

CHAPTER 5

Is the building and construction industry unique?

The need for a specialist regulator

5.1 The establishment of a unique regulatory framework for the building and construction industry has been a point of contention ever since the Building Industry Taskforce was established in 2002. The approach has been continued through the creation of the Australian Building and Construction Commission and subsequently through Fair Work Building and Construction.

5.2 The principle that the industry required industry specific regulation was first promoted by Justice Cole in his report of the Royal Commission into the Building and Construction Industry:

These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform.¹

5.3 Supporters of the legislation cited the Cole Royal Commission as evidence that the industry had exceptional problems that could only be dealt with if a specialist regulator was in force to address the unique nature of the conduct that Justice Cole described. Business SA submitted that the Cole Royal Commission had found breaches of various forms of regulation, state and federal law to the extent that they represented a cultural and structural problem in the industry:

The Cole Royal Commission went on to summarise the unique structural and cultural problems of the industry, as follows:

“At the heart of the findings is lawlessness. It is exhibited in many ways. There are breaches of the criminal law. There are breaches of laws of general application to all Australians where the sanction is a penalty rather than possible imprisonment. There are breaches of many provisions of the Workplace Relations Act 1996 (C’wth). The unsatisfactory record in respect of occupational health and safety indicates breaches of the various State acts addressing that matter. There is disregard of or breach of the revenue statutes, both Commonwealth and State.²

5.4 Independent Economics, in the report commissioned by Master Builders Australia, were persuaded by the emphasis on the commercial grounds for the creation of a specialist regulator:

The Cole Royal Commission concluded that these problems occurred because the unique structure of the building and construction industry meant that head contractors had an “unwillingness and incapacity ... to

1 Hon Terence Cole, *Final Report of the Royal Commission into the Building and Construction Industry, Volume One, Summary of Findings and Recommendations*, p. 6.

2 Business SA, *Submission 9*, p. 6.

respond to unlawful industrial conduct causing them loss”. Commercial pressures meant that contractors would concede to union demands rather than become involved in long disputes. Consequently, the Cole Royal Commission concluded that the conditions in the Australian building and construction industry were unlike those in other industries.³

5.5 However these grounds were specifically addressed by Justice Wilcox in his 2009 report. Justice Wilcox considered whether the building and construction industry was uniquely vulnerable to industrial action, and the commercial impact that that may have:

‘...it is necessary to remember there are many other industries in which industrial action may cause great loss to an employer, and even the national economy, and/or considerable public inconvenience. One has only to think of the major export industries, most components of the transport industry, the gas and electricity industries, the telecommunication industry and emergency services such as police, ambulances and hospitals. There is no less need to regulate industrial action in those industries than in the building and construction industry...’⁴

5.6 The Australian Council for Trade Unions (ACTU) were similarly of the view that there was insufficient grounds for treating the industry as unique:

[W]e believe there is no case that has been made for special and discriminatory laws to apply to the building industry and laws to target building workers and their unions, in particular. We say that there is nothing specific or unusual or unique about the building industry that requires Australia to have, in essence, an entirely different industrial relations regime for one industry.⁵

5.7 The New South Wales Council of Civil Liberties held similar views on the need for an industry to be singled out for special attention on the basis that allegations of improper conduct have been made. They suggest that a number of other industries could be treated as unique if the criteria is that crimes or misconduct have been reported by participants in that industry:

I do not think it is appropriate to set up an industry specific body. The comments that have been made, allegations that have been raised and evidence that has been produced in the past about corruption are not unique to the building and construction industry. There are other industries like the tattooing industry, the security industry, and there are dozens and dozens of industries, where from time to time there are individuals who are successfully prosecuted for engaging in corrupt conduct, for committing crimes. As Senator Cameron says, the finance industry is not immune to that also. The real question is what really is unique about the building and construction industry that would suggest that that is different to the dozens

3 Master Builders Australia, *Submission 3, Attachment A: Economic Analysis of Building and Construction Industry Productivity: 2013 Update, Independent Economics*, August 2013, p. iii.

4 CFMEU, *Submission 18*, pp 40-41.

5 ACTU, *Proof Committee Hansard*, 12 March 2014, p. 10.

of other industries where from time to time individuals are investigated and successfully prosecuted?⁶

5.8 However Independent Economics was not satisfied with the retention of a specialist regulator in the legislation that replaced the ABCC. They maintain that the powers have to be the same to address the purported problems in the industry:

However, because it does not have the strong building industry-specific legislation and powers that were held by the Taskforce and ABCC, the simple existence of a building industry-specific regulator is unlikely to be able to contribute much to workplace practices in the industry.⁷

Criminal Activity in the Building and Construction Industry

5.9 The issue of endemic lawlessness, first raised by the Cole Royal Commission, was one that raised a number of issues throughout the inquiry to justify the re-establishment of the ABCC. The Prime Minister, while responding to allegations aired by the ABC's *7.30 Report*, leaving the impression that the ABCC would have a role in tackling corruption and lawlessness in the industry:

What today's revelations demonstrate is the absolute pressing need for the reestablishment of the Australian Building and Construction Commission with full power, full authority, full funding...The commission should have full authority to ensure that the law is upheld. Full authority to ensure that the law is upheld in an industry which has been long marked by lawlessness.⁸

5.10 The Minister for Education and Leader of the House introduced the Bill and justified the need for the ABCC to be re-established in his second reading speech by citing the findings of the Cole Royal Commission:

It found consistent evidence that building sites and construction projects in Australia were hotbeds of intimidation, lawlessness, thuggery and violence.⁹

5.11 Master Builders Australia explicitly link alleged reports of criminal activity, namely corruption, with the need to re-establish the ABCC:

The matter that I would like to go to by way of opening remarks is that the restoration of the ABCC is about changing the culture in the industry. The Cole Royal Commission into the Building and Construction Industry

6 New South Wales Council for Civil Liberties, *Proof Committee Hansard*, 6 February 2014, p. 26.

7 Master Builders Australia, *Submission 3, Attachment A: Economic Analysis of Building and Construction Industry Productivity: 2013 Update, Independent Economics*, August 2013, p. 11.

8 Prime Minister Tony Abbott, 'Tony Abbott pushes for return of Australian Building and Construction Commission following union corruption claims', *ABC News website*, 28 January 2014, <http://www.abc.net.au/news/2014-01-28/abbott-pushes-for-return-of-australian-building-and-constructio/5223032> (accessed 19 March 2014).

9 The Hon, Mr Christopher Pyne, Minister for Education and Leader of the House, *House of Representatives Hansard*, 14 November 2013, p. 265.

found that the building and construction industry is characterised by widespread disregard for the law. Media reports of alleged corruption and criminality in the building and construction industry cannot be ignored in the current context. In that regard, those media allegations have brought home to the community the sheer scope and extent of the toxic culture of the industry.¹⁰

5.12 The ACTU, along with many other submitters, was deeply concerned about the suggestion by the Prime Minister and other ministers, that the ABCC can address criminality in the construction industry. The ACTU point out that the ABCC does not have any powers to deal with criminal activity:

The first is that we say there has been a deliberately misleading campaign in public debate to conflate this proposal and these arrangements about industrial law with broader allegations concerning unlawful behaviour. The reality is that this bill does not deal with criminal offences in the building industry. The only criminal penalties that would be established by this bill are associated with a failure to give evidence under the coercive powers. That is, they are on a par with contempt related offences. The public campaign is deeply misleading because it suggests that if there are allegations—for example of fraud or violence—which we have unreservedly condemned on a range of occasions, they would not in any case be dealt with by the ABCC; they are and would remain properly the remit of the ordinary criminal law of the land and the relevant police authorities, not an industrial inspectorate.¹¹

5.13 The CFMEU was also highly critical of what it sees as an orchestrated and deliberate political campaign to promote the return of the ABCC as the solution to criminality in the industry:

The present Prime Minister Mr. Abbott, The Employment Minister Mr. Abetz and even a previous Prime Minister Mr. Howard, have all publicly referred to these reports in support of the return of the ABCC. Each would know full well, particularly given their legal qualifications, that the ABCC and the legislation under which it would operate, have no role whatsoever in the ‘policing’ of criminal behaviour in the industry.¹²

5.14 Policing authorities that appeared before the committee clarified the scope of their operations in relation to criminality in the construction industry or anywhere else:

We usually, no matter what the industry, if we get referrals of criminal activity, investigate those. But in most cases we do not have a role in relation to proactively entering industry and looking for issues. We tend to

10 Master Builders Australia, *Proof Committee Hansard*, 6 February 2014, p. 10.

11 ACTU, *Proof Committee Hansard*, 12 March 2014, p. 11.

12 CFMEU, *Submission 18*, p. 2.

have a more responsive model, where allegations will be referred to police.¹³

5.15 The scale of criminal activity in the industry was illustrated when Victoria Police responded to questions on the number of referrals it received from the ABCC in the entire time the ABCC was in existence. In the period from 2005 to 2012 Victoria Police received 15 referrals. Since the ABCC has been abolished the force has received four referrals from Fair Work from Fair Work Building and Construction. Of these 19 referrals there has been one conviction in the state that has recently been the focus of corruption allegations in the industry.¹⁴ These allegations led to the Prime Minister saying there was a 'pressing need' for the ABCC to be re-established 'to ensure that the law is upheld in an industry which has been long marked by lawlessness.'¹⁵

5.16 The Australian Crime Commission also gave evidence that there was nothing unique about the building and construction industry that would make it particularly susceptible to the involvement of organised criminality:

I think it would be fair to say that organised crime will gravitate to any sector, any industry where it believes it can generate profitability through its involvement. They will do so in many different ways, including through criminal acts and exploiting a lack of regulation or a lack of law. But their main motivation is profitability. So the first point I would make is that there is no sector that they would not focus on... We find them present in the sector we are discussing this evening and in other sectors as well.¹⁶

5.17 Victoria Police supported the view that other industries attracted elements of criminal activity:

In answer to that broader question, the other industries where we see that activity occurring include the security industry, the liquor industry, both the legal and the illegal sex industry and, more recently, in heavy haulage to a significant degree. The answer to the second part of your question is no, it is not restricted to the building sector.¹⁷

5.18 The committee heard from other witnesses who concurred with the evidence from the policing authorities that allegations of criminal actions and corruption are raised in other industries and there was no evidence to support singling out the building and construction industry:

13 Victoria Police, *Proof Committee Hansard*, 17 March 2014, p. 3.

14 Victoria Police, *Proof Committee Hansard*, 17 March 2014, p. 7.

15 Prime Minister Tony Abbott, 'Tony Abbott pushes for return of Australian Building and Construction Commission following union corruption claims', *ABC News website*, 28 January 2014, <http://www.abc.net.au/news/2014-01-28/abbott-pushes-for-return-of-australian-building-and-constructio/5223032> (accessed 19 March 2014).

16 Australian Crime Commission, *Proof Committee Hansard*, 17 March 2014, p. 11.

17 Victoria Police, *Proof Committee Hansard*, 17 March 2014, p. 11.

Corruption and crime are not a problem that is unique to the building and construction industry. There are many other industries where these sorts of allegations are raised all the time—in particular, the security industry and the finance industry, amongst countless others. Really I do not think the case has been made out that the construction industry is so unique that it requires a body like this with extraordinary powers.¹⁸

5.19 Submitters from the unions re-iterated their stance that they are opposed to all elements of criminal activity and that these should be addressed. The PTEU stated that they were not objecting to the re-establishment of the ABCC on the grounds that the regulator may expose something in the industry, but because it was bad policy:

The PTEU is a force for good in modern Australian society. We are transparent and condemn corruption. Our union has subjected itself to forensic audit and has implemented a range of measures to ensure we function with the upmost probity. We have nothing to fear from the re-establishment of the ABCC, but oppose it as it represents bad and discriminatory public policy.¹⁹

5.20 The CFMEU also stressed that if every sector of the workforce across the economy had the same level of scrutiny and the same emphasis on litigating against regulatory non-compliance then a similar number of cases would be brought to the fore:

If any other sector of the community had a regulator imposed and funded to the degree that the building and construction unions, particularly the CFMEU, do—for example, if the corporate sector or a section of the corporate sector had a regulator this focused and funded and ideologically committed to litigation—I think you would see a lot of litigation and court cases in those particular sectors too. We have itemised some issues of corporate malfeasance in our submission.²⁰

Insolvency and bad debt

5.21 The committee heard evidence from the policing authorities that discussed the debt collection industry and how there is 'heavy involvement' of outlaw motorcycle gangs and organised crime in that industry. As discussed above by the Australian Crime Commission, organised crime is attracted to any sector where it can generate profit and with the levels of unrecovered debt through insolvencies in the sector, the construction is a prime focus of those engaged in organised criminality.

5.22 The level of insolvency in the industry is a major problem as was illustrated by figures collated by ASIC in 2010-11. ASIC found that of the 8 054 initial external administrators reports lodged in the 2010-11 financial year 1 862 (23 per cent) of

18 New South Wales Council for Civil Liberties, *Proof Committee Hansard*, 6 February 2014, p. 28.

19 Plumbing Trades Employee's Union, *Submission 16*, p. 2.

20 CFMEU, *Proof Committee Hansard*, 12 March 2014, p. 4.

these related to companies in the construction sector.²¹ This had risen to 2,245 reports or 24.3 per cent in 2012-13.²² The estimated amount of money lost by creditors in the construction industry in 2010-11 was \$2.4 billion.²³

Committee View

5.23 The evidence to support the claims that criminality in the building and construction industry is 'endemic', or that the industry is a 'hotbed of lawlessness', simply does not exist. The figures pertaining to referrals from the ABCC to the police show clearly that criminal behaviour is relatively rare, and certainly no more prevalent in the building and construction industry than anywhere else. Despite the political discourse around this issue, and the vast amounts of funding that has been provided for Royal Commissions and the ABCC litigation, there is no evidence to support the argument that this industry should be subject to any stricter enforcement powers than any other industry.

5.24 The huge sum of money lost underpins an extensive debt collection industry that, as the evidence from policing authorities shows, attracts organised criminality. If there is any organised criminality in the industry it is more likely that it would stem from debt collection activities than from industrial action.

21 Kingsway Financial Assessments Pty Ltd, *Corporate Insolvency in the Australian Construction Sector - Key findings from ASIC insolvency data 2010 – 2011*, 7 February 2012, p. 4.

22 ASIC, *Report 372, Insolvency statistics: External administrators' reports (July 2012 to June 2013)*, October 2013, p. 6. [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep372-published-17-October-2013.pdf/\\$file/rep372-published-17-October-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep372-published-17-October-2013.pdf/$file/rep372-published-17-October-2013.pdf) (accessed 24 March 2014).

23 Kingsway Financial Assessments Pty Ltd, *Corporate Insolvency in the Australian Construction Sector - Key findings from ASIC insolvency data 2010 – 2011*, 7 February 2012, p. 1.