

**SENATE STANDING COMMITTEE ON EDUCATION,
EMPLOYMENT AND WORKPLACE RELATIONS**

Supplementary Budget Estimates for 2010-11

Wednesday, 20 October 2010

Opening statement by ABC Commissioner Leigh Johns

Commencement of appointment

I commenced my appointment as the Australian Building and Construction Commissioner on 11 October 2010.

The public value delivered by the Office of the Australian Building and Construction Commissioner (ABCC) is critical to the Australian economy and to the employment of nearly 1 million Australians. This is particularly so having regard to the strong demand for resources-based construction and infrastructure.

I am both proud of the ABCC's achievements to date and energised by its continuing potential.

I am determined to work hard with building industry participants to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.

Continuing need for cultural reform

Having spent seven months at the ABCC as its Deputy Commissioner in late 2009 and early 2010, I have a strong sense of the calibre of the staff, the challenges in the industry we regulate, and the climate in which this agency operates.

Having regard to the matters presently under investigation and being litigated by the ABCC it is clear to me that the ABCC continues to operate in, and seeks to regulate, a commercial sector that continues to require cultural reform.

There continues to be a need for:

- a recognition of the rule of law;
- a recognition of freedom of association and a repudiation of coercion;
- control of building sites by head contractors and major subcontractors; and
- an attitudinal change to safety.

I appreciate that, in pursuing this agenda of cultural change, the ABCC at times operates in a climate of opposition to our regulatory intervention.

However, as ABC Commissioner, and as a staff of committed Australian public servants, we at the ABCC pledge anew to the job we have been directed to do by the Parliament of Australia in the form of the *Building & Construction Industry Improvement Act 2005* (BCII Act).

Senate Education, Employment and Workplace Relations
Committee

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Full service regulator for the whole industry

As Commissioner, I am determined that the ABCC evolve into a 'full service regulator' in the building and construction industry.

Our mantra will be 'fair and productive' building and construction work.

Productive in the sense that the ABCC will continue to work towards eliminating unlawful industrial action and barriers to participation like breaches of freedom of association, coercion or mandated industrial arrangements.

Fair in the sense that the ABCC will promote harmonious, equitable practices on site, and tackle issues including sham contracting and the underpayment of building workers.

As such I will be working with my senior executive team to redefine a broader role for the ABCC with a respectful acknowledgement of the wide range of interests in the building and construction industry.

I am confident that the ABCC's staff, in particular the ABC Inspectorate, are more than equal to the task of promoting fair and productive building and construction work across the whole industry.

Underpayment claims

Royal Commissioner Terence Cole concluded that,

There is a significant role for the Australian Building and Construction Commissioner to play in connection with the non-payment of employee entitlements... (para 365)

The ABCC itself should assume a role in the recovery of employee entitlements under federal awards and certified agreements in the building and construction industry. (para 369)

To this end, last week I wrote to the Fair Work Ombudsman, Nicholas Wilson, and terminated the long standing practice which has seen the ABCC refer claims of under-payments that would otherwise fall within the jurisdiction of the ABCC to the FWO.

The ABCC will assist building and construction workers in the regulated community to recover under-payments when they seek our assistance.

As a citizen-centric agency, we will not be turning away any citizen in the building and construction industry.

This decision is entirely consistent with the recommendations of Royal Commissioner Terence Cole who wrote:

"it will be vital to the success of the ABCC for it to emphasise that its services are available equally to all groups involved in the industry..."

Sham contracting matters

The existence of sham contracting in any industry adversely affects decent employers, employees and government revenue.

Decent employers in the building and construction industry are at a competitive disadvantage to those who seek to engage workers through bogus contracting arrangements. They are then faced with an invidious choice: join in the indecency of sham contracting or go out of business.

For workers, it means a reduced capacity to enjoy basic conditions of employment such as annual

leave and sick leave. It means that work security is jeopardised and it is usually attended by the absence of a commitment to formal training.

As a whole, there is reduced workplace health and safety performance and poor workplace relations. For government, sham contracting has implications for taxation revenue and the degree of equity in the tax system.

All of the detriments identified above were reported on by Royal Commissioner Cole. Further, he concluded that,

The indications of high levels of incorporation and possession of ABNs by contractors in the building and construction industry support the view that there may well be significant illegitimate subcontracting. (para 276)

He also concluded that,

The best guard against sham contracting is for the revenue authorities and the Government agencies responsible for recovering unpaid employee entitlements to perform their tasks effectively and promptly. (para 291)

The ABCC is, of course, one of those agencies. Consistent with our existing efforts (which include civil penalty litigation we have commenced in the ACT), we will continue to focus on these matters.

However, it is vital that industry stakeholders engage with government agencies in this endeavour. Employer associations, with their membership of decent employers under attack from sham operators, and unions, representing the interests of workers who are being ripped off, both have important roles to play.

Accordingly, I plan to convene a round-table of relevant government agencies and stakeholders to devise an all-of-government action plan aimed at eliminating sham contracting in the building and construction industry.

A transparent approach to litigation

We will continue to be a tough 'cop on the beat', in a way that is open, transparent and respectful of the community we are tasked to regulate.

Accordingly, I will soon publish an ABCC Litigation Policy.

The ABCC Litigation Policy will set out guidelines to be followed by the ABCC in the making of decisions relating to the commencement of proceedings in relation to a contravention or threatened contravention of the BCII Act and other Commonwealth workplace laws (where the ABCC has jurisdiction).

ABCC Litigation Policy will be substantially based upon the *Prosecution Policy of the Commonwealth 2nd Edition (1990)* and also be consistent with the Litigation Policy of the Fair Work Ombudsman (2009).

The policy will then become a public document on our website, as the community has a right to expect from a best practice regulator.

Section 52

In terms of our section 52 powers, which are often the focus of public discourse, I am very mindful of the comments made by the Honourable Murray Wilcox QC last year.

He wrote,

It is understandable that workers in the building industry resent being subjected to an interrogation process, that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power.

However, that would not be a responsible course.

I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the [the Government's proposed ABCC replacement agency] to undertake compulsory interrogation.

The reality is that, without such a power, some types of contravention would be almost impossible to prove.

I endorse those comments. Nothing in my time as Deputy Commissioner or since has evidenced an outbreak of workplace law compliance in the building and construction industry. Nor is there evidence that the 'culture of silence' has been entirely broken.

Of course, it ought to go without saying that there would be less section 52 examinations if:

- employers and the staff of contractors and head contractors (in particular) did not insist that the ABCC issue a section 52 notice in circumstances where they should more readily voluntarily assist the ABCC in its investigations. These requests account for nearly 35% of examinations; and
- employees and their union representatives provided information about health and safety matters or 'their side of the story' voluntarily and early in the investigation. Just under 50% of section 52 examinations would not have occurred if this type of voluntary assistance had been provided.

In the circumstances, therefore, I continue to see a need to use section 52 examinations in cases where (adopting the criteria of the Hon. Mr Wilcox QC):

- the ABCC has commenced an investigation;
- there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation;
- it is likely to be important to the progress of the investigation that this information or evidence be obtained; and
- it is reasonable to require the attendance, having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact on the person being required to do so.

There is, however, one important change I plan to make in this regard. As ABC Commissioner, I will preside over section 52 examinations, at least, in the foreseeable future. My experience as a lawyer, industrial advocate, Chief Counsel of a workplace law regulator and, previously, as Deputy Commissioner presiding over section 52 examinations, makes me well qualified to perform this role.