

CHAPTER 2

The Cole Royal Commission

2.1 In submissions and public hearings, the Committee repeatedly heard that evidence undermining the economic case for the re-establishment of the ABCC and concerns about its limitations on civil and political rights can be swept aside because the Cole Royal Commission into the Building and Construction Industry found evidence of widespread unlawfulness and criminality in the industry. According to the ABCC's supporters, the findings of the Cole Royal Commission into the building and construction industry trump every other consideration; they are unimpeachable and the Royal Commission infallible.

2.2 Examples include the following, which are representative of the type of submission made in this regard:

In connection with the regulatory structure, you might ask why there is a need to restore an entity such as the ABCC with the powers proposed in the legislation. You only need to briefly examine the reports of the Giles Royal Commission and the Cole Royal Commission to see the reason for this.¹

2.3 From the Australian Mines and Metals Association:

Royal Commissions enjoy a unique and influential status in our legal system with very good reason. The specific remedial recommendations of any royal commission must inherently enjoy the strongest presumptions towards being followed by our parliament and to be above the vagaries of political fortune and change. There is no basis for this parliament to continue to fail to properly implement the specific remedial institutional recommendations the Cole Royal Commission handed down to begin to fix the proven culture of lawlessness in this industry.²

2.4 This is a particularly interesting submission. For reasons that will become clear in the consideration of the nature of Royal Commissions that follows, the presumption that lies at the heart of it is the proposition that the Parliament is subservient to the Executive. It is a submission which if accepted would lead to a substantial undermining of the separation of powers.

2.5 Mr Barklamb from the Australian Mines and Metals Association proved in his evidence to be an especially enthusiastic supporter of the proposition that the Cole Royal Commission's findings and recommendations ought to override all other considerations:

Senator CAMERON: I just have a different view: I do not see that royal commissioners, even with all their investigative powers and all the coercive

1 Mr Lindsay Le Compte, Executive Director, Australian Constructors Association: *Proof Committee Hansard*, 6th February 2014, p. 1.

2 Mr. Scott Barklamb, Executive Director, Policy and Public Affairs, Australian Mines and Metals Association, *Proof Committee Hansard*, 6th February 2014, p. 37.

powers that are available to them, always get it right. That is the point. You say no-one can question Cole. Well, I am questioning Cole. It was done in a highly political environment.

Mr Barklamb: You are correct that our industrial relations system in debate is always inherently political. I know of no basis to question the probity, accuracy or rigour of the Cole process, nor the findings that were made. But the point we would make is that we think Cole—

Senator CAMERON: There are plenty of critiques out there, Mr Barklamb; you just may not have seen them or you may have been out of the country.³

2.6 In answer to a question from Senator Wright as to why people employed in the building and construction industry should be treated differently to anyone else, merely on the basis of the industry in which they are employed, Mr. Calver on behalf of Master Builders Australia said:

The answer to that question is that the example to which you allude was not the subject of a royal commission. The behaviour of all participants in the building and construction industry was the subject of a comprehensive royal commission—the Cole royal commission. Before that, it was the subject of a comprehensive state based royal commission—the Gyles commission—in New South Wales. Each of those royal commission(s) pointed to the fact that the industry needed different and separate regulation, and we rely on those findings, which are continued into this bill.⁴

2.7 The Minister for Education and Employment put his view quite succinctly:

The need for the Australian Building and Construction Commission is clear. The Cole Royal Commission suggested it.⁵

2.8 The Committee takes a far more cautious approach. The parliament must not interfere lightly with the human rights of people based on the industry in which they work, even if a Royal Commissioner, more than a decade ago, formed an opinion that particular incursions were somehow justified. The Cole Royal Commission was a creature of its terms of reference. It was not required to consider the implications of its recommendations on the civil rights of those affected by them. The parliament however has higher obligations. It is required to consider the civil and human rights of those affected by legislation and it is the duty of inquiries such as this to do so. In this regard, the Committee notes the report of the Parliamentary Joint Committee on Human Rights report on the bills that would re-establish the ABCC. The report reads as a lengthy catalogue of civil, legal political and human rights curtailed, conditioned and removed by the proposed legislation.

3 Mr. Scott Barklamb, Executive Director, Policy and Public Affairs, Australian Mines and Metals Association, *Proof Committee Hansard*, 6th February 2014, p. 37.

4 Mr. Richard Calver, National Director Industrial Relations and Legal Counsel, Master Builders Australia, *Proof Committee Hansard*, 12th March 2014, p. 27.

5 Senator the Hon. Eric Abetz, Minister for Education and Employment, *Proof Committee Hansard*, 12th March 2014, p. 45.

2.9 This chapter will briefly examine the role and function of Royal Commissions in general and the Cole Royal Commission in particular. With the passage of more than a decade since the Cole Royal Commission produced its final report, it is appropriate to revisit its findings and to assess them from a contemporary perspective.

2.10 Commonwealth Royal Commissions are established under the *Royal Commissions Act 1902* in accordance with Letters Patent issued by the Governor General on the advice of the Attorney General.⁶ The Letters Patent describe the terms of reference of the Royal Commission. The Crown also has the power at common law to appoint a person to conduct inquiries and make a report but such a person does not have any common law power to coerce the attendance of witnesses and compel the giving of evidence.⁷ The *Royal Commissions Act 1902* sets out the powers and procedures of Royal Commissions including its powers of coercion to compel the giving of evidence.

2.11 Royal Commissions are widely believed to be independent of the Executive branch of government. They are not. They are an instrument of the Executive and report to it. They derive their existence and authority from the Executive and just as they can be established by the Executive, they may be dissolved, altered or even completely ignored should the Executive find discomfort with its conduct, progress, findings or recommendations.

2.12 A Royal Commission is not a Court and does not exercise judicial power. The former Chief Justice of the High Court, Justice Gibbs described a Royal Commission as being, “a mere inquiry which cannot lead to judgement.”⁸ Royal Commissions act “in a purely inquisitorial capacity.”⁹

2.13 A Royal Commission is an inquisition. An inquisition can be an investigation or commission of inquiry. It can also be “a tribunal created to enable judgements to be made against heretics, persons and institutions who are opposed to or do not embrace the values, ideology and interests of whoever constitutes the inquisition or brought the said inquisition into being.”¹⁰

2.14 The findings of Royal Commissions have no legal consequences. They are the expression of the opinions of those who conduct them and guide their processes. Like the Commissioner appointed by the Executive to conduct the inquiry, counsel

6 It is also possible for a Royal Commission to be established by statute for a specific Royal Commission, such as the Royal Commission on Espionage (known as the Petrov Royal Commission) established in 1954.

7 Parliamentary Library, *Bills Digest No. 83, 2012-13 - Royal Commissions Amendment Bill 2013*; 7 March 2013, p. 4 and footnote.

8 Gibbs CJ, *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* [1982-1983] 152 CLR 25 at p. 53.

9 Gibbs CJ, *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* [1982-1983] 152 CLR 25 at p. 53.

10 Dabscheck, B., *Two and Two Make Five: Industrial Relations and the Gentle Art of Doublethink*, Economic and Labour Relations Review Vol. 15, No. 2, January 2005: 181-198, p. 183.

assisting the inquiry – usually one or more Senior Counsel – are also appointed by the Executive. Unless the findings are taken further by the Parliament in the form of legislation, or through the judicial system in the form of prosecution of alleged wrongdoing, the findings of the Royal Commission remain merely an expression of the opinions of the Commissioner; albeit opinions reached at great expense and occasionally, with less than the usual regard for procedural fairness, natural justice and judicial reasoning found in the ordinary courts.

2.15 Such is the high regard with which Royal Commissions are held and the mystique surrounding them so pervasive, that they are often believed to possess greater powers and facility for dispensing justice than the ordinary courts. They do not. Royal Commissions play an important role inquiring into issues that are beyond the ordinary processes of politics and judicial inquiry. They have helped the country come to grips with issues involving a complex intersection of legal, political and moral dilemmas requiring special attention.¹¹ However, Royal Commissions can be and at times are used as a tool of the Executive to provide a spur or more often, a fig leaf for political and legislative action that the electorate may otherwise find unpalatable.

2.16 During the course of Royal Commissions, sensationalised media coverage, uninformed commentary and the political motivations that occasionally lie behind the establishment of Royal Commissions can lead to presumptions of guilt becoming commonplace, reputations can be destroyed and possible future prosecutions prejudiced. Justice Murphy described the features that distinguish Royal Commissions from the normal course of criminal justice in his judgement in *Victoria v ABCEBLF*:

Proceedings upon a Royal Commission such as this must be sharply distinguished from committals for trial, which are based on a charge, conducted by a regular course calculated to ensure proper protections for the defendant and for witnesses for and against the defendant, in particular that the defendant is not exposed to compulsory self-incrimination. Committal procedures are also calculated to ensure that they are not used to unfairly prejudice the defendant in any subsequent proceedings or for political purposes. Such proceedings may be kept to a regular course by writs and orders from the superior courts. The Royal Commission's functions must also be distinguished from proceedings in which findings of guilt are arrived at after a regular course of trial conducted with all protections which experience has shown to be necessary, with trial by jury in those cases guaranteed by the Constitution

...

For these non-judicial inquiries to find facts which may suggest guilt, or to find that there is evidence which would warrant prosecution, is not inconsistent with the regular course of criminal justice, but to find that

11 For example, the Royal Commission into Institutional Responses to Child Sexual Abuse 2013-; Royal Commission into Aboriginal Deaths in Custody 1987-1991; Royal Commission into British Nuclear Tests in Australia 1984-1985; Royal Commission into Drug Trafficking 1981-1983.

particular persons have committed particular criminal offences is inconsistent with that course.

The Royal Commission is a non-judicial body authorised to conduct some sort of investigation and to find persons guilty of serious offences without the protection afforded them in the regular exercise of judicial power. The persons are deprived of trial by jury. Their reputations may be destroyed, their chances of acquittal in any subsequent judicial proceedings hopelessly prejudiced by an adverse finding.¹²

2.17 Pointing to the potential for Royal Commissions to whittle away civil and political rights, Justice Murphy made this assessment:

The authority given to the Commissioner to exercise such an important ingredient of judicial power as finding a person guilty of ordinary crimes, is in itself an undermining of the separation of powers. It is a fine point to answer that the finding is not binding and does not of itself make the person liable to punitive consequences. It is by fine points such as this that human freedom is whittled away. Many in governments throughout the world would be satisfied if they could establish commissions with prestigious names and the trappings of courts, staffed by persons selected by themselves but having no independence (in particular not having the security of tenure deemed necessary to preserve the independence of judges), assisted by government-selected counsel who largely control the evidence presented by compulsory process, overriding the traditional protections of the accused and witnesses, and authorised to investigate persons selected by the government and to find them guilty of criminal offences. The trial and finding of guilt of political opponents and dissenters in such a way is a valuable instrument in the hands of governments who have little regard for human rights. Experience in many countries shows that persons may be effectively destroyed by this process. The fact that punishment by fine or imprisonment does not automatically follow may be of no importance; indeed a government can demonstrate its magnanimity by not proceeding to prosecute in the ordinary way. If a government chooses not to prosecute, the fact that the finding is not binding on any court is of little comfort to the person found guilty; there is no legal proceeding which he can institute to establish his innocence. If he is prosecuted, the investigation and findings may have created ineradicable prejudice. This latter possibility is not abstract or remote from the case. We were informed that the public conduct of these proceedings was intended to have a "cleansing effect".¹³

2.18 From its inception, the Cole Royal Commission was controversial. It was announced in July 2001 in the wake of a report by the Employment Advocate.¹⁴ The

12 Murphy J, *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* [1982-1983] 152 CLR 25, pp 106-107.

13 Murphy J, *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* [1982-1983] 152 CLR 25, p. 111.

14 Office of the Employment Advocate: *Employment Advocate Report on the Building Industry*, report to the Minister for Employment, Workplace Relations and Small Business, 11 May 2001.

Employment Advocate had been asked by the Minister for Employment, Workplace Relations and Small Business, the Hon Tony Abbott MP, to provide a report on “behaviour in the building industry”. A mere 10 days later, the Employment Advocate was able to produce a report riddled with unsubstantiated allegations of the sort one might hear in a public bar; about which no evidence was ever produced, no allegation verified and no investigation ever conducted in either the subsequent Royal Commission or any court proceeding. But it was never intended to be otherwise. Once the report was made public, the Employment Advocate’s job and the accompanying damage was done. He never made any subsequent attempt to establish the truth of any of his lurid allegations and nor did he ever produce a shred of evidence to support them.

2.19 At the opening of the Cole Royal Commission public hearings in October 2001, the Commission published a practice note which would govern how parties were to be granted leave to appear before it. The practice note required that any party wishing to be represented before the Commission must, as a condition of such grant of leave, provide the Commission with a statement setting out all matters within that person's knowledge within the inquiry's terms of reference. Robert Richter QC described the proposed practice note as requiring that parties submit to a “Stalinist” obligation to inform in exchange for a limited right to legal representation, that Commissioner Cole’s directive was “outrageous, unprecedented and provocative”¹⁵ and “requires any person as a condition of their leave to appear to rat on anyone.”¹⁶

2.20 Commissioner Cole was also the subject of an application to stand down on grounds that he had demonstrated bias against the NSW branch of the CFMEU by making adverse findings against it in his interim report without allowing the CFMEU to make submissions or produce evidence that would rebut the allegations on which the Commissioner’s findings were based. Commissioner Cole heard the application himself and dismissed it.

2.21 Criticism of the Cole Royal Commission wasn't only confined to the construction unions and their legal representatives.

2.22 Journalist Jim Marr published a book¹⁷ on the Cole Royal Commission which was launched in Sydney on 24th February 2003 with a speech by the radio broadcaster Alan Jones. Mr Jones gave an eloquent address on the contribution of construction workers to the success of the 2000 Sydney Olympic Games, the redefinition of collective bargaining as corruption by the Royal Commissioner, the dignity of the labouring class and the difficulties encountered by those who have only their labour to sell. He said of the Royal Commission:

15 Robinson, Paul, *Commission builds on previous inquiries of similar construction*: The Age, 7 May 2002.

16 Australian Broadcasting Corporation 7:30 Report, *Building industry correction*., 24 October 2001; <http://www.abc.net.au/7.30/content/2001/s400434.htm> (accessed 14 March 2014)

17 Marr, Jim. *First the Verdict: The real story of the building industry Royal Commission*: Pluto Press, Annandale, 2003.

I've had difficulty with this Royal Commission from day one. I certainly have difficulty with \$60 million being spent when it's almost impossible to get appropriate services for the disabled and the mentally ill. At times you have to wonder just what the priorities are and that people do things for political reasons. From day one this Commission seemed to have lost its way.¹⁸

2.23 Elsewhere in his address, Mr Jones noted that the Royal Commission had overlooked the opportunity presented to it to investigate tax avoidance, phoenix companies, insolvent trading, underpayment and non-payment of employee entitlements and breaches of occupational health and safety laws that resulted in death and injury. He concluded with these remarks:

So I'm delighted to launch it (the book). It simply confirms in my view, opinions that I have expressed over the last 18 months and you're dead right John (Sutton), \$60 million is a lot of dough and we can't get into the business in this country, there's enough of 'them and us'. It's hard enough for battling people to make a quid here. It's hard for a worker and all you've got is your labour and your skill and there has to be a recognition that in the balance that must exist between modern society, the role of the employer, it's an important role, he takes risks. He's gotta put the capital up. But we can't have the odds balancing entirely in his favour at the exclusion of people like you and I just think the best thing the Government should do with Mr. Cole's report, even though it cost \$60 million, is to use it for a door stop on one of those Commonwealth garages down there and let's get on with the business of making Australia more productive.¹⁹

2.24 An aspect of the Cole Royal Commission's proceedings that remains the subject of myth-making and controversy today is the subject of productivity in the construction industry. This is dealt with in more detail elsewhere in this report, but the genesis of the myth and controversy around productivity in the industry lies in the Cole Royal Commission and the flaws in the Commission's methods.

2.25 As is the case with many of the Royal Commission's methods and conclusions, its approach to the issue of productivity has been the subject of criticism.

2.26 Commissioner Cole claimed in his report that the legislative changes he recommended, including the establishment of the ABCC and its coercive powers would improve what he considered lacklustre productivity in the industry which he in turn believed was the result of what he called "inappropriate" behaviour in the sector.

18 Jones, A, *Remarks at the launch of "First the Verdict" by Jim Marr*, 24th February 2003; http://workers.labor.net.au/features/200303/a_guestreporter_jones.html (accessed 15th March 2014).

19 Jones, A, *Remarks at the launch of "First the Verdict" by Jim Marr*, 24th February 2003; http://workers.labor.net.au/features/200303/a_guestreporter_jones.html (accessed 15th March 2014).

2.27 Based on a discussion paper prepared for the Royal Commission by Tasman Economics,²⁰ Commissioner Cole estimated that an additional \$12 billion of accumulated GDP might be generated between 2003 and 2010 if productivity growth in the construction industry could be “unlocked” through radical industrial relations “reform”. Commissioner Cole was not the first and he almost certainly will not be the last to assume the productivity benefits of punitive industrial relations laws. Indeed, national labour productivity fell off a cliff under the former WorkChoices regime. If punitive industrial relations laws boosted productivity, we would have expected that Australia’s productivity would have soared in the period 2006-2009. But the opposite is true. In the WorkChoices era, labour productivity growth rates were lower than any 3-year period in recent times.²¹ Indeed, Tasman Economics, the authors of the Royal Commission discussion paper were more cautious than Commissioner Cole about ascribing productivity improvements to the wonders of industrial relations “reform”, noting a number of times in the paper that the determinants of productivity are “complex”.

2.28 Tasman said in their paper:

Reversing the high level of industrial disputes is not of itself a panacea for improving productivity. There is a poor direct correlation between the average number of days lost to industrial disputes and changes in the three productivity measures. For example, the period with relatively few days lost to industrial disputes in the early 1990s had relatively flat MFP. Importantly the level of MFP in this period was lower than estimated in the 1980s when industrial disputation was much higher. The weak relationship is also evident in more recent times. For example, MFP and working days lost per thousand employees both increased in 1997-98. However, in the following two years working days lost decreased while MFP increased.²²

2.29 Perhaps dissatisfied with Tasman Economics’ cautious views about the productivity benefits of radical industrial relations reform, just two weeks after the release of the Cole Royal Commission’s final report, the Minister for Employment and Workplace Relations released the first of what over the years has become a seemingly endless stream of reports prepared by Econtech and its successor, Independent Economics, claiming a direct causal relationship between the existence of the ABCC, its coercive powers and improved productivity.

2.30 As Commissioner Cole boiled it down, “To unlock these benefits, productivity must increase. To achieve these greater benefits by increasing productivity, structural

20 Tasman Economics, “*Productivity and the Building and Construction Industry*”: Discussion Paper 17, Paper prepared for the Royal Commission into the Building and Construction Industry. <http://www.royalcombc.gov.au/docs/Discussion%20Paper%2017.pdf> viewed 17 March 2014.

21 5204.0 Australian System of National Accounts, Table 13. Productivity In the Market Sector, http://www.abs.gov.au/AUSSTATS/abs@archive.nsf/log?openagent&5204013_productivity.xls&5204.0&Time%20Series%20Spreadsheet&6EA28DCFA1C650F4CA2577CA0013B151&0&2009-10&29.10.2010&Latest

22 Tasman Economics, “*Productivity and the Building and Construction Industry*” op cit, p. ix.

and cultural reform is necessary.²³ Since then, a veritable cottage industry, led by Independent Economics and its predecessors has emerged, whose principal function is to prop up the central myth of the Cole Royal Commission and the rationale for the wholesale undermining of civil rights by the ABCC – that the productivity performance of the construction industry would only improve with radical “reform” of the sector’s industrial relations institutions, including the establishment of an agency with unsupervised coercive powers of a kind usually reserved for criminal law enforcement and national security agencies.

2.31 In a 2006 paper that examined the Cole Royal Commission’s findings on productivity and the Commissioner’s expectations that productivity would improve under a more punitive industrial relations regime²⁴, L.J. Perry concluded:

One of the central foundations of the Cole Report is that productivity growth has been substandard in the construction sector. This note has illustrated that when the data are extended to the most recent estimates, multifactor productivity is on a par with the rest of the market sector. The issue has, in a sense, evaporated.

...

The second issue relates to the contention that the construction sector’s supposed substandard productivity is linked to disputatious unions. Again, the evidence simply does not support that contention.²⁵

2.32 In another paper highly critical of Commissioner Cole’s approach to productivity in the construction sector, Dabscheck noted that the Commission’s own reports; the Tasman Economics report and a further report prepared by the School of the Built Environment, per Unisearch Limited of the University of New South Wales, did not support Commissioner Cole’s findings on construction industry productivity.²⁶

2.33 The Unisearch report found that in terms of both cost and productivity, the Australian industry performed well. The report said:

In terms of cost performance, Australia’s building and construction industry has been rated highly in international research comparisons and published series in construction costs. The most common ranking for Australia was second place ... In two studies Australia was ranked highest ... Australia fell within the group of countries with a clear competitive advantage in the majority of studies described.

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23 Royal Commission into the Building and Construction Industry: Final Report, Vol. 1, p. 3.

24 Perry, L.J. “*Productivity and Industrial Disputes: A note on the Cole Royal Commission*”: Economic Papers Vol. 25, No. 3 September 2006, pp 284-294.

25 Perry, L.J. “*Productivity and Industrial Disputes: A note on the Cole Royal Commission*”: Economic Papers Vol. 25, No. 3 September 2006, p. 292.

26 Dabscheck, B., *Two and Two Make Five: Industrial Relations and the Gentle Art of Doublethink*, Economic and Labour Relations Review Vol. 15, No. 2, January 2005: 181-198, p. 186.

In terms of productivity, international research comparisons indicate that Australia is on a par with Japan and Germany in value added per hour, performing slightly better than France and the UK, but lagging behind the US, Canada and Singapore. In value added per employee the picture is similar with Australia on a par with Japan, performing slightly better than the UK, Germany and France. The US, Canada and Singapore have a clear competitive advantage in both cases, and the small differences between the other countries may not be statistically significant. Both indicators show an upwards trend in Australia over the ten year period shown.²⁷

2.34 In terms of the causal relationship between specific reform initiatives and improved construction industry performance, the Unisearch report noted:

Attempting to establish a direct causal relationship between construction reform initiatives and industry performance is problematic. Not only have these issues remained largely un-researched in any rigorous sense, but there are many concurrent factors that influence productivity and efficiency at any one point in time. This is not to say that the impact of reform strategies cannot be identified, but that quantifying the outcome of initiatives is fraught with difficulty.²⁸

2.35 As Dabscheck points out, Commissioner Cole acknowledged the findings of the Unisearch report saying, 'It is true that a number of international studies have concluded that the Australian building and construction industry is among the better performers internationally'.²⁹ But, 'he then indulges in the lawyer's trick of finding an alternative term for productivity, and using this distinction to deny the evidence of research that he in fact commissioned'.³⁰

2.36 Without offering much in the way of reasoning for reaching his conclusion on this, Commissioner Cole said:

It is true that a number of international studies have concluded that the Australian building and construction industry is among the better performers internationally (see annexure 4, volume 4, National Perspective Part 2, of this report). But using this as an excuse not to act is short-sighted. The studies do not show that the industry is operating efficiently. Indeed, the fact that on various productivity measures, the industry has fallen

27 *Workplace Regulation, Reform and Productivity in the International Building and Construction Industry*: Report prepared by Unisearch Limited, University of New South Wales for the Royal Commission into the Building and Construction Industry (RCBCI), RCBCI Final Report, Volume 4, Annexure 4, pp.253-372 at p.259

28 *Workplace Regulation, Reform and Productivity in the International Building and Construction Industry*: Report prepared by Unisearch Limited, University of New South Wales for the Royal Commission into the Building and Construction Industry (RCBCI), RCBCI Final Report, Volume 4, Annexure 4, pp.253-372 at pp 288-289.

29 Royal Commission into the Building and Construction Industry: Final Report, Volume 3, p. 224.

30 Dabscheck, B., *Two and Two Make Five: Industrial Relations and the Gentle Art of Doublethink*, Economic and Labour Relations Review Vol. 15, No. 2, January 2005: 181-198, p.187.

behind the market average in Australian industry indicates that significant inefficiencies remain.³¹

2.37 So faced with the inconvenience of studies finding that productivity in the Australian building and construction industry are at least “on a par” with comparable countries and ahead of many others, Commissioner Cole invented a new and highly subjective standard almost beyond measurement by which to judge the industry – efficiency. Efficiency and productivity are not the same things.

2.38 Commissioner Cole was appointed to conduct a Royal Commission into the building and construction industry, excluding the domestic housing sector, by Letter Patent on 29th August 2001 to investigate:

(a) the nature, extent and effect of any **unlawful or otherwise inappropriate industrial or workplace practice or conduct**, including, but not limited to: (emphasis added)

(i) any practice or conduct relating to the Workplace Relations Act 1996, occupational health and safety laws, or other laws relating to workplace relations; and

(ii) fraud, corruption, collusion or anti-competitive behaviour, coercion, violence, or inappropriate payments, receipts or benefits; and

(iii) dictating, limiting or interfering with decisions whether or not to employ or engage persons, or relating to the terms on which they be employed or engaged;

(b) the nature, extent and effect of any **unlawful or otherwise inappropriate practice or conduct** relating to: (emphasis added)

(i) failure to disclose or properly account for financial transactions undertaken by employee or employer organisations or their representatives or associates; or

(ii) inappropriate management, use or operation of industry funds for training, long service leave, redundancy or superannuation;

(c) taking into account your findings in relation to the matters referred to in the preceding paragraphs and other relevant matters, any measures, including legislative and administrative changes, to improve practices or conduct in the building and construction industry or to deter unlawful or inappropriate practices or conduct in relation to that industry.³²

2.39 Commissioner Cole produced a 23 volume report delivered in February 2003. Twenty two of these volumes are publicly available. The twenty third volume, said to comprise findings of concerning 'unlawful' or 'criminal' conduct was not made public and is said to have been referred to appropriate prosecutory bodies for their consideration.

31 Royal Commission into the Building and Construction Industry: Final Report, Volume 3, p.224.

32 Royal Commission into the Building and Construction Industry: First Report, pp 1-2.

2.40 Volume one of the report provides a summary of Commissioner Cole's findings concerning 'inappropriate' behaviour. He lists 88 'types of inappropriate conduct which exist throughout the building and construction industry'.³³

2.41 Many of these acts amount to little more than industrial jaywalking. The vast majority were alleged to be committed by unions, a small number by government departments or agencies “due to 'inappropriate' pressure being placed on them by unions” and a mere handful involved employers not observing their legal obligations.

2.42 Some even included employers actually complying with agreements by paying wages and allowances meant to be paid under the agreement. In the world of the Cole Royal Commission, actually complying with the law could be deemed “inappropriate”.

2.43 In his 2005 paper, Dabscheck tried to make sense of this peculiar turn of events. Dabscheck noted that apart from finding only four examples of employers breaching occupational health and safety obligations, Commissioner Cole found no evidence of 'inappropriate' behaviour on the part of employers concerning phoenix companies, non-payment and underpayment of employees' entitlements, tax evasion and avoidance, the use of illegal migrant labour or where migrants were employed legally, their gross exploitation.³⁴

2.44 Apart from finding actions that were not only not unlawful but necessary for compliance with relevant industrial relations laws 'inappropriate', Commissioner Cole also saw fit to criticise the way the law was interpreted and applied by the Full Court of the Federal Court. Commissioner Cole found that the Full Court judgement in *Electrolux No. 2*³⁵ - that sanctioned the lawful payment of bargaining fees by non-union members to unions, to be “damaging”.³⁶ It was surely no coincidence that the Howard government subsequently amended the Workplace Relations Act to outlaw the practice.

2.45 In the conduct of the Cole Royal Commission and the methods it employed to come to its findings, behaviour which was not 'unlawful', or was not only lawful but essential for compliance with the law, such as employers complying with industrial agreements, became 'inappropriate' because Commissioner Cole deemed it so.

2.46 By this process, legislative changes can be recommended to transform that which is lawful but deemed 'inappropriate' into that which is 'unlawful'. Through the interplay of the words 'unlawful' and 'inappropriate' in the Royal Commission's terms of reference, lawful conduct becomes unlawful.

33 Royal Commission into the Building and Construction Industry: Final Report, Volume 1, paragraph 19.

34 Dabscheck, B., *Two and Two Make Five: Industrial Relations and the Gentle Art of Doublethink*, Economic and Labour Relations Review Vol. 15, No. 2, January 2005: 181-198, p. 184.

35 *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited* [2002] FCAFC 199 (21 June 2002)

36 Royal Commission into the Building and Construction Industry: Final Report, Volume 5, pp 127-128.

2.47 Dabscheck's conclusion provides a damning appraisal of the processes of the Cole Royal Commission and the reasoning, or lack of it, behind its findings.

The Cole Royal Commission into the building and construction industry was an inquisition into the heresy of unionism. The Letters Patent asked Commissioner Cole to investigate 'unlawful' and 'inappropriate' practices in the industry. He made findings that 'lawful' behaviour, even a decision of an appeal court, was 'inappropriate'; and recommended, at times, extensive legislative changes to make such behaviour 'unlawful'. In terms of doublethink that which is lawful is unlawful. Commissioner Cole kept from the 'public gaze, and devoted little time, energy and resources of the Royal Commission – one report out of twenty three – to an issue which, he claimed was most important to the Royal Commission, namely occupational health and safety. On the other hand, he devoted most of his time, energy and resources of the Commission – in terms of hearing days, gathering and presentation of material, twenty two of twenty three volumes – to an issue of less importance – that of unions and associated 'poor' industrial relations. That which is important is unimportant. Moreover, the inferences and conclusions Commissioner Cole 'derived' from publicly available material, much of which he commissioned himself, does not engender confidence in his findings, which have not been subject to 'normal' standards of natural justice and procedural fairness.³⁷

2.48 Submissions made to this inquiry and many public statements by supporters of the re-establishment of the ABCC, advance the proposition that the ABCC and its extraordinary coercive powers are necessary. When in the face of a crumbling economic, legal and human rights case for the ABCC they are asked why, the answer can be simply summarised as "the Cole Royal Commission".

2.49 The Committee is mindful of the words of William Pitt in a speech to the House of Commons on 18th November 1783, 'Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves.' In assessing whether the ABCC is necessary to industrial relations in the building and construction industry, it is as well to examine the record of prosecutions over the decade since the Cole Royal Commission.

2.50 Apart from the instances of "inappropriate" conduct set out in Volume One of his final report, Commissioner Cole issued a confidential volume³⁸ which was said to comprise findings of 392 instances of unlawful and criminal conduct, of which 98³⁹ were referred by the then Attorney-General to law enforcement bodies for their

37 Dabscheck, B., *Two and Two Make Five: Industrial Relations and the Gentle Art of Doublethink*, Economic and Labour Relations Review Vol. 15, No. 2, January 2005: 181-198, p.194.

38 Royal Commission into the Building and Construction Industry: Final Report, Volume 23.

39 Correspondence from the Hon. Julia Gillard MP, Deputy Prime Minister and Minister for Employment and Workplace Relations to the National Secretary of the Construction, Forestry, Mining and Energy Union – Construction and General Division, 13th January 2009: Tabled 17th March 2014.

consideration. That volume remains secret and the precise nature of its contents is unknown to the Committee.

2.51 Whatever the contents of Volume 23, the evidence to this inquiry is that there has been just a single successful prosecution arising from the Cole Royal Commission for an offence related to conduct as a building industry participant; that of a company prosecuted for the payment of strike pay. The only other successful prosecution arising from the Cole Royal Commission was that of a union officer found guilty of perjury during the course of the Royal Commission.⁴⁰

2.52 At the public hearing in Canberra on 17th March 2014, the law enforcement agencies appearing were asked about the fate of criminal matters contained in Volume 23 and referred to them from the Cole Royal Commission.

2.53 The representative of the Australian Federal Police was able to confirm that a total of seven matters arising from allegations of criminal conduct were referred to them from the Cole Royal Commission. Of these, five matters were not proceeded with, two prosecutions were launched, one of which led to an acquittal and the other the perjury conviction mentioned above.

Senator CAMERON: Deputy Commissioner Phelan, what about the issues that came to you?

Mr Phelan: Out of the seven matters that came to us, two of them resulted in prosecutions. One was the conviction that you have already referred to and another was an acquittal. Four of the matters that came to us we evaluated and determined that no further action should be taken. One of the other matters was referred to another agency, and I do not know the result of that one.⁴¹

2.54 The Australian Crime Commission officer who gave evidence to the Committee understood that no referrals from the Cole Royal Commission had been received by the Australian Crime Commission.

Senator CAMERON: Thank you, Deputy Commissioner Phelan. Mr Jevtovic, did the Crime Commission receive any?

Mr Jevtovic: To my understanding we did not. However, I cannot be categoric. It is something that I will take on notice as well.⁴²

2.55 Victoria Police were unable to confirm at the Committee hearing in Canberra that it had received any matters referred to them by the Cole Royal Commission.⁴³

40 Correspondence from the Hon. Julia Gillard MP, Deputy Prime Minister and Minister for Employment and Workplace Relations to the National Secretary of the Construction, Forestry, Mining and Energy Union – Construction and General Division, 13th January 2009: Tabled 17 March 2014.

41 Mr Michael Phelan, Deputy Commissioner – Operations, Australian Federal Police, *Proof Committee Hansard*, 17 March 2014, p. 6.

42 Mr Paul Jevtovic, Acting Chief Executive Officer, Australian Crime Commission, *Proof Committee Hansard*, 17 March 2014, p. 6.

2.56 However, in relation to referrals of alleged criminal conduct from the former ABCC, Victoria Police confirmed that it received 15 matters in the period from 2005 to 2012; around two per year. Of these, one matter was the subject of a prosecution at the conclusion of which a diversionary sentence was imposed and no conviction recorded against the offender. The remaining fourteen referrals were not proceeded with.⁴⁴

2.57 Since 2012, Victoria Police have received four referrals of alleged criminal conduct from Fair Work Building and Construction, none of which have been proceeded with.⁴⁵

2.58 The Australian Federal Police indicated that they would take on notice the question as to whether they had received any referrals of alleged criminality from either the former ABCC or FWBC.⁴⁶

2.59 The Australian Crime Commission told the Committee that it did not believe it had received referrals of alleged criminal conduct *per se* from the former ABCC, but would check and took on notice the question of whether it may have received intelligence from the former ABCC.⁴⁷

2.60 The picture to emerge from the record of prosecutions, successful or otherwise, arising from what are said to be Commissioner Cole's findings of widespread unlawful and criminal conduct is that the claims have been over-stated. It is the Committee's view that had the Cole Royal Commission's "findings" of unlawful and criminal conduct been borne out, there would be a reasonably lengthy catalogue of successful prosecutions arising from the Royal Commission to which the proponents of the re-establishment of the ABCC could point. That there is no such catalogue of successful prosecutions leads the Committee to the view that the case for the "necessity" of the ABCC to deal with widespread unlawfulness, including criminal conduct, has not been made out.

2.61 On the contrary, the evidence to this inquiry from the law enforcement agencies who gave evidence is that criminal behaviour is not endemic in the building and construction industry. In relation to Victoria, where supporters of the re-establishment of the ABCC claim criminal conduct is endemic, the following exchange in the hearing of 17 March 2014 in relation to referrals to Victoria Police from FWBC and its predecessor, the former ABCC, indicates that such claims are grossly over-stated:

43 Mr Graham Ashton, Deputy Commissioner, Victoria Police, *Proof Committee Hansard*, 17 March 2014, p. 6.

44 Mr Graham Ashton, Deputy Commissioner, Victoria Police, *Proof Committee Hansard*, 17 March 2014, pp 7-8.

45 Mr Graham Ashton, Deputy Commissioner, Victoria Police, *Proof Committee Hansard*, 17 March 2014, pp 7-8.

46 Mr Michael Phelan, Deputy Commissioner – Operations, Australian Federal Police, *Proof Committee Hansard*, 17 March 2014, p. 8.

47 Mr Paul Jevtovic, Acting Chief Executive Officer, Australian Crime Commission, *Proof Committee Hansard*, 17 March 2014, p. 7-8.

Senator CAMERON: I am happy for that. Did these allegations result in further investigations?

Mr Ashton: Certainly from the Victoria Police, yes. I know that they did follow up with investigations from our end, yes.

Senator CAMERON: I will keep with you, then. Did they result in any prosecutions?

Mr Ashton: I do not have a record here of any prosecutions. There was one matter where we have a prosecution afoot from February 2013, but I do not think that came as a result of a referral. I do not have a record here of any convictions.

Senator CAMERON: So the referrals from the ABCC and the allegations that have been made are not resulting in a flood of allegations or a flood of convictions in the building and construction industry, are they?

Mr Ashton: To put a term like 'flood' around it requires me, I guess, to form some opinion about it. But I can certainly tell you: they are the facts. We certainly receive information from other areas and we have had other investigations and convictions, but not specifically from those bodies.

Senator CAMERON: Mr Jevtovic?

Mr Jevtovic: We are in a not dissimilar situation: we collect intelligence nationally and we would receive intelligence relevant to a range of criminal entities, groups and targets. But in relation to those two specific bodies, I have taken that on notice, Senator, and I will get back to you.

Senator CAMERON: Deputy Commissioner Phelan?

Mr Phelan: Yes, I would have to take on notice too the matters that were referred, as to where they ended up.⁴⁸

Committee View

2.62 With the passage of time and the ability it affords to take a dispassionate view of the Cole Royal Commission in the light of subsequent events, the Committee takes the view that Commissioner Cole's findings and recommendations do not provide a sufficient basis on which the Parliament, over a decade later, ought to consider passing legislation that empowers the exercise by a Commonwealth agency of extraordinary coercive powers, without adequate oversight, that involve substantial limitations and extinguishment of a range of civil, political and legal rights of people solely on the basis of their employment in the building and construction industry.

48 *Proof Committee Hansard*, 17 March 2014, p. 9.