Chapter 3

The plan to quarantine a workforce

> 'Apartheid' is an emotional term but does bear out the wrong done when a discrete group within a community is treated differently to the rest. Whether that different treatment is based on race, or religion, or income, or location, it is unjust. The fact that it is based on industry, as is the case in the present instance [see clause 3 of the Bill], does not remove the vice in treating one section of a class less or more favourably than the rest. As discussed earlier the rule of law principle showers us all. Those proposing this legislation understand that, unless there is valid justification, it is wrong to identify a particular industry for special treatment.[1]

3.1 The central issue to be addressed in this chapter is the Government's rationale for creating legislation which isolates an important segment of industry through stringent regulation of the conditions of employment imposed upon its workforce. It is as though 7 per cent of the national workforce is being sent into quarantine, or at least to undergo some form of collective punishment for failing to meet unspecified productivity goals. The Government has argued for nearly eight years that the building and construction industry has been in need of some form of special treatment, now it appears that the BCII Bill is to be this cure. The discriminatory features of the Building and Construction Industry Improvement Bill 2003 are plain to see. What is not so clear is how the Government expects to apply such a regime to this relatively small sector of the economy and workforce, in isolation from the wider industrial economy.

3.2 This chapter looks at the institutions to be created by this legislation, how they might carry through Government policy, and the serious consequences that are likely to flow from this. It will also respond to a number of matters raised in submissions relating to excessive restrictions on the rights of employees which have not been dealt with elsewhere in the report.

Issues of principle and practice

3.3 The fact that employer organisations have so readily accepted the principles underlying this legislation says a great deal about their indifference to notions of equal treatment under the law and the practical problems likely to result from jurisdictional disputes and other complex litigation in the courts. The committee notes an exception in the comments of the Australian Industry Group (Ai Group). The Ai Group states

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1 Submission No.36, CEPU Plumbers Division, p.21

that as a general principle, it would prefer to have consistent workplace relations legislation that is applicable to all employers and employees, rather than sector-specific legislation. While on balance the Ai Group supports the BCII Bill, with qualifications, it proposes that there be a review of the legislation after 5 years to ascertain whether there is a need to retain it.[2] The committee notes that the Ai Group has a great many reservations about the BCII Bill, many of them relating to definitional problems which are dealt with further on in this chapter.

3.4 The committee accepts advice that there would have to be very strong and cogent evidence of the need for industry specific legislation in area of industrial legislation, especially in the case where it could be demonstrated, as it can be here, that workers in that industry will enjoy less favourable terms and conditions of employment. The Cole royal commission has not provided this evidence.[3]

3.5 The committee is aware of some specific provisions under the former Conciliation and Arbitration Act and now the Workplace Relations Act that deal with particular groups of workers in particular industries, where there are constitutional limitations under the conciliation and arbitration power on the Commonwealth's ability to regulate these employees. In the past, such bodies as the Joint Coal Board and the Flight Crew Officers Industrial Tribunal had wage fixing and arbitration functions, but these arrangements, which arose from particular circumstances, were accepted without controversy because there needed to be a mechanism to include those workers in provisions which applied generally. These industry-specific approaches to industrial relations were considered worthwhile at the time.[4] Had those provisions not existed they would be excluded from the benefits of the rest of the workforce. The committee was told that the purpose of the BCII Bill was to achieve the very opposite result:

> It is an attempt to quarantine a segment of the Australian community's economic life away. One of the things I also say in the submission is that even if that were justified—and in my view it clearly is not—this bill can never do that. It can attempt to do that but it cannot succeed.[5]

3.6 Apart from issues of principle, it is clear from the evidence given to the committee that there are some serious practical problems which the Government and industry stakeholders are likely to encounter as a result of attempts to differentiate some building and construction workers from other workers. The problems will be compounded by new definitions contained in the bill, an issue discussed in a later section of this chapter. This is explained in the submission from Taylor and Scott:

> In simple terms, it will mean two or more differing standards applying to workers working for the same employer, or performing the same work for

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2 Submission No.1, Australian Industry Group (Ai Group), Attachment A, pp.21-22

3 Submission No.64, Taylor Scott, Lawyers, p.6

4 Submission No.1, op. cit., p.21

5 Mr Lachlan Riches, *Hansard*, Sydney, 3 February 2004, p.71

> different employers or working in different parts of the country. That is, to the extent that the Bill is an attempt to "quarantine" a discrete and defined section of the workforce from those industrial laws of general application, it does not and cannot ever succeed. To take some obvious examples:
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> > Given constitutional and other limitations, it will never be possible in practice to legislate away State award coverage in the proposed sector of the building and construction industry, meaning that there will be under the proposals two or three "tiers" of standards: State award/agreement workers, Federal award, Federal agreement or Federal AWA workers (first class) and Federal BCII workers (second class).
> >
> > Given the structure of the industry and the inherent mobility of building workers, the industrial law standards applying to a worker will vary from month to month (perhaps day to day) or from job to job. For example building and construction workers move readily into and out of the "single dwelling" housing sector and the "commercial" sector of the industry, move from one state or region to another and from one employer to another.
> >
> > Notwithstanding (or perhaps because of) the attempts at definitions to confine or quarantine the coverage of the BCII Bill to a specific area of the industry, it is difficult to envisage that there will not be clear anomalies even in the "heartland" of what is attempted to be defined. That is, it appears that a number of workers of a single employer could be subject to the provisions of the proposed legislation while others would not be so subject.[6]

3.7 The committee accepts the view expressed above and in a number of other submissions that the proposed bill will not simplify or codify industrial or workplace rights for the areas defined as coming within the scope of the bill. It will most likely introduce a multiplicity of operative regimes and create even more complexity and confusion. Only when this occurs, and as the courts become choked with litigants, is the Government likely to recognise that the bill cannot achieve its stated objectives. It may even be forced to reconsider whether the objectives were properly founded on necessity.

A matter of definition

3.8 A number of submissions pointed out the difficulties that will face the industry, and eventually the courts, as a consequence of disputes over definitions in the BCII Bill. The central question is where the proposed regulatory regime begins and ends? As the CFMEU submission reminds the committee, sound law-making requires that people know with some certainty what laws apply to them and in what circumstances.[7] This is particularly so where the imposition of heavy civil penalties apply.

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6 Submission No.64, Taylor and Scott, pp.7-8

7 Submission No.37, CFMEU, p.26

3.9 Several submissions itemise the difficulties with reference to particular terms. For instance, the CFMEU refers to the term 'maintenance', which was removed from the bill at the urging of the Ai Group which claimed it was not the same as 'construction'. As the CFMEU points out:

> …the definition still includes references to "restoration" and "repair" work which can be regarded as synonymous with "maintenance". The distinction between "construction" on the one hand and "maintenance" or "repair" on the other is regarded by many in the industry as difficult to draw. Often it can be difficult to determine where repair or maintenance ends and construction starts and vice versa. The history of lengthy litigation over industry definitions in for example union eligibility rules and long service legislation indicate the problems that can be associated with attempts of this kind.[8]

3.10 Even among employer groups expressing complete or qualified support for the BCII Bill, there are varying degrees of dissatisfaction with the definitions in the bill.

3.11 The Ai Group submitted that its support for industry–specific legislation was contingent upon an appropriate definition of the building and construction industry being incorporated into the legislation, especially for the purposes of defining the coverage of the legislation. Ai Group does not support the approach taken in the bill, which defines the building and construction industry in a very broad way. Ai Group fears that the bill's definitions would lead to the significant risk of a drift of construction industry terms and conditions across into non-construction sectors. The Ai Group is critical of the Government's definition of terms and expressions in the bill such as 'building award' and 'building agreement' and 'building work', the definition of the latter term being taken from security of payment legislation in New South Wales. The Ai Group claims that it is appropriate for its original purpose, but not for the BCII Bill. The Ai Group further argues that clear definitions are extremely important for industries which are not involved in the construction industry, and who have no wish to have construction industry terms and conditions used in their own agreements.[9]

3.12 The submission from ACCI only noted the failure of the Government to define the 'building and construction industry' in the bill. It supported the broad definition of the industry, for reasons that the submission does not entirely make clear, claiming that narrow definitions provided scope for 'the unlawful, coercive or unacceptable practices as found by the Royal Commission to still occur in the excluded area, and for it to be without an adequate legal or enforcement regime to deal with such practices.'[10]

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8 ibid., p.24

9 Submission No.1, Ai Group, Attachment A, p.26

10 Submission No.14, ACCI, p.19

The Australian Building and Construction Commission

3.13 Commissioner Cole concluded from all the evidence that he heard about lawlessness in the industry that a thoroughgoing cultural change was necessary in the industry. He concluded that a well-resourced and dedicated regulator was necessary if the industry was to be kept in order. The explanatory memorandum to the bill describes the Australian Building and Construction Commission (ABCC) as an 'independent' body broadly covering investigation, enforcement and prosecution in the building and construction industry. The agency will operate as a 'one-stop shop', either dealing with matters itself under the powers granted to it under a BCII Act or the WR Act, or referring a matter on to state agencies with the requisite powers.

3.14 In the exercise of 'wide ranging powers' the ABCC Commissioner will operate across the country, accessing over 400 Commonwealth construction sites including nearly 200 CBD sites. To ensure that ABCC inspectors are quickly deployed, employers are to be obliged to notify the ABCC Commissioner within 72 hours of any industrial action. The Government has stated its expectation that the effect of the new regime on the industry will be 'significant', dealing as it will with the lawlessness which was discovered by Commissioner Cole to be 'endemic'. Even so, the ABCC Commissioner will be 'even-handed' in protecting the public interest, and although this may involve legal action, there will also be an educative role for the commission to undertake. What form this role might take is one of very many questions which the committee was not able to ask in the time available.

3.15 Under the proposed legislation the ABCC will have 'wide ranging powers' to monitor, investigate and enforce Commonwealth workplace relations law and the Building Code, and refer other matters to the appropriate Commonwealth, state or territory agencies. The DEWR submission explains that:

> It is appropriate for an industry specific body to be established for the building and construction industry as the industry has been found to require a level of regulation over and above that generally applicable to ensure compliance with the law. The BCII Bill will impose a higher level of regulation, and the establishment of the ABCC will involve considerable resources. However, without such an approach, the industry will continue to operate as it does presently, with the economic benefits that should flow to the Australian economy from an improved building and construction industry never being fully realised.[11]

3.16 The committee majority finds the descriptive prose of so much Government commentary on this bill as being worthy of parody. The tone of this extract suggests that the Government is only doing this for our own good, and that if we want to grow up to be rich then we have to take this medicine, which by the way is rather expensive. This is government as a wrong-headed nanny.

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11 Submission No.21, Australian Government Agencies, p.50

Ministerial and bureaucratic control

3.17 The committee majority does not believe that statutory positions created under the BCII Bill will have any areas under their control which are not subject to almost routine supervision of the minister and senior level officers of the department. That will be so in the case of the ABCC Commissioner and the Federal Safety Commissioner, as it is currently with the Director of the Building and Construction Industry Taskforce. This is not a Government which maintains a light hand on the tiller of state. The extraordinary detail of legislation, anticipating every possible contingency and loophole, is indicative of this tendency. As one witness told the committee:

> In recent years I have observed a tendency amongst the drafters of federal legislation to be ever more prescriptive in all fields. It is thought, wrongly in my view, that it is preferable to enact prescriptive rules for all foreseeable circumstances than to grant discretionary powers to institutions, agencies and bodies that have superintendence of the activities covered by the legislation in question. For example, the following clauses are, in my view, unnecessarily prescriptive: clause 54—Extraneous matters; clause 55—Non-standard period or retrospective payments; clause 62—Indicators of genuinely trying to reach agreement; and clause 68—Project agreements not enforceable.[12]

3.18 The same point is made in the joint submission from the states and territories:

> The Joint Governments … submit that the Bill itself does not accord with its objects. The Bill is overly prescriptive, unnecessarily legalistic and will only serve to drive a wedge between employers and their workforce. The Bill will ultimately increase conflict.
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> Some irony is to be found in the approach of the Federal Government, on the one hand railing against the intervention of third parties in workplace relations, and then promoting legislation that tries to micro-manage the day-to-day employment relationship. Turning again to the WR Act, the centrepiece of the Federal Government's industrial legislation, the principle objects of that Act are replete with references to the sanctity of the employer-employee relationship, free from outside interference. …The current federal Government has a long history of intervening in workplace relations, against the wishes of both the employer and employees. This latest Bill continues that history.[13]

3.19 Obsessive ministerial control and departmental and agency supervision are the hallmarks of this Government. It is for this reason that promises of a benign and protective independent agency to which construction industry stakeholders can refer their industrial woes is a piece of fiction. The disadvantage of maintaining a close rein on agencies is that they then loose public confidence. If they are subject to the whims

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12 Professor Ron McCallum, *Hansard,* Sydney, 2 February 2004, p.3

13 Submission No.26, Australian States and Territories, p.31

of ministerial discretion they will never become effective instruments of public policy. There is a high expectation that agencies run by EWR ministers will be subject to an unusually high level of political direction. As the ACTU submission pointed out in relation to the absence of restrictions over the powers of the ABCC:

> Not only does the Bill lack any provision for judicial oversight, it is not clear that the Cole Royal Commission's recommendation that the ABCC be subject to the jurisdiction of the Commonwealth Ombudsman has been accepted and will apply. The ACTU believes that there should be a clearly independent process involved in initiating applications for civil penalties of up to $110,000. The Bill indicates that the ABCC is likely to act in a partisan and political way, as has been the case with the Office of the Employment Advocate.[14]

3.20 The ACTU also points out the problems that will result from expensive bureaucratic impositions on employers. It argues for what would normally be regarded as a common-sense view that there is no need to establish an expensive bureaucracy to enforce laws when current structure are able to do so:

> A particularly absurd element of the scheme is the level of mandatory reporting by employers - all 80,000 of them - to the ABCC of events including the taking of unprotected industrial action or a request for payment for a period during which employees are on strike. Union officials holding a right of entry permit are required to provide to the ABCC a copy of each notice of entry given to an employer. Building industry unions would expect an organiser to make a number of site visits each day. The Commission must notify the ABCC of each hearing to certify an agreement - thousands of such agreements are certified.[15]

3.21 This has been described by the ACTU as bureaucracy gone mad. It also points to the slavish and unquestioning attitude of the Government to the tenor of the royal commission report, and its determination to follow Commissioner Cole's thinking without reference to the experience of its supporters and constituents. It may be laudable in some cases for Governments to ignore wide ranging advice from interests groups, but it is impossible to justify in this case. It is unlikely that ACCI members would support the ABCC's requirements on mandatory reporting requirements on employers in relation to industrial action. In doing so they will be required to participate in legal proceedings in which they have no interest.[16] They may take some comfort from this extract from the Explanatory Memorandum:

> Despite the administrative burden associated with notification of matters to the ABC Commissioner, those affected by unlawful industrial action will benefit through improved access to damages to which they are entitled.[17]

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14 Submission No.17, ACTU, p.7, paras.30-31

15 ibid., p.5

16 ibid., p.20

17 Explanatory Memorandum, p.11, para.40

The uncertain role of the ABCC inspectorate

3.22 The teeth of the ABCC are to be its inspectorate. They will have power to gather information by requiring the production of documents and by demanding answers to questions. ABCC inspectors will be able to exercise powers of entry and investigation to determine whether relevant legislation and the Building Code are being complied with. ABCC inspectors will be empowered to enter premises without warrant, and they may inspect work, material and machinery, take samples of goods or substances, interview anyone, inspect or copy documents or require their production. ABCC inspectors can also be directed by the ABCC to make an assessment of damages resulting from industrial action. The committee emphasises that the powers of inspectors under the provisions of the BCII Bill exceed those of inspectors having similar responsibilities under the Workplace Relations Act, as is explained below:

> The powers of the WR Inspectors and the OEA do not include coercive powers of the type proposed for the ABC Commissioner in section 230. In particular, the ACTU is concerned about the proposed power of the Commissioner to require persons to attend and answer questions in relation to an investigation. This power would enable the Commissioner to require individual building workers to attend its premises and answer questions under oath about issues such as why they took or did not take industrial action, or why they did or did not vote for a certified agreement. Such treatment would be terrifying for most workers and union officials, as it would be for most Australians, and is quite disproportionate to the scale of any identified problem.[18]

3.23 This is evidence of the limitations on the rights of employees in the construction industry as compared to those in the housing industry or in any other employment. These are additional restrictions that don't apply to other workers.

3.24 Such powers as these invite speculation as to the reaction of builders and their employees should inspectors find themselves on a building site. The bill makes it clear what they will intend to do, but it is not clear as to how they will manage their task. The committee majority is of the view that the exercise of coercive powers should be sanctioned by regulation only when there is clear evidence of likely criminality, or when the operation will not result in even more strife than it is investigating. There is a danger that all sense of proportion will be lost as a result of these powers being made available to the inspectorate. The Government will no doubt respond with the assurance that the ABCC will exercise careful discretion, but there can be no assurance that this will always be exercised.

3.25 Nor is it clear that the Government has thought through the likelihood and consequences of physical resistance to ABCC inspectors on building sites. These inspectors have no police powers, and if a show of force is required, support will have to come from state police or the Australian Federal Police. Yet the committee heard

18 Submission No.17, ACTU, p.6

quite emphatic evidence from a number of supporters of the BCII Bill that coercive measures were required because of the reluctance of state police to enter building sites to enforce the law.

3.26 The committee has heard no evidence that police would be any more willing to back up the ABCC inspectorate in the exercise of its powers, than they would be to act in their own capacity. Some idea of the attitude of police to this issue is indicated in the submission from the Police Association of Victoria, which expressed its abhorrence at the requirement that police be required to enforce laws which eroded the political neutrality of the police.[19] As is mentioned later in this chapter, the New South Wales Government opposes the secondment of its police to the ABCC, presumably for the same reason.

3.27 Commissioner Cole recognised the tendency for the police to regard all conduct on constructions sites as an industrial issue, even if the conduct is potentially in breach of criminal laws. He noted the continuation of signs posted on building sites denouncing investigators as 'rats' and inciting workers not to cooperate. The Government submission refers to the lack of success experienced by the Office of the Employment Advocate in signing up construction workers to AWAs. It states that this is partly due to limitations on the power of inspectors to investigate suspected contraventions of the law and the modest penalties for coercive conduct.[20] However, as Commissioner Cole has reported, the main reason for the OEAs lack of success has been the harassment of OEA officers on worksites. Their very presence is a provocation. It is reported that OEA officers have been abused, had objects thrown at them and had their property vandalised:

> The arrival of OEA inspectors frequently leads to work stoppages, with resulting increased project costs, and sometimes site invasions. For obvious reasons, under these circumstances, neither offenders nor their victims are eager to co-operate in law enforcement.[21]

3.28 The committee majority is struck by the misguided trust that is being placed in the powers of the ABCC and its inspectorate. While it is intended that it be armed with powers that the Building Industry Taskforce claims it needs now, principally the powers to enforce demands for evidence, there is no assurance that this alone can deal with the problems the royal commission has identified. This is particularly so in relation to criminal matters. As one witness told the committee:

> It is important that the committee be aware of what I mentioned about the state criminal matters. The royal commissioner said, 'There's some uncertainty about whether a commission could investigate matters under state criminal law.' It is our view there is no uncertainty about that; it is perfectly clear, as a matter of constitutional law, that the commissioner

19 Submission No.6, Police Association of Victoria, para.1-2

20 Submission No.21, Australian Government Agencies, p.48

21 ibid.

> could not investigate breaches of state criminal law. Nor could the Commonwealth parliament authorise the commissioner to do that. That means that there is much less actual role for that commissioner to play as the 'cop on the beat' than the government might have been suggesting or the commissioner might have hoped. It will actually be limited to matters under Commonwealth law, in particular the Workplace Relations Act.[22]

3.29 It is not clear to the committee majority how matters will be improved if the BCII Bill is passed by the Senate. The Government has yet to recognise that by creating certain offences and having inspectors enforce them leads to resistance which can be very effectively organised and managed on a building site. Unions are 'militant' in that they are organised and can show solidarity under pressure. The nature of construction work builds a culture of solidarity and acceptance of organisation and leadership which is alarming to many people without collectivist action experience either in the workplace or in any other activity in their lives.

3.30 The committee would be most alarmed if the Government deliberately sought to provoke confrontations on worksites. It cannot imagine that leading contractors would call in the ABCC inspectors and risk industrial action and set-backs to project completions. What the committee majority fears most is a conjunction of events or circumstances involving a clash over several separate concurrent issues which would strain beyond breaking point the normally successful mechanisms for on-site dispute resolution. This may arise from no fault on the part of either unions or lead contractors and project managers. The source of such disputes is likely to be the difficulty which both sides have in complying with the BCII Act.

The Building Code of Practice

3.31 The Building Codes have a significance far beyond their purpose of ensuring that occupational health and safety measures on Commonwealth-funded building sites reach the highest minimum standards. For that reason the Building Code is dealt with in this chapter, rather than in the chapter dealing with occupational health and safety.

3.32 The BCII Bill provides, in Chapter 3, for a new Building Code of Practice, to be issued by the Minister in a series of documents. Clause 26 sets out that these relate to occupational health and safety matters, and will take into account the recommendations of the Federal Safety Commissioner. These apply to building contractors recognised as coming under the corporations power of the Constitution or who are carrying out construction on building projects in a Commonwealth or territory place.

3.33 The Government intends to use its purchasing power to impose its Building Code on the industry. Naturally enough, the Master Builders Association (MBA) has some complaints about this for the threat it poses to builders who may be disadvantaged as a result of having to comply with the Code. The MBA has argued

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22 Mr Chris Maxwell, *Proof Hansard*, Melbourne 21 May 2004, p.25

that clause 26 needs further consideration, and that statutory recognition of the Code requires more direct reference to the checks and balances relating to its development and implementation, including industry consultation. Like the ACTU, the MBA draws attention to the administrative burden on builders.[23] The MBA also expresses concerns about the possibility of the Building Code being used to erect prescriptive measures that could damage the flexibility and simplicity attached to labour hire.[24] The committee majority notes that the concerns of the MBA and its members are that they may have to take more notice of occupational health and safety issues. Prepared as they are to support a severe restriction on the rights of employees, they are suspicious of any attempt to impose more rigorous occupational health and safety regulations.

3.34 Nonetheless, the committee majority accepts, if for rather different reasons, the point made by the MBA that more reliance should be given to state and territory occupational health regulations, and that these should be valid for Commonwealth projects. This is consistent with evidence provided that the state level agencies are the most appropriate administrators and enforcers of OH&S laws. There is no doubt about the force of some of the MBA's arguments in relation to this matter:

> MBA believes that this is but one example of a difference between the State and Commonwealth regimes that may induce a builder to be forced to choose between undertaking work for either the Queensland Government or the Commonwealth. Such a situation is untenable. … In particular, we note that Recommendation 41 would require any person who contracts to work on a building site owned, operated or funded, even in part, by the Commonwealth, to comply with the national Code and Guidelines in all their other work including private sector work. In the face of inconsistent Commonwealth and State laws, Recommendation 41 would seem to an undue constraint on individual enterprises.[25]

3.35 Another serious objection to the Building Code relates to the manner of its coming into force. As in other aspects of the bill, the hand of the Minister is never far from the lever of policy micro-management. For all the claims of 'independence' for the ABCC Commissioner and the Federal Safety Commissioner, there is no indication that such independence can be exercised in practice. If the Government acts according to accustomed practice, as is likely, the Building Code will be a matter for routine exercise of ministerial discretion, with only a tabling requirement laid down. This would be an exercise in ministerial heavy-handedness seldom seen even from this Government. As the ACTU submitted:

> The use of Commonwealth contribution to building projects as a means of forcing all other parties into industrial relations arrangements which are repressive, unnecessary and unwanted is a misuse of that funding role based on a view that the Government's preferred industrial relations model trumps

23 Submission No.12a, MBA, para.12.11

24 ibid., para.10.4

25 ibid., para.9.4.11

> any other element of public interest. … The proposed Code has also been strongly criticised by the governments of Victoria and Western Australia, the former submitting that it will "simply impose another layer of complexity on the industry" while the latter stated that: "Commonwealth funding of State projects is often only a small proportion of the total cost and the Commonwealth's policy represents an unjustified intrusion into an area of state responsibility."[26]

3.36 The committee takes the ACTU point about the reaction of the states. The complexity of the BCII Bill, and the limited parliamentary time available to debate it, means that this point has been lost on many people. The Building Code is regarded by states as a wedge, driven into current bilateral arrangements to administer occupational health and safety, to ensure the hegemony of the Commonwealth over an area where they have neither experience nor expertise.

3.37 The Ai Group has expressed strong opposition to the proposal to regulate the industry through a non-legislative instrument. The Ai Group points out that the bill extends the role of the Code far beyond that of providing a client guidance document. The Code represents a minister's exercise of the corporations power, making it binding on contactors coming under that power. The Ai Group believes that the Building Code should be a statutory instrument, subject to tabling and disallowance.[27]

3.38 The opposition of AiG to the Building Code runs deep. It is dissatisfied at the way in which the Government has implemented recommendations of the Cole royal commission, as its submission states:

> In its submissions to the Royal Commission, Ai Group argued for increased client activism in order to achieve higher standards of OHS in the building and construction industry. This proposal was adopted by Commissioner Cole who recommended that there be increased activism by the Commonwealth, as a client of the industry and as an agent to drive OHS improvement. However, AiGroup is concerned that the manner in which the Commissioner's recommendations have been translated into the *Building and Construction Industry Improvement Bill* may exacerbate the confusion and complexity described above. One area of concern relates to the provisions of the Bill which pertain to the proposed *"Building Code"*.[28]

3.39 The following extract from the AiG submission indicates that it rejects entirely the Government's strategy in relation to take more control of the building and construction industry through the device of the Building Code.

> The incorporation of health and safety requirements within the *Building Code* (s.26(2)) and the application of the *Building Code* to all incorporated building contractors, has the potential to establish competing occupational

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26 Submission No.17, ACTU, paras.38-42

27 Mr James Barrett, *Hansard,* Canberra, 11 December 2004, p.23

28 Submission No.1, Attachment A, Ai Group, p.59

> health and safety standards and, accordingly, to compromise the OHS of employees because of confusion regarding which of the competing obligations need to be complied with by employers.[29]

3.40 And later:

> It is not appropriate that the Federal Safety Commissioner have a role in monitoring and promoting "compliance"18 with the *Building Code,* nor is it appropriate that the *Building Code* contain detailed provisions relating to OHS. At the present time, OHS is almost entirely regulated through State and Territory laws. Comprehensive monitoring and compliance mechanisms are already in place under such legislation.[30]

3.41 The committee finds it noteworthy and encouraging that one employer organisation is able to look critically at the detail and the ramifications of the legislation. It comes as close as any submission from such an organisation could in recognising the Building Code as a 'trojan horse' whose significance to the legislation has little to do with the Government's promotion of occupational health and safety. Its purpose is to provide the constitutional lever, through the corporations power, to allow the Government to be the ultimate regulator for the majority of building and construction firms in the country. If it did not have this purpose there would be little reason for its existence. As nearly all submissions addressing occupational health and safety argue, there is little wrong with the current system that more rigorous compliance regimes and more determined collaborative attempts to achieve minimum levels of uniformity across states will not fix.

3.42 Whether or not the committee majority agrees that the Building Code ought to be subject to the provisions of the Acts Interpretation Act, and that the Codes be subject to tabling and disallowance like any other regulation, is an academic point. It fully understands why the Government will never consent to this.

Protected action

3.43 Proposals in Part 3 of the BCII Bill provide for exceptions to the rules currently in force under the Workplace Relations Act. The result has been that, for all intents and purposes, employees in the industry will be deprived of their right to take industrial action.

3.44 Clause 78 makes it clear that where industrial action is taken for the purpose of supporting or advancing claims, the action will not be protected if it does not pertain to the relationships between the parties to the agreement. The issue of whether or not a claim is pertinent is complex, and often cannot be easily determined. Parties engaging in protected action need to be able to make confident and rational decisions. The ACTU believes it is inappropriate to make immunity from legal liability dependent on

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29 ibid., p.60

30 ibid., p.61

conclusions concerning a technical matter of law, and notes that the courts have accepted union claims on this matter.[31]

3.45 The committee has heard evidence that the requirements for industrial action to be protected would, in practice, be impossible for building unions to meet, for the following reasons:

- the requirements are all at individual employer level, there being 4 000 EBAs in the industry in Victoria alone;
- the requirements apply to every single ban or limitation, not just strikes;
- before even a bargaining notice is served on a particular employer, the employees of that employer must have voted in favour of serving the notice in the last 21 days, and the vote must be by secret ballot if there are more than 10 employees;
- the union must be 'genuinely trying to reach agreement' with the particular individual employer;
- then before serving a notice of industrial action, the union must apply to the AIRC for an order for a secret ballot of the employees of the particular employer, and 30 pages of the bill are devoted to requirements about how the AIRC must deal with the application and how the ballot must be conducted;
- if the AIRC grants the ballot order, then the secret postal ballot is held;
- only if more than 40 per cent of the employees vote in the ballot and more than 50 per cent of them vote in favour, can the industrial action notice be served;
- industrial action can only continue for 14 days, after which it becomes unlawful for the next 21 days;
- After the 21 day 'cooling off period', the union can apply to the AIRC for approval of further industrial action;
- if the AIRC is satisfied that strict criteria are met, it may grant a certificate allowing further action for a maximum period of 14 days, after which action again becomes unlawful.
- after the 21 day 'cooling-off' period, the union can apply to the AIRC for approval of further industrial action; and
- if the AIRC is satisfied that strict criteria are met, it may grant a certificate allowing further action for a maximum period of 14 days, after which action again become unlawful.[32]

3.46 It is almost inevitable that a union or an employee attempting to negotiate their way through this minefield would fail to pass in safety. Just one of the traps, for instance, that unions must be 'genuinely trying to reach agreement', has a set of

31 Submission No.17, ACTU, p.20

32 Submission No.69, Slater Gordon, Lawyers, p.3

indicators in clause 62 which would, on the evidence of one industrial law firm, be 'practically impossible to comply with'.[33]

3.47 The ACTU describes the cooling off processes as tortuous and litigious, as well as counter productive. It points out that while long periods of industrial action are rare in the construction industry, the effect of this provision would be to encourage unions and their members to take more sustained action, rather than ceasing work for a day and recommencing negotiations. The committee majority fears that we may then see the kinds of industrial action that occur in North America, resulting in longer bargaining disputes, with greater economic damage to employers and employees alike.[34]

3.48 Slater Gordon Lawyers were quizzed on this list of protected action conditions and confirmed that while industrial action had not been outlawed explicitly, the practical effect of the legislation did so:

> …. I think that, if one analyses in the concrete conditions of the building industry how this regime would work, one sees that in effect you would never get to protected industrial action, and the bill provides that if it is not protected then it is unlawful. The problem is the hoops that would need to be jumped through. I think reference was made to this before. Take the situation in Victoria. I think there are about 3,000 or 4,000 individual enterprise agreements in Victoria. If this regime were imposed, I think it would be practically impossible for the union and the workers of each of those employers to go through the process here in order to reach protected action. If they took industrial action, it would not be protected and therefore would be unlawful. That is the aim of the bill, it seems to me, when you read it.[35]

3.49 That opinion echoes advice received in Sydney from another industrial lawyer, who stated that the right to take protected action is so circumscribed as to be something of a theoretical right only. This is because of the tortuous processes of the law which can tie up both parties to disputes:

> Lawyers can make the process through which unions and employers have to go, in working their way through this labyrinth in the bill, worse. There are opportunities for lawyers or indeed the ABC Commissioner to intervene actively at all stages in this process. They can go to the Federal Court to seek injunctive relief and are not liable to give the usual undertakings as to damages if they happen to turn out to be wrong. Sometimes they may have genuine issues, but sometimes they may want to use the law and lawyers—my brothers and sisters in the law—as delaying devices as a means to obfuscate.[36]

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33 ibid.

34 Submission No.17, ACTU, pp.22-23

35 Mr Marcus Clayton, *Hansard,* Melbourne, 19 May2004, p.96

36 Mr Lachlan Riches, *Hansard*, Sydney, 3 February 2004, p.70

3.50 The committee heard evidence of serious legal problems, flaws and deficiencies in the bill in regard to protected action. On legal grounds alone, and without regard to the various objections on policy grounds, the committee was told of a number of serious concerns about the differentiating and novel concepts in this bill, compared with the Workplace Relations Act. The Taylor and Scott submission set these out thus:

> Among the matters which it is respectfully suggested will pose particular legal problems are:
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> > the level of intrusion generally and coercive powers of the ABC Commissioner;
> >
> > the concept of and the particular manner in which the Bill seeks to proscribe "pattern bargaining";
> >
> > the extent of retrospective effect of the Bill (given that paragraph 2.9 of the Explanatory Memorandum stated that the related Transitional Bill, "will ensure that, after the commencement of these provisions, the AIRC holds a hearing for the certification of every building agreement");
> >
> > the enormously technical, legalistic and convoluted procedure sought to be prescribed for the taking of protected industrial action (quite apart from matters of "policy" in all this, the provisions provide a certain type of lawyer's "happy hunting ground" for the imposition of technicality, delay and obfuscation); and
> >
> > the failure to provide full legislative prescription or detail on the Building Industry Code, which is however to be established on a statutory basis, but the content to be at the discretion of the Minister under Clause 26 of the Bill.[37]

3.51 The committee majority agrees with the ACTU that there is no justification for such drastic restriction on protected industrial action based on any evidence that industrial action, or unprotected industrial action, is a significant problem in the industry. It scarcely warrants the labyrinthine obstacles the Government has erected with this legislation. The ACTU submission described the extent of the problem the Government was dealing with:

> The number of incidents of unprotected action in the building and construction industry found by the Royal Commission is small, when considered in the context of the industry as a whole. Findings were made in relation to the taking of unprotected industrial action in only 24 disputes around the country since 1999: four in NSW, seven in Victoria, three in Queensland, two in South Australia, seven in Western Australia and one in Tasmania. Many of these incidents of unprotected action were very short, involving a stoppage of no more than a few hours, and frequently involved issues to do with site working conditions.[38]

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37 Submission No.64, Taylor and Scott, p.11

38 Submission No.17, ACTU, pp.18-19, paras.114-115

3.52 A related issue arising from the bill needs mentioning: protected action during the term of a certified agreement. The Government is legislating to overcome a loophole in section 170MN of the Workplace Relations Act which could allow protected action, during the term of a certified agreement, as part of negotiation over a claim that parties had agreed to set aside for later resolution. The Federal Court has found such action to be legal. The Government is taking this opportunity to ensure that the loophole will not appear in the BCII Bill. The committee majority takes the view that if this succeeds, the Government will have unnecessarily fettered the parties' freedom to bargain and to negotiate site-specific arrangements for particular types of projects.

Union right of entry

3.53 Right of entry provisions for trade union officials wishing to confer with their members or to recruit new members are more severely restricted under the BCII Bill than under the Workplace Relations Act. This is in response to a recommendation of the royal commission which it regarded as critical to the success of 'reform'. The royal commission received evidence that industrial disputes often followed the visit to work sites of trade union officials, particularly when they intervened in some matter. The royal commission believed that such visits had an unsettling effect on workers, and that for many of them the visit was unwelcome.

3.54 Subject to constitutional limitations, therefore, the right of entry provisions applying to premises and worksites under the coverage of the bill will be limited. That is, they will become more restrictive than the opportunities afforded to union officials and members of their unions than is the case for all other employers and workplaces. The ABCC will enforce the proposed rules and the Industrial Registrar will certify whether individual union officials are 'fit' persons to be issued with a right of entry permit.

3.55 The ACTU asserts that the right of entry provisions are intended to make it difficult for union officials to carry out their responsibilities. Union recruitment is likely to be made difficult because potential members may be intimidated by fear of their employers being aware that they have taken the opportunity to talk to a visiting official. Entry for recruitment purposes is only allowed every six months. The submission continued:

> The degree of investigation of an applicant for a permit under proposed section 182 is unnecessary, and is likely to result in long delays in the issuing of permits. This is made even more difficult by the automatic expiry of permits after three years provided for in section 183. The scheme is established to encourage third party intervention by the ABCC in applying for revocation of a permit, whether or not the employer involved is concerned about the way in which the permit holder has exercised his or her rights. This is linked to the requirement that the ABCC receives a copy of each and every notice of entry, presumably to allow for investigation during or after the entry. The restriction of union officials to an area of the workplace determined by the employer, even to the extent of the route taken

> to get there, makes the task of effective representation virtually impossible, given that employees may find themselves in the position of being observed by the employer as they go to meet the union official in the designated place.[39]

3.56 The provisions of the BCII Bill dealt with so far demonstrate the inequitable treatment to be given to workers in the construction industry. The committee asked former Australian Industrial Relations Commission (AIRC) commissioner Robert Merriman his view on the likely effect of imposing a lesser set of rights and entitlements on this industry sector than what prevails throughout the rest of the workforce, to which the reply was:

> Firstly, I would say it is unfair. I do not think it is necessary. If we can get the current act to the situation of having proper dispute-settling procedures—and I mean proper dispute-settling procedures that are enforceable by the commission—and if we can give the commission back the power that it had, that is all we need to do to resolve the problem of some of the figures that were quoted to me earlier. Going the next step and imposing on the industry an absolutely different—and harsher, to go to the example—set of criteria will only create greater disputation. Every time it has been applied over the years, whether in the post office or wherever else, we have seen nothing but greater anarchy and ultimately the need to back down from that legislation in the interests of the operation of the business.[40]

3.57 This point has been made many times to the committee. It has never been responded to by proponents of the legislation.

Commonwealth–state issues

3.58 The reaction of the states to the Building and Construction Industry Improvement Bill 2003 has been muted, as far as the committee can see. The joint states and territories submission has made some strong points in disagreement to the bill, but the committee has relied on other submissions, mainly from trade unions, to identify areas where state rights and functions are threatened by the proposed legislation. As a starting point, the states and territories have submitted that:

> The Joint Governments are of the view that the Bill constitutes an unwarranted and disruptive incursion by the Federal Government into State jurisdictions. The legislation appears to be based on the notion that the modern workplace relations regulatory approach (ie. a framework that allows employers and employees to build fair, productive relationships via agreements at the enterprise level) has failed to deliver positive outcomes in the building and construction industry. It is submitted that any apparent failure is a reflection of the legislative approach taken by the Federal Government through the WR Act. The adoption of an interventionist, highly regulated, restrictive and punitive model under the Bill is unlikely to

39 ibid., p.28

40 Mr Robert Merriman, *Hansard*, Melbourne 19 May 2004, p.91

> increase productivity and efficiency in the industry. Nor is it likely to increase levels of trust and cooperation in the industry. Instead, it will drive the parties into further levels of confrontation and litigation.[41]

3.59 The committee majority accepts this view, but it has not been clearly set out in the submission how the Commonwealth incursion will be disruptive, or how the states are able to deal better with matters coming within the scope of the bill. The committee majority believes that this is the case, and would have welcomed a more forensic examination from state officials of the proposed ABCC arrangements for supervising the industry. It would have welcomed commentary on how the proposed Commonwealth administration (to the extent that is known) would have been deficient, and fallen short of current practices which are so fulsomely described, in the case of some states, in the joint submission.

3.60 The committee notes a number of issues affecting the states which have arisen in different contexts. The first, already discussed in this chapter, is in reference to the right of entry provisions, which, at clause 195 of the BCII Bill, exclude union officials from all rights to enter workplaces under other industrial laws, such as the Workplace Relations Act or state industrial acts. This is a generally recognised instance of the use of the corporations power to override state legislation. It will surely be subject to a legal test should the bill pass. The committee notes that the states oppose this provision in principle, but the seriousness with which this matter should be regarded is most strongly put by the ACTU:

> The attempt to override state jurisdiction, resulting in state parliaments and tribunals being unable to determine the conditions under which right of entry operates in respect of its own laws and awards, is another attempt to reduce industrial law to the lowest common denominator.[42]

3.61 Based on some evidence that the committee heard of the different problems, and the different industrial cultures around the states, it accepts that there are important functions which states must retain in regulating the industry and bringing about changes where necessary. It was put to the committee that the Victorian Government's initiative to establish a Building Industry Consultative Committee was likely to do much more for the industry in that state than any national body.[43] The point that was being made was that while a national body similar to CIDA, which operated for a time in the 1990s, was useful, it was perhaps more important to maintain active state bodies.

3.62 The Government assumes that the passage of its legislation would require the states to fall into line and pass complimentary legislation to give effect to the Commonwealth's need for the transfer of certain state powers. The New South Wales

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41 Submission No.26, op. cit., p.12

42 Submission No.17, ACTU, p.28

43 Mr Robert Merriman, *Hansard,* 19 May 2004, p.89

Government has said that it will not do this.[44] It opposes the imposition of Commonwealth laws which override state laws in regard to freedom of association and right of entry. It points out that the secondment of New South Wales police to the proposed ABCC is contrary to current state policy which is based on a co-operative an consultative model.

3.63 The most serious consequences of Commonwealth intrusion into the affairs and responsibilities of states is in relation to occupational health and safety. The New South Wales Government has advised the committee that proposed changes to safety standards in the building industry are inconsistent with current state safety frameworks, and are likely to result in confusion. The state's compliance with the National Code would require the reorganisation of current project management practice. Nor does New South Wales require replacement or substitute Commonwealth legislation dealing with security of payments in place of its own very successful legislation. Submissions from all states explained, in varying levels of detail, the differences between state laws and the proposals under the BCII Bill which would mostly give rise to confusion.

Lost faith in the Australian Industrial Relations Commission (AIRC)

3.64 The committee has received much evidence from submissions and from witnesses in lamentation of the Government's contempt for long-standing and respected national institutions, the most crucial of which have had their powers gravely weakened over the past seven years. In broad terms, this means institutions which are accessible to industry stakeholders on the basis of equity before the law, and where collaboration and negotiation between parties and among interest groups is the accepted operating norm.

3.65 Chief among all of these institutions is the AIRC. This institution is the successor to the Australian Conciliation and Arbitration Commission, established by an act of the Parliament in 1903. The committee heard evidence from legal practitioners and a former AIRC commissioner about ways in which the AIRC should be strengthened so as to overcome the problems the government claims to want to address. Such evidence is of no interest to the Government which attempts in small ways, to further reduce the scope of AIRC activity under the BCII Bill. But it does reassure the committee majority that its more conservative approach to industrial relations reform is practicable and likely to be a far more attractive solution that an ABCC.

3.66 The AIRC was probably lucky to survive the 'reform' attempts of the coalition government in 1996 with the passage of the Workplace Relations Act. The restriction of the power and influence of the AIRC was the main purpose of the 1996 Act. As the committee was informed, it was the Government's wish to reduce the influence of third parties, that is, the AIRC, over the regulation of working conditions. There was

44 Submission No.26, op. cit., p.84

to be no more umpire. The scope of awards was severely limited, as they are to be further limited under the provisions of the BCII Bill. At the same time, the ability of the AIRC to intervene in disputes and settle them was reduced, with its arbitral powers to be exercised only as a last resort. It lost its powers to enforce bargaining in good faith between parties to a dispute. The AIRC has been out of favour for some time. Commissioner Cole, it is submitted, disagreed with the AIRC resolving matters by conciliation and mediation.[45]

3.67 But the AIRC has strong supporters at all levels, who recognise that its functions are sorely missed in an industrial relations climate where there is insufficient attention given to the difficulties faced by industry participants in the bargaining process. The purist line followed by the Government leaves many employees marginalised in the process. Ironically, this is given belated recognition in the sudden attention given to the plight of sub-contractors caught in the cost squeeze.

3.68 This matter, among others, has been the subject of attention by former AIRC Commissioner Mr Robert Merriman, who is chairman of the Building Industry Consultative Committee of Victoria. This is a body set up to overview the industry and to recommend regulatory changes that come within the ambit of state legislative power, including industrial relations. Mr Merriman told the committee that there was agreement on his committee that:

- there was a need for the Workplace Relations Act to be improved to provide the Australian Industrial Relations Commission with powers to make good faith bargaining orders, to increase the capacity of the Industrial Relations Commission to resolve disputes on its own motion, to strengthen section 127;
- to increase resources to the commission and to ensure timely resolution of disputes—something that is not occurring in this industry because of the resources available to the commission at the moment;
- to amend the Workplace Relations Act to remove the limits on the subject matters on which the Australian Industrial Relations Commission can make determinations—in other words, the restrictions placed by section 89A of the act;
- to amend the Workplace Relations Act to require all agreements to provide effective dispute resolution mechanisms which allow the Australian Industrial Relations Commission to arbitrate outcomes within those dispute resolutions, not just to conciliate;
- to amend the Workplace Relations Act to provide a legal framework for site agreements, where the parties seek it; to amend the Workplace Relations Act to provide for industry-wide bargaining—again, where the parties seek it; and

45 Submission No.82, Mr John O'Connor, pp.4-5

- to amend the Workplace Relations Act to ensure that subcontractors receive a fair minimum wage and conditions; and to provide for the effective enforcement of awards and agreements made under the act.[46]

3.69 Mr Merriman told the committee that the Building Industry Consultative Committee, of which the Master Builders Association of Victoria is a member, has approached Vice-President Ross, head of the building panel of the AIRC to have this plan accepted for consideration by him when cases come before the AIRC.

> The goal of the BICCV is to have a joint position on the exact form of dispute resolution that should be applied in the industry. There are good prosects of success.[47]

3.70 In his submission Mr Merriman stated that the Government should start taking the AIRC seriously, and appoint people to it who were experienced and knowledgeable about industrial relations. Orders and certificates and the bureaucratic processes now laid down cannot resolve the underlying issues of the dispute. Most cases that come before the AIRC should be resolved through conciliation processes.[48] The committee notes the Government's suspicion of this. Evidence to this inquiry indicates that many stakeholders retain considerable faith in the potential for a re-empowered AIRC to deal effectively with problems that arise in the industry. The committee majority believes that there is a cost-effective solution available to the Government if only they could recognise it.

3.71 Without specifically endorsing the proposals that the BICCV has agreed to, the committee majority commends them to the Government as an excellent staring point for multi-lateral discussions. They are an example of what can be done within the current legislative framework, dispensing with the need for the kind of legislation which would give us the Australian Building and Construction Commission. The committee majority's consistent view has been that long-established institutions of regulatory control and policy formulation retain their ability to deliver appropriate judgements and solutions to changing needs. It is for this reason that the committee majority recommend a return to the principles of federalism and tripartite decision making.

Recommendation 4

The committee majority recommends that the Government promote cultural change throughout the industry by encouraging states to institute tripartite industry councils at state level, based on the Victorian model. Associated with this, the committee majority also recommends the establishment of an

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46 Mr Robert Merriman, *Hansard*, Melbourne, 19 May 2004, pp.78-79

47 ibid., pp.87-88

48 Submission No.8, Mr Robert Merriman, p.1

overarching national body, working to a ministerial council, to implement a broad program of agreed reform in the building and construction industry.

Concluding comments on 'reform'

3.72 The committee is suspicious of any claim that 'reform' can be achieved through legislation, or that legislation can produce culture change. There is no doubt that governments can play a part in such a process, but the change process needs to be supported at key levels of the industry and enlist the participation and goodwill of the main participants. The leadership role for government is to promote stakeholder consensus and promote industry leadership from among them. In none of these respects has the Government even attempted to play its proper role, much less succeed in doing so. Instead it has taken refuge behind a flawed royal commission inquiry and report and produced a piece of bludgeoning legislation which will bring benefit only to industrial lawyers.

3.73 The 'reform' of the building and construction industry was intended to follow up the 'reform' of the stevedoring industry. Minister Reith had certain advantages not now possessed by Minister Andrews. He did not attempt to prepare the ground with a royal commission. He worked closely and publicly with a waterfront industry leader, and he dealt with a relatively small, discrete and specialised industry. Furthermore, as events have shown, the waterfront changes were driven not so much by government initiative as by the irresistible force of macro-economic demand. The changes fitted the changing nature of the industry at the time and managed also to accommodate the changing attitudes of the workforce. In the case of construction industry 'reform' we see few of those characteristics.

3.74 Perhaps the most telling evidence of the difference between the Government's record on waterfront changes compared to construction industry changes, is that in the case of the waterfront, the leadership was in the hands of Patrick Stevedoring, with the assistance of the Government. In the case of the construction industry there is a deafening silence from the large building contactors whose levels of efficiency and profitability compare well with international standards. The only submission received by the committee from the peaks of the industry was from Multiplex, proposing changes to the industrial relations of the industry which were the antithesis of the provisions in the BCII Bill. When asked by Senator Tierney whether, in supporting the Government, the MBA had 'got it wrong', Ford Australia's labour relations manager for 27 years, and later AIRC commissioner, Mr Robert Merriman said:

> There is no doubt in my mind that they are wrong. I would rely on the evidence from Multiplex, from Grollo, from Baulderstone and from other major builders as to the culture and the activities in this industry.[49]

3.75 The ABCC is the Government's answer to its loss of faith in institutional thinking that has served the country well since federation. As a bureaucratic entity

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49 Mr Robert Merriman, *Hansard,* Melbourne, 19 May 2004, p.78

subject to the whims of ministerial direction it is not an inspiring replacement. To begin with, there is no thought given as to whether the ABCC is likely to endure. Just as the Government is in the process of repealing the National Occupational Health and Safety Commission Act it is probably a reasonable assumption to expect that the Government does not believe its legislative work will endure either. The committee majority does not believe this attitude is worthy of a government, which should be building enduring institutions and strengthening those which have enjoyed national support for generations. Such institutions cannot, in any event, be built on the basis of inequity in the treatment of their workforces, with restrictions placed on the legal rights of both employers and employees, and operating in an industrial relations gulag.

3.76 The committee majority heard much evidence which supports this attitude. There is a general belief that what the Government is presenting in this legislation in the form of the ABCC is a body that is both threatening and impotent, and both dangerous and toothless. It is threatening and dangerous because it has the potential to cause strife through intervention in processes that need to be negotiated between parties. It is impotent and toothless because when the arguments which it has caused come to a head it will be powerless to do any thing about them of its own accord. It will call in the AIRC and the Federal Court to solve the disputes which it has fermented. This is because the ABCC has been designed to fly in a constitutional vacuum: to extend Commonwealth powers where they need not belong. It invests far too much legislative effort in a search for solutions to a problem which it has chosen to magnify out of all proportion to its real significance.