

# Coalition Senators' Report

## Introduction

The *Building and Construction Industry Improvement Act 2005* (the BCII Bill) was a direct outcome of the recommendations of the Cole Royal Commission. It should be noted that the government majority on the committee remains reluctant to accept the veracity and the findings of the royal commission. Then Opposition senators rejected the findings in two previous reports of this committee in 2004<sup>1</sup> and again in 2005.<sup>2</sup>

Submissions from employer organisations reminded the committee that a royal commission is the ultimate form of inquiry and is never established lightly.<sup>3</sup>

The Cole Royal Commission was comprehensive and was conducted over 12 months with 171 public sitting days, 16,000 pages of transcript, 765 witnesses, 1900 exhibits and 29 general submissions.<sup>4</sup> The then Opposition sought to discredit the findings by Cole of widespread sabotage of industry productivity through strikes and intimidation, but the evidence was unassailable.

The findings of the royal commission cannot simply be dismissed. As noted by Hon Kevin Andrews MP, Minister for Employment and Workplace Relations in 2004:

The royal commission found the building and construction industry is characterised by illegal and improper payments, threats of violence, chronic failure to honour legally binding agreements, contempt for commission and court rulings and has a culture of coercion, harassment and intimidation. This industry has been and continues to be crippled by lawlessness.<sup>5</sup>

The commission recommended structural and cultural change and it considered that both strong regulation and a strong regulator were required to effect change. Cultural change takes much longer to effect than structural change, and the more cultural change needed the more time it will take.

- 
- 1 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole The future of the construction industry: confrontation or co-operation?*, June 2004.
  - 2 Senate Employment, Workplace Relations and Education References Committee, *Inquiry into the Provisions of the Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005*, May 2005.
  - 3 Civil Contractors Federation (CCF), *Submission 2*, p. 4.
  - 4 AMMA, *Submission 4*, p. 11.
  - 5 Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, *House of Representatives Hansard*, 25 March 2004, p. 27297.

## Are we there yet?

Submissions stressed that as the ABCC has been in operation for only three years, the reform process is not yet complete.<sup>6</sup> The cultural changes required in the industry have not been fully embedded. The CCF submitted:

A history of decades of bad behaviour, intimidation and coercion will hardly be resolved in the 3 years since the ABCC has been operating.<sup>7</sup>

Those supporting the retention of the ABCC point to recent reports of incidents to show a culture of intimidation and harassment still exists in the industry. These incidents highlight the continuing need for the BCII Act and the ABCC. AMMA stressed:

Industry participants are continuing to engage in unlawful and inappropriate conduct and are subject to continued investigations and court proceedings initiated by the ABCC.<sup>8</sup>

To illustrate that behavioural improvements have not yet been entrenched, the Civil Contractors Federation (CCF) highlighted two recent reports of intimidation and harassment:

The first incident was reported in the Melbourne Age on the 10<sup>th</sup> of September 2008 it relates to a death threat made to an executive of Bovis Lend Lease...

The second incident that has been widely reported related to the ABCC itself. The Australian on 1 September reported that ABCC inspectors were abused and intimidated on a Melbourne construction site.<sup>9</sup>

These instances serve to illustrate that intimidation and harassment may take years to change and will take longer to resolve than the three years the ABCC has been in operation.<sup>10</sup> According to the CCF, behaviours have improved but that these changes may yet be transitory. They argued that the reform process is far from complete stating:

Failure to retain a tough regulator with strong investigation powers could see a return to the undesirable and non productive behaviour highlighted by the Royal Commission.<sup>11</sup>

The royal commission found that previous attempts to effect cultural change in the industry were not successful. Evidence from submissions make clear that the ABCC

---

6 See CCF, Submission 2, p. 6; AMMA, p. 5.

7 CCF, *Submission 2*, p. 8.

8 AMMA, *Submission 4*, p. 5.

9 CCF, Submission 2, p. 9.

10 CCF, Submission 2, p. 8.

11 CCF, *Submission 2*, p. 6.

---

has been operating for an insufficient period of time to ensure that the change required in the industry has been embedded. Coalition senators believe that the reform process is not yet complete as evidenced by continuing inappropriate conduct and proceedings, and the powers should be retained.

The report will now turn to the benefits of the BCII Act and the ABCC for the economy and the industry.

### **Effect on the economy of abolishing the ABCC**

Many submissions viewed the ABCC as a spectacular success and it is credited by many with restoring peace and stability to the industry. Submissions provided evidence that the BCII Act and the ABCC have led to quantifiable increases in productivity and reduced industrial disputation in the construction industry<sup>12</sup>. The effect of abolishing the ABCC would be devastating for the commercial building sector and the flow-on effects to the economy would be substantial.

The increased productivity can be seen in recent reports by Econtech. The report shows the following significant improvements:

- 7.3 per cent productivity gain in commercial building relative to residential building since 2004;
- 10 per cent addition to labour productivity in the construction industry due to the ABCC and associated reforms; and
- 10.5 per cent out performance in construction industry labour productivity compared to predictions based on historical performance to 2002.<sup>13</sup>

In its 2008 report, Econtech reaffirmed the ABCC's role in improving productivity in the construction industry with significant benefits for the national economy. The report highlights the following broader effects:

- GDP is 1.5 per cent higher than it otherwise would be;
- The CPI is 1.2 per cent lower than it otherwise would be;
- The price of dwellings are 2.5 per cent lower than they otherwise would be; and
- Consumer living standards have improved.<sup>14</sup>

Overall Econtech found an annual economic welfare gain of \$5.1 billion from the ABCC.<sup>15</sup> The CCF highlighted that a 'break out' of costs and charges in the industry would be a threat to inflation and therefore damaging to the economy.<sup>16</sup>

---

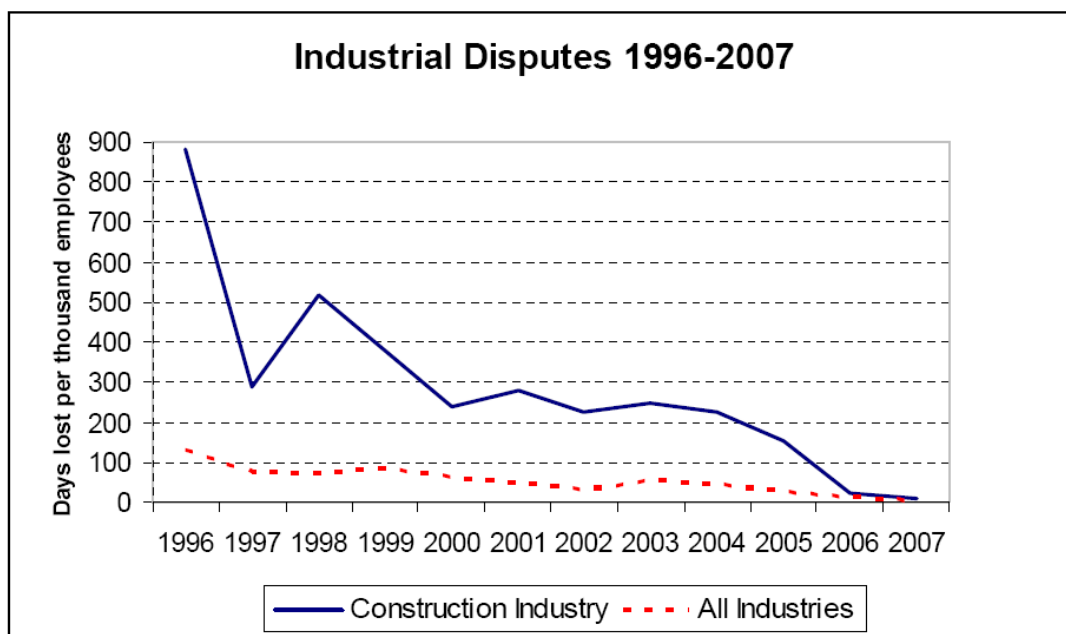
12 See CCF Submission, 2, p. 3.

13 MBA, *Submission 5*, p. 6.

14 MBA, *Submission 5*, pp 6-7.

The Econtech study also concluded that the ABCC and the reforms to the construction industry have led to a significant reduction in the days lost in the industry due to industrial action.<sup>17</sup>

AMMA provided data sourced from the ABS on the decline in industry dispute levels, noting the dramatic decline since 1996 which had 882.2 days lost per thousand to 153.8 in 2005 and 10.1 in 2007.<sup>18</sup>



**Table 1: Industrial Disputes 1996-2007<sup>19</sup>**

The CCF submitted that industrial harmony is critical for their members and smaller contractors are particularly vulnerable to industrial disruption, intimidation and coercion which are all matters the ABCC deals with.<sup>20</sup>

The Ai Group has argued that the BCII Act and the ABCC have been critical factors in improving the industry's culture, reducing time lost and other project costs, tempering unlawful union behaviour and limiting unlawful industrial action and

15 ABCC Media Statement, 'Construction Industry Productivity: 2008 Report Card', 1 August 2008.

16 CCF, *Submission 2*, p. 10.

17 ABCC Media Backgrounder, 'Productivity in the Construction Industry continues to Improve', 1 August 2008.

18 AMMA, *The Building industry regulator A tough cop or a transition to a toothless tiger?*, 9 September 2008, p. 19.

19 AMMA, *The Building industry regulator A tough cop or a transition to a toothless tiger?*, 9 September 2008, p. 19.

20 CCF, *Submission 2*, p. 2.

---

greatly increasing productivity. They emphasised that it is important that these gains are not lost. Ai Group Chief Executive Ms Heather Ridout has argued:

Currently the construction industry is experiencing a period of unprecedented industrial harmony. The industry has never been a better place in which to work and invest as is evident from the record low level of industrial disputation, high wages growth and higher productivity.<sup>21</sup>

In the 2006-07 Annual Report of the ABCC the commissioner reported:

The impact of the Office of the Australian Building and Construction Commissioner (ABCC) on the building and construction industry is significant. Industrial relations conduct has improved markedly. Industrial disputation has fallen to all time low levels. The key measure of industrial disputation is 4,200 per cent lower in 2007 compared to 2001 – the year the Cole Royal Commission commenced.<sup>22</sup>

### *Effect on the workplace*

Econtech's 2008 report stated that case studies found the ABCC and industrial relations reforms have led to the following industry improvements:

- significant reduction in days lost due to industrial action;
- less abuse and the proper management of OH&S issues;
- proper management of inclement weather procedures;
- improvement in rostering arrangement; and
- cost savings stemming from the prohibition on pattern bargaining.<sup>23</sup>

MBA highlighted the increase in construction wages compared to other sectors and calculated that workers in the construction industry

...have increased aggregate earnings by close to \$18 million per annum via the benefits of fewer working days lost in a more harmonious industrial relations environment.<sup>24</sup>

The Hon Kevin Andrews MP has noted that the presence of the ABCC has changed the practices on worksites. Costly strikes and industrial action have all but disappeared and projects are being completed without costly delays.<sup>25</sup>

---

21 *Media Release*, Ai Group, 'Ai Group welcomes consultative approach on ABCC transition, 22 May 2008.

22 Office of the ABCC, Annual Report 2006-07, Commissioner's Review, available at: <http://www.abcc.gov.au/abcc/Reports/AnnualReport0607/ABCCCommissionersReview.htm> accessed 20 November 2008.

23 Econtech, Economic Analysis of Building and Construction Industry Productivity: 2008 Report, 30 July 2008, p. iii.

24 MBA, *Submission 5*, p. 7.

The CCF summed up the views in this area:

...the ABCC and the legislation it enforces has led to quantifiable increases in productivity in the construction industry and that its actions have underpinned cultural change which is vital for Australia's long term prosperity.<sup>26</sup>

### ***Placing billion dollar projects at risk***

Organisations such as AMMA are concerned about the nature of the practices and conduct in engineering construction work which is engaged heavily in capital intensive construction projects. They advised that as at April 2008 there were 97 minerals and energy projects at advanced stages of development with a total capital expenditure of \$70.5 billion.<sup>27</sup> AMMA contends that the abolition of the BCII Act and the ABCC will put at risk billion dollar investment decisions for major minerals and energy projects.<sup>28</sup> AMMA contends:

...that if the building and construction industry returned to the industrial environment of the 1990s, project deadlines, budgets and contractual obligations would be put at risk, costs would escalate and investment confidence would deteriorate.<sup>29</sup>

The CCF highlighted that any return to disputation and lost productivity may also undermine the government's commitment to infrastructure development.<sup>30</sup>

Coalition senators believe that the BCII Act and the ABCC should be judged on the results achieved and, on this criterion, they would understandably be judged as a success by many in the industry.

### **Powers**

Submissions stated that the unusual powers conferred by the BCII Act are regrettably necessary as a response to the culture of intimidation and harassment in the industry. The vast majority in the industry believe the powers of the ABCC are appropriate and have been exercised with discretion<sup>31</sup> and that there are adequate safeguards in place.

---

25 The Hon Kevin Andrews MP, 'Union rule remains the worst option', *Australian Financial Review*, 18 August 2008, p. 71.

26 CCF, *Submission 2*, p. 3.

27 AMMA, *The Building industry regulator A tough cop or a transition to a toothless tiger?*, 9 September 2008, p. 8.

28 AMMA, *Submission 4*, p. 5.

29 AMMA, *The Building industry regulator A tough cop or a transition to a toothless tiger?*, 9 September 2008, p. 10.

30 CCF, *Submission 2*, p. 3.

31 Ai Group, *Submission 12*, p. 9.

---

The Australian Industry Group emphasised that the powers of the ABCC are vital to achieve cooperation in the industry. They noted that prior to the ABCC unions officials routinely refused to provide information or answer questions and advised their members to do the same. Ai Group argued that:

Prior to the enactment of the BCII Act and the establishment of the ABCC, a culture of intimidation in the industry made it very difficult for investigators to gain the cooperation of those affected and the rule of law was severely diminished.<sup>32</sup>

### *Penalties*

AMMA noted that the penalties which result from an act of non-compliance are in place to ensure that investigations are taken seriously and that there are no barriers to addressing unlawful and inappropriate conduct. Coalition senators note that ABCC reported that the evidence of 17 witnesses who were compelled to attend and answer questions between 1 October 2005 and 31 March 2008 were critical to the relevant court proceedings.<sup>33</sup>

### *Safeguards*

Submissions emphasised the protections in the BCII Act. AMMA contended that the coercive powers are adequately balanced by relevant protections, including the right to legal representation and inadmissibility of any evidence given or information obtained against a person in future proceedings. They also noted that reasonable grounds must be present before a person can be subjected to the coercive powers.<sup>34</sup>

The CCF highlighted privilege against self incrimination and that these protections in the Act contain both 'use' and 'derivative use' immunities.

Put simply the evidence obtained through compulsion cannot be used against the person to directly found proceedings against that person. Nor under derivative use immunity can a person have proceedings brought against them, by something derived from the evidence obtained.<sup>35</sup>

Regarding the investigatory powers and the right to legal representation, the Ai Group submission argued:

There has been much misinformation circulated concerning a witness' rights to choose his/her own legal representative following the Federal Court's *Bonan v Hadgkiss* decision. In that case the deputy ABCC excluded a legal representative because that representative had already acted for a different

---

32 Ai Group, *Submission 12*, p. 9.

33 ABCC, Report on the Exercise of Compliance Powers 1 October 2005 to 31 March 2008, p.3.

34 AMMA, *Submission 4*, p. 4.

35 CCF, *Submission 2*, p. 15.

witness in another examination related to the same investigation. The federal court upheld the Deputy ABCC's decision.<sup>36</sup>

The CCF noted that the Administrative Review Council report, *The Coercive Information-gathering Powers of Government Agencies*<sup>37</sup>, contains best practice principles. The CCF pointed out that the ABCC reviewed its procedures against these and found that the legislation and procedures complied with all the principles applicable to its use of powers.<sup>38</sup> It also advised:

Additionally, the ABCC also published detailed guidelines on its use of its powers which is at odds with the claim in the Second Reading Speech that the ABCC Commissioner 'determines his own practices with a high level of secrecy'.<sup>39</sup>

### ***Accountability***

In relation to the accountability of the ABCC, the CCF offered the following points:

- the ABCC like a number of Federal agencies is subject to review by the Commonwealth Ombudsman;
- the ABCC's own actions have been the subject of judicial overview;
- the ABCC Commissioner and senior staff appeared before the Senate Education, Employment and Workplace Relations Committee as part of the estimates process; and
- the Minister for Employment and Workplace Relations can be asked questions in Parliament about the activities of the ABCC.<sup>40</sup>

Coalition senators accept that protections provided by the BCII Act are substantive. They recognise that the powers comply with best practice principles in the ARC report which also states these protections are not present in all acts with similar compulsory powers.<sup>41</sup> Coalition senators also emphasise the various accountability mechanisms which apply to the ABCC and notes that the ABCC publishes regular reports on the use of its compliance powers.

---

36 Ai Group, *Submission 12*, p. 9.

37 Administrative Review Council (ARC), *The Coercive Information-gathering Powers of Government Agencies*, Report No 48, May 2008.

38 CCF, *Submission 2*, p. 16.

39 CCF, *Submission 2*, p. 16.

40 CCF, *Submission 2*, p. 17.

41 ARC, *The Coercive Information-gathering Powers of Government Agencies*, Report No 48, May 2008, p.49.



---

## Industry specific legislation is not unique or unusual

The CCF noted that industry-specific legislation is not unique nor is it unusual and provided the following examples:

- those dealing with public health – for example regulation of health providers, pharmaceuticals;
- regulation of particular professions by the industry and government for example, lawyers and accountants;
- the financial services industry which includes those providing advice or services, the banking industry generally through the granting of licences and the financial markets;
- regulation of the 'education and further education industry' such as education providers including Acts which specifically establish universities, colleges and institutions and their governance structures and accountability.<sup>42</sup>

The CCF noted that many regulators such as ASIC, the ATO and the ACCC have the power to compel people to attend to provide answers, information and documents. They referred the committee to the report by the ARC which includes a comprehensive list.<sup>43</sup>

The Master Builder's Association (MBA) provided the committee with a table to show that the powers of the ABCC are not unusual and not unique to the ABCC. They explained the compliance power is modelled on the ACCC and is similar to the powers used by the ASIC.<sup>44</sup>

## Conclusion

Coalition senators believe that the evidence before the inquiry compellingly suggests that the ABCC has contributed to the increased productivity and levels of industrial peace evident in the building and construction industry today.

However, the job is not yet done. Recent examples show the remnants of a culture of intimidation and harassment still exist in the industry. The ABCC has proved its worth in checking the abuse of union power and reducing unlawful conduct, and it has contributed to increases in industry pay rates.

The benefits of the ABCC to not only the industry but the whole economy are clearly visible in the Econtech reports with the ABCC, in conjunction with related industry reforms, adding about 10 per cent to productivity in the industry and 1.5 per cent to GDP.

---

42 CCF, *Submission 2*, p. 12.

43 CCF, *Submission 2*, p. 13.

44 MBA, *Submission 5*, pp. 9–11.

These important gains should not be placed at risk at any time, particularly in these uncertain economic times.

Coalition senators do not support the thrust of the Government senators' majority report. Their report appears to argue for the principles underpinning the *Building and Construction Industry (Restoring Workplace Rights) Bill 2008* but then, incongruously, it recommends that the bill not proceed. This may reflect ambivalence – even division – in the ranks of Government senators about the BCII Bill and the ABCC. The position of Coalition senators is clear: we reject this bill.

In addition, Coalition senators do not support Recommendations 1 and 2 of the Government senators' majority report.

**Senator Gary Humphries**

**Senator Mary Jo Fisher**

**Deputy Chair**



**Senator Michaelia Cash**