

**CIVIL CONTRACTORS FEDERATION
SUBMISSION TO SENATE EDUCATION,
EMPLOYMENT AND WORKPLACE RELATIONS
COMMITTEE**

**INQUIRY INTO *BUILDING AND CONSTRUCTION*
INDUSTRY (RESTORING WORKPLACE RIGHTS) BILL
2008**

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The Civil Contractors Federation

The Civil Contractors Federation (CCF) welcomes the opportunity to make a submission to the Senate Education, Employment and Workplace Relation Committee inquiry into the Building and Construction Industry (Restoring Workplace Rights) Bill 2008.

The CCF is the member based representative body of civil engineering contractors in Australia providing assistance and expertise in contractor development and industry issues.

Through our Federation we represent 2000 small, medium and large sized contractors who in turn employ more than 40,000 people.

Our members are involved in a variety of projects and activities including the development and maintenance of civil infrastructure such as roads, bridges, dams, wharves, commercial and housing land development.

At an individual project level CCF members play a very strong role in ensuring Australia's long term prosperity through constructing:

- roads and bridges which connect communities and allow delivery of freight in a timely and cost effective manner;
- hospitals and medical facilities;
- schools and training facilities for young Australians;
- railways which support our mining and resources sector;
- Ports and wharves for Australian exports; and
- Reservoirs, pipelines and desalination plants to help manage limited resources such as water.

The delivery of such important nation building projects is reliant upon a productive and industrially peaceful building and construction industry.

Such peace and productivity is all the more critical as we face uncertain economic times and a real and present threat of serious economic downturn.

1 Overview of our position

CCF members strongly support the retention of the Australian Building and Construction Commission as committed to by the Government until 2010. We also strongly support the Government's commitment to a new inspectorate for the building and construction industry to be established within Fair Work Australia.

Civil Contractors range in size from small business right through to major engineering companies. Whilst industrial harmony is critical for all our members, smaller contractors are particularly vulnerable to industrial disruption, intimidation and coercion. All matters the ABCC is empowered to deal with.

For a number of our members with heavy sunk capital, margins are slim and can be eliminated by a few days of disruption.¹ Our members collectively are major employers and have little capacity to absorb costs other than in reducing staff.

We note and welcome the Minister for Employment and Workplace Relations the Hon Julia Gillard's recent comments that:

"... (the new system) will be overseen by a new independent umpire with teeth: Fair Work Australia...it will ensure compliance with new laws, with a new inspectorate to investigate and enforce breaches, including where necessary through the courts."²

¹ The CCF gave evidence to this effect before the Senate *Employment, Workplace Relations and Education References Committee* on 21 May 2004

² Minister for Employment and Workplace Relations – speech to the National Press Club 17 September 2008

The CCF believes that the ABCC and the legislation³ 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.⁴

Our submission sets out in detail why we believe that the passage of the Bill would be seriously damaging to the construction and building industry and ultimately the Australian economy.

A return to disputation and loss of productivity on building and construction sites would be particularly concerning at this time. With tightening credit markets, certainty of construction costs will be vital if Australian companies are to be able to secure finance for major projects on commercially attractive terms. It may also seriously undermine the Government's stated commitment to infrastructure development – a reform which the CCF warmly welcomes and which is long overdue.⁵

Finally, it has always been the CCF position that the laws administered by the ABCC should apply equally to both employers and employees.

³ The Building and Construction Improvement Act 2005, the Workplace Relations Act 1996 and the Independent Contractors Act 2006

⁴ See Economic Analysis of building and construction industry productivity – 2008 Report prepared by Econtech available at www.abcc.gov.au

⁵ The Infrastructure Australia Act establishes Infrastructure Australia and in the 2008-09 Budget the Government announced the establishment of a Building Australia Fund.

2 Background to the ABCC and the BCII

2.1 Royal Commission into the Building and Construction Industry (Cole Royal Commission)

It has been over 5 years since the report of the Royal Commission into the Building and Construction Industry (the Cole Royal Commission).⁶

The Royal Commission was heavily criticized but it is important to note that:

- A Royal Commission is the ultimate form of Inquiry in our parliamentary and democratic system. It is never established lightly.
- The Royal Commission takes its evidence on oath, it can compel witnesses to appear and can take serious action if parties refuse to cooperate with it⁷.
- Ultimately in the case of a number of Royal Commissions the inquiry results in action taken by Prosecutors in the criminal courts for example the HIH Royal Commission.

That such a Commission with its powers of compulsion should have been necessary in respect of the building and construction industry is testament itself to the seriousness of the problems bedeviling the building and construction industry.

The Royal Commission was damning⁸. It found a widespread disregard for the rule of law occurring through out Australia and that the culture underpinning the building and construction had not changed (despite a number of previous inquiries).⁹

⁶ Commonwealth of Australia *Final Report into the Building and Construction Industry* February 2003 available at www.royalcombcgi.gov.au

⁷ Note that at a Commonwealth level the extensive powers available to a Royal Commission as per the Royal Commissions Act 1902.

⁸ Commonwealth of Australia *Final Report into the Building and Construction Industry* Summary of Findings and Recommendations opcit pages 5-14

⁹ Commonwealth of Australia *Royal Commission into the Building and Construction Industry Reform – Achieving Cultural Change* opcit volume Eleven Appendix A

It is important to reflect on the actual findings of the Royal Commission. The Commission stated:

“At the heart of the findings is lawlessness. It is exhibited in many ways. There are breaches of the criminal law...There are breaches of laws of general application to all Australians where the sanction is a penalty rather than possible imprisonment. ..When courts or tribunals become involved and make orders, some union participants, particularly the CFMEU, regard such orders as not binding upon them. ..Underlying all of this lawlessness is an understanding and expectation, which reflects the reality, that those engaging in unlawful conduct will not be held to account by criminal proceedings, proceedings for penalties, or for loss occasioned to others by unlawful conduct.”¹⁰

To address these issues the Royal Commission made a number of recommendations. Of particular importance to subsequent developments and the present proposal to abolish the ABCC and its supporting legislation were the following recommendations for reform:

“That there be an act of special application to the building and construction industry, called the *Building and Construction Industry Improvement Act*. This Act will amend aspects of the *Workplace Relations Act 1996* (C’wth) as it applies to the industry. It will also legislate for many other reform proposals;

“...(amongst them being)... the creation of the Australian Building and Construction Commission (ABCC). This body will be responsible for monitoring conduct in the industry, and prosecuting unlawful industrial action, breaches of freedom of association laws, and addressing all complaints of unlawfulness in the industry. It will become a ‘one stop shop’ for all

¹⁰ Commonwealth of Australia Royal Commission into the Building and Construction Industry *Summary of Findings and Recommendations* opcit page 6 paragraph 17

complaints. It will have the power to commence proceedings to restrain unlawful industrial action, and to restrain secondary boycotts”¹¹

Commissioner Cole made these recommendations after having sat for 171 public sitting days, and having heard from 765 witnesses.

The reform process is far from complete and failure to retain a tough regulator with strong investigation powers could see a return of the undesirable and non productive behavior highlighted by the Royal Commission.

2.2 The Building Industry Taskforce and the ABCC

In response to the Cole Royal Commission’s findings, the Building Industry Taskforce was established in October 2002. The Taskforce produced two important reports, *Upholding the Law: Findings of the Building Industry Taskforce (September 2005)* and *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce (March 2004)*.

On the 1st of October 2005 the ABCC was established.

It is important to spend a few moments on the Taskforces reports because they highlight why Parliament ultimately gave the ABCC strong compliance and investigation powers.

The 2004 Report notes that:

“ (the Report)... provides an overview of the environment in which the Taskforce operates, highlighting in particular the continuation of unlawful and inappropriate behaviour in the building and construction industry... Behaviours that are unacceptable by general community standards are the norm in the industry. Too many Australians attempting to earn an honest living have become victims of the industry’s blatant disregard for the law. The report

¹¹ Ibid p14 paragraph35

also highlights the overwhelming need for the Taskforce to be given greater powers”¹²

The 2005 Report once again painted a stark picture of what was occurring in the industry:

“During the 35 months of the Taskforce’s existence it has uncovered an unparalleled disregard for the rule of law. While the Taskforce has been determined to rid this industry of intimidation, thuggery and illegal conduct, in reality, while it has had encouraging initial success, the process of reform has just begun. Industry specific legislative reform is the only way that the challenges associated with establishing the rule of law in the industry can be met. With the passage of the Building and Construction Improvement Bill 2005, and the establishment of the ABCC on 1 October 2005, permanent and fundamental reform of the building and construction industry throughout Australia can finally be achieved”¹³

The CCF believes that the ABCC has been a real success in the short time it has been in operation. This is not just in relation to actions it has taken, but its presence generally and its ability to take strong action if required.

3 Cultural change

The Royal Commission and subsequent taskforces and ABCC all focus on the need for cultural change.

Indeed “Entrenched behavior” was the focus of our previous submission in 2004 to the Senate Employment, Workplace Relations and Education References Committee *Building and Construction Inquiry*. At that time we made the point that there have been many attempts at reform in the industry

¹² Commonwealth of Australia, Interim Building Taskforce, *Upholding the Law – One year on: findings of the Interim Building Taskforce*, March 2004 at p iv

¹³ Commonwealth of Australia, Taskforce, *Upholding the Law – Findings for the Building Industry Taskforce*, September 2005 at page i

and yet behaviors had not altered. We strongly submitted that it was time for a sea change and that we needed a new set of rules.¹⁴

Lasting change in an industry, workplace, organization or society is only possible if the culture from which the behavior emanates itself changes. A history of decades of bad behavior, intimidation and coercion will hardly be resolved in the 3 years since the ABCC has been operating.

By way of illustration cultural change in the community also can take a considerable period of time. Examples that come to mind are:

- the change in cultural attitudes to drink driving and speeding – once again involving education and strong legislation;
- the compulsory wearing of seat belts – once again backed by education and sanctions; and
- the changes to the acceptability of smoking - backed by education and health campaigns and legislation prohibiting smoking in certain places.

Recent losses in the Corporate Sector have also focused on the need for cultural change. In some cases this has been at the heart of the actions by regulators such as APRA and ASIC.

All of this reinforces the point that deep seated unacceptable cultures may take many years to change and that they involve a combination of education and strong regulation and sanctions.

That this change process is far from complete in the construction industry was highlighted with two recent and disturbing reports of intimidation and harassment.

¹⁴ Senate Employment, Workplace Relations and Education References Committee Hansard Friday 21 May 2004 page 90 - Evidence to the Committee Mr Williams

The first incident was reported in the Melbourne Age on the 10th of September 2008 it relates to a death threat made to an executive of Bovis Lend Lease. That report also stated that the Senior Deputy President Ian Watson in hearing the case “told those in the hearing that any behavior thought to be intimidatory of witnesses would result in jail terms.”¹⁵

The second incident that has been widely reported relates to the ABCC itself. The Australian on 1 September reported that ABCC inspectors were abused and intimidated on a Melbourne construction site. The behavior being of such a serious nature that it is currently under police investigation.¹⁶

4 Real reform brought about by the ABCC and the BCCI Act.

4.1 Measurement of improvements in the industry

The ABCC has commissioned detailed work from Econtech which has shown that there have been significant improvements across a range of productivity measures since the BCCI Act commenced operation.

They show:

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

They also show the benefit of the reforms to the economy more generally:

- GDP is 1.5% higher than it otherwise would be;

¹⁵ Ben Schneiders, *Death threat for Bovis Boss* The Age 10 September 2008 p3

¹⁶ Matthew Franklin *Union Battle undercut by thugs* The Australian 1 September p1

- The CPI is 1.2 % lower than it otherwise would be;
- The price of dwellings are 2.5% lower than they otherwise would be;
- and
- Consumer living standards have improved reflected in an annual economic welfare gain of \$5.1 billion.¹⁷

4.2 Threat to inflation and home loan affordability

These gains must not be lost. The current economic debate has centred very heavily on the risk of inflation to the Australian economy. A “break out” in the building industry in costs and charges could be critically damaging to the Australian economy overall.

Further the government has announced a number of very important reforms in housing affordability it is vital that such programmes not be undermined by a loss of productivity and increasing costs in the building and construction industry.

4.3 Qualitative research – measuring cultural change

Qualitative proof of cultural change is difficult to provide in a hard data form.

However the Committee is referred to recent qualitative research that is publicly available in the report prepared for the Australian Constructors Association¹⁸

That Report found that that the climate in the construction industry amongst those surveyed¹⁹ “has improved markedly in recent times...the industry is now characterised by greater stability, fewer unnecessary disruptions and

¹⁷ Economic Analysis of Building and Construction Industry Productivity: 2008 Report ABCC at www.abcc.gov.au

¹⁸ Australian Constructors Association *A report on changes following reforms flowing from the Building and Construction Industry Royal Commission as observed by managers, superintendents and subcontractors* (August 2007) Jackson Wells Morris Pty Ltd

¹⁹ Those surveyed in the study were at the middle management or senior supervisor level. Similarly, the sub-contractors interviewed were generally senior people in medium-sized firms.

more cooperation. These improvements have made it easier to work in the industry and this has led to significantly better productivity and improved efficiency for many operators as well as, in the main, a more satisfied workforce.”²⁰

Our discussions with members reflect the very strong view in the industry generally that behaviors have genuinely improved. There is also a strong countervailing view however that those changes are not yet embedded.

This is also borne out in recent media reports.²¹

Additionally the CCF believes that the settled workplace environment that has been brought about by the ABCC has allowed employers and most importantly employees to feel confident in entering into Employee Collective Agreements.

Recent data from the Workplace Authority confirms that in the six months period from 1 October 2007 to 31 March 2008, 512 Employee Collective Agreements were approved compared to 290 Union Collective Agreements in the construction industry. That is just under two thirds of collective agreements did not involve unions.²²

In other words employees felt confident bargaining directly with their employer.

²⁰ Australian Contractors Association *opcit* page 3

²¹ We also note a view of improvements in the industry which was recently reflected in a media interview given to Stateline Victoria see Transcript *Building Unions intimidated by watchdog bullying* Broadcast 12 September 2008.

²² See http://www.workplaceauthority.gov.au/graphics.asp?showdoc=/workplacere/relations/march_quarter_2008.asp

5 Why should there be a separate law for Building and Construction Industry

The second reading speech states that the building industry “should be regulated just like any other industry”.

We note the findings of the Royal Commission that the industry was singular and that it exhibited conduct which departed from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy.²³

Industry specific legislation is neither unique or unusual.

Examples of industry specific legislation include:

- 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.

²³ Commonwealth of Australia *Final Report into the Building and Construction Industry* opcit p6 at paragraph 16

6 The rights conferred by the Act and claims made about them

The Second Reading Speech makes the claim that it is “an affront to democracy to have workplace relations laws that take away the right to silence, deny people their choice of lawyer, provide powers to compel evidence with the possibility of jail for non-compliance”

This claim needs to be examined carefully within the context of the BCII Act.

6.1 The power to compel a person to attend for examination, give answers, to provide information and to produce documents.

Many regulators such as ASIC, the ATO and the ACCC have the power to compel people to attend to give answers on examination, to provide information and to produce documents. We would refer the Committee to the recently released Report by the Administrative Review Council (ARC) *The Coercive Information-gathering Powers of Government Agencies*.²⁴ which has a comprehensive list of compulsory powers in relation to the agencies reviewed.

Coercive powers seek to strike a balance between the importance of the uncovering of wrong doing for society generally as against the rights of a particular individual particularly the right at common law to silence (see paragraph 6.2 below)

The 2004 Queensland Law Reform Commission Report *The Abrogation of the Privilege against self incrimination*²⁵ has a very extensive and thorough examination of these competing considerations. The issues were also

²⁴ Administrative Review Council *The Coercive Information-gathering Powers of Government Agencies* Report No 48 May 2008

²⁵ Queensland Law Reform Commission *The Abrogation of the Privilege against self incrimination Report* 59 December 2004

extensively canvassed in the Senate Legal and Constitutional References Committee Report *Investigatory powers of the Australian Securities Commission 1995* and also the ARC Report referred to previously. Indeed the Report notes:

“ Coercive information-gathering powers are important administrative and regulatory devices. It is essential that, when using them, agencies impinge on the rights of individuals only in a proportionate and justifiable way.”²⁶

The ARC has also developed a series of 20 best practice principles.²⁷

In the case of the ABCC as outlined earlier in this submission the culture underpinning the building and construction industry is such that compulsory powers are regrettably necessary.

However it is important to note that these powers have not been given without important statutory safeguards.

6.2 The privilege against self incrimination and important safeguards in the BCII Act

Aligned with the power of compulsion is the removal of the so called privilege against self-incrimination.

The privilege “provides an immunity against compulsion to give evidence or to supply information that would tend to prove one’s own guilt. The privilege against self-incrimination protects not only from direct incrimination, but also from making a disclosure that may lead indirectly to incrimination or to the discovery of other evidence of an incriminating nature.”²⁸

²⁶ Administrative Review Council *opcit* p5

²⁷ *Ibid* p xi

²⁸ See QLRC page 2 but also see page 17 to 18 inclusive for a discussion about privilege. Note also ARC Report *opcit* at Chapter 6

Where Statutes remove this privilege it is nearly always aligned with provisions which deal with how that information obtained by compulsory powers may be used. In other words there are careful safeguards built into many Acts to protect the rights of an individual who is compulsorily required to provide information.

The protections can contain both “use” and or the more extensive “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.

An example might be where a compulsory obtained document leads investigators to discover other evidence which implicates the person.

The BCII Act contains both use and derivative use immunity, something which has not been highlighted in the debate so far.²⁹

It also provides a more general protection from liability in Section 54. That section provides protection from liability for a person who provides information, a document, or answers a question in good faith where that act might be a contravention of another act or might cause loss to another person which could found civil proceedings.

These are substantive and real protections. These protections are not present in all Acts with similar compulsory powers.³⁰

²⁹ Section 53 (2) provides that the information, answer or document obtained cannot be used in evidence against the person except in very limited circumstances.

³⁰ See ARC Report opcit page 49 for an interesting discussion of use immunity in various agencies.

6.3 Guidelines in Relation to the use of the compulsion powers

We note that the ARC Report contains a set of best practice principles that it considers will ensure that the agencies “use the powers effectively, efficiently and with due regard to individual rights”.³¹

We note also the statement from the ABCC that

“The ABCC conducted a thorough review of its procedures against the 20 best practice principles.

The review found that the ABCC legislation and procedures complied with all the principles that are applicable to its use of the power. Some minor adjustments have been made to our procedures to further improve the rigour of our processes and usefulness of the information we provide witnesses.

This means that the use of the compulsory power by the ABCC is strictly in accordance with the best principles of sound public administration and accountability.”³²

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”.

It should be noted that:

- The power to issue a notice under Section 52 can only be exercised by the ABC Commissioner or Deputy Commissioner where the

³¹ Letter to Attorney General from the ARC President Ms Jillian Segal 1 May 2008 enclosing ARC Report

³² Email Alert ABCC 2 October 2008

Commissioner believes on reasonable grounds that a person has information relevant to an investigation.

- Persons subject to the compulsion power have the right to legal representation – on the ABCC’s own evidence 64% of witnesses had availed themselves of such representation.³³

6.4 Public accountability of the ABCC

There is also some public commentary in relation to the accountability of the ABCC.

In response to this we would ask the Committee to note that:

- 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 overview³⁴;
- the ABCC and its Commissioner and senior staff have also appeared before the Senates Education, Employment and Workplace Relations Committee as part of the Estimates process;
- The Minister for Workplace Relations and Employment can be asked questions in the Parliament about the activities of the ABCC.

7 Abolishing the Act abolishes the Federal Safety Commissioner

We note that in repealing the BCII Act the office of the Federal Safety Commissioner (FSC) will also be abolished. This would seem inconsistent with the stated concerns in relation to occupational health and safety in the Second Reading Speech.

³³ The Hon John Lloyd Australian Building and Construction Commissioner Senate Education Employment and Workplace Relations Committee *Estimates* June 3 2008 Hansard page 123.

³⁴ See ABCC Report on the Exercise of Compliance powers of the ABCC for the period 1 October 2005 to 31 March 2008.

CCF believes that the FSC has an important role to play in improving occupational health and safety in the industry. We also note that the Australian Government Building and Construction OH&S Accreditation Scheme would also be abolished. We also believe that this would be a backward step.

8 Conclusion

The CCF believes very strongly in the importance of the retention of a strong building and construction industry regulator, underpinned by compulsory powers.

If Australia is to meet tomorrow's challenges in economically volatile times it essential we build on and consolidate the real gains that have been made in the building and construction industry as a result of the presence of the ABCC and the BCII Act.