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Submission to the Senate Select Committee relating to the establishment of a National Integrity Commission

20 April, 2016



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Chamber of Commerce
and Industry



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1 Introduction

The Australian Chamber of Commerce and Industry (Australian Chamber) welcomes the opportunity to provide a submission on the proposed establishment of a National Integrity Commission.

The Australian Chamber believes a broad regulator should not stand as a substitute for a re-established Australian Building and Construction Commission (ABCC), nor should the proposed work of the ABCC be viewed as fitting into the work of a more general anti-corruption agency. Recent media coverage has created the false impression that restoring the ABCC is somehow unnecessary if a broader anti-corruption agency is created.¹

This submission argues for the restoration of the ABCC then addresses some of the Committee's terms of reference. On 18 April 2016, the bills to restore the ABCC were rejected by the Senate, but the Australian Chamber continues to believe that the re-introduction of the ABCC is vital, as we explain in our submission.

Given its terms of reference, the Committee's task is considerable. The time provided does not enable as comprehensive a submission as the Australian Chamber wishes to make. The Australian Chamber submits that the terms of reference could only satisfactorily be addressed following considerable research by the Government. Some of that work is currently underway in other inquiries mentioned in this submission.

In determining if a National Integrity Commission is necessary, the submission sets out the Australian Chamber's preferred approach.

First, there should be a risk-based analysis of where corruption is most likely to do the most damage. Secondly, the jurisdiction of current anti-corruption agencies, including the Australian Commission for Law Enforcement Integrity (ACLEI), should be assessed. Thirdly, only if the existing agencies are found to be inadequate should consideration be given to a new agency.

The Committee should adopt a risk-based approach in tailoring a response to the emerging issues of corruption.

2 The Argument for the Restoration of the ABCC

The building and construction industry has a cultural problem, particularly in the commercial sector. This problem means that there is:

- disregard for the law;
- important projects costing more and taking longer to complete than they should;
- use of members' funds by unions for improper purposes; and

¹ See for example H Aston, *PUP senator Dio Wang: 'Learn from China' and root out corruption at national level*: <http://www.smh.com.au/federal-politics/political-news/pup-senator-dio-wang-learn-from-china-and-root-out-corruption-at-national-level-20160210-gmq3w3.html#ixzz44pcKgr48>, 10 February 2016.



- extreme behaviours on sites that threaten harmony and wellbeing and which undermine collaborative management strategies.

The final report of the Heydon Royal Commission² shows the necessity for the re-introduction of the ABCC in order to effect cultural change in the building and construction industry. The main argument advanced in opposition to the bills to restore the ABCC³ is that there is no need for special laws for the building and construction industry and that the proposed laws unfairly single out the industry for treatment different to other industries. That argument is misconceived. The singular treatment is justified by the findings of the Heydon Royal Commission and three prior Royal Commissions⁴ which all indicated that special laws were required for the regulation of the industry, particularly its workplace relations arrangements.

The Heydon Royal Commission comprehensively considered this matter. The arguments in support of an industry specific regulator are forceful and cogent:

*One consideration which supports the need for an industry specific regulator is the high level of unlawful conduct in the industry. This is demonstrated by Appendix A to this Chapter. The sustained and entrenched disregard for both industrial and criminal laws shown by the country's largest construction union further supports the need. Given the high level of unlawful activity within the building and construction sector, it is desirable to have a regulator tasked solely with enforcing the law within that sector.*⁵

The Royal Commissioner addressed the argument that the ABCC did not deal with criminal behaviour as follows:

*The suggestion that the need for specific industrial regulation cannot be justified by criminal conduct occurring within the industry is misplaced in a number of respects. It ignores the fact that a lot of the criminal conduct for which unions and union officials are responsible arises in the context of breaches of industrial laws (either because it occurs in the course of contravening industrial laws, or because it constitutes a criminal contempt of orders of a court restraining contraventions of industrial laws) and out of a culture of defiance of all laws. It also ignores the ability of a dedicated industrial regulator to assist police, through referrals and information sharing, in combatting criminal activity within the industry.*⁶

The prior ABCC and the Fair Work Building and Construction agency (FWBC) have indeed been involved with referring matters to the police and other enforcement agencies as Table 1 shows. The Australian Chamber would like to see a greater number of referrals made where evidence of unlawful conduct is uncovered.

² Royal Commission into Trade Union Governance and Corruption 2015.

³ *Building and Construction Industry (Improving Productivity) Bill 2013 [No. 2]* and *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 [No. 2]*.

⁴ The Heydon Royal Commission mentioned the prior Royal Commissions at paragraph 2 of Appendix A to Chapter 8 Volume 5 of its final report thus: *The same issues have been identified in reports of three separate Royal Commissions conducted over the past 40 years: the Winneke Royal Commission in 1982, the Gyles Royal Commission in 1992 and the Cole Royal Commission in 2003.*

⁵ Royal Commission into Trade Union Governance and Corruption 2015, para 83 Chapter 8 Volume 5.

⁶ *Ibid*, para 84.

Table 1: ABCC/FWBC referrals by Financial Year

Fin Year	Law Enforcement
2005/06	2
2006/07	5
2007/08	5
2008/09	9
2009/10	4
2010/11	1
2012/13	1
2013/14	5
Total	32

The building and construction industry is too important for the Australian economy not to effect reform to change the unacceptable culture. The significance of the industry to the economy has been highlighted by Master Builders Australia:

The building and construction industry accounts for close to 8 per cent of gross domestic product, and around 9 per cent of employment in Australia. It makes an essential contribution to the generation of wealth and welfare of the community. At the same time, the wellbeing of the building and construction industry is closely linked to the prosperity of the domestic economy.⁷

Australia's changing economic conditions make it necessary to give attention to policy settings concerned with driving investment and job creation. The significant contribution of the building and construction industry to the Australian economy means that it has a critical role to play in rebalancing the economy. Infrastructure investment underpins economic growth and has an important part to play in maintaining Australia's living standards. However Australian governments are facing challenges in the provision of infrastructure due to growing community needs, an ageing population and declining revenue, factors which place significant pressure on government budgets. It is critical that public revenue is allocated in the most efficient way possible. Equally, the private sector should also be engaged to the maximum extent possible in the financing and delivery of infrastructure assets. This necessitates the creation of a regulatory environment conducive to private sector investment.

Workplace relations reform is required to address industrial behaviour that results in increased risk, anti-competitive practices, unnecessary delays and inefficiencies. Together these factors act as a disincentive to investment. The culture of industrial lawlessness that has been reported in multiple

⁷ Master Builders Australia, 2015/16 Pre-Budget Submission, February 2015, p. 2.



Royal Commissions, as mentioned above, and which is enduring in the building and construction industry warrants specific regulatory attention and has significant economic and social consequences.

The Australian Chamber's position is that a broadly based national corruption body would not be sufficient to effect the necessary change in the building and construction industry.⁸ The building and construction industry's entrenched problems extend beyond corruption and require deep-seated cultural change. The ABCC would have an effect on that culture and fulfil a role that has been identified as necessary by the highest level of inquiry in this country.

3 The ABCC fills a regulatory gap

There is clearly a regulatory gap in the building and construction industry where the powers of the FWBC are currently insufficient to effect necessary cultural change. In a report by Independent Economics⁹ the following deficiencies of the FWBC were identified:

- The circumstances under which industrial action attracts penalties are narrowed, to be in line with other industries.
- The maximum penalties applicable for breaches of industrial law have been cut, to be in line with other industries.
- The use of the compulsory examination notice powers is now subject to a number of restrictions. Despite acknowledgements that these powers have been useful in assisting investigations, the use of these powers has been significantly reduced.
- The FWBC cannot continue to participate in proceedings or initiate fresh proceedings on matters which have been settled between building industry participants.
- The right of union officials to enter work sites has been expanded to allow them to visit for the purpose of "discussions with potential members".

The restoration of the ABCC will fill that regulatory gap. The ABCC legislation deals with the first four of the deficiencies identified. The last matter is dealt with in Part 5 of the *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* currently before Parliament

For all of the reasons advanced in this submission, the Australian Chamber maintains the view that the Bills to restore the ABCC should be given fresh consideration by Parliament.

4 General Regulatory Gap?

Whether there is a wider gap to be filled by a broad-based anti-corruption agency is a more difficult question. Certainly, revelations about the worldwide use of shell companies to hide wealth¹⁰ have thrown a new light on practices that are unethical, potentially corrupt and potentially unlawful. These revelations show that more complex national and international business structures and

⁸ Referred to in *PM engages senator to win over crossbenchers on IR bills*, Workplace Express, 29 March 2016.

⁹ Independent Economics, *Economic Analysis of Building and Construction Industry Productivity: 2013 Update*, 2013, p iv.

¹⁰ See for example *Shell Games Hid Wealth* Australian, Financial Review, p. 36, 5 April 2016.



financial instruments to transfer and conceal illicit wealth have the capability to pose a significant challenge to law enforcement domestically and internationally.

The Australian Chamber notes that Wouters, Ryngaert and Cloots¹¹ have charted the substantial strengthening of the international anti-corruption legal framework over the past two decades. Their work also shows that international monitoring of national implementation and enforcement of some of these initiatives should be given additional impetus.

The role of a dedicated government agency with a broad anti-corruption remit, however, would be potentially more focused on corruption in the public sector rather than on community-based corruption. The latter is dealt with by Government enforcement agencies. Hence, it is the oversight of those agencies which often features in anti-corruption initiatives.¹²

Australia currently has legislative regimes in place which criminalise corrupt behaviours or which provide civil penalties, acting as a deterrent to their many forms. Corruption is combatted by federal and state laws involving civil and criminal sanctions. For example, the statute governing the New South Wales Independent Commission Against Corruption (ICAC) and its functioning has a broad definition of corruption. There are 25 offence typologies which amount to corrupt conduct set out in subsection 8(2).¹³ It is acknowledged, however, that the structure of the definition provisions in the relevant statute is complex and cumbersome and appears to require amendment.¹⁴ Research suggests that the investigation of corrupt conduct should be limited to conduct having the potential to impair the probity of an exercise of an official function by a public official.¹⁵

The research that identified the need for amendment of the NSW statute also isolated the reach of the other State anti-corruption statutes, a summary which is useful for the Committee's terms of reference:

- *Crime and Corruption Act 2001* (Qld), s 15: Basically the provision combines elements of ss 8(1) and (2) of the ICAC Act but appears to limit the scope of corrupt conduct to matters of probity.
- *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s 4: Again the provision borrows from the ICAC formulation but appears to be limited to the probity approach, with a focus on the honesty and trust of public officials.

¹¹ J Wouters, C Ryngaert and S Cloots *The International Legal Framework Against Corruption: Achievements and Challenges Melbourne Journal of International Law 2013 Vol 14 1*

¹² Numerous examples are available eg the Victorian Beach inquiry <http://www.parliament.vic.gov.au/papers/govpub/VPARL1978-79No32.pdf> and the Fitzgerald inquiry <http://www.ccc.qld.gov.au/about-the-ccc/the-fitzgerald-inquiry>

¹³ See also broader sweep of s 9.

¹⁴ G Griffith NSW Parliamentary Research Services *ICAC v Cunneen: the power to investigate corrupt conduct May 2015* [https://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/ICACvCunneen:thepowertoinvestigatecorruptconduct/\\$File/ICAC+v+Cunneen.pdf](https://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/key/ICACvCunneen:thepowertoinvestigatecorruptconduct/$File/ICAC+v+Cunneen.pdf)

¹⁵ Ibid esp at p 15.

- *Integrity Commission Act 2009* (Tas), s 4: It is explained in a commentary on the statute that “misconduct” does not include “administrative decisions or actions by public authorities where there is no suggestion that the decisions were made dishonestly or improperly”.
- *Independent Commissioner Against Corruption Act 2012* (SA), s 5: The terms “corruption, misconduct and maladministration” are separately defined, with corruption defined in connection with specified offences relating to breaches of public trust.
- *Corruption and Crime Commission Act 2003* (WA), s 4: The term “misconduct” is defined in relation to public officials and is restricted to the “probity” approach. Neither the term “corruption” nor “corrupt conduct” is defined.¹⁶

Accordingly, the agencies that currently exist to specifically deal with corruption at the State level are concerned with the oversight of the conduct of public authorities and officials.

Whether or not there is a regulatory gap or a need for an expanded jurisdiction for the existing Commonwealth public sector watchdog for enforcement agencies, the Australian Commission for Law Enforcement Integrity (ACLEI), is currently the subject of a separate inquiry, next discussed.

5 ACLEI and Anti-Corruption

On 6 March 2014, the Parliamentary Joint Committee on the ACLEI initiated an inquiry into the jurisdiction of the ACLEI.¹⁷ A number of submissions were made to the inquiry. No report date has yet been established for the Joint Committee’s findings. However, the outcome of that inquiry is important for the current inquiry. This is particularly the case because one of the terms of reference of the contemporaneous inquiry is the adequacy of ACLEI’s current jurisdiction. In that context, ACLEI’s role is to support the Integrity Commissioner to investigate law enforcement-related corruption issues, giving priority to systematic and serious corruption. The office of the Integrity Commissioner and ACLEI are established by the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (the LEIC Act). It is clear that the ACLEI’s reach and the jurisdiction of the LEIC Act is limited to certain law enforcement agencies and does not cover other public sector agencies or Departments.

In a submission¹⁸ to the Parliamentary Joint Committee on the ACLEI, the Attorney General’s Department provided an overview of the Australian Government’s approach to tackling corruption:

The Australian Government’s approach to preventing corruption is multi-faceted and diverse. Under this approach, Australia’s strong constitutional foundation, which establishes the separation of powers and guarantees the rule of law, is complemented by Australia’s multi-agency approach, in which a number of Commonwealth agencies play a role in combating corruption by promoting accountability, transparency and effective enforcement.

¹⁶ Griffith above n 14, pp 16-17.

¹⁷ On 6 March 2014, the Joint Committee on the Australian Commission for Law Enforcement Integrity initiated an inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity.

¹⁸http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Jurisdiction_of_ACLEI/Submissions submission number 3.



This holistic approach to anti-corruption includes standards and oversight, detection and investigation, prosecution and international cooperation.¹⁹

The same submission indicated:

The agencies which contribute to combating corruption at the Commonwealth level include:

- *Australian National Audit Office*
- *Australian Crime Commission*
- *ACLEI*
- *Australian Federal Police*
- *Attorney-General's Department*
- *Australian Public Service Commissioner*
- *Australian Securities and Investment Commission*
- *Australian Transaction Reports and Analysis Centre (AUSTRAC)*
- *Commonwealth Director of Public Prosecutions*
- *Commonwealth Ombudsman*
- *Department of Foreign Affairs and Trade (and Austrade)*
- *Department of Finance and Deregulation*
- *Inspector General of Intelligence and Security*
- *Office of the Australian Information Commissioner*
- *Parliamentary Services Commissioner*
- *Treasury*

The above-mentioned committee conducted a prior inquiry into the Operation of LEIC Act in 2011 and recommended that the legislation be amended to expand ACLEI's jurisdiction to include a number of Commonwealth agencies including the ATO, CrimTrac and the Department of Immigration.²⁰ The basis of this recommendation was that those agencies with the highest inherent corruption risk potential should be subject to ACLEI's oversight. A risk-based approach circumvents the difficult task of establishing which Commonwealth agencies have a law enforcement function for the purposes of law enforcement integrity oversight. This factor is especially important having regard to the extensive list of agencies involved with combatting corruption as indicated by the Attorney General's Department in the above extract. A risk management approach enables the application of measures (and resources) that are commensurate with the corruption risk.

It would be of use to the current inquiry if the findings of the Parliamentary Joint Committee could be available to inform the Committee of the need to establish an agency with a broader remit than currently possessed by the ACLEI. Alternatively, using the risk management approach favoured in the 2011 inquiry outcome, the Committee could be satisfied or otherwise that a potential expansion of the ACLEI's jurisdiction would be sufficient to satisfy any further corruption risks identified by the

¹⁹ N 18, para 1.

²⁰http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Completed_inquiries/2010-13/integrity_com_act/report/index



Joint Parliamentary Committee. Accordingly, it is vital that the current inquiry has regard to the work being undertaken through the separate inquiry underway.

6 Risk Based Approach the Key

De Koker and Harwood ²¹ have applied a risk based approach to an examination of government procurement. They have examined the potential for criminals and terrorism financiers to secure lucrative government contracts and concluded that this potential poses a risk to Australia's anti-money laundering, anticorruption and counter-terrorism financing objectives. Their article compares the customer due diligence measures that banks are required to implement to prevent money laundering and terrorism financing with the general supplier due diligence practices and processes of key Australian government departments and agencies. They identify various weaknesses in current procurement practices relating to standard contracts and argue that these render Australian public procurement vulnerable to criminal abuse, threaten compliance with its sanctions regime and potentially undermine the crime combating objectives of its money laundering and terrorism financing laws.

The authors call for a national re-design of public procurement at all levels of Government, federal State and local. The authors say that the design of an improved framework should ideally be informed by a more comprehensive understanding of current supplier risk assessment and mitigation practices in relation to standard as well as higher risk procurement contracts. It is this risk based approach that should be adopted across all levels of government and which links with the notion as applied to the application of limited resources in fighting corruption being targeted to higher risk areas. This approach enables the application of measures (and resources) that are commensurate with the corruption risk. No matter the agency or agencies which are in the future tasked with greater anti-corruption measures, the risk based approach should be adopted.

The Australian Chamber therefore submits that the Commonwealth should be asked to prepare a paper on existing Commonwealth arrangements to combat corruption, inclusive of current processes which are working well. The same work should include an analysis of current and emerging corruption risks and should examine a framework to ensure that Government is able to effectively address these risks into the future. That work should examine how the various State and territory agencies concerned with combatting corruption operate and how their work is able to be better coordinated having regard to the emerging risks identified. The Australian Chamber submits that it is only from detailed research of this kind that an optimal response to the Committee's terms of reference could be made.

Finally, we note that an inquiry by the Senate Economics Committee that also deals with issues of corruption approaches its report date of 1 July 2016. That inquiry relates to the measures governing the activities of Australian corporations, entities, organisations, individuals, government and related parties with respect to foreign bribery, with specific reference to the effectiveness of, and any possible improvements to, Australia's implementation of its obligations under:

²¹ de Koker, Louis; Harwood, Kayne --- "Supplier Integrity Due Diligence in Public Procurement: Limiting the Criminal Risk to Australia" [2015] SydLawRw 11



- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), and
- the United Nations Convention against Corruption (UNCAC).

The research undertaken in that context should assist with the identification of foreign bribery as an issue of corruption that should be given greater prominence when looking at existing Commonwealth arrangements to combat corruption having regard to the risk-based approach commended in this submission.

7 About the Australian Chamber

7.1 Who We are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council

7.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.



Australian Chamber Members

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