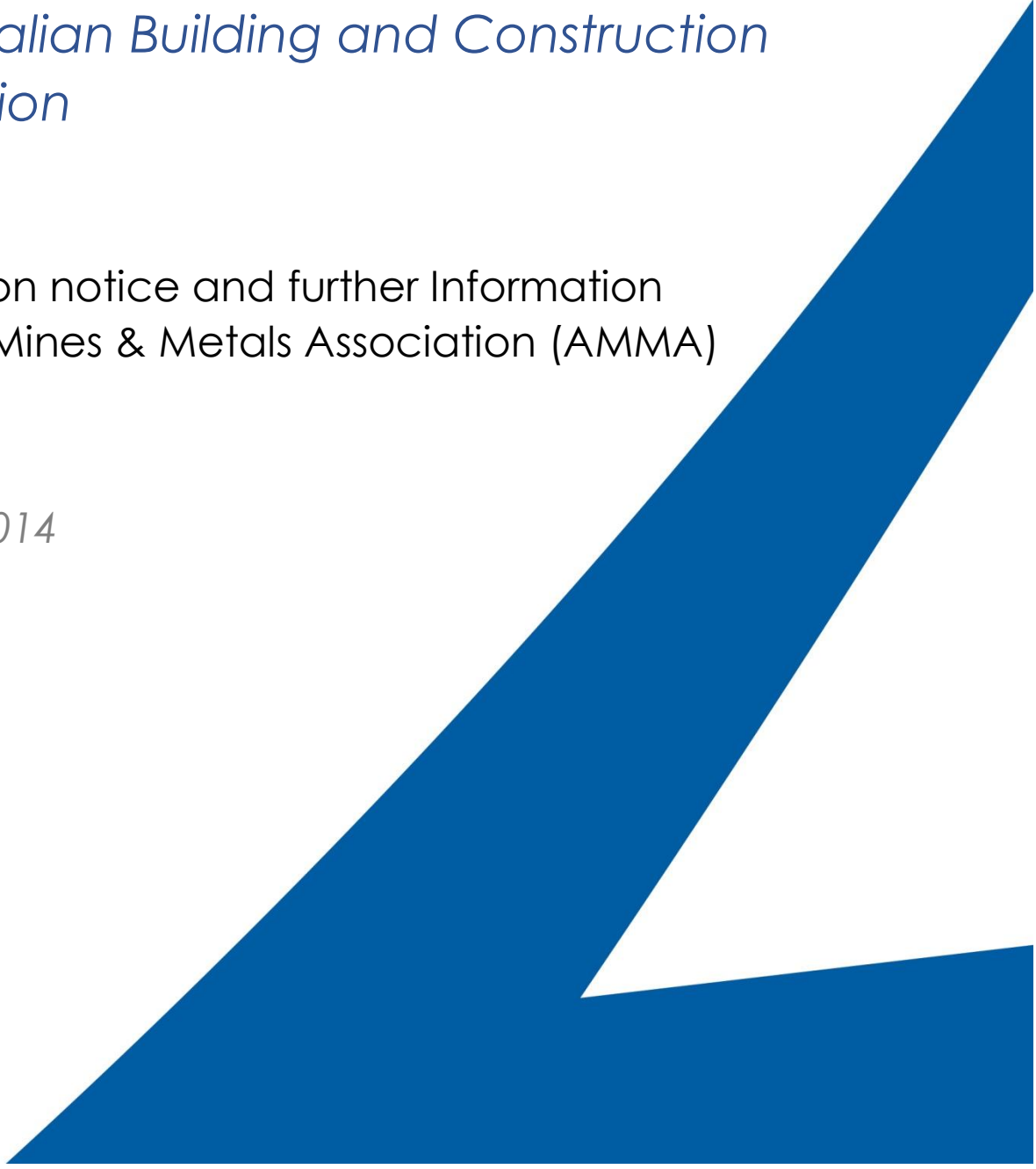


Senate Education and Employment References Committee

Government's approach to re-establishing the Australian Building and Construction Commission

Questions on notice and further Information
Australian Mines & Metals Association (AMMA)

February 2014



AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for more than 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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GPO Box 2933

Brisbane, QLD, 4001

Contact: Scott Barklamb - Executive Director, Policy and Public Affairs

Email: policy@amma.org.au

Phone: 07 3210 0313

Website: www.amma.org.au

ABN: 32 004 078 237

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INTRODUCTION

1. During the course of our oral evidence to the Committee on 6 February 2014, the Australian Mines and Metals Association (AMMA) consented to provide further assistance, to the extent we are able, on various matters/questions from the Committee by way of additional written information.
2. Senator Cameron also subsequently raised three cases and an additional query (via an email from the Committee on 12 February 2014) upon which he has sought AMMA's views.
3. Given the number and breadth of these matters, we have combined our responses into this further submission.

INCOME PROTECTION INSURANCE

4. Senator Back raised a question regarding industrial claims for employers to pay income protection insurance¹.
5. Feedback on this from the experience of AMMA members in bargaining includes:
 - a. Claims for some form of income protection coverage are being discussed in a growing number of negotiations.
 - b. In some cases they are not pressed by unions, and fall away as core concerns of pay and conditions are successfully resolved.
 - c. In others, employers agree to work towards brokering a corporate deal for all employees of the company, and consent to come back to employees / the union with options on coverage and cost. In other words, the topic having being raised, the employer consents to shop around for the best deal for all concerned.
 - d. The outcome of such discussions may see a provision included in an enterprise agreement, or not. Generally, we apprehend a union preference for an enforceable agreement term on this issue, including a term that details who will provide the income protection insurance.
 - e. Concerns can be raised to the extent that unions insist on particular providers, or appoint preferred providers (which in turn they seek to have included in all agreements to which the union is party as the only insurer).
 - i. There are self-proclaimed "industry" income protection funds, analogous to industry superannuation funds, with employer and trade union representatives on the board.

¹ Hansard, p.40

- ii. Where these are freely chosen or pursued by consent at the workplace level this may not be problematic.
- iii. However, it is difficult to see why a single, "whole of industry" approach needs to be pursued in what is a very heavily regulated (and properly underwritten) industry (i.e. the Australian insurance industry), and why greater choice and discretion should not be available to each workplace.
- iv. If the "industry" insurer is superior for the employees, it should be able to selected competitively and on its merits.

6. A so-called industry insurer approach may serve to:

- a. Prioritise the issue of income protection centrally as a standard union claim. However, in some instances income protection insurance may not actually be a priority for the employees at a particular workplace, and such a claim would serve to displace something else which may have been important to the employees and their employer. It can in short be a centralised union priority, which may not be an individual employee priority.
- b. Stifle competition, and by setting a single insurer for which the union will enter into agreements fail to guarantee or ensure the best income protection cover is delivered for the persons covered.
- c. Reduce democracy and personal financial discretion, because the decision on choice of preferred insurer has been taken by the union centrally, prior to the consideration of the agreement at the particular workplace / by an individual.
- d. Entrench an "us and them" attitude as the employer and employees are robbed of capacity to choose an insurance provider (or panel of providers) in which all staff, including management, might participate.
- e. Create potential risks and conflicts of interest (real or perceived), including where unions may be insisting on union owned (or controlled, affiliated or endorsed) insurance products.

7. There may also be an unexplored area of legal liability if the income protection insisted on by the union is not optimal for an employee and that employee subsequently suffers a circumstance which requires a pay-out, and that pay-out is suboptimal.

8. Plaintiff lawyers may at some stage become interested in any liabilities for an employer and union who jointly chose an insurance product for an employee which did not deliver to that employee the level of benefit another commercially available product may have delivered. In other words if someone (here the union and employer) have robbed an individual of a choice, and they suffer a loss as a result compared to an alternative choice they may have made, they may have grounds to litigate seeking damages.

9. Ultimately, one approach which should be possible is that the employer agree to provide a given amount towards such cover as part of a negotiation and to facilitate a direct debit from payroll to each employees chosen income protection insurer. Then the employee could choose, and not be bound to a single union nominated insurer. This would also raise the prospect of such monies going towards broader life insurance style products, or a product mix that may be suitable to each employee and their stage of life / priorities.

CASES RAISED BY SENATOR CAMERON

10. We received an email from the Committee on 12 February 2014 requesting our assistance with three cases and an additional question from Senator Cameron.
11. We wish to provide the committee with the following general comments in response to these cases and the selective quotation and presentation of passages from them raised by Senator Cameron.

The ABCC overwhelmingly got it right

12. ABCC annual reports are getting a little hard to find online, however, even in its final period of operation under Labor, its 2011/12 Annual Report contains the following:

TABLE 2.22 RESULTS OF PROCEEDINGS 1 JULY 2011 – 31 MAY 2012

State	2011-12
Successful	25
Unsuccessful	2
Discontinued	1

13. As the report indicates *"Twenty-eight cases were completed in the reporting period, twenty-five of those were successful"*.
14. That's a success rate of 89% (and we suspect a very low rate of discontinuance compared to other prosecuting agencies, some of which omit their withdrawn matters from the success statistics they publish, inflating the picture of their overall success in prosecutions).
15. By way of comparison, the Victorian Director of Public Prosecutions (DPP) reports in its most recent Annual Report *"Guilty outcomes have been achieved in 88 per cent of matters, either as convictions or guilty pleas"*².

² Office of Public Prosecutions Annual Report for 2012-13 [Download PDF \(3.8 MB\)](#), p.8

16. The ABCC data is for completed cases during the final phase of the ABCC, and the success levels reflect investigations and events during the earlier operation of the agency (i.e. pre-the transition to the FWBC, and the matters determined in 2011/12 concerned events some period prior).
17. It shows an overall level of prosecutorial success which is not reflected in the selection of cases identified by Senator Cameron. The ABCC's overall record of success is also not reflected in the isolated and unrepresentative comments reproduced from the three selected cases.

An unrepresentative selection of decisions

18. To put it bluntly, in making prosecutions, "you win some, you lose some", which is as it should be.
19. However, on any reasonable reading - the ABCC lost very few, and its decision outcomes should be properly understood as:
 - a. A substantial record of success in making successful prosecutions.
 - b. A very small number of negative judicial comments regarding its investigations and prosecutions.
20. The three decisions raised by Senator Cameron are highly selective and can, in light of the preceding data, not be taken as a reliable reflection or sample of how the ABCC operated or pursued its prosecutions.
21. In fact the only reliable data, across the ABCC's work, indicates a near 90% success rate in prosecutions.
22. We also note that the ABCC was specifically asked about judicial criticism of its prosecutions in Senate Estimates in early 2009 (indicating this line of criticism is not new) and provided the following reply (reproduced in full³):

DEEWR Question No. EW1155_09

The Chair asked on 26 February 2009, EEWL Proof Hansard page 28

Question: Could you provide the Committee with all the judicial criticism you have received including criticism from the AIRC?

Answer: The Office of the Australian Building and Construction Commissioner has provided the following response.

Of the 87 proceedings initiated by the ABCC/BIT judicial criticism has occurred in three court proceedings and one Australian Industrial Relations Commission proceeding.

3

http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCgQFjAA&url=http%3A%2F%2Fwww.aph.gov.au%2F~%2Fmedia%2Festimates%2FLive%2Fest_ctte%2Festimates%2Fadd_0809%2Fanswers%2FEW1155_09.ashx&ei=zrkGU77hHMTFkwWomYDwCw&usg=AFQjCNF9 WEFP9I1adtoh5T G9fQDyJPzg&bvm=bv.61725948,d.dGl&cad=rja

Judicial Criticism

Ponzio v B&P Caelli Construction Pty Ltd [2006] FCA 1221- North, J.

Justice North criticised the ABCC for taking proceedings for what he considered a minor contravention of strike laws.

Pine v Seelite Windows & Doors Pty Ltd [2005] FCA 500 - Finklestein, J:

Justice Finklestein criticised the ABCC for commencing a proceeding which was regarded as unnecessary.

Lovewell v Carroll QUD 427 of 2007 – Spender, J

Justice Spender criticised the ABCC for commencing a proceeding he regarded to be without merit.

AIRC Criticism

Criticism - Bias

Martino v McLoughlin [2007] 717 – SDP Watson

SDP Watson criticised the ABCC Inspectors' method of interview and recording of statements.

23. So, of 87 proceedings to that point, three attracted judicial criticism, along with one non-judicial criticism from the non-judicial AIRC.
- a. That is, at worst, concerns were raised regarding just 4.5% of the matters litigated to finality by the ABCC.
 - b. As we understand the earlier question and answer on notice, this success rate would also cover the period in which the BCII Act 2005 was new and the ABCC was finding its feet and applying its powers for the first time.
 - c. This makes the paucity of judicially criticised matters all the more striking.

Old news

24. The three cases cited are also not fresh material by any means:
- a. The *Lovewell* decision was raised in Senate Estimates in early 2009, and addressed by way of an additional written reply.
 - b. The *Duffy* matter was raised in Senate Estimates in early 2010.
 - c. Senator Cameron was provided with an answer to a question on notice regarding the *Stephenson* matter two years ago, again arising from an estimates hearing during the previous Parliament⁴.

⁴ http://www.aph.gov.au/~media/Estimates/Live/eet_ctte/estimates/add_1112/answers/EW0995_12.ashx

Mistakes are made

25. Prosecutions should be pursued where there are reasonable chances of success. However:
- a. All public prosecutors (both criminal and other) pursue a range of cases with a range of success.
 - b. No agency will ever have a 100% success rate in prosecutions, nor should it in our legal system.
 - c. All prosecutorial agencies occasionally incur the wrath of the courts in bringing matters, including where witnesses do not deliver the evidence expected or provide what is required to successfully prosecute the case.
 - d. A level of occasional judicial criticism goes with the territory of prosecution.
26. For the concerns implicit in raising these cases to be borne out, there would need to be evidence that the ABCC was:
- a. Somehow significantly more prone to error and judicial criticism than comparable agencies enforcing the rule of law and bringing prosecutions.
 - b. These problems to be a direct function of the legislative structure and responsibilities of the ABCC, and somehow inherent in the fundamentals of the ABCC model recommended by Royal Commissioner Cole and included in the 2005 BCII legislation.
 - c. No such evidence exists. In fact all available evidence is that the ABCC was quite successful in prosecuting matters successfully without significant adverse judicial comment (which is in the end mere *obiter* comment in any event). There is no evidence to support the concerns some might seek to read into the three decisions raised by Senator Cameron.
27. It is also important to recognise that both the Fair Work Ombudsman and Fair Work Building and Construction (the inspection and enforcement agencies put in place by the previous ALP government) have been subject to judicial criticism and reductions in the award of penalties:
- a. For example, in *New Image Photographics*⁵, the Federal Court found that “misleading” press releases issued by the Fair Work Ombudsman should reduce the penalty given to a business found to be underpaying one of their workers.
28. There have also been non-judicial criticisms, including by members of the Parliament of the conduct of FWO investigations into the Church of Scientology⁶, and into the well-publicised matters regarding the HSUA and the former member for Dobell (including the time taken to progress that investigation). There is also the reported

⁵ *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385 (17 December 2013)

⁶ <http://www.abc.net.au/lateline/content/2011/s3319927.htm>

commencement of appeal proceedings alleging “witness intimidation”, and an associated complaint to Victoria Police⁷.

29. No one would argue that because the Fair Work Ombudsman has periodically been criticised, and has been found to have erred by the courts, that the government should cease to properly inspect and enforce employment entitlements.
30. Such an absurdity is directly analogous to concluding the ABCC should not be restored because a very small minority of its matters attracted criticism in the past.

Prosecution policies and guidelines of the Commonwealth

31. The ABCC, as with the current FWO and FWBC (and all prosecuting agencies of the Commonwealth⁸), undertakes its prosecutions according to strict guidelines and parameters set centrally by the legal arms of the government.
32. These litigation policies ensure the quality and veracity of the prosecutions, and the proper use of both public monies and the power of the state in acting against individuals.
33. These litigation policies/controls existed prior to the ABCC, and throughout its operation. They currently apply to its successor (the FWBC) and will apply to a restored ABCC.
34. The Commonwealth DPP is responsible for the Prosecution Policy of the Commonwealth⁹. The role and operation of the policy is explained on the DPP website as follows:

The Prosecution Policy of the Commonwealth underpins all of the decisions made by the CDPP throughout the prosecution process and promotes consistency in decision making. It is a public document and applies to all Commonwealth prosecutions.

The Prosecution Policy outlines the relevant factors and considerations which are taken into account when our prosecutors are exercising their discretion. The Policy also serves to inform the public and practitioners of the principles which guide the decisions made by the CDPP.

The Prosecution Policy provides a two-stage test that must be satisfied before a prosecution is commenced:

- there must be sufficient evidence to prosecute the case; and
- it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.

In determining whether there is sufficient evidence to prosecute a case the CDPP must be satisfied that there is prima facie evidence of the elements of the offence and a reasonable prospect of obtaining a conviction. The existence of a prima facie case is not sufficient.

In making this decision, our prosecutors must evaluate how strong the case is likely to be when presented in court. They must take into account matters such as the availability, competence and credibility of witnesses, their likely effect on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have

⁷ “Fair Work bullied witnesses to secure win”, Gary Morgan claims, Smart Company, Cara Waters | Feb 05, 2014, <http://www.crikey.com.au/2014/02/05/fair-work-bullied-witnesses-to-secure-win-gary-morgan-claims/>

⁸ There may be some exceptions, but generally these are guidelines and policies of general application.

⁹ <http://www.cdpp.gov.au/publications/prosecution-policy-of-the-commonwealth/>

regard to any lines of defence open to the alleged offender and any other factors that could affect the likelihood or otherwise of a conviction.

The possibility that any evidence might be excluded by a court should be taken into account and, if that evidence is crucial to the case, this may substantially affect the decision whether or not to institute or proceed with a prosecution. Prosecutors need to look beneath the surface of the evidence in a matter, particularly in borderline cases.

Having been satisfied that there is sufficient evidence to justify the initiation or continuation of a prosecution, the prosecutor must then consider whether the public interest requires a prosecution to be pursued. In determining whether this is the case, prosecutors will consider all of the provable facts and all of the surrounding circumstances. The public interest factors to be considered will vary from case to case, but may include:

- whether the offence is serious or trivial;
- any mitigating or aggravating circumstances;
- the youth, age, intelligence, physical health, mental health or special vulnerability of the alleged offender, witness or victim;
- the alleged offender's antecedents and background;
- the passage of time since the alleged offence;
- the availability and efficacy of any alternatives to prosecution;
- the prevalence of the alleged offence and the need for general and personal deterrence;
- the attitude of the victim;
- the need to give effect to regulatory or punitive imperatives; and
- the likely outcome in the event of a finding of guilt.

These are not the only factors, and other relevant factors are contained in the Prosecution Policy.

Generally, the more serious the alleged offence is, the more likely it will be that the public interest will require that a prosecution be pursued.

The decision to prosecute must be made impartially and must not be influenced by any inappropriate reference to race, religion, sex, national origin or political association. The decision to prosecute must not be influenced by any political advantage or disadvantage to the Government.

35. In addition, there are Legal Service Directions administered by the Attorney General's Department:

The Legal Services Directions 2005 are a set of binding rules issued by a former Attorney-General about the performance of Commonwealth legal work.

The directions set out requirements for sound practice in the provision of legal services to the Australian Government.

They offer tools to manage legal, financial and reputational risks to the Australian Government's interests.

They also give agencies the freedom to manage their particular risks while providing a supportive framework of good practice.

The Office of Legal Services Coordination (OLSC) administers the directions.

36. As we understand it:
- a. There are central rules and standards on which prosecutions will be pursued by Commonwealth agencies.
 - b. The centralised rules and quality controls for prosecutions:
 - i. Applied to the former ABCC.
 - ii. Apply to the current FWBC.
 - iii. Apply to the wider prosecutorial powers of the Fair Work Ombudsman.
 - iv. Will apply to a restored ABCC if the Bill passes.
37. We understand all prosecutions of the former ABCC to have been made in accordance with the prosecution guidelines of the Commonwealth. In the absence of any specific evidence to the contrary, this would include the prosecutions raised in Cases 1, 2 and 3 by Senator Cameron.

Criticism is more common than praise

38. An innate “bias” in any judges’ *obiter* comments regarding the conduct of investigations and how cases are run should also be recognised in considering the three decisions cited.
39. When a prosecutor (and the preceding investigators) does a good job, they don’t get praised in the written decision, or told how well they have done their work. Their reward and acknowledgement is the successful prosecution, and securing the verdict they commended to the court.
40. However, when a judge doesn’t like how a case is run, or has concerns about an investigation or prosecution, they show much less reticence to say so, and can be inclined to include specific criticism in their decisions. Often the actual purpose of these comments is communication with the prosecuting agency, and seeking to educate the agency or counsel about the courts expectations of how matters will be brought before it and conducted.
41. Obiter comments on prosecutions can be curmudgeonly in nature, but it is one of the few mechanisms courts have to quality control how matters come before them.
42. As a prosecutor it is therefore far more common to get a “brickbat” than a “bouquet” from judges – that reflects the fundamental nature and culture of our legal system.
- a. Prosecuting agencies need to listen and learn from such judicial feedback to the extent appropriate, and it is their responsibility to navigate the climate and personality of courts, and not attract additional criticism in future.

- b. Evidence indicates the ABCC did that, and there is no evidence of a repeated trend of the same criticisms reoccurring (and the data presented in estimates in early 2009 shows the opposite¹⁰).
- c. Lawmakers need to be very cautious in reading too much into exchanges directed to the conduct of matters, and a failure to locate such comments in their proper context could lead to unfortunate outcomes. As we stress, a judge may be sending messages to an agency of what is expected in future, and the agency may be heeding those signals.

Conclusions

43. If the conclusions being invited by the selection of cases raised by Senator Cameron are that:
- a. There was some inordinate or material error or failing in the operation of the ABCC and its conduct of prosecutions.
 - b. This was typical or characteristic of the prosecutions being pursued by the agency.
 - c. Its level of prosecutorial errors were atypical and manifestly in excess of those that “go with the territory” of state prosecutions.
 - d. This was an agency performing significantly worse than comparable state and territory agencies in successfully investigating and prosecuting matters.
 - e. Errors or faults in prosecutions were not human error, or typical of what can go wrong in court when legislation is being tested for the first time¹¹, but were structural and arise as a function of the specific form and responsibilities set out in the legislation establishing the ABCC.
 - f. Errors and faults in the former ABCC will inevitably arise in the operation of the restored ABCC which will operate under very similar legislation, as a function of some inherent structural flaw in the ABCC model.
 - g. And as such the ABCC should not be restored...
44. If this is what is attempted to be concluded from this material...
45. We say such conclusions are not open to the Committee on any proper reading of the decisions, and the additional material we provide.

¹⁰

http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCgQFjAA&url=http%3A%2F%2Fwww.aph.gov.au%2F~%2Fmedia%2Festimates%2FLive%2Feet_ctte%2Festimates%2Fadd_0809%2Fanswers%2FEW1155_09.ashx&ei=zrkGU77hHMTFkwWomYDwCw&usq=AFQjCNF9 WEFP9I1adtoH5T G9fQDyJPzg&bvm=bv.61725948,d.dGl&cad=rja

¹¹ Or within a passage of initial cases during the early life of an entirely new agency.

Specific cases

46. Some limited specific comment can be made on the three cases and the passages cited, noting that AMMA was not party to these cases and must rely solely on the published decisions.

Case 1 – Lovewell

47. The request regarding the first case was as follows:

Steven Lovewell v. Bradley O'Carroll & others; Federal Court of Australia [QUD 427 of 2007]

The ABCC commenced proceedings on 24 December 2007 in the Federal Court against Bradley O'Carroll and the Qld Branch of the CEPU alleging that O'Carroll had attempted to coerce a head contractor not to engage a subcontractor (Underground) on the Southport Central project on the Gold Coast. Justice Spender made some strong adverse comments about the merits of the case brought by the ABCC.

He observed, in his *ex tempore* dismissal of the case brought by the ABCC:

"The case, as brought and as evidenced by the evidence yesterday, was misconceived, was completely without merit and should not have been brought."

"There is room for the view that if the Commission was even-handed in discharging its task of ensuring industrial harmony and lawfulness in the building or construction industry, proceedings, not necessarily in this court and not necessarily confined to civil industrial law, should have been brought against a company, Underground, and its managing director and possibly another director."

His Honour was referring here to Underground setting up its employees as independent subcontractors. His Honour went on to say:

"The promotion of industrial harmony and the ensuring of lawfulness of conduct of those engaged in the industry of building and construction is extremely important, but as one which requires an even-handed investigation and an even-handed view as to resort to civil or criminal proceedings, and that seems very much to be missing in this case."

In concluding his remarks, Justice Spender said:

"The commercial arrangements that Underground entered into with its workers is a species of black economy, which, unfortunately, seems to exist in the building industry, and equally, that it is to be stamped out if at all possible in the payment to workers in such a way as to avoid the obligations of the income tax legislation and the superannuation legislation. It is not to be ignored or a blind eye cast when it is engaged in by employers."

48. We have had trouble sourcing this decision, and have had to rely upon reportage.
49. To the extent errors were made in that particular action:
- It was a single matter during the initial period of the ABCC's operation.
 - The judge was asking the agency to perform better in bringing matters before the court, and evidence indicates that it successfully moved to do so after this time.

- c. The overwhelming majority of subsequent ABCC matters were successful and attracted no such criticism.
- d. Sham contracting has been addressed, and continues to give rise to investigations and prosecutions (both under the ABCC and its replacement).

Case 2 – Duffy

50. The second case raised by Senator Cameron was as follows:

Duffy v Construction, Forestry, Mining & Energy Union [2008] FCA 1804 (28 November 2008)

The ABCC alleged that the Union breached s 38 of the BCII Act, on 20 October 2005, by engaging in unlawful industrial action at a construction site in Plenty Road, Bundoora, known as the University Hill site. The matter was heard by Justice Marshall.

An ABCC inspector was "avidly anti-union" and biased against the construction union and evidence produced from an interview was "inherently unreliable", Justice Marshall said.

"I consider the interviewer's (the ABCC inspector's) approach to be biased against the respondent and her tone to be avidly anti-union," he said. Justice Marshall described the interview as producing "unsatisfactory evidence and (was) inherently unreliable".

51. This comment concerns a taped interview with a Mr Steve Douglass¹². It is a little unclear from the decision precisely who Mr Douglass was and his role, but it appears that he was a supervisory or managerial employee.
52. It therefore appears Marshall J comments concerned an interview with a managerial employee, not bias against the union in an interview of any union officer.
53. As we understand it, if any such evidence has been unduly or inappropriately "led" through flawed questioning, this could be followed up in the hearing of such evidence, and it would certainly go to the weight that could be attached to such evidence.
54. That is what Marshall J seems to have done in this matter.
55. The following paragraph makes clear the adverse conclusions Marshall J drew as a result of failings in this material:

14 *The interview with Mr Douglas is unsatisfactory evidence and inherently unreliable. Insofar as it is relied on to support the proposition that the organisers, and not Mr Fahnle, called the workers from their jobs, it is inconsistent with the evidence of Ms Belcher and Mr Gilliland that Mr Fahnle called them from their jobs before any discussion was held with an organiser.*

56. This does appear to be one isolated example of some error or deficiency in the conduct of a specific interview, and it appears to have been germane to the lack of weight the judge ultimately accorded to the evidence concerned.

¹² Duffy v Construction, Forestry, Mining & Energy Union [2008] FCA 1804 (28 November 2008), ¶13

57. However:

- a. There is no basis in the decision to conclude that this was representative of investigations generally by the ABCC.
- b. Such a generalisation is just not open to the Committee on the basis of a single case/decision.
- c. In fact the overall success rate of ABCC prosecutions would favour a conclusion that the majority of their investigations were entirely sound and unassailable.
- d. Defence counsel in subsequent matters would have been familiar with the decision in *Duffy*, and would have been keen to exploit any inherent weaknesses in ABCC interviews, had such a weakness existed.
- e. That other decisions are not being raised by Senator Cameron indicates:
 - i. ABCC interviews from that time on were not similarly afflicted by the concerns raised in *Duffy* – or to put it simply, the ABCC learned from its mistakes, to the extent that is a fair reading of *Duffy*.
 - ii. There is nothing structural or inbuilt into the ABCC model that will inevitably yield such problems.
 - iii. It cannot be concluded that a restored ABCC would inherently and necessarily be afflicted by such problems (which in fact were not repeated in its predecessor).

Case 3 - Stephenson

58. The third case was raised by Senator Cameron as follows:

ABCC v Stephenson & Ors [FMCA 1026] (December 22, 2011).

CFMEU Victorian officials did not order that work be stopped on a road building project in an effort to increase union membership but because of a genuine health and safety issue, the Federal Magistrates Court has found.

The Federal Magistrates Court dismissed an application by the ABCC to prosecute the Victorian CFMEU branch.

The ABCC conceded at the close of its case that a health and safety issue raised by the CFMEU had been genuine rather than a “ruse” to justify ordering work to stop and workers on site to join the union.

This followed evidence by the contractor’s project manager that he had agreed with the union official’s assessment that using a forklift to unload a truck at the site was unsafe.

The project manager gave evidence that he told the sub-contractor delivering material for the bridge railings that there would either need to be an alternative method used or a Work Safe inspection prior to the work proceeding.

Federal Magistrate Dominica Whelan criticised the ABCC for presenting its case on the assumption that the health and safety issue was a ruse, rather than a potentially genuine issue.

"While the [ABCC] abandoned the contention that the raising of the safety issue was without substance, the evidence... was clearly presented in that light. It was also clearly presented, in the drafting of the affidavits, that the raising of the health and safety issue was a ruse to justify the ordering of the...employees to cease work and to support the making of the membership demand," Magistrate Whelan said.

59. This decision is pretty straightforward and unremarkable. It concerns non-recorded, later recollections of events at a busy construction site, the balance of assessment of which ultimately went with the party claiming not to have contravened the law.
60. The decision simply weighs the evidence, and ultimately does so in favour of the respondent not the applicants in a situation of conflicting and contested recollections, recalled and tested well after the fact.
61. We see in the decision little or no criticism of the former ABCC, and its approach to the litigation. That counsel abandons a contention it cannot make out, and amends its case during the course of proceedings reflects an inherent obligation and courtesy to the court, and shows a model litigant rather than one to be criticised.
62. Again, the full decision needs to be consulted. Just as three isolated and atypical decisions cannot reflect the overwhelmingly successful conduct of prosecutions from the ABCC, cherry picking isolated paragraphs from a wider decision inherently robs them of context, and cannot properly reflect the tenor or substance of the wider matter and decision.
63. Furthermore, to the extent that one of the causes of evidentiary problems in *Stephenson* was a delay in investigation and recording recollections of events, this favours a model for examinations under the Act which is not artificially held up by redundant levels of external supervision (i.e. by the AAT, addition to and Ombudsman).

SENATOR CAMERON – ADDITIONAL QUESTION

64. Senator Cameron has requested submitters' views on the following:

Question 1:

[The] checks and balances applied by the Administrative Appeals Tribunal on the use of the Fair Work Building Industry Inspectorate's coercive powers and to address specifically why the proposed legislation should not maintain those checks and balances, as recommended by His Honour Justice Wilcox.

65. We will treat this question jointly with the Senator's similar question at 43 of the Proof Hansard from the Committee hearing of 6 February 2014.

Ombudsman:

66. The proposed Bills retain oversight in addition to the original iteration of the ABCC, by way of the role of the Commonwealth Ombudsman as set out in ss.65-66 of the

Building and Construction Industry (Improving Productivity) Bill 2013. This is retained from the FWBC and the current 2012 legislation, and represents an increase in oversight from the original ABCC.

Delay:

67. The current Act contains a process of double or replicated oversight, through both the AAT and the Ombudsman.
 - a. This builds in a level of redundancy which serves mainly to delay the investigation process through delaying the issuing of investigation/examination notices.
 - b. The Act would streamline this into a single level of oversight, materially extended from that of the former ABCC.
 - c. The ABC Commissioner would be able to issue the notices and commence examinations under a process of significant and rapid oversight from the Ombudsman.
68. It is imperative for the protection of all concerned, and for properly acting on instances and allegations, that evidence be able to be obtained rapidly and matters recalled whilst still fresh in the minds of all concerned.
69. The current provisions serve to delay investigations, and as we have seen from other matters highlighted by Senator Cameron, delays can cause confusion in securing reliable evidence for many people. This appeared to be the concern in *Stephenson*, and delays can affect the quality of evidence and capacity to reliably get to the facts.
70. Employers have every confidence in the process of oversight by the Ombudsman established by the previous government being able to protect the rights and interests of all concerned in this process.

Not standard practice:

71. We also note the following:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 - SECT 19

Notice requiring appearance for examination

- (1) This section applies where ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate, under Division 1.
- (2) ASIC may, by written notice in the prescribed form given to the person, require the person:
 - (a) to give to ASIC all reasonable assistance in connection with the investigation; and
 - (b) to appear before a specified member or staff member for examination on oath and to answer questions.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3) A notice given under subsection (2) must:

- (a) state the general nature of the matter referred to in subsection (1); and
- (b) set out the effect of subsection 23(1) and section 68.

72. A process of double oversight presently in the 2012 FWBC legislation is not typical, and other comparable investigatory agencies can instigate their own comparable investigations, without the need to go to an external approver in addition to more general supervisory oversight (such as that of the Ombudsman).

Sunset?

73. We also note s.46 of the *Fair Work (Building Industry) Act 2012*, which appears set to sunset the making of examination notices 3 years from commencement (presumably sometime in mid-2015).

74. Pending confirmation from the Commonwealth, this appears to require of the Parliament some remedial legislative action during 2014, lest the ABCC / FWBC lose this key power outright.

75. This is critical - unless the Parliament passes replacements for the FWBC legislation, the key capacity to properly investigate developments in this industry will be lost entirely. Evidence of ongoing conduct of concern in the industry is ongoing, and few if any outside the union movement would support this power being sunsetted as currently scheduled.

76. The best way to address this would be passage of the Bills you have before you.

PRODUCTIVITY

Professor Peetz submission (Submission #8)

77. We have re-read this submission and can further assist the Committee only in the following regard:

Nothing material in there being no response to the Peetz critique

78. We reiterate the point made in our oral evidence that Professor Peetz is an academic and Econtech is a commercial economic consultancy, and that the two are different.

79. An academic's stock in trade is scrupulously rebutting anyone kind enough to cite and dispute their work.

80. Econtech is a commercial consultancy, and will not follow up and rebut every critique such as that of Professor Peetz.

- a. Both the critical articles appended to the submission were published after the election of the Rudd government and after the change of leadership and approach at the ABCC (as has recently occurred at FWBC).
- b. Both the Econtech reports critiqued were published prior to the change at the ABCC, and we understand that Econtech was not further commissioned on this matter after the 2007 change of government.
- c. Nothing material can be concluded from the fact that Econtech has not responded to Professor Peetz and the two articles included in his submission.

Gittens' comments

- 81. Professor Peetz concludes his submission with a quote from journalist Ross Gittens, also regarding the work of economic consultancies, and specifically Econtech.
 - a. With respect, the inclusion of this material verges on an *ad hominem* argument:
 - b. The Gittens comments are entirely irrelevant as they address an entirely different piece of research.

Senator Cameron's question

- 82. At p.41 of the Proof Hansard, Senator Cameron asked about labour versus capital based productivity in the resources industry, and the extent to which productivity decline is driven by changes in investment.
- 83. We have reviewed this exchange and can add the following.
- 84. With respect, the Senator appeared to be drawing a partial and potentially misleading distinction between labour productivity and investment in the resources industry.
- 85. We don't use the term "misleading" in any adverse way, but rather to highlight that the premise of the Senator's line of inquiry could draw attention away from an absolutely essential nexus and inter-relationship.
- 86. In an economic sense, the Senator is correct in differentiating labour productivity from the other discrete factors of multifactor productivity, including capital and non-labour costs.
- 87. However, the delineation is a false one in terms of behaviours and practical considerations for investors and decision makers. Perceptions of Australia as a place to do business and employ people significantly influence investment decisions in this country – as they do for our competitors for investment capital.
- 88. Investors are acutely aware of the costs and complications of doing business in Australia, and of project delays and overruns impacted on by the operation of the *Fair Work Act 2009* amongst other factors.

89. We can assure the committee that international investors are, for example, all too aware of the cost and complications in bringing new projects online in Australia, including complications created by the changes to the arrangements for making greenfields agreements in the Fair Work Act of 2009.
90. Labour productivity, labour costs, the risks of employing etc all influence decisions to make capital investments in any country.
91. The risks, delays, and unbudgeted for costs of construction in Australia are factors negatively impacting on influencing investment in this country. Restoring the ABCC will be a very positive step in helping restore confidence in investing and employing in this country and in particular ensuring built infrastructure can better play its part in facilitating investment, economic growth and employment.