

STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND
WORKPLACE RELATIONS

**Putting the
“it’s not wrong, it’s just illegal”
mentality behind us**

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

SUBMISSION BY THE
**NATIONAL ELECTRICAL AND
COMMUNICATIONS ASSOCIATION**



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EXECUTIVE SUMMARY

According to Senator Siewert of the Australian Greens, the *Building and Construction Industry Improvement Act 2005* ('the BCII Act'):

"..... is the former Government's Work Choices agenda at its most extreme and no-one that purports to be bringing fairness back to Australian workplaces could support the BCII Act or the ABCC [Australian Building and Construction Commission] continuing any longer and certainly not until 2010.

*The ABCC should be abolished and the building industry regulated just like any other industry....."*¹

This is the same message and rhetoric that construction unions and the Australian Council of Trade Unions ('ACTU') have been remorselessly hammering at the Federal Government since the last election.

In this submission NECA:

1. Rejects the assertions of the Australian Greens (per Senator Siewert), the construction unions and the ACTU in respect of the BCII Act.
2. Notes that the BCII Act and the Australian Building and Construction Commission ('ABCC') not only preceded the previous Government's Work Choices reform agenda, but were introduced for reasons "*specific*" to the history and problems of the building and construction industry.
3. Opposes the passing of the Australian Green's *Building and Construction Industry (Restoring Workplace Rights) Bill 2008* ('the 2008 Bill').

¹ Senator Siewert, Australian Greens, Second Reading Speech, Building and Construction Industry (Restoring Workplace Rights) Bill 2008.

In making this submission, NECA supports the Federal Government's stated position (and leadership) to keep existing legislative and regulatory arrangements in place for Australia's building and construction industry (including the BCII Act).²

Notwithstanding that NECA will continue to argue for the maintenance of the ABCC beyond the Federal Government's proposed transitional date of 31 January 2010 (after which time ABCC responsibilities will transfer to a specialist division of Fair Work Australia),³ NECA notes that the Federal Government is yet to release draft legislation on this matter and therefore reserves further (or more specific) comment on the ABCC for the appropriate time (including as part of the review by the Honourable Murray Wilcox QC).⁴

THE NATIONAL ELECTRICAL AND COMMUNICATIONS ASSOCIATION ('NECA')

Who is NECA?

The National Electrical and Communications Association (NECA) is the only national industry association representing contractors responsible for the delivery of electrical, voice and data communications systems in Australia. It has approximately 5,000 businesses as its members, which employ approximately 50,000 tradespeople.

² Forward with Fairness Policy Implementation Plan, August 2007, p.24, found at: http://www.alp.org.au/download/now/070828_dp_forward_with_fairness_policy_implementation_plan.pdf

³ Ibid

⁴ See 'Terms of Reference' for Wilcox Inquiry, found at: <http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/Termsofreference.htm>

The Association actively represents the needs and entitlements of contractors within the Australian Government and industry, ensuring members' needs are heard. NECA works to steer the future of the industry on critical issues such as licensing and regulations, training and education, skills shortages, workplace relations and occupational health and safety. Through membership on more than 30 Standards Australia Technical Committees and other relevant industry bodies, NECA represents its members' interests on important matters that affect their businesses.

NECA provides members with timely information and advice, and practical tools to make business more efficient, safe and cost-effective. With offices in every state, NECA employs specialists in industrial relations, occupational health and safety, management, education and training, human resources and technology. NECA expertise and the skills it is able to offer to members, form an integral component of member business operations.

NECA is a significant employer through Group Training Companies

NECA has a major interest and influence in the area of training and development of young and mature age workers in electrotechnology, through Group Training Companies and other industry development activities.

NECA Group Training Companies currently select and employ approximately 2,000 quality apprentices in electrotechnology. These apprentices are then hosted by electrical and communications contractors.

Networks and affiliations

NECA's network of contacts and affiliations is extensive. NECA is represented on or affiliated with the following organisations:

- Australian Construction Industry Forum (ACIF) Council
- EE-OZ Industry Skills Council
- Australian Chamber of Commerce and Industry, General Council
- Australian Chamber of Commerce and Industry, Labour Relations Committee
- Australian Chamber of Commerce and Industry, OH&S Committee
- CONNECT Superannuation Fund
- NESS Superannuation Fund
- International Forum of Electrical Contractors (IFEC)
- International Association of Electrical Contractors (AIE)
- TRAA Central Trades Committee
- Copper Development Centre, Smart Wiring Project
- National ICT Industry Alliance
- Australian Cabler Registration Service Pty Ltd (ACRS)
- Standards Australia
- Australian Refrigeration Council (ARC)
- Federation of Asia and Pacific Electrical Contractors Associations (FAPECA).

THE INDUSTRY

The electrical, voice and data/communications contracting industry (otherwise known as the 'electrotechnology industry') includes Companies undertaking the installation, maintenance or repair of electrical, voice, data, communications and/or telecommunications wiring and systems, as well as the electrical/electronic/communications aspects of air conditioning, refrigeration, fire-protection and security alarm systems.

NECA estimates that the overall value of the electrotechnology industry is approximately \$4.8 Billion.⁵

Whilst Work in the electrotechnology industry is carried out in and across a variety of sectors (eg commercial construction, industrial, residential), for the purposes of this submission, NECA's focus is upon the 50% or more of work that is carried out by electrotechnology contracting Companies who are "*Building Industry Participants*"⁶ and perform work within the definition of "*Building Work*" under Section 5 of the BCII Act.

⁵ See *NECA Industry Study*, January 2003, Peter Morris and John Houghton, found at: http://www.neca.asn.au/filelibrary/AUS/Publications/NECA_Industry_Study_Report_2003.pdf

⁶ See Section 4 of the BCII Act

SUBMISSION OVERVIEW

The industrial and commercial practices of the Australian building and construction industry ('the industry') have long been the subject of public scrutiny, and since the early 1990s, have seen two Royal Commissions (1992 NSW; 2003 Commonwealth).

Rightly so, the industry has been a closely examined sector of the Australian economy, subject to fundamental legislative and regulatory change arising from the findings of the *Royal Commission into the Building and Construction Industry* ('the Cole Royal Commission') in 2003. Most importantly, these reforms have altered the way in which industrial relations is now conducted in the industry. What the Cole Royal Commission documented was a pattern of unlawful activity so widespread and so accepted (as the normal way of doing business) that the practices and attitudes of "*it's not wrong, it's just illegal*" were systemic.

NECA, which represents approximately 5,000 businesses, who in turn employ approximately 50,000 tradespeople, has always been a strong advocate for better workplace relations in the industry via a separate legislative framework that applies equally to employers, employees and their respective representative bodies.

NECA points out that as a direct result of the BCII Act (monitored and enforced by the ABCC), Companies within the industry have faced considerable challenges and implemented many changes to their systems, procedures and operations, including investing heavily in the provision of training to ensure compliance with the new laws. This has enhanced the role of the industry as a world class building and construction sector, an important

contributor to national growth and a significant employer of working Australians.

NECA submits that the industry is one of the most progressive and strategically important sectors of the Australian economy, especially in terms of Federal Government's proposed nation building and infrastructure agendas. Indeed, an industry so directly (and indirectly) vital to Australia's GDP and employment, simply cannot go back to the cost overruns, violence, intimidation, undesirable behaviours and anti-competitive conduct that affected the industry in the past.

In this submission NECA will highlight, by reference to the operation of specific parts of the BCII Act, why the Federal Government needs to be supported in its endeavours to maintain existing legislative and regulatory arrangements across the industry.

THE BCII ACT IS NOT WORK CHOICES

The concept of a separate (and more specialised) system of workplace relations for the building and construction industry (including the BCII Act and the ABCC) **did not** arise from the previous Federal Government's Work Choices reforms in 2005. Rather, it arose from a report commissioned by the (then) Office of the Employment Advocate ('OEA') in 2000-2001 that identified a range of concerns about illegal activity in the industry, including: theft, fraud, money laundering, collusion, intimidation by unions, breaches of freedom of

association laws, false invoicing and the involvement of criminal figures in the industry.⁷

The Federal Government's response was to establish a Royal Commission, headed by the Honourable Terence Cole QC (the Cole Royal Commission) in August 2001.

Commissioner Cole handed down an interim report in August 2002, whilst his final report was provided to the Governor-General in February 2003 and tabled in Federal Parliament in March 2003.⁸ It is noted that in October 2002, on the basis of Cole's interim report findings, the Federal Government moved quickly to establish the *Interim Building Industry Taskforce* to investigate and take legal action in relation to some of the "already identified" breaches of law.

The final findings of the Cole Royal Commission are well documented and mirror conduct and behaviour throughout the industry. They include:

- efforts by unions to unlawfully or inappropriately regulate the industry;
- threats, intimidation and thuggery;
- widespread disregard of enterprise bargaining laws and contractual obligations;
- disregard of freedom of association laws;
- unlawful strikes and disregard of no-strike pay laws;
- inappropriate industrial pressure; and
- breach of right of entry laws.

⁷ Department of Parliamentary Library, Bills Digest Nos 129-130, 2003-2004

⁸ Royal Commission into the Building and Construction Industry, Home Page, found at: <http://www.royalcombcgi.gov.au/index.asp>

As a result of these findings, Commissioner Cole made 212 final recommendations for regulatory reform (both structural and cultural)⁹, including:

- a) the proper application of the rule of law;
- b) the prohibition of “*pattern bargaining*”;
- c) industry specific legislation;
- d) the establishment of an independent body with appropriate enforcement powers (currently the ABCC); and
- e) better accountability/penalty mechanisms.

On the basis of these final findings and recommendations, in March 2004 the Federal Government established the Building Industry Taskforce (‘BIT’) as a permanent body. BIT operated until the creation of the ABCC (under the BCII Act) on 1 October 2005. In its time, BIT received some 3,367 inquiries, investigated over 500 matters and placed 29 matters before the Courts.¹⁰

From a legislative point of view, the Federal Government sought to introduce in November 2003 the *Building and Construction Industry Improvement Bill 2003*, however, this Bill was blocked by the Senate and ultimately lapsed upon the calling of the 2004 election. Upon its re-election in October 2004 (with a Senate majority from 1 July 2005), the previous Federal Government introduced the *Building and Construction Industry Improvement Bill 2005*, which was passed by Federal Parliament in September 2005 and took effect from 1 October 2005 (as the current BCII Act).

⁹ See Final Report, Royal Commission into the Building and Construction Industry, found at: http://www.royalcombcgi.gov.au/docs/finalreport/V01Summary_PressFinal.pdf

¹⁰ Building Industry Taskforce, Activities Report, September 2005. Found at: <http://www.abcc.gov.au/abcc/>

NECA submits that the above history and chronology of the BCII Act, culminating in the legislative and regulatory arrangements in place today, can be clearly differentiated from the previous Federal Government's Work Choices reforms. Claims to the contrary (in support of the 2008 Bill) are not only less than candid, misinformed and misguided, but fail to consider:

- a) the history of the BCII Act (and the ABCC) as set out above;
- b) the recent results (and applauded/reported successes) of the BCII Act (and the ABCC) in addressing 'lawlessness' in the industry (discussed further below);
- c) the current Federal Government's acknowledgement that the BCII Act was not part of the previous Federal Government's Work Choices reforms, ie via Federal Labor's policy promise to maintain existing arrangements (albeit with the ABCC in a different form); and
- d) the Federal Government's clear statements that the "*practices of the past [in the building and construction industry] are not part of Labor's future for industrial relations*".¹¹

¹¹ Forward with Fairness Policy Implementation Plan, August 2007, p.24, found at: http://www.alp.org.au/download/now/070828_dp_forward_with_fairness_policy_implementation_plan.pdf

COERCION RE ‘NOMINATED PERSONNEL’

NECA’s May 2002 Submission to the Cole Royal Commission¹² (‘NECA’s 2002 Submission’), stated in part (at pp. 10-11):

“Generally, the ETU (the Electrical Trades Union) will demand (usually from the builder, otherwise from the contractor) that the main electrical contractor on a project must employ the ETU nominated person as the shop steward. If employed, that person will generally act as the shop steward for all electrical workers in the project regardless of who their employer is. On medium to large projects the role of shop steward becomes virtually a full time job.

NECA members advise that the union nominated shop steward becomes the one significant risk variable, which they are unable to control or manage on their projects.

Shop stewards can turn a profitable project into one where the contract makes a significant loss. Evidence of this can be found on the National Gallery of Victoria project.”

The Cole Commission recommended inclusion of a provision to address these inappropriate demands (not only by unions, but also head/major contractors on site). In this regard, Section 43 of the BCII Act reads:

“43. Coercion in relation to engagement etc. of building employees and building contractors

(1) A person (the **first person**) must not organise or take action, or threaten to organise or take action, with intent to coerce another person (the **second person**):

(a) to employ, or not employ, a person as a building employee; or

¹² NECA Submission to Cole Royal Commission, May 2002. Found at: <http://www.royalcombc.gov.au/snapshot/snapshot/086/0553/0283/0011/view.htm>

- (b) *to engage, or not engage, a person as a building contractor; or*
- (c) *to allocate, or not allocate, particular responsibilities to a building employee or building contractor; or*
- (d) *to designate a building employee or building contractor as having, or not having, particular duties or responsibilities.”*

NECA submits that Section 43 of the BCII Act is essential, not only to productivity and cost outcomes on projects in the building and construction industry, but to the contracting employer’s right to determine who he/she will employ on any particular project. Given that there is no equivalent provision in the *Workplace Relations Act 1996* (‘the WR Act’), the repeal of the BCII Act by the 2008 Bill, including Section 43, will clearly enable these inappropriate, costly and coercive practices to return without legal remedy.

UNLAWFUL INDUSTRIAL ACTION

NECA submits that the provisions of the BCII Act in respect of unlawful industrial action are fair and reasonable, especially when one re-reads the scandalous findings of the Cole Royal Commission on the issue and considers various decisions of the Courts in the last 3 years enforcing the BCII Act.

In terms of reasonableness and fairness, it must be noted that the sanctions under the BCII Act will **not** apply to:

- protected industrial action taken in accordance with the WR Act;

- action taken by employees authorised or agreed to, in advance and in writing, by their employer¹³;
- action taken by an employer authorised or agreed to, in advance and in writing, by his/her employees¹⁴;
- action taken by employees based upon a reasonable occupational health and safety ('OH&S') concern¹⁵.

By way of context (and reality), one need only review (as one of many examples¹⁶) the decision of the Supreme Court of Western Australia (per Le Miere J) in *Leighton Contractors Pty Ltd v CFMEU*¹⁷ to confirm that the industry needs its own specific legislation and regulation (ie beyond that contained in the WR Act), as follows:

*“Importantly, there is evidence that the employees have engaged in extensive unlawful industrial action on the project since July 2004. Even after the s 127 order made by [Commissioner] Gregor on 6 December 2005 there has been industrial action - two unauthorised meetings of an hour each, a two day strike on 25 January 2006 and then the 13 day strike from 24 February 2006. **That course of conduct shows that the existence of the s 127 order is not of itself sufficient to ensure that no unlawful industrial action will take place.**”¹⁸*

(our emphasis)

¹³ See Section 36(1)(e) of the BCII Act

¹⁴ See Section 36(1)(f) of the BCII Act

¹⁵ See Section 36(1)(g) of the BCII Act

¹⁶ See also *Pine v Multiplex Construction (Vic) Pty Ltd* [2005] FCA 1428; *Carr v AMWU* [2005] FCA 1802; *Employment Advocate v Barclay Mowlem Construction Ltd* [2005] FCA 431; *Stuart-Mahoney v CFMEU & Ors* [2008] FCA 1426

¹⁷ [2006] WASC 144 (unreported)

¹⁸ *Ibid*, at [42]

PATTERN BARGAINING

In relation to pattern enterprise bargaining ('pattern bargaining'), NECA's 2002 Submission to the Cole Royal Commission states (at p.6):

"Pattern agreements are not the preferred form of industrial agreement but are the best that was able to be negotiated given the legislative framework and the contractors industrial dispute tolerance.

The conditions in [pattern] EBAs are in some States creating an unregulated de-facto industrial jurisdiction beyond the legislated jurisdiction.

Committing to a pattern agreement is often the defining point between a business that is dynamic, lateral and flexible, compared with a business that must commit to a regime of pattern agreement regulation, high wages, inflexibility and therefore the nature of the work that can be sought."

For the purposes of these submissions, NECA submits that given pattern bargaining outcomes are not arrived at via genuine workplace negotiation, they are arrangements that hold no place in Australia's workplace relations landscape (other than with the genuine consent of all parties involved).

NECA acknowledges the Federal Government's policy position "*that Labor will not allow industrial action to be taken in respect of pattern bargaining*"¹⁹, however, as the Cole Royal Commission has emphasised, special additional sanctions (beyond those contained within, or proposed for, the WR Act) are required to deal with the militant unions operating in the building and construction industry and ensure that pattern bargaining is nothing other than

¹⁹ Forward with Fairness Policy Implementation Plan, August 2007, p.22, found at: http://www.alp.org.au/download/now/070828_dp_forward_with_fairness_policy_implementation_plan.pdf

a 'rare' event by consent²⁰. Attempts by unions to engage in pattern bargaining in the industry, including via the use of indirect coercion, closet intimidation and/or unlawful industrial action, must be met with the strongest of sanctions. In this regard, the penalty provisions and injunctive remedies available under Section 39 of the BCII Act are reasonable, appropriate and must be maintained.

THE ABCC & CODE COMPLIANCE

Two of the most important reforms flowing from the Cole Royal Commission have been the establishment of the ABCC and Federal Government's requirements for compliance with the *National Code of Practice for the Construction Industry* ('the Code'). These matters will now be discussed in turn.

The ABCC

Whilst the purpose of the BCII Act is to "*provide an improved workplace relations framework for building work to be carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole*"²¹, such purposes (or objects) are of little relevance without a proper compliance and enforcement regime.

²⁰ See, for example, *Electrical Contractors Association of New South Wales v Electrical Trades Union of Australia, New South Wales Branch and Anor* [2003] NSWIRComm 404 (unreported)

²¹ See Section 3 of the BCII Act

Pursuant to Section 10 of the BCII Act, the Australian Building and Construction Commissioner (through the ABCC) has been the 'industry spearhead' responsible for:

- a) monitoring and promoting compliance with the BCII Act, the WR Act and the *Independent Contractors Act 2006* ('the IC Act');
- b) investigating suspected contraventions of the BCII Act, the WR Act, the IC Act, federal industrial instruments and the Code;
- c) providing advice to and/or representing building industry participants;
- d) instituting (or intervening in) proceedings in respect of building industry participants; and
- e) utilising powers of inspection and entry.

The results of the ABCC's efforts speak for themselves, adding at least 10% to productivity in the industry. The 2008 *Econtech Report* (released 1 August 2008)²², which updates the economic analysis in its 2007 report, uses data from the Australian Bureau of Statistics, the Productivity Commission, Rawlinson's Australian Construction Handbook and recent studies to make the following key findings:

- a) 10.5% outperformance in construction industry labour productivity compared to predictions based on historical performance to 2002;

²² *Economic Analysis of the Building and Construction Industry: 2008 Report*, Econtech Pty Ltd.
Found at: <http://www.abcc.gov.au/NR/rdonlyres/236C2F25-E2CB-4D77-9615-6B3762CF832D/0/EcontechproductivityreportAugust2008.pdf>

- b) 13.6% increase in multifactor productivity in the construction industry over the four years to 2005/06;
- c) 12.2% increase in non-residential construction industry multifactor productivity in the five years to 2007;
- d) 7.3% productivity gain in commercial building relative to residential building since 2004;
- e) 10% addition to labour productivity in the construction industry due to the ABCC and associated reforms; and
- f) working days lost due to industrial disputes in the industry plummeting from 120,000 in 2005, to 15,000 in 2006, to only 7,000 in 2007.

Further, Econtech predicts that the industry wide impacts of the ABCC's activities (in 2007-2008) include:

- i) GDP being 1.5% higher than it otherwise would be;
- ii) CPI being 1.2% lower than it otherwise would be;
- iii) the price of dwellings being 2.5% lower than they otherwise would be; and
- iv) improved consumer living standards reflected in an annual economic welfare gain of \$5.1 billion.

NECA congratulates the ABCC for its past and on-going efforts in policing workplace relations in the building and construction industry and submits that

based upon the ABCC's documented efforts alone, the passing of the 2008 Bill (and inter alia the repeal of the BCII Act and the abolishing the ABCC) would be an absurd outcome not only for building industry participants, but all Australians.

Code Compliance

Whilst not directly covered by the BCII Act²³, the obligations (and reach) of Code, and its related *Implementation Guidelines*²⁴, have ensured that self-compliance and self-assessment in relation to proper industrial practices and the rule of law (including the BCII Act) are now a commercial and financial imperative for nearly all participants in the construction industry. In this regard, the Code has had a marked effect in the industry upon:

- registered and unregistered industrial agreements;
- union right of entry;
- the selection and use of subcontractors;
- project agreements and 'jump-up' clauses;
- pattern agreements;
- dispute resolution procedures; and
- OH&S.

The fact that the ABCC has primary responsibility for monitoring compliance with the Code and investigating alleged breaches of the Code has ensured not

²³ It is noted that in April 2006, the Hon. Kevin Andrews MP, then Minister for Employment and Workplace Relations, announced that the BCII Act would not be amended to include the Code. See Commonwealth Government Media Release re National Building Code, 5 April 2006.

²⁴ *Implementation Guidelines for the National Code of Practice for the Construction Industry*, DEWR, Reissued June 2006.

only that building industry participants follow the Code, but that the purpose and objects of the BCII Act are also upheld in practice.

NECA submits that the 2008 Bill, abolishing the role of the ABCC, will have a direct and detrimental effect upon Code compliance in the industry. For this reason alone, the 2008 Bill must be rejected.

CONCLUSION

The BCII Act has now been in place for nearly three years. Change in the building and construction industry has been dramatic and beyond expectations. Productivity, worker numbers, profitability and wages have soared. Cultures of honesty and trust are emerging.

But with the job far from complete, the Australian Greens, supported by construction unions and the ACTU, seek the immediate undoing of the BCII Act and the ABCC - without transition and without any consideration of the outcomes of the Wilcox Inquiry (to report in 2009). Such an approach is pre-emptive and neither sensible, nor appropriate. It cannot be countenanced. Too much is at stake. We must learn from past failures.

As the Cole Royal Commission stated in its summary of findings:

“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.*²⁵

Whilst the laws may have changed through the introduction of the BCII Act and the creation of the ABCC, the culture identified by the Cole Commission (as summarised above) **has not** changed. So much so is evidenced by recent ABCC data showing that in 2006-07 (alone) the ABCC had 112 investigations continuing, already pursued 216 investigations into suspected contraventions of workplace laws, had a further 367 reports subject to preliminary investigation and instituted 26 penalty proceedings.²⁶

NECA has made this submission not only to highlight that the industry must be able to continue to put the *“it’s not wrong, it’s just illegal”* mentality behind us, but to lend its support to the Federal Government’s position of keeping existing legislative and regulatory arrangements in place in the Australian building and construction industry.

²⁵ Cole Commission Report Summary, pp. 6. Found at:
http://www.royalcombcgi.gov.au/docs/finalreport/V01Summary_PressFinal.pdf

²⁶ See ABCC Annual Report 2006/2007. Found at:
<http://www.abcc.gov.au/abcc/Reports/AnnualReport0607/InvestigatingContraventions.htm>

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