

# EXECUTIVE SUMMARY AND KEY FINDINGS

## **Parliamentary Scrutiny**

While the Legislation Committee recommended that the bills re-establishing the ABCC be passed, the *Legislation* Committee did not have the benefit of a significant body of material this Committee has received in evidence that seriously undermines the case for its re-establishment.

By 2 December 2013, only a very small part of the Parliament's scrutiny of the bills had been completed while at the same time the government and supporters of the re-establishment of the ABCC were calling for the Senate to effectively abandon its role and simply pass the bills with minimal scrutiny.

The Legislation Committee was given a mere 18 days in which to consider the bills and produce its report, submitters were given a mere 8 days to make submissions on a wide range of complex matters and there was only one public hearing on 26 November 2013 during which three and a half of hours was available for the Committee to receive evidence.

Since the tabling of the Legislation Committee report on 2 December 2013, the second report of the 44<sup>th</sup> Parliament of the Parliamentary Joint Committee on Human Rights was tabled on 11 February 2014 and Alert Digest No. 9 of the Senate Standing Committee for the Scrutiny of Bills was tabled on 11 December 2013.

Both reports raise very serious concerns that the bills to re-establish the ABCC involve the limitation, curtailment and extinguishment of a wide range of civil, human and political rights of people working in the building and construction industry.

Both committees have written to the Minister for Education and Employment seeking detailed evidence to support the government's assertions that the interference with human rights contained in the bills is necessary, reasonable and proportional. The government has yet to provide responses to the concerns of either of those committees. The submissions of the Minister to this inquiry is not of a sufficient detail and quality to satisfy the very high standard of proof required to establish that human rights should be interfered with in the manner that the ABCC bills do.

This inquiry has provided the opportunity for a wide range of views to be ventilated in detail on a range of complex matters and for contentious submissions to be tested.

## **Key Findings**

### ***Cole Royal Commission***

The Cole Royal Commission was instituted by the Howard government to provide the quasi-legal cover for firstly its legislation to establish the former ABCC and secondly, for its WorkChoices legislation. It was only after July 2005 when the Howard government secured control of the Senate in its own right that these pieces of legislation were able to pass into law.

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The origins of the former ABCC, its predecessor the Building Industry Taskforce and the current Fair Work Building Industry Inspectorate lie with the Cole Royal Commission. It is the Cole Royal Commission that proponents of the ABCC claim provides the legal, intellectual and policy rationale for the existence of the ABCC in its pre-2012 form and for its re-establishment.

The chapter examines the role and function of Royal Commissions generally and follows this with an examination of the findings and recommendations of the Cole Royal Commission in relation to the Commissioner's conclusions on building and construction industry productivity.

The Committee is of the view that the Cole Royal Commission's findings on productivity were deeply flawed and gave rise to a cottage industry of economic modelling and reporting that in subsequent years has been almost entirely devoted to propping up the Cole Royal Commission's flawed productivity analysis.

The chapter also examines the Cole Royal Commission's "findings" in relation to alleged unlawful and criminal activity and finds that the record of referrals to criminal prosecutors and the almost complete absence of successful criminal prosecutions of building and construction industry participants in the decade since the Cole Royal Commission produced its final report indicates that highly inflammatory claims of endemic thuggery, violence and criminal activity in the building and construction industry are wildly over-stated.

The Committee finds that the Cole Royal Commission findings and the processes adopted in arriving at them, combined with an almost complete absence of prosecutions arising from the matters referred by the Cole Royal Commission to prosecutors are not a sufficient basis on which the Parliament ought to consider passing the bills to re-establish the ABCC.

### ***Human Rights Implications***

This chapter considers the effect of the bills to re-establish the ABCC on the human rights of people working in the building and construction industry.

The re-establishment of the ABCC in the manner proposed in the bills would infringe on common law rights and privileges such as those relating to the burden of proof applying to an accused person, the right to silence, the privilege against self-incrimination, freedom from retrospective laws, equality of treatment before the law and infringement of the separation of powers by delegating law making power to the executive.

The government has failed to meet any of the tests demanded by the Parliament that must be met in order for the Parliament to consider legislating to limit and extinguish the human rights of people affected by the bills.

The government asserts that the limitations to be placed on human rights by the bills are in pursuit of a legitimate objective. Mere assertion alone cannot be sufficient to persuade the Parliament to agree to the limitations. The government has carried the onus throughout the debate over the re-establishment of the ABCC to establish that there is a rational connection with the limitation of human rights proposed and the

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stated objective of the limitation. The government also carries an onus to establish that the limitations on human rights in the bills are proportionate to the stated objective.

The evidence produced to this inquiry leads the Committee to the view that it has not done so and no amount of unsubstantiated, hysterical hyperbole alleging rampant lawlessness in the industry will substitute for the detailed evidence the Parliament requires before it should legislate away people's rights.

### ***Productivity***

Chapter four considers the claims made by supporters of the ABCC that its presence in the building and construction industry has caused productivity growth in the industry of unprecedented proportions.

The Committee finds that claims of enhanced productivity caused by the ABCC based on reports prepared by Econtech and Independent Economics and recycled endlessly are not supported by the evidence. They are made on the basis of deeply flawed analyses that have not withstood scrutiny by submitters to this inquiry and recent appraisal by the Productivity Commission.

They have been produced over the years by vested interests for the purpose of propping up the original flawed findings of the Cole Royal Commission in relation to productivity in the building and construction industry and to prop up the case for the existence of the ABCC and its coercive powers. They do not provide a credible economic case for the re-establishment of the ABCC.

Proponents of the ABCC have been unable to answer the detailed criticism of the assumptions and methodology adopted by Econtech and Independent Economics. Despite this, supporters of the ABCC including the Prime Minister, the Minister for Employment and employer organisations continue to use the reports as a bedrock argument in support of draconian laws.

### ***The “uniqueness” of the building and construction industry***

A significant part of the case for the establishment of a specialist industrial relations regulator in the building and construction industry rests on the premise that the industry is somehow unique among industries.

Much of the “uniqueness” of the industry is to be found in assertions and allegations made by supporters of the ABCC that the industry suffers from endemic “lawlessness” that only a specialist regulator such as the ABCC can deal with. Some have even gone so far as to suggest that the ABCC will be able to stamp out alleged criminality in the industry. This is nonsense.

The ABCC will not have any jurisdiction to investigate any form of criminality in the industry. Indeed, if were to do so it could irrevocably prejudice any possible criminal prosecution that might be launched by competent law enforcement agencies.

The ABCC will only have jurisdiction to investigate and prosecute civil offences under designated industrial relations laws. It will not be a crime fighting body and the Committee views with concern the impression, created through an orchestrated and deliberate campaign, that the re-establishment of the ABCC will somehow be a solution to allegations of criminality in the industry.

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Furthermore, evidence received by the committee from law enforcement and criminal intelligence agencies in the public hearing on 17 March 2014 does not support the claims that the industry is a “hotbed of lawlessness”. The rate of referrals of alleged criminality from the former ABCC to Victoria Police between 2005 and 2012 ran at an average of about two per year and resulted in just one successful prosecution in which a diversionary penalty was imposed.

Evidence from law enforcement agencies indicates that to the extent criminals may be involved in the industry, this does not make the building and construction industry unique. Criminals will go where they think they can make a profit including the security industry, the heavy haulage industry, the liquor industry and the banking and financial services industries to name just a few.

The Committee finds no case has been made out to single out the building and construction industry for the application of extraordinary industrial relations laws that remove basic rights enjoyed by all other Australians and target building workers and their unions in a most discriminatory way.

### ***Safeguards on the use of coercive powers***

Some of the coercive powers proposed to be conferred on the ABCC are of a type normally reserved for law enforcement and national security agencies responsible for investigating serious crime, threats to national security and criminal breaches of corporate law. Law enforcement and national security agencies’ powers are subject to strict oversight and reporting requirements that include safeguards aimed at preventing misuse and abuse of their powers and protection of civil rights. The bills to re-establish the ABCC involve a significant watering-down of the existing safeguards and oversight of Fair Work Building and Construction’s coercive powers.

While the Ombudsman is provided an oversight role under the bill, it is only after-the-event monitoring and no meaningful remedial action is available in the event of misuse or misapplication of the proposed coercive powers of the ABCC.

The Committee finds that the safeguards and oversight of the proposed ABCC’s quite extraordinary coercive powers to prevent misuse and abuse of those powers and to protect human rights are limited and wholly inadequate.

The Committee does not accept the argument that the proposed safeguards over the ABCC’s coercive powers similar to those applying to the use of coercive powers by other agencies are in any way similar. The coercive powers proposed for the ABCC are extraordinary for the civil jurisdiction.

The Committee does not share the view expressed by the government that extensive safeguards over the use of such extraordinary powers as those proposed are unwarranted or inconvenient. On the contrary, they are essential.

### ***Related matters***

The Committee has considered two matters related to the re-establishment of the ABCC.

The first of these is the rate of insolvencies in the building and construction industry and volume of unpaid debts left in the wake of insolvency. It were replicated across

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the rest of the economy it could quite possibly render the country a commercial and industrial wasteland.

The Australian Securities and Investments Commission produce regular statistical publications on insolvencies.<sup>1</sup> The construction industry accounted for 23% of all insolvencies in Australia in 2010-11, three times more than the number of insolvencies in accommodation and retail businesses. In 2010-11, construction industry insolvencies left in their wake \$2.64 billion in unpaid debts with the most likely return to creditors being zero.

The Committee views with concern the likelihood that this level of unpaid debt might create a “honey-pot” effect sufficient to attract individuals and organisations involved in debt-collecting who in turn may have links to criminal elements.

In the Committee’s view, this potential poses a far more serious threat to the rule of law in the industry than collective bargaining over site agreements, which is the real target of much of the enforcement activity to be engaged in by the ABCC if it is re-established.

The second related matter is the level of non-compliance with industrial laws in the domestic house construction sector. The reason this issue is related to this inquiry is because the domestic building industry is often held up as the model for cost reduction and industrial relations that should be followed by the commercial construction sector. The domestic building industry is largely outside the scope of the bills to re-establish the ABCC and would not be subject to its jurisdiction.

Victorian domestic builders employing first year carpentry and brick laying apprentices were the subject of a compliance audit program conducted by the Fair Work Ombudsman (FWO) which ran from August 2011 to June 2012. The compliance audit was implemented due to the constant flow of complaints received by the FWO from the domestic building industry and the vulnerable nature of apprentices working within the industry.

Of the 164 employers who had their records assessed for compliance with hourly rates of pay, allowances, record-keeping and pay slip obligations, only 10 (6.1%) were compliant. The 154 (93.9%) employers in contravention were found to have a total of 251 contraventions which resulted in 121 employees sharing in nearly \$193 000 in owing entitlements.

Better rates of compliance, though still unacceptably low, at less than 50% were found in similar compliance audits in Tasmania, Western Australia, South Australia and the Northern Territory.

The results of these compliance audits and the rate of non-compliance with legal obligations on the part of employers are quite shocking. They are even more shocking

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1 ASIC, *Insolvency and company registration statistics*, February 2014, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Insolvencies%2C+terminations+%26+new+reg+stats+portal+page?openDocument> (accessed 25 March 2014).

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because they involve young, vulnerable workers. If, as appears might be the case, the results of these compliance audits are an indication of the culture of the domestic building industry, it is hard to imagine a worse model on which to base the future direction of the commercial building industry.