

Government Senators' Majority Report

1.1 On 3 September 2008, the Senate referred the Building and Construction Industry (Restoring Workplace Rights) Bill 2008 (the bill) to this committee for report by 30 November 2008. As 30 November is a Sunday the committee is reporting early.

Provisions

1.2 The bill, a private senator's bill introduced by Senator Rachel Siewert seeks to repeal the Building and Construction Industry Improvement Act 2005 (BCII Act) and the Building and Construction Industry Improvement (Consequential and Transitional) Act 2005 in their entirety. A consequence of the repeal of the BCII Act is the abolition of the office of the Australian Building and Construction Commissioner (ABCC).

1.3 Senator Siewert explained the rationale for the bill as follows:

...These laws are some of the most pernicious ever to have passed through this place. They strip away internationally recognised rights of workers in the building and construction industries. This bill is intended to ensure such laws no longer exist in Australia.¹

1.4 Further consequences not identified in the second reading speech are the abolition of the Office of the Federal Safety Commissioner (FSC)² and the Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme³ which will be addressed later in the report.

Conduct of the inquiry

1.5 The committee advertised the inquiry in *The Australian* newspaper calling for submissions by 10 October 2008. Details of the inquiry and the bill were placed on the committee's website. The committee also directly contacted a number of relevant organisations and individuals to notify them of the inquiry and invite submissions. 15 submissions were received as listed in Appendix 1.

1.6 The committee decided to prepare its report on the basis of the submissions received and thanks those who assisted by providing submissions to the inquiry.

Background

1.7 The bill is familiar ground for this committee. In 2003 the government introduced the Building and Construction Industry Improvement Bill 2003 which

1 Senator Rachel Siewert, Second Reading Speech, *Senate Hansard*, 28 August 2008, p. 3983.

2 Master Builders Australia (MBA), *Submission 5*, p. 2.

3 MBA, *Submission5*, p. 8.

lapsed in the Senate when Parliament was prorogued for the 2004 election. The committee produced a report in June 2004 covering the 2003 bill and industry related matters.⁴ In 2005 the Building and Construction Industry Improvement Bill 2005 was introduced and passed as the current BCII Act. The committee reported on the 2005 bill in May 2005.⁵

Committee comment

1.8 The submissions revisit a number of key issues dealt with by this committee during the consideration of the BCII Act in 2005 and its predecessor in 2003. The committee majority stands by the findings of the committee majority report in 2004 and the Opposition senator's report in 2005. This report does not replicate previous reports, although it will provide reminders of past committee findings.

1.9 The issues raised in submissions are well known to the committee as are the positions of the various stakeholders. However, this bill has provided the committee with another opportunity to reflect on the assumptions underlying the BCII Act. Three years have passed since the establishment of the ABCC and the committee has considered this issue with the benefit this time has provided.

1.10 Detailed background on the construction industry and the introduction of the BCII Act is available from the two reports produced by this committee in 2004 and 2005. This report will provide only a brief section on background. For those who may be unfamiliar with the history of the bill, greater detail is provided in the committee's 2004 and 2005 reports.

Final report of the royal commission

1.11 The office of the ABCC was established under the BCII Act and commenced operation on 1 October 2005. The ABCC was part of the government's response to the Cole royal commission into the building and construction industry which presented its findings to Parliament in 2003. Cole found there was an urgent need for cultural and structural reform. He identified unlawful conduct at the centre of the findings as well as widespread inappropriate conduct and recommended specific industry legislation.⁶

4 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole The future of the construction industry: confrontation or co-operation?*, June 2004, available from: http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2002-04/building03/index.htm.

5 Senate Employment, Workplace Relations and Education References Committee, *Provisions of the Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005*, May 2005, available from: http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2004-07/buildingbills/index.htm.

6 *Royal Commission into the Building and Construction Industry*, Summary of Findings and Recommendations, 24 February 2003, p. 6.

1.12 The royal commission findings were controversial. Submissions from employer organisations pointed to the importance of these findings to understand the current regulatory arrangements in the industry and the necessity for their continuation.⁷ Representative of employer comments, the Australian Mines and Metals Association (AMMA) stressed 'the findings of the royal commission remain relevant considerations and highlight the necessity of retaining the BCII Act and ABCC as a measure to achieve enduring cultural change in the building and construction industry'.⁸

1.13 The Cole findings were not accepted without question. The exercise was seen by many as politically motivated and directly aimed at weakening the unions representing employees in the industry.

1.14 The Combined Construction Unions (CCU) argued that the commission was a highly politicised process motivated by ideological opposition to the construction unions and was used to provide the justification for a range of anti-union measures. The CCU further argued that the focus, processes, findings and recommendations were highly contentious and profoundly flawed.⁹ The CCU contended that:

Any reasonable examination of the provenance of the BCII Act would support the view that it is steeped in the same ideology that gave rise to WorkChoices. The BCII Act is the most extreme expression of that ideology.¹⁰

1.15 Professor George Williams and Nicole McGarrity in their submission reminded the committee of the resolution of the ACTU Congress in 2003 which stated:

The report reflects the anti-union nature of the proceedings, the focus of which was on presenting unions in the worst possible light, while denying them any adequate opportunity to counter allegations made by employers and counsel assisting the Commission.¹¹

1.16 In the 2003 resolution the ACTU noted that:

The majority of the 392 findings of unlawful conduct against organisations and individuals concern technical breaches of the Workplace Relations Act by unions and their officials. Some of these findings were based on alleged incidents occurring up to seven years ago. Most findings concerned ordinary industrial issues relating to matters such as right of entry and adherence to disputes procedures and reflecting, to a large extent, the

7 AMMA, *Submission 4*, p. 3.

8 AMMA, *Submission 4*, p. 12.

9 CCU, *Submission 13*, p. 2.

10 CCU, *Submission 13*, p. 2.

11 ACTU Congress 2003, Final Policies, *The Royal Commission into the Building and Construction Industry Resolution*, 23 October 2003.

unsatisfactory state of the current industrial law and its application to the industry.¹²

1.17 The resolution also highlighted that very few findings were made against employers. It countered that conclusions such as unions habitually ignore Commission and Court orders, were made on the basis of little evidence. Non-compliance with an order was found in only five disputes, involving in total seven individuals and three unions. The resolution concluded that the Commission did not establish any evidence of union misconduct, whether criminal or industrial, to justify a vicious attack on the unions' ability to organise and bargain.¹³

1.18 Williams and McGarrity cited work by John Howe which supported the view that the focus of the ABCC is on restricting trade union activities rather than investigating unlawful activities of employers.¹⁴

1.19 Williams and McGarrity also pointed out that not only the findings but also the process used by the royal commission was criticised. They noted the concerns put forward at the time of the inquiry in 2004 by the Victorian Council for Civil Liberties and the CFMEU regarding the departure from established rules of evidence and procedure.¹⁵

1.20 In their submission to this inquiry, the ACTU noted the use of the royal commission to justify the existence of the BCII Act. In response they highlighted the findings of the committee majority report in 2004 regarding the royal commission which are summarised below.¹⁶

1.21 In the 2004 report, the committee majority report questioned the purpose and findings of the Cole royal commission:

The Cole royal commission wasted its time in chasing demons rather than looking at the commercial characteristics of the industry which determine the nature of its labour needs...¹⁷

12 ACTU Congress 2003, Final Policies, *The Royal Commission into the Building and Construction Industry Resolution*, 23 October 2003.

13 ACTU Congress 2003, Final Policies, *The Royal Commission into the Building and Construction Industry Resolution*, 23 October 2003.

14 Professor George Williams and Nicola McGarrity, *Submission 6*, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law*, p. 246.

15 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 249–250; and Senate Employment, Workplace relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, pp. 39–42.

16 ACTU and TLCs, *Submission 15*, pp. 3–4.

17 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, p. xvi.

and

The committee has looked at the same industry as Commissioner Cole, but sees it in a vastly different light, as do so many authorities and specialists involved in some way with the industry.¹⁸

1.22 Witnesses before the 2004 inquiry argued that the decision to establish a royal commission on the building and construction industry was an inherently political act. Legal practitioners and others told the committee that, being part of an executive process, royal commissions could never enjoy the same measure of independence as a court.¹⁹

1.23 The majority report concluded that they could have no confidence that the findings were fair or accurate.²⁰ The only point of agreement between the then government's position and the findings of the Senate inquiry was that there was room for further reform in the building and construction industry.²¹

Conclusion

1.24 Attitudes to the Cole royal commission findings continue to influence opinion in regard to the BCII Act and the ABCC.

1.25 As noted earlier, in previous reports, the committee acknowledged the need for reform in the building and construction industry, with due regard for the complexity of issues, to address practices which were clearly unacceptable. The real question is whether industry specific legislation was required. Should this industry be treated singularly and differently to other industries? The committee will keep this question in mind as the report turns, in chapter two, to the issues raised with the committee in relation to the functions and powers of the ABCC and then in chapter three, the question of whether these are warranted for one section of the workforce.

18 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, p. 1.

19 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, pp. 36–37.

20 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, p. 50.

21 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole, The future of the construction industry: confrontation or co-operation*, June 2004, p. 1.