

## Preface

This is the committee's fourth report relating to the building and construction industry since 2004. In 2004 the committee undertook a wide-ranging inquiry into the construction industry in the light of recommendations of the Cole royal commission. In considering whether there was a need for separate, industry-specific legislation for the building and construction sector, the 2004 inquiry also considered broader issues relating to the nature of the industry; its unique operational characteristics and culture. Later inquiries, including this one, have focussed on examining specific legislation, and the committee has not had the opportunity to revisit the broader issues facing this industry in any comprehensive way. The committee believes that these broader issues remain relevant today, as highlighted in the report to the government by Mr Wilcox<sup>1</sup>, and require a brief mention here.

While this report examines the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, the committee majority reminds the Senate that many of the issues which characterise the building industry cannot be addressed by legislation alone.<sup>2</sup> The Australian Building and Construction Commission (ABCC), established under the Building and Construction Industry Improvement Act (BCII) has taken a narrow view of its role and has not sought to remedy all the unacceptable practices which occur in the industry. This has resulted in a perception that the ABCC is interested only in protecting employers against union 'aggression' rather than safeguarding the interests of all stakeholders in the industry.

This is a tough industry with tough players, working in a physically demanding and inherently risky work environment. Pressures are linked to cost structures, profit margins and sensitivity to economic cycles. The building and construction industry is underscored by commercial imperatives which drive tensions in industry relationships. These tensions are more likely to spill over into the industrial relations arena in this industry than in other industries. The industry is highly competitive with contracts largely determined by price. In the 2004 inquiry, the committee observed how commercial pressures resulted in reduced compliance with workplace entitlements and occupational health and safety (OH&S) regulations, which creates workforce tensions. Business practice, determined by fluctuating rhythms of construction activity and the temporary nature of construction sites has led to the use of extensive subcontracting rather than direct employment of labour by principal contractors. Securing payments

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1 Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 55.

2 See Mr Jeff Lawrence, *Proof Committee Hansard*, 31 August 2009, p. 14; Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole The future of the construction industry: confrontation or co-operation?*, June 2004; Martin Loosemore (2004) Reform in the Australian construction industry, *The Australian Institute of Quantity Surveyors refereed journal*, Sydney, Australia, 3 (2) 1-8.

is complicated by this hierarchical employment system. As a result this industry has seen the use of sham corporate structures to avoid legal obligations and evasion or underpayment of taxation. The attitudes of the workforce are influenced by these characteristics.

It was unfortunate that the ABCC was established for the purpose of curbing the militancy of building unions. In the view of the government of the day, this was believed to be the main, if not the sole-source of the building industry's problems. Few of the industry characteristics listed above appear to have had a bearing on the initial or continuing rationale for separate legislation. The committee majority makes the obvious point that 'fixing' the problems in this industry cannot be reduced to a simple formula of 'fixing' the conduct of industrial relations by legislation.

Although it concentrated on union behaviour, the Cole royal commission unearthed a wealth of evidence regarding unacceptable practices by employers, including the use of phoenix companies, tax avoidance, evading payment of workers entitlements, and disregard for OH&S rules. The committee majority is concerned that the focus of ABCC investigations continues to be on employee organisations rather than on broader problems bearing on workplace conduct. It notes the more recent observations of Professor David Peetz that employer compliance is not without its problems:

...There is no reason to believe the building and construction industry would have no problems of employer compliance and indeed an exercise by the Sydney Office of the Workplace Ombudsman found 31 per cent non-compliance in the NSW construction industry, even though inspections were restricted to head offices and no building worksites, where breaches could be expected, were visited (Workplace Ombudsman 2009c). Yet most actions taken by the ABCC against employers are for cooperation with unions that are seen to be in breach of the law, rather than for unfair treatment of employees.<sup>3</sup>

To this end the committee majority welcomes the expanded role of the Office of the Fair Work Building Industry Inspectorate to ensure compliance with safety net contractual entitlements.

The building and construction industry is enormously important to the economic, social and environmental fabric and its many achievements can be celebrated. The committee majority accepts there is still work to do to improve practices and culture in the sector to ensure the industry fosters cooperative and harmonious workplaces. In view of the prevailing focus of ABCC activity this cultural change has been difficult to achieve.

As noted in previous committee reports, genuine and broad reform can only succeed through collaboration with states/territories and through consultation with all

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3 Professor David Peetz, *Submission 20*, p. 29.

stakeholders. To take an example, OH&S has been identified as one of the critical issues for the industry. It remains a source of workplace tension and dispute.

The Minister for Employment and Workplace Relations has emphasised the need for a new focus on cultural change in the workplace, to build partnerships between management and workers and their unions to benefit all.<sup>4</sup> This desire for greater collaborative and cooperative relationships in the building and construction industry to address issues like OH&S, skills development and productivity was stressed in evidence to the committee.<sup>5</sup>

The building and construction industry is treated differently to other industry sectors on the basis that it is more prone than other industries to industrial disputes. The committee majority notes, however, Australian Bureau of Statistics data which shows the building and construction industry conforming to the industry-wide reduction in industrial disputes. The amount of this reduction directly attributable to the BCII Act and ABCC is a matter of conjecture.

Regarding the alleged lawlessness and criminality in the sector, importantly, it is not criminal activity that is being addressed by the coercive powers held by the ABCC which are to be retained under this legislation. This point is recognised by employer groups<sup>6</sup> as well as unions.<sup>7</sup> The ABC Commissioner has no power regarding the general criminal law as it might apply in the industry. The ABCC is primarily responsible for investigating civil breaches of federal industrial law.<sup>8</sup> There are criminal laws and police to deal with criminal activities. The strong coercive powers are usually reserved for serious crime, not arguments on building sites and potentially minor breaches of industrial instruments. The committee majority understands that the coercive powers impinge on civil liberties and that their use should be limited to circumstances where there is an overwhelming public interest. With the exception of the coercive powers, construction workers should soon join other workers in being regulated by the Fair Work Act (FW Act) on most matters. In this regard, the committee majority points out that more than half of the court cases in which the ABCC successfully obtained penalties were brought under the WR Act (now FW Act) alone.

The committee majority welcomes the introduction of additional safeguards in the legislation. This was recommended in the committee's last report in 2008. It notes

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4 Hon Julia Gillard MP, Minister for Employment and Workplace Relations, Speech to the 15<sup>th</sup> World Congress International Industrial Relations Association, 25 August 2009.

5 See Mr Jeff Lawrence, *Proof Committee Hansard*, 31 August 2009, pp. 9-10, pp. 12-13 and Mr Greg Quinn, *Proof Committee Hansard*, 31 August 2009, pp. 33-34.

6 ACCI, *Submission 11*, p. 55.

7 CCU, *Submission 18*, p. 3.

8 See George Williams and Nicola McGarrity, 'The investigatory Powers of the Australian Building and Construction Commission', *Australian Journal of Labour Law*, (2008) 21, p. 274.

with disappointment that the early introduction of these safeguards by the government was prevented by the Coalition in June 2009. While supporting the increased safeguards it maintains its in-principle objection to separate legislation for one sector of the workforce when it deprives employees of the rights they enjoy in other occupations. Whatever particular issues remain in the building and construction industry, they should be dealt with under the same law that applies to any other industry. The committee majority believes there needs to be a strong and effective enforcement and investigation regime that applies across all industries. The coercive powers should not have a continuing role in the enforcement of workplace laws. The ultimate goal must be the regulation of the building and construction industry under the same laws as the rest of the workforce. This bill is the next step in this process. The committee majority recommends that the bill be passed.

**Senator Gavin Marshall**

**Chair**