 and that the major elements of these laws are common across all jurisdictions. These include a right to progress payments, a right to interest on late payments, a right to suspend work in cases of non-payment and rapid interim adjudication of disputed claims by an independent adjudicator.

Despite this substantial degree of commonality, the MBA argues that there are important differences between the state and territory laws that can cause contractors and subcontractors considerable confusion. Moreover, security of payment legislation has been more or less constantly under review, in one or another jurisdiction, over the last 5 to 6 years and, in this context, the utility of a further level of regulation is questionable. This position reflects the MBA's view that the various moves taken to strengthen the regulatory regimes in place have frequently proven ineffective and possibly counter-productive.

Given the context of complex, sometimes inconsistent and frequently changing legislation, the MBA also questions the ABCC's knowledge and understanding of the relevant issues and its capacity to ensure compliance with the security of payment laws of each jurisdiction. This leads them to question whether the compliance obligations established under the BCIIIP Act and 2016 Code will deliver the desired policy outcome or simply add confusion and cost to an already complex regulatory environment. The MBA recommends consideration should be given to shifting the additional security of payments function from the 2016 Code to more appropriate regulators with greater expertise and capacity to achieve that outcome.<sup>84</sup> However, no specific suggestions were made as to what regulatory agencies might more appropriately take on this role.

The ACTU's submission also addresses security of payment at some length. It quotes the report of the 2015 Senate Economic References Committee inquiry that repeated the recommendations of several previous inquiries:

---

<sup>83</sup> Note that security of payments issues are also addressed at Clause 21 of the 2013 Code. Thus, this is not a new, BCIIIP Act-specific area of operation for the regulator.

<sup>84</sup> Master Builders Australia 2018, written submission, p. 35.

[T]he completely unacceptable payment practices in the construction [industry] has to end. The continued viability of the industry in its current structure requires Commonwealth intervention to ensure that businesses, suppliers and employees that work in the industry's subcontracting chain get paid for the work they do.<sup>85</sup>

The ACTU criticises the structure of the current Working Group, noting that there is only one employee representative among the 11 members of the working party. It notes that the Working Group had, as of April 2018, only met three times, and states that its representative and the representative of the Subcontractors' Alliance have raised concerns that the ABCC is not doing nearly enough to address the widespread problem of security of payments.

The ACTU specifically criticised the definition of 'disputed or delayed progress payment' adopted by the ABCC. The term 'disputed or delayed progress payment' is not defined in the 2016 Code. Initially, the ABCC defined a 'disputed payment' as a payment that has been referred to adjudication, and a 'delayed payment' as a payment not paid in accordance with the timeline determined by the adjudicator. However, the ABCC has since revised its approach and has put in place a process to require mandatory reporting of disputed or delayed payments to the ABCC, and any relevant funding entity, directly by code covered contractors and suppliers as soon as this problem arises – well in advance of when a state/territory legislator is involved.<sup>86</sup>

Comments from the Civil Contractors Federation (CCF)<sup>87</sup> also argue that the ABCC should become engaged with security of payments disputes prior to the adjudication process commencing. The CCF suggested that, at a minimum, coordination between the ABCC and relevant state and territory regulators could lead to the development of a protocol whereby the ABCC was notified of all disputes brought to them. This would give the ABCC a better understanding of the scale of security of payments disputes and the ability to monitor both the time taken to resolve them and the outcomes reached.<sup>88</sup>

The CCF believes that a key issue is a continued low level of awareness among industry participants of the relevant state and territory security of payment laws and their benefits. Consequently, they anticipate that the education campaign to be launched by the Working Group during 2018 will yield a significant increase in the number of disputes notified to state and territory regulators.

In common with the MBA, the CCF expressed concern about the considerable review and reform activity occurring with state and territory legislation in this area and its potential to increase confusion and uncertainty in the industry. A particular concern was that such activity had continued in at least one jurisdiction while the Australian Government's Murray Review was being undertaken. The CCF argued that there is a high degree of anticipation of the report of the Murray Review being released and acted upon by the Government.

---

<sup>85</sup> Senate Economics References Committee 2015, *Insolvency in the Australian Construction Industry: 'I Just Want to Be Paid'*, Canberra, p. xviii. Cited in Australian Council of Trade Unions 2018, written submission, p. 14.

<sup>86</sup> Australian Building and Construction Commission, *Security of Payment: Mandatory Reporting of Disputed or Delayed Payments*, ABCC, Melbourne, viewed 3 October 2018, ([abcc.gov.au/building-code/security-payments](http://abcc.gov.au/building-code/security-payments)).

<sup>87</sup> Telephone interview with Civil Contractors Federation, 24 April 2018.

<sup>88</sup> Subsection 11D(1)(f) of the 2016 Code already requires code-covered entities to notify the ABCC in such situations. Hence, it is not clear what practical effect such a change would have.

The ACTU submission similarly states its expectation that the Murray Review will recommend wide-ranging reforms to better harmonise national security of payments laws and improve compliance and that the government will implement these recommendations.

The Murray Review was released after the receipt of these submissions and does, in fact, recommend a range of harmonisation options.

## **5.6. Analysis**

The focus of the Security of Payments Working Group on increasing awareness of the existing state and territory security of payments legislation is clearly an appropriate response to the low level of awareness of this legislation among industry participants, highlighted in the Murray Review. There may also be unexplored potential for better cooperation and data flows between the relevant state and territory government bodies and the ABCC in relation to security of payments issues. As suggested in the submissions discussed above, provision of relevant information by state and territory regulatory bodies could have the potential to improve the ABCC's effectiveness in this area by improving the market intelligence available to it and enabling it to undertake relevant analysis.

That said, security of payments is a further area in which the provisions of the BCIP Act extend to issues that are fundamentally the regulatory responsibility of state and territory governments. The fact that all states and territories adopted legislation specifically addressing security of payments in the decade to 2009 clearly indicates a general acceptance that this is an issue of major concern. Given this, it is unsurprising that the Australian Government should seek to extend its influence as a major purchaser by adopting mechanisms in the 2016 Code that aim to ensure a high level of compliance with the laws in this area by those with whom it contracts.

The ABC Commissioner indicated to the review his belief that the Security of Payments Working Group has functioned effectively in practice and provided significant assistance to the ABCC in acquitting its responsibilities. He noted, in particular, the positive engagement in the work of the ABCC by the ACTU representative. This dynamic may be particularly significant in a context in which the ABCC is seeking acceptance by all industry participants as an impartial and apolitical 'full service regulator'.

As a practical matter, the need to fulfil its responsibilities in this area could lead to a diversion of ABCC resources to from other tasks, as noted by the MBA. If the ABCC's education campaign succeeds in raising awareness, a further increase in the number of delayed and disputed payments reported to it can also be expected. This underlines the resource question.

The Murray Review has addressed the issue of security of payments in detail. Its recommendations focus on the need for greater harmonisation of state and territory laws and on identifying the preferred characteristics of security of payments legislation around which harmonisation should occur. It identifies a range of harmonisation models, including the use of Commonwealth legislation, drawing on the corporations power, mirror legislation and referral of powers. Mr Murray argues that the merits and disadvantages of each option require further consideration, as does the question of

the potential for cooperation between the Australian Government and state and territory governments.<sup>89</sup>

The Australian Government is, at the time of writing, yet to provide its formal response to the Murray Review recommendations. This response could be delayed for some time, pending consultation with state and territory governments on the nature and extent of any harmonisation initiatives. Given this context, changes to the BCIP Act and 2016 Code in this area should await clarification of the expected outcomes of these discussions.

### **Finding and recommendations**

**Finding:** There is relatively limited support among stakeholders for the role of the ABCC in relation to security of payment matters. However, the ABC Commissioner believes that the Security of Payments Working Group has, to date, worked effectively and achieved significant outcomes.

**Recommendation 5.4:** That the ABCC should continue to cooperate systematically with state and territory government bodies responsible for administering and enforcing security of payments laws, particularly in terms of data and intelligence sharing.

**Recommendation 5.5:** That the Australian Government further consider the nature of the ABCC's role in relation to any changes to security of payment arrangements, including in the context of its response to the Murray Review into this issue.

---

<sup>89</sup> Other options are also available in this regard, including template legislation, legislation 'by reference' and harmonisation based on agreed 'common essential requirements'.



## Chapter 6: Conclusions

As discussed above, both the requirement for the current review and its timing are mandated by Section 119A of the BCIP Act. However, several stakeholders argued that the review has been undertaken too soon after the commencement of the BCIP Act. The ACCI argued that there have been few pieces of legislation that have been subject to such intense and protracted scrutiny as the BCIP Act and that only 18 months have elapsed since the Senate Education and Employment Legislation Committee published the report of its inquiry into the BCIP Bill. In this context, there is no reason to modify the BCIP Act's provisions at present.

A similar view was expressed by the MBA. It noted that the terms of reference deal with matters about which there is likely to be limited evidence at present and counselled against the review forming firm conclusions on many of these matters. Instead, it recommended that a review with similar terms of reference should be undertaken in the future, when more data and experience with the BCIP Act, including the exercise by the ABCC and the FSC of their additional functions, had become available.

The terms of reference for the review are relatively narrow and specific; indeed, both the AWU submission and the correspondence received from the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU)<sup>90</sup> argue that they are narrower than what is required by section 119A of the BCIP Act. The formulation of the terms of reference may reflect recognition that the review is being undertaken at an early stage of the BCIP Act's operation and a desire to focus the review on addressing matters that are reasonably capable of assessment at this early stage. However, as the above discussion indicates, evidence in relation to several terms of reference remains scant.

In this context, the review believes that a cautious approach should be taken to the question of amending the BCIP Act and 2016 Code. Frequent legislative change has occurred in this field in recent years, with associated costs for industry participants in keeping up to date with their legislative obligations. Moreover, most submissions received from stakeholders expressed a desire for the current provisions to remain in force, at least in the medium term. Even where a need for changes was suggested, as in the case of the MBA, it was often expressed in the context of a preference for decisions to be delayed until further experience with the operation of the BCIP Act had been concluded.

The recommendations contained in the preceding chapters are, therefore, limited in extent and focus on addressing areas where there appears to be sufficient evidence of potential to improve key aspects of the BCIP Act, the 2016 Code or the practice of relevant parties in relation to their implementation. In many cases, the recommendation is that issues continue to be monitored with a view to future consideration of the potential need for legislative change.

---

<sup>90</sup> See Consultation.

## Consultation

The review was undertaken between February and June 2018.<sup>91</sup> Given the limited time available to complete the review, consultation was primarily undertaken via peak representative bodies. Letters were sent to a range of peak bodies and relevant government agencies in early March 2018, advising them that the review had commenced, providing a copy of the terms of reference and inviting them to provide a written submission on behalf of their members. Stakeholders were also invited to indicate whether they wished to be consulted directly following the receipt of written submissions.

Written submissions were received from the following organisations:

- Australian Chamber of Commerce and Industry
- Australian Council of Trade Unions
- Australian Industry Group
- Australian Minerals and Metals Association
- Australian Workers Union
- Commonwealth Ombudsman
- Housing Industry Association
- Master Builders Association
- National Electrical Contractors Association.

Written submissions were also received from a small number of member organisations within these peak bodies.

The review wrote directly to the CFMMEU, inviting it to provide a submission or engage in direct consultations. The CFMMEU responded, noting that the terms of reference for the review appear to be 'much narrower than the general review contemplated by s119A of the BCIP Act' and declining to participate in the review.

In a small number of cases, written questions were sent to stakeholders in response to the submissions received, with supplementary material being provided in response.

Where stakeholders requested direct consultations, these were undertaken via a mix of face-to-face meetings, teleconferences and correspondence. Direct consultations occurred with the following organisations:

- Australian Building and Construction Commissioner
- Australian Chamber of Commerce and Industry
- Australian Industry Group
- Civil Contractors Federation
- Commonwealth Ombudsman
- Federal Safety Commissioner
- Master Builders Association.

---

<sup>91</sup> Terms of reference for the review were approved in December 2017, prior to the anniversary of the commencement of the BCIP Act. However, the process of appointing a reviewer was not completed until February 2018.

## References

Administrative Review Council 2008, *Coercive Information-Gathering Powers of Government Agencies*, Report No. 48, ARC, Canberra.

Australian Building and Construction Commission 2017, *Annual Report 2016–17*, ABCC, Melbourne.

Australian Building and Construction Commission 2012, *Annual Report 2011–12*, FWBC, Melbourne.

Australian Building and Construction Commission, *Quarterly Reports (various)*, ABCC, Melbourne.

Attorney-General 2017, *Legal Services Directions 2017 [F2018C00409]*, Canberra.

Commonwealth Ombudsman 2017, *Annual Report by the Commonwealth Ombudsman under s 13(1) of the Building and Construction Industry (Consequential and Transitional Provisions) Act 2016 for the period 1 July 2015 to 30 June 2016*, Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman 2018, *Quarterly report by the Commonwealth Ombudsman under s 65(6) of the Building and Construction Industry (Improving Productivity) Act 2016 for the period 1 July 2016 to 31 March 2017*, Commonwealth Ombudsman, Canberra.

Commonwealth Ombudsman 2018, *Quarterly report by the Commonwealth Ombudsman under s 65(6) of the Building and Construction Industry (Improving Productivity) Act 2016 for the period 1 July to 30 September 2017*, Commonwealth Ombudsman, Canberra.

Department of Immigration and Border Protection, *Subclass 457 Quarterly Report: Quarter Ending at 31 December 2016*, Department of Home Affairs, Canberra.

Fair Work Building and Construction 2016, *Annual Report 2015–16*, FWBC, Melbourne.

Fair Work Building and Construction 2015, *Annual Report 2014–15*, FWBC, Melbourne.

Fair Work Building and Construction 2014, *Annual Report 2013–14*, FWBC, Melbourne.

Fair Work Building and Construction 2013, *Annual Report 2012–13*, FWBC, Melbourne.

Federal Safety Commissioner 2015, *FSC Audit Criteria Guidelines: The FSC Audit Criteria Explained*, Department of Jobs and Small Business, Canberra.

Murray, J 2017, *Review of Security of Payment Laws: Building Trust and Harmony*, Department of Jobs and Small Business, Canberra.

Productivity Commission 2014, *Public Infrastructure: Inquiry Report No.71*, Productivity Commission, Canberra.

Royal Commission into Trade Union Governance and Corruption 2015, *Final Report*, Canberra.

Safe Work Australia 2016, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand: October 2016*, SWA, Canberra.

Safe Work Australia 2017, *Work-related Traumatic Injury Fatalities Australia 2016*, SWA, Canberra.

Senate Economics References Committee 2015, *Insolvency in the Australian Construction Industry: 'I Just Want to Be Paid'*, Canberra.

Senate Economics References Committee 2017, *Non-Conforming Building Products: Interim Report: Aluminium Composite Cladding*, Canberra.

Shergold, P & Weir, B 2018, *Building Confidence: Improving the Effectiveness of Compliance and Enforcement Systems for the Building and Construction Industry Across Australia*, report to the Building Ministers' Forum, Department of Industry, Innovation and Science, Canberra.

Victorian Cladding Taskforce 2017, *Interim Report November 2017*, State of Victoria Department of Environment, Land, Water and Planning, Melbourne.

Wilcox, M 2009, *Transition to Fair Work Australia for the Building and Construction Industry: Report*, Department of Jobs and Small Business, Canberra.

## Appendix 1: ABCC summary data

**Table A.1: Enquiries received by the ABCC, 1 July 2017-31 December 2017**

Enquiries	Building Industry Participant						Gov't.	Public	Total
	Employee	Employer	Employer Assoc.	Other	Trade Union	Total			
Code	222	2,224	143	74	22	2,685	110	106	2,901
Code Assessment	118	1,211	84	19	15	1,447	14	28	1,489
General Code Info.	60	500	19	25		604	41	24	669
Code Advice	42	421	37	27	7	534	54	43	631
s.6A Application	1	29	1	1		32		1	33
Notice of Code Breach	1	23		1		25			25
Security of Payment – Enquiry		17	2			19		4	23
Security of Payment – Notification		19				19	1		20
s.6A General advice		4		1		5		3	8
State Code Info.								3	3
Workplace Laws – Building Work	100	262	14	16	4	396	25	10	431
Right of Entry	9	115	8	2	1	135	8		143
Wages & Entitlements	62	37	1	5	2	107	9	3	119
Unlawful Industrial Action	3	49	1	4	1	58	5	2	65
Coercion	8	34	4	1		47		4	51
Freedom of Association	7	14		1		22	2	1	25
Sham Contracting	10	10		3		23	1		24
Strike Pay	1	1				2			2
Non-compliance with Notices		1				1			1
Misrepresentation of workplace rights		1				1			1
Other Laws	34	50	1	81		166	2	134	302
Agency Info and Activities	20	52	11	40		123	26	60	209
Not relevant to the Building Industry	1	10	1	10		22	1	35	58
Workplace Laws – Non-Building Work	18	10		10	1	39	1	14	54
<b>Total</b>	<b>395</b>	<b>2,608</b>	<b>170</b>	<b>231</b>	<b>27</b>	<b>3,431</b>	<b>165</b>	<b>359</b>	<b>3,955</b>

Source: Unpublished data provided by the ABCC

**Table A.2: Enquiries in relation to workplace laws, 1 July 2017-31 December 2017**

Subject	Employee	Employer	Other	Total	%
Right of entry	9	115	21	143	33.2%
Wages and entitlements	62	37	20	119	27.6%
Unlawful industrial action	3	49	13	65	15.1%
Coercion	8	34	9	51	11.8%
Freedom of Association	7	14	4	25	5.8%
Sham contracting	10	10	4	24	5.6%
Strike pay	1	1	0	2	0.5%
Non-compliance with notices	0	1	0	1	0.2%
Misrepresentation of workplace rights	0	1	0	1	0.2%
<b>Total</b>	<b>100 (23.2%)</b>	<b>262 (60.8%)</b>	<b>71 (16.5%)</b>	<b>431</b>	<b>100.0%</b>

Source: Unpublished data provided by the ABCC

**Table A.3: Investigations commenced by the ABCC, 1 July 2017-31 December 2017**

Investigations			Suspect Type			
Subject	Number	Percentage	Employer	Union	Employee	Other
Wages and entitlements	24	40.0%	24	0	0	0
Coercion	12	20.0%	4	11	6	0
Unlawful industrial action	8	13.3%	2	6	5	0
Right of entry	8	13.3%	8	0	8	0
Sham contracting	4	6.7%	4	0	0	0
Freedom of association	4	6.7%	2	2	0	1
<b>Total</b>	<b>60</b>	<b>100.0%</b>	<b>36 (48.0%)</b>	<b>27 (36.0%)</b>	<b>11 (14.7%)</b>	<b>1 (1.3%)</b>

Source: Unpublished data provided by the ABCC

**Table A.4: Investigations open during the quarterly reporting periods**

Subject	Jan-Mar 17	%	Apr-Jun 17	%	Jul-Sep 17	%
Coercion	27	33.3%	20	24.4%	21	25.6%
Wages & entitlements	10	12.3%	13	15.9%	20	24.4%
Unlawful industrial action	17	21.0%	22	26.8%	14	17.1%
Right of entry	15	18.5%	15	18.3%	14	17.1%
Freedom of association	7	8.6%	7	8.5%	7	8.5%
Misclassification/ sham contracting	4	4.9%	5	6.1%	6	7.3%
<b>Total</b>	<b>81</b>	<b>100.0%</b>	<b>82</b>	<b>100.0%</b>	<b>82</b>	<b>100.0%</b>

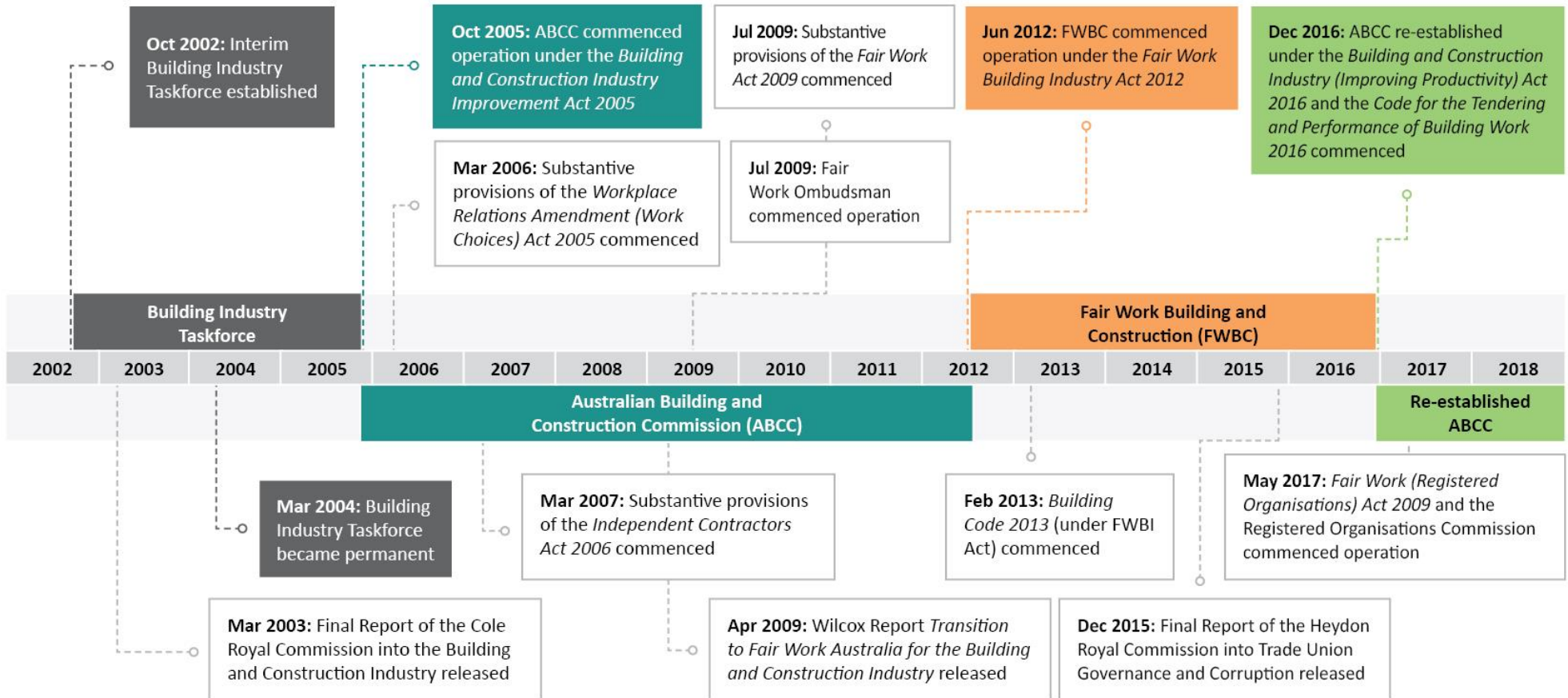
Source: ABCC Quarterly Reports

**Table A.5: Wages and entitlements investigations finalised, 2 December 2016-31 December 2017**

Outcome	Number	Percentage
Letter of caution	1	5.9%
Voluntary settlement between parties	5	29.4%
Employer insolvent – no further action	1	5.9%
Insufficient evidence	1	5.9%
Not in the public interest	2	11.8%
No breach identified	7	41.2%
<b>Total</b>	<b>17</b>	<b>100.0%</b>

Source: Unpublished data provided by the ABCC

## Appendix 2: History of the BCIIIP Act and previous legislation



### Appendix 3: Comparison of key provisions – BCIP Act, FWBI Act & BCII Act

Regulator			
Key provisions	<i>Building and Construction Industry (Improving Productivity) Act 2016</i>	<i>Fair Work (Building Industry) Act 2012 (and Fair Work Act 2009 where appropriate)</i>	<i>Building and Construction Industry Improvement Act 2005</i>
Functions	<p>The functions of the Australian Building and Construction Commissioner include:</p> <ul style="list-style-type: none"> <li>Promoting the objects of the Act; and</li> <li>Ensuring building and building contractors comply with their obligations under the Act, designated building laws and Building Code</li> </ul> <p>The ABC Commissioner must:</p> <ul style="list-style-type: none"> <li>perform his or her functions and allocate resources in a reasonable and proportionate manner to each of the categories of building industry participants; and</li> <li>perform his or her functions in relation to certain provisions of the Fair Work Act (ie be a ‘full service regulator’).</li> </ul>	<p>The Director of the Fair Work Building Industry Inspectorate had similar functions but it did not include:</p> <ul style="list-style-type: none"> <li>Promoting the objects of the Act; and</li> <li>Ensuring building and building contractors comply with their obligations under the Act, designated building laws and Building Code.</li> </ul> <p>No performance requirements.</p>	<p>The Australian Building and Construction Commissioner had similar functions but it did not include:</p> <ul style="list-style-type: none"> <li>Promoting the objects of the Act; and</li> <li>Ensuring building and building contractors comply with their obligations under the Act, designated building laws and Building Code.</li> </ul> <p>No performance requirements.</p>
Information gathering powers			
Key provisions	<i>Building and Construction Industry (Improving Productivity) Act 2016</i>	<i>Fair Work (Building Industry) Act 2012 (and Fair Work Act 2009 where appropriate)</i>	<i>Building and Construction Industry Improvement Act 2005</i>
Power to issue an examination notice	<p>Issued by nominated AAT presidential members on application by the ABC Commissioner.</p> <p>A person subject to an examination notice:</p> <ul style="list-style-type: none"> <li>Must not be required to give non-disclosure undertakings;</li> <li>Can be represented by a lawyer of their choice</li> <li>Is entitled to reimbursement of reasonable expenses (excluding legal expenses).</li> </ul>	<p>Substantially similar except:</p> <ul style="list-style-type: none"> <li>The Commonwealth Ombudsman prepared annual reports for Parliament (rather than quarterly);</li> <li>The Independent Assessor could determine (on application) that examination notices were not available in relation to a particular project;</li> </ul>	<p>Different to the BCIP Act in that:</p> <ul style="list-style-type: none"> <li>No AAT oversight;</li> <li>A person could be legally represented in an examination but no clear right to lawyer ‘of choice’;</li> <li>No right to reimbursement of reasonable expenses;</li> <li>No Commonwealth Ombudsman oversight.</li> </ul>



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

Key provisions	<i>Building and Construction Industry (Improving Productivity) Act 2016</i>	<i>Fair Work (Building Industry) Act 2012 (and Fair Work Act 2009 where appropriate)</i>	<i>Building and Construction Industry Improvement Act 2005</i>
	The Commonwealth Ombudsman oversees the exercise of the examination notice powers and prepares quarterly reports for Parliament.	<ul style="list-style-type: none"> <li>A person was entitled to reimbursement of reasonable expenses incurred (including legal expenses) in attending an examination.</li> </ul>	<ul style="list-style-type: none"> <li>No prohibition against a person being required to give non-disclosure undertakings.</li> </ul>
Australian Building and Construction (ABC) Inspectors	<p>ABC Inspectors have similar compliance powers as Fair Work Inspectors, but in addition can:</p> <ul style="list-style-type: none"> <li>Enter premises if they reasonably believe a breach of a relevant law has occurred, is occurring or is likely to occur;</li> <li>Enter business premises if they reasonably believe a person who ordinarily performs work or conducts business at the premises has relevant information;</li> </ul> <p>A civil remedy provision prohibits a person from intentionally hindering or obstructing an inspector. Maximum penalty: 1000 penalty units for a body corporate and 200 penalty units for a natural person.</p>	<p>FWBC inspectors had the same functions and powers as Fair Work Inspectors in relation to building matters. This did not include:</p> <ul style="list-style-type: none"> <li>Enter premises if they reasonably believed a breach of a relevant law had occurred, was occurring or was likely to occur;</li> <li>Enter business premises if they reasonably believed a person who ordinarily performs work or conducts business at the premises had relevant information.</li> </ul> <p>The Fair Work Act in force at that time did not prohibit a person intentionally hindering or obstructing an inspector.</p>	<p>Similar powers but ABC Inspectors could not:</p> <ul style="list-style-type: none"> <li>require a person's name and address;</li> <li>Issue a notice requiring the production of a record or a document.</li> </ul> <p>No prohibition on a person intentionally hindering or obstructing an inspector.</p>
Federal Safety Officers	Can exercise compliance powers in relation to the accreditation scheme.	Could exercise powers in relation to both the Building Code and the accreditation scheme.	Same as FWBI Act.

Federal Safety Commissioner

Key provisions	<i>Building and Construction Industry (Improving Productivity) Act 2016</i>	<i>Fair Work (Building Industry) Act 2012 (and Fair Work Act 2009 where appropriate)</i>	<i>Building and Construction Industry Improvement Act 2005</i>
Federal Safety Commissioner	Functions include auditing compliance with the National Construction Code performance requirements in relation to building materials.	No function relating to the National Construction Code but had functions in relation to both the accreditation scheme and the Building Code.	Same as FWBI Act.

Civil remedy provisions and enforcement			
Key provisions	<i>Building and Construction Industry (Improving Productivity) Act 2016</i>	<i>Fair Work (Building Industry) Act 2012 (and Fair Work Act 2009 where appropriate)</i>	<i>Building and Construction Industry Improvement Act 2005</i>
Coercion and discrimination	<p>Civil remedy provisions prohibit:</p> <ul style="list-style-type: none"> <li>• Coercion in relation to the engagement of contractors and employees, allocation of duties or responsibilities, or choice of superannuation fund;</li> <li>• Coercion or undue pressure in relation to making varying or terminating building enterprise agreements, or the appointment of bargaining representatives;</li> <li>• Taking action against a building employer because building employees are or are not covered by a Commonwealth industrial instrument.</li> </ul> <p>Maximum penalty: 1000 penalty units for a body corporate and 200 penalty units for a natural person.</p>	<p>No building industry specific civil remedy provisions. The Fair Work Act protects workplace rights and the exercise of those rights from unlawful actions including adverse action, coercion, misrepresentations and undue influence (see Part 3-1).</p> <p>Maximum penalty: 300 penalty units for a body corporate and 60 penalty units for a natural person.</p>	<p>Similar provisions to the BCIP Act but did not include a prohibition on coercion in relation to choice of superannuation fund.</p> <p>Same maximum penalties applied.</p>
Industrial action	<p>Civil remedy provision prohibits unlawful industrial action (i.e. unprotected industrial action or protected industrial action that is engaged in in concert with unprotected persons).</p> <p>Industrial action defined in the same manner as in the Fair Work Act, but action authorised by the employer or employees is only excluded from the definition if it is given in advance and in writing.</p> <p>Maximum penalty: 1000 penalty units for a body corporate and 200 penalty units for a natural person.</p> <p>Higher penalties also apply to a breach of the Fair Work Act strike pay provisions.</p>	<p>No building industry specific civil remedy provisions.</p> <p>Under the Fair Work Act:</p> <ul style="list-style-type: none"> <li>• The Fair Work Commission can issue an order to stop or prevent unprotected industrial action.</li> <li>• Industrial action must not be organised or engaged in before the nominal expiry date of an enterprise agreement. Maximum penalty: 300 penalty units for a body corporate and 60 penalty units for a natural person.</li> </ul>	<p>Similar civil remedy provision to the BCIP Act.</p> <p>Same maximum penalty.</p>
Unlawful Picketing	<p>Prohibits unlawful picketing.</p> <p>Maximum penalty: 1000 penalty units for a body corporate and 200 penalty units for a natural person.</p>	<p>No civil remedy provision</p>	<p>No civil remedy provision.</p>

Other matters			
Key provisions	<i>Building and Construction Industry (Improving Productivity) Act 2016</i>	<i>Fair Work (Building Industry) Act 2012 (and Fair Work Act 2009 where appropriate)</i>	<i>Building and Construction Industry Improvement Act 2005</i>
Building Code making power	<p>The Code can place obligations on certain building industry participants (reflecting constitutional limitations), the Commonwealth and corporate Commonwealth entities.</p> <p>The Building Code must include specific requirements in relation to procurement and the engagement of non-citizens and non-residents.</p>	<p>The Code could only place obligations on certain building industry participants (reflecting constitutional limitations).</p> <p>Separate policy guidelines outlined the obligations of the Australian Government when procuring Commonwealth-funded building work.</p> <p>The Code did not have to include the specific procurement or engagement requirements.</p>	Same as FWBI Act.
Building Work	<p>Definition includes a number of activities that relate to buildings, structures or works that form, or are to form, part of land (including land beneath water), whether or not permanent.</p> <p>It also includes:</p> <ul style="list-style-type: none"> <li>the off-site prefabrication of made-to-order components that form part of any building structure or works; or</li> <li>the transport and supply of goods and materials directly to building sites.</li> </ul>	<p>Definition did not include:</p> <ul style="list-style-type: none"> <li>the off-site prefabrication of made-to-order components that form part of any building structure or works; or</li> <li>the transport and supply of goods and materials directly to building sites.</li> </ul>	Did not include the transport and supply of goods and materials directly to building sites.
Project agreements	Provides that project agreements are not enforceable.	No provision.	Similar provision to BCIIIP Act.
Security of Payments Working Group	Establishes the Security of Payments Working Group	No provision	No provision

**Appendix 4: Comparison of compulsory examination powers – safeguards**

Safeguard	BCII Act	FWBI Act	BCIIP Act
<p><b>Notice to attend</b> A person required to attend an examination has at least 14 days written notice that they will need to appear and there is an ability to set a different time.</p>	<p>Yes But no provision to set an alternative date. s 52(2)</p>	<p>Yes s 50</p>	<p>Yes s 61E</p>
<p><b>Right to representation</b> A person required to attend an examination is entitled to be represented by a lawyer.</p>	<p>Yes s 52 (3)</p>	<p>Yes The person may be represented <i>by a lawyer of the person's choice.</i> s 51(3)</p>	<p>Yes The person may be represented <i>by a lawyer of the person's choice.</i> s 61F</p>
<p><b>Reasonable expenses reimbursed</b> A person required to attend an examination will be reimbursed for their reasonable expenses including legal representation, travel, accommodation and lost earnings.</p>	<p>No</p>	<p>Yes s 58</p>	<p>Yes (But does <i>not</i> include legal expenses). s 63</p>
<p><b>Protection from liability</b> A person who discloses information in good faith under an examination notice is protected from proceedings for contravening any other law and from civil action for damages because of that disclosure.</p>	<p>Yes s 54</p>	<p>Yes s 54</p>	<p>Yes s 103</p>
<p><b>Privilege against self-incrimination/ Use/derivate use indemnity</b> Although a person cannot refuse to provide information on the grounds that it might incriminate them or contravene another law, any information, answers or documents obtained as a result of an examination notice is inadmissible in almost all* criminal or civil court proceedings against them.</p>	<p>Yes s 53</p>	<p>Yes s 52(2) &amp; 53</p>	<p>Yes s 102</p>
<p><b>Protection of information</b> Certain persons must keep any information acquired under an examination notice confidential. Also information obtained can only be disclosed in very limited circumstances.</p>	<p>Yes s 65</p>	<p>Yes s 65</p>	<p>Yes s 106</p>
<p><b>Giving of undertakings</b> The Commissioner/Director cannot require a person to give an undertaking not to disclose information or answers given at the examination or discuss the matters relating to the examination with another person.</p>	<p>No</p>	<p>Yes s 51(6)</p>	<p>Yes s 61F(6)</p>
<p><b>Commonwealth Ombudsman oversight</b></p> <ul style="list-style-type: none"> <li>• Ombudsman notified of issuing of notice</li> <li>• All examinations are videotaped and a video and transcript of the examination is given to the Ombudsman</li> <li>• Ombudsman is required to report to Parliament at least annually on the exercise of the powers.</li> </ul>	<p>No</p>	<p>Yes s 49 s 54A</p>	<p>Yes Commonwealth Ombudsman is required to report quarterly. s 64 &amp; 65</p>
<p><b>Independent assessor</b> Apply to Independent Assessor – Special Building Industry Powers to have the ability to apply for a compulsory examination switchoff.</p>	<p>No</p>	<p>Yes s 40</p>	<p>No</p>

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

Safeguard	BCII Act	FWBI Act	BCIIP Act
<b>AAT oversight</b> The Commissioner/Director must apply to AAT presidential member for the issue of an examination notice.	No Commissioner has the power to issue the examination notice. s 52(1)	Yes s 44-47	Yes s 61A-61C
<b>Requirement to report on use of powers</b> The Commissioner/Director must report on the performance of functions and exercise of powers (including examination powers) to the Minister.	Yes Annual report. s 14	Yes Annual report. s 14	Yes Quarterly and annual reports (specific requirement to detail the number, and type, of matters for which examination notices were issued). s 20

\* The exceptions to this otherwise complete immunity relate to failure to comply with an examination notice, a witness knowingly perjuring themselves by giving false testimony or refusing to answer questions or obstructing Commonwealth public officials. Refer ss. 53(2) of *Fair Work (Building Industry) Act 2012* and ss. 102(2) of the *Building and Construction Industry (Improving Productivity) Act 2016*.