The Senate

Education and Employment References Committee

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

March 2014

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RECOMMENDATION

Recommendation 1

6.45 The committee recommends that in view of the failure of the government and proponents of the re-establishment of the ABCC to:

- **Establish an economic or productivity case for the ABCC;**
- **Address the very serious incursions on human rights in the bills;**
- **Establish the uniqueness of the building and construction industry sufficient to warrant draconian powers and penalties;**
- **Establish that the coercive powers proposed for the ABCC are subject to sufficient oversight and safeguards;**
- **Establish that the ABCC would improve occupational health and safety in the building and construction industry;**

the Senate not support the re-establishment of the Australian Building and Construction Commission and accordingly, not pass the Building and Construction Industry (Improving Productivity) Bill 2013 and related bill.

EXECUTIVE SUMMARY AND KEY FINDINGS

Parliamentary Scrutiny

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

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

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

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

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

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

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

Key Findings

Cole Royal Commission

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

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

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

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

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

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

Human Rights Implications

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

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

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

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

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

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

Productivity

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

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

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

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

The "uniqueness" of the building and construction industry

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

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

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

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

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

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

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

Safeguards on the use of coercive powers

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

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

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

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

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

Related matters

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAPTER 1

Background to the Inquiry

Reference

On 4 December 2013 the Senate referred the Government's approach to re-establishing the Australian Building and Construction Commission for inquiry and report by the last sitting day in March 2014 (27 March 2014). The committee agreed that submissions should be received by 10 February 2014. The terms of reference for the inquiry are:

> The Government's approach to re-establishing the Australian Building and Construction Commission through the Building and Construction Industry (Improving Productivity) Bill 2013 and related bills, with particular reference to:
>
> a. the potential impact of the re-establishment of the Australian Building and Construction Commission on the building and construction industry;
>
> b. the need or otherwise for a specialist industrial regulator in the building and construction industry;
>
> c. the potential impact of the bills on productivity in the building and construction industry;
>
> d. whether the bills are consistent with Australia's obligations under international law;
>
> e. the potential impact of the bills on employees, employers, employer bodies, trade and labour councils, unions and union members;
>
> f. the extreme and heavy-handed proposed powers of the Australian Building and Construction Commission, including coercive powers, conduct of compulsory interviews, and imprisonment for those who do not co-operate;
>
> g. the provisions of the bills relating to requirements to provide information to the Australian Building and Construction Commission during interviews including provisions that interviewees have no right to silence;
>
> h. the provisions of the bills that introduce the law of conspiracy into the industrial regulation of the building and construction industry;
>
> i. whether the provisions of the bills relating to occupational health and safety in the building and construction industry are adequate to protect the health and safety of employees and contractors in the industry; and
>
> j. any other related matter.[1]

1 *Journals of the Senate*, 4 December 2013, p. 233.

Previous inquiry

1.1 The referral was immediately preceded by an inquiry by the Senate Education and Employment *Legislation* Committee into the bill itself. In its report tabled on 2 December 2013 that committee recommended that the bill be passed.

1.2 Prior to the committee's inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 the committee had considered much of the subject matter through a number of inquiries and reports into various legislative instruments concerning workplace regulation within the construction industry.

Legislative History

1.3 The Building and Construction Industry (Improving Productivity) Bill 2013 currently under consideration would replace the Office of the Fair Work Building Industry Inspectorate with the re-established Australian Building and Construction Commission. The bill governs the appointments and functions of the Commission as well as those of the Office of the Federal Safety Commissioner.

1.4 The Australian Building and Construction Commission was abolished in 2012 under the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (The current Act). The committee considered that bill in its report of February 2012.[2]

1.5 In 2003 the government introduced the Building and Construction Industry Improvement Bill 2003. This bill lapsed in the Senate when Parliament was prorogued in 2004. Nevertheless, the committee produced a report in June 2004 covering the 2003 bill and related matters.[3]

1.6 In 2005 the Building and Construction Industry Improvement Bill 2005 was introduced and passed. The committee inquired into the 2005 bill and tabled a report in May of that year. Senator Siewert introduced the Building and Construction Industry (Restoring Workplace Rights) Bill 2008. The committee inquired into and reported on this bill in November 2008.

1.7 On 17 June 2009 the government introduced the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009. The Senate referred the provisions of the bill to the committee. The bill lapsed when Parliament was prorogued on 19 July 2010. The committee inquired and presented a report in September 2009.

Purpose of the Bill

1.8 The bill re-establishes the Australian Building and Construction Industry Commission (ABCC) that was abolished under the 2012 Act and replaced by the

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2 Senate Employment, Workplace Relations and Education References Committee *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, February 2012.

3 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole: The future of the construction industry: confrontation or co-operation?*, June 2004.

Office of Fair Work Building Industry Inspectorate (FWBII). The bill proposes that the FWBII would continue in existence under the name of the ABCC. Chapter 2 would also regulate the appointment and functions of the Australian Building and Construction Industry Commissioner (ABC Commissioner).

1.9 The bill would provide powers to either the Minister or to the ABC Commissioner and staff to:

- issue a Building Code which includes providing the ABC Commissioner with the power to require a person to report on his or her compliance with the Code;
- prohibit unlawful industrial action if the action has a connection to a constitutionally-covered entity;
- prohibit coercion of persons in relation to the engagement of contractors and employees or choice of superannuation fund;
- prohibit coercion or undue pressure on persons in relation to Commonwealth industrial instruments; and
- obtain information.

1.10 The bill also includes enforcement provisions and deals with administrative matters.

The Building Code

1.11 Chapter 3 of the bill would provide the Minister with the power to issue a Building Code. The current Building Code was issued by Legislative Instrument under the *Fair Work (Building Industry) Act 2012* and commenced on 1 February 2013. While the Minister had the power to issue a Building Code under the *Building and Construction Industry Improvement Act 2005(Superseded)* this was never exercised.

1.12 This bill adds a provision that building industry participants may be directed to report to the ABC Commissioner on their compliance with the Code.

Unlawful Industrial Action

1.13 Chapter 5 of the bill prohibits unlawful industrial action. Unlawful industrial action includes bans on working, employees failing to attend work and employers locking out employees.[4] This Chapter would apply only if the unlawful action or unlawful picket has a connection to a constitutionally-covered entity. Any person would be able to apply for an injunction to restrain a person from organising or engaging in unlawful industrial action or an unlawful picket in relation to building work.[5]

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4 Building and Construction Industry (Improving Productivity) Bill 2013, s 44.

5 Explanatory Memorandum, Building and Construction Industry (Improving Productivity) Bill 2013, p. 3.

1.14 The bill also states that the provisions in Part 3-3 of the *Fair Work Act 2009* relating to strike pay would also apply in relation to unlawful industrial action.

Coercion, discrimination and unenforceable agreements

1.15 Chapter 6 would prohibit action that:

- intends to coerce a person to employ or engage individual employees or independent contractors;
- intends to coerce a person to assign particular duties or responsibilities to people or contractors;
- intends to make an employee or employer nominate a particular superannuation fund.

1.16 In addition, the chapter proposes to ban actions that intend to coerce or apply undue pressure to make, vary or terminate enterprise agreements.

1.17 Part 3 of Chapter 6 would make an agreement unenforceable if the agreement is entered into with the intention to secure standard employment conditions for building employees at a particular site and not all the employees are employed in a single enterprise.

Obtaining Information

1.18 The powers to obtain information in relation to an investigation of a suspected contravention of the bill or a designated building law are set out in Chapter 7. The bill would give the ABC Commissioner the power to issue an examination notice to a person directing them to provide documents or information relevant to the investigation. The person would have 14 days to comply.

1.19 These powers were first introduced in the Building and Construction Industry Improvement Bill 2005. The powers were retained in the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012 but with a requirement to notify the Commonwealth Ombudsman of the issue of an examination notice. This provision has been retained in the bill.

Compatibility with human rights

1.20 The explanatory memorandum states that the Building and Construction Industry (Improving Productivity) Bill 2013 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.

1.21 A number of human rights are engaged by the bill, including: the right to freedom of association, the right to just and favourable conditions of work, the right to a fair trial, the right to peaceful assembly, the right to freedom of expression, and the right to privacy and reputation. The explanatory memorandum submits that the measures contained in the bill are reasonable and proportionate.

1.22 The Parliamentary Joint Committee on Human Rights (PJCHR) considered the bill in its report of 10 December 2013. Analysis of the PJCHR's findings,

including consideration of the various rights engaged by the bills is discussed in Chapter 3.

Acknowledgement

1.23 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions and giving evidence at the hearing.

Notes on references

1.24 References in this report to the Hansard for the public hearing are to the Proof Hansard. Please note that page numbers may vary between the proof and the official transcripts.

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

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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.

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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

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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 wrong-doing, 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

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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 book[17] 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:

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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.

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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

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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.royalcombci.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 regime[24], 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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> …

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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

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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.

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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.

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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 volume[38] which was said to comprise findings of 392 instances of unlawful and criminal conduct, of which 98[39] were referred by the then Attorney-General to law enforcement bodies for their

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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?
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> **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]

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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:

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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.

CHAPTER 3

Human Rights and the International Labour Organisation

3.1 The Committee received evidence from numerous submitters, including the Law Council of Australia (Law Council), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia about the human rights implications of the bills, with many submitters arguing that the bills have severe adverse impacts on human rights in Australia. The Committee took note of other Parliamentary inquiries into the proposed bills and their potential engagement of international legal instruments and human rights law. Significant concerns were raised by the Parliamentary Joint Committee on Human Rights (PJCHR) and the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), that the bills would have a negative impact on human rights in Australia.

3.2 The Committee heard that Australia's numerous obligations under International Labour Organisation (ILO) conventions were under threat by the bills, and that ILO obligations were critical in maintaining fairness in the Australian industrial relations system. Some submitters, like the ACTU suggested that Australia's reputation overseas as a champion of human rights and therefore workers' rights is directly threatened by the legislation.

3.3 While these concerns were rebutted by the Minister for Employment (the Minister), the Government argued that it would determine the extent to which it engaged human rights law in Australia, and that it was not necessarily concerned that the bills infringed obligations in force due to ILO Conventions to which Australia is a party. A list of ILO Conventions in effect in Australia is available at Appendix 3.

Criticism of the bills

3.4 The Law Council of Australia argued the bills feature numerous contraventions of common law rights and privileges, including:

> the burden of proof, the privilege against self-incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive.[1]

3.5 The Law Council agreed with the concerns of the Scrutiny of Bills Committee, that the bills would negatively impact numerous rights currently guaranteed in Australian law. Further, the Law Council submitted the Committee should wait for a response from the Minister to the concerns raised in the Scrutiny of Bills Committee alter digest, before tabling its final report.[2]

Human Rights, Scrutiny and the pursuit of legitimate objectives

3.6 The Committee notes that potential engagement of human rights is required pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011,* to be justified in the

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1 Law Council of Australia, *Submission 17,* p .2.

2 Law Council of Australia, *Submission 17,* p .2.

statement of compatibility, to accompany the bills through the Parliamentary process. The Attorney-General's Department has also created a flowchart that guides Commonwealth Agencies and Departments in how to comply with human rights law in Australia, available at Appendix 4. The PJCHR has provided, through its Practice Note 1, details of the process for assessing engagement of human rights law by bills and proposed legislative instruments:

> In line with the steps set out in the assessment tool flowchart (and related guidance) developed by the Attorney-General's Department, the committee would prefer for statements to provide information that addresses the following three criteria where a bill or legislative instrument limits human rights:
>
> 1. whether and how the limitation is aimed at achieving a legitimate objective;
> 2. whether and how there is a rational connection between the limitation and the objective; and
> 3. whether and how the limitation is proportionate to that objective.[3]

Legitimate objective

3.7 The Committee does not accept the Government's contention that the re-establishment of the ABCC is required, and does not accept that the former ABCC increased the performance of the building or construction sector, or that it provided any economic benefits to either workers or to the community at large.[4] The Government submitted:

> The need to re-establish the ABCC, underpinned by provisions put in place in 2005, is clear. While the ABCC existed, the performance of the building and construction sector improved. During its period of operation, the ABCC provided economic benefits for consumers, higher levels of productivity, less days lost to industrial action and a respect for the rule of law.[5]

3.8 The Law Council suggested that the information gathering powers proposed by the bills are generally reserved for law enforcement or intelligence agencies. They argue the intrusive and extraordinary nature of the powers increase the need for evidentiary proof of consistent problems within the building and construction industry.[6] Furthermore, the Council highlight the need for adequate safeguards for such extensive powers:

> It is also critical that if shown to be necessary, such powers are introduced with strict safeguards (such as judicial oversight of the issue of examination notices) to guard against the misuse or overuse of such powers.[7]

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3 Parliamentary Joint Committee on Human Rights, *Practice Note 1*, p.2.

4 Minister for Employment, *Submission 1*, p. 3.

5 Minister for Employment, *Submission 1*, p. 3.

6 Law Council of Australia, *Submission 17*, p. 4.

7 Law Council of Australia, *Submission 17*, p. 4.

3.9 The Committee notes that submitters, including the ACTU disagreed; arguing that there was no evidence to suggest that industrial disputes in the building and construction industry were at historic levels, or that since the ABCC was abolished there has been a rise in industrial disputes.[8] Further, the ACTU argued that the rate of industrial disputes remains low relative to historic levels.[9]

3.10 The use of statements without evidence does not satisfy the requirement that engagement of human rights in Australia must be in pursuit of a legitimate objective. Given the Committee does not accept evidence from the Minister about increases in delays or illegal activity in the building and construction sector, the engagement of human rights by the bills cannot be justified. The Committee firmly believes that no legitimate objective exists, and that the only objective pursued by the bills is the fundamental interference of the human rights of workers in the building and construction industry.

Rational connection between limitations of rights and the objective

3.11 Similarly, the Committee does not accept there is a rational connection between the engagement of human rights and the objective, given the objective itself is illegitimate and non-existent.

3.12 The provisions of the bill, including the human rights implications discussed below clearly demonstrate that the investigative and coercive powers proposed by the bills are draconian and unnecessary. The Committee does not accept that any rational connections exist due to the complete lack of evidentiary support for the Government's claims. The limitation would not achieve the objective, as the objective is based on false statements and misinformation.

Proportionality of objective

3.13 The Committee notes that any human rights engaged by legislation must be proportionate to the objective and, 'limitations on rights must go only as far as necessary to achieve a legitimate aim.'[10] The analysis provided by the Scrutiny of Bills Committee and PJCHR demonstrate the disproportionality of the engagement of rights, and provide further evidence that the bills should be opposed in their entirety. The ACTU submitted that, in light of the ILO's observations in respect to how the ABCC operated (and restricted the rights of workers), the inclusion in the Statement of Compatibility that 'the Bill will enhance workers' right to freedom of association', to be 'highly objectionable'.[11]

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8 ACTU, *Submission 14*, p. 26.

9 ACTU, *Submission 14*, p. 26.

10 Attorney-General's Department, *Flowchart for Assessing the Human Rights Compatibility of Bills and Legislative Instruments*, at http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Documents/Flowchart.pdf, accessed 24 March 2014.

11 ACTU, *Submission 14*, p. 24.

3.14 The Committee agrees that the contention by the Government that the bills would enhance workers' rights is both false and deliberately misleading, given the negative consequences for human and therefore, workers' rights discussed below.

Committee view

3.15 The Committee disagrees that the limitations are legitimate, rationally connected or proportionate. The Committee disputes the assertions made by the Government that specific legislation is required for the building and construction industry.

3.16 The Committee agrees that the engagements of rights by the bills are excessive and dangerous, and represent an effort to undermine the ability of workers to unite and organise under international and Australian law.

3.17 The Committee accepts the criticism of the explanatory memorandum and statement of compatibility, and takes the view that if they are to be of any use to either the Parliament or the courts, significantly more detail is required.

Engagement of human rights in the bills

3.18 The PJCHR expressed its concern with the potential engagement of numerous rights in the bills and has written to the Minister seeking additional information relating to the bill's engagement of numerous human rights instruments, including:

> …the right to equality and non-discrimination, the right to freedom of association and to engage in collective bargaining, the right to freedom of assembly, the right to freedom of expression, the right to privacy, the right to a fair hearing, and the prohibition against self-incrimination.[12]

3.19 The PJCHR noted that while the bills give effect to the recently elected government's commitment to re-establish the Australian Building and Construction Commission (ABCC), the bills largely replicate provisions previously enforced in Australian legislation, by removing the changes made by the 2012 Act.

3.20 While each bill is accompanied by a statement of compatibility, the PCJHR found the statement accompanying the main bill notes the engagement of:

- The right to freedom of association;[13]
- The right to just and favourable conditions of work (including the right to safe and healthy working conditions);[14]
- The right to a fair trial;[15]

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12 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 1.

13 Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

14 Article 7 of the ICESCR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

15 Article 14 of the ICCPR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

- The right to freedom of assembly;[16]
- The right to freedom of expression;[17] and
- The right to privacy.[18]

3.21 The PJCHR noted the government's claim in the statement of compatibility that any limitations on the rights engaged by the bills are, 'compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.'[19]

3.22 The PJCHR criticised the statement of compatibility and the explanatory memorandum generally. The PJCHR noted the documents made assertions and statements of fact that are not supported by evidence or data.[20] The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) also criticised the explanatory memorandum, noting that:

> …generally, the explanatory memorandum is regrettably brief and uninformative, for the most part repeating the provisions of the bill. For example, the explanatory memorandum frequently notes that various provisions are modelled on or similar to provisions contained in the FW Act, but without any detail about the extent of similarities or whether there are salient differences.
>
> A comprehensive explanatory memorandum is an essential aid to effective Parliamentary scrutiny (including the scrutiny undertaken by this committee) as it greatly assists people to understand the legislative proposal and it may also be an important document used by a court to interpret the legislation under section 15AB of the *Acts Interpretation Act 1901*.[21]

3.23 The Scrutiny of Bills Committee made numerous additional comments in its report on the bills, tabled in the Senate on 11 December 2013, including the inclusion in the bills of provisions relating to the potential:

- Exclusion of judicial review rights;
- Delegation of legislative power;
- Trespass on personal rights and liberties;
- Delegation of legislative power;

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16 Article 21 of the ICCPR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

17 Article 19 of the ICCPR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

18 Article 17 of the ICCPR, as cited by the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

19 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 5.

20 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp 5-6.

21 Senate Standing Scrutiny of Bills Committee, *Alert Digest No. 9 of 2013*, p. 18.

- Undue dependence upon insufficiently defined powers;
- Broad discretionary powers;
- Merits review; and
- Penalties.[22]

3.24 The ACTU also noted the ILO's analysis of the operation of the ABCC. In the Concluding Observations on Australia's Fourth Periodic Report in 2009, criticised the effect of the ABCC on workers in the building and construction industry. Specifically, the ILO contended the rights to organise and freedom of association are engaged inappropriately:

> The Committee is concerned that provisions of the Building and Construction Industry Improvement Act 2005 seriously affect freedom of association of building and construction workers, by imposing significant penalties for industrial actions, including six months of incarceration. The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise (art.8)[23]

Australia's commitment to International Labour Organisation conventions

3.25 The Committee also heard extensive evidence from some submitters, such as the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA) that suggested the bills, if enacted, could result in the abrogation of ILO instruments relating to rights to employment. The criticism related to the engagement by the bills of the Freedom of Association and Protection of the Right to Organise Convention (No. 87) (the Convention), and the likely interference with the rights in the Convention to participate in the trade union movement. The Convention has been in force in Australia since 28 February 1973.[24]

3.26 The MUA argued the bills, if passed, would amount to the abrogation of Australia's international legal obligations under the Convention. Specifically, the MUA contended that the ILO had previously found the previous Act (*Building and Construction Industry Improvement Act 2005*) (Cth) contravened numerous ILO instruments, including:

- The Labour Inspection Convention 1947 (No. 81);
- The Freedom of Association and Protection of the Right to Organise Convention 1947 (No. 87); and

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22 Senate Standing Scrutiny of Bills Committee, *Alert Digest No. 9 of 2013*, pp 3 to 18.

23 Committee on Economic, Social and Cultural Rights, Forty-Second Session, Geneva, 4–22 May 2009 at [19], as cited in ACTU, Submission 14, p. 24.

24 International Labor Organisation, C087 – *Freedom of Association and Protection of the Right to Organise Convention*, 1958, (No. 87)

- The Right to Organise and Collective Bargaining Convention 1949 (No. 98).[25]

3.27 The ACTU noted that while Australia is subject to numerous international obligations, the failure to abide by human rights obligations would have significant impacts on the promotion and protection of human rights, and also on Australia's reputation. The ACTU agreed with the MUA that the previous Act, upon which the bills are based, was found to constitute a serious breach of Australia's obligations under ILO instruments, as described above.[26]

3.28 The ACTU argued the ILO supervisory committees (the Tripartite Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations) held that the original Act breached Australia's international obligations. Those committees specifically criticised:

- Provisions that rendered some industrial action 'unlawful';
- The imposition of penalties and sanctions on workers and unions that engaged in 'unlawful industrial action';
- The unenforceability of project agreements;
- The National Code of Practice for the Construction Industry and associated guidelines;
- The investigative and enforcement powers of the ABCC;
- The absence of proportionality with respect to offences prescribed under the Act; and
- The focus of the ABCC on investigating and prosecuting workers and trade union officials.[27]

3.29 The Minister for Employment rebutted the arguments put forward by submitters, such as the MUA and ACTU. The Minister suggested the issues raised by the PJCHR and the Scrutiny of Bills Committee relating to Australia's obligations under ILO conventions were under consideration, however:

> **Senator Abetz:** The ILO's views are always of interest to us, but we in Australia will determine for ourselves what our law ought to be. The ILO's interpretation of certain conventions is always interesting and we will take it into account but, at the end of the day, I think Australians want to be the determinants of their own legislative framework.[28]

3.30 Further, the Minister argued that, with respect to the operations of the ILO conventions in Australia, 'What our obligations are under international law is often a

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25 Maritime Union of Australia, *Submission 12*, p. 9.

26 Australian Council of Trade Unions, *Submission 14*, p. 22.

27 Australian Council of Trade Unions, *Submission 14*, p. 22.

28 Senator the Hon Eric Abetz, Minister for Employment, *Proof Committee Hansard*, 12 March 2014, p. 47.

matter of interpretation. We will make up our own minds as to what those requirements are.'[29]

Proposed discrimination against employees and employers in the building and construction industry

3.31 The PJCHR noted that while its mandate was to ensure legislation complies with international human rights obligations, the bills give rise to a number of human rights concerns. Specifically, the PJCHR questioned whether the introduction of a separate legislative regime that would apply to one group of workers and employers raises issues of equality and non-discrimination, in respect of Australia's international human rights obligations.[30]

3.32 Much of the analysis provided by the PJCHR relates primarily to two of the seven international human rights instruments contained in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, namely:

- International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5) (ICESCR); and
- International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23) (ICCPR).[31]

3.33 The PJCHR noted the inclusions of the government's view in the explanatory memorandum that the bills are necessary on the grounds the building and construction industry is distinctive and requires a distinctive policy response for economic reasons.[32] The explanatory materials also suggests that since the abolition of the ABCC:

> Standards of behaviour [in the building and construction industry] have declined. The industry has returned to the 'bad old days' where disputes are violent and there exists thuggery and disregard for the rule of law.[33]

Ministerial powers

3.34 The Law Council submitted that clause 120 would permit inappropriate delegation of legislative authority. The clause proposes to allow a Minister to make rules by legislative instrument, specifically to determine whether someone is an authorised applicant for the purposes of obtaining an order 'relating to a contravention of a civil remedy provision'.[34]

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29 Senator the Hon Eric Abetz, Minister for Employment, *Proof Committee Hansard*, 12 March 2014, p. 47.

30 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 6.

31 *Human Rights (Parliamentary Scrutiny) Act 2011*, s3

32 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 8.

33 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 8.

34 Law Council of Australia, *Submission 17*, p .2.

3.35 The Law Council shared the concerns of the Scrutiny of Bills Committee, who questioned why the power would need to be set by regulation, opposed to being determined by the Parliament in the bills. The Law Council submitted it is not clear why anyone other than the ABC Commissioner should have the power under the bills to designate authorised persons.

Exclusion of judicial review rights

3.36 The Scrutiny of Bills Committee's argued that exclusions from the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) should be avoided is critical, as the removal of judicial review rights (as proposed by the bills) would severely diminish the capacity for individuals to seek review of a decision. The removal of this right, while consistent with the other industrial relations legislation could result in the loss of the ability of workers to seek judicial review, where appropriate:

> …the effect that decisions made under the *Building and Construction Industry (Improving Productivity) Act 2013* will be excluded from the application of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). No rationale is provided in the explanatory memorandum, though it is noted that the predecessor legislation (which is repealed when this bill commences) was also excluded. The explanatory memorandum also notes that decisions made under the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* are excluded from review under the ADJR Act.
>
> The committee continues its practice of expecting a justification for excluding the operation of the ADJR Act. The ADJR Act is beneficial legislation that overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act*) and also provides for the right to reasons in some circumstances. The proliferation of exclusions from the ADJR Act is to be avoided.[35]

Rights to equality and non-discrimination

3.37 As discussed previously, the PJCHR stated that the bills' engagement of the rights to equality and non-discrimination may not be necessary or appropriate, given the lack of evidence provided in the explanatory memorandum. Importantly, the PJCHR noted the bills would involve the prohibition of certain forms of industrial activities that would apply to specific aspects of the building and construction industry. The bills would also create significant investigative powers, civil penalties and criminal offences only applicable to employers and employees who fall within the building industry.

3.38 While the PJCHR recognised the permissibility of targeted legislation to affect social or economic activity, it questioned the legitimacy of whether the bills

35 Senate Scrutiny of Bills Committee, *Alert Digest No 9 of 2013,* p 2.

single out particular groups of workers, while subjecting them to different penalties and offences.[36]

3.39 The PJCHR argued that the right to equality and non-discrimination, guarantees equal protection under the law and prevents the discrimination of persons on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or 'other status'.[37] The PJCHR suggested the latter category would apply to persons (both employers and employees) engaged in the building industry. Further, the PJCHR noted all workers are entitled, under international legal instruments, to the same rights at work,[38] including freedom of association and trade union rights.

Right to freedom of association and right to form and join trade unions

3.40 The PJCHR noted the potential engagement of the aforementioned right, contained in Article 22 of the ICCPR, specifically that limitations on this right are permissible only where they are both prescribed by law and 'necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.'[39]

3.41 The PJCHR stated that Article 8 of the ICESCR also guarantees the right to form and participate in trade unions as well as ensuring the rights of trade unions to:

> Function freely subject to no limitations other than those prescribed by law and which are necessary for the purposes set out above, and the right to strike. As with Article 22 of the ICCPR, Article 8 provides that no limitations on the rights are permissible if they are inconsistent with the rights contained in ILO Convention No. 87.[40]

3.42 The ACTU noted the ILO's previous analysis of the operation of the ABCC under the 2005 Act. In the *Concluding Observations on Australia's Fourth Periodic Report* in 2009, the ILO criticised the effect of the ABCC on workers in the building and construction industry and contended the right to organise and freedom of association were adversely engaged, in contravention of international law:

> The Committee is concerned that provisions of the *Building and Construction Industry Improvement Act 2005* seriously affect freedom of association of building and construction workers, by imposing significant penalties for industrial actions, including six months of incarceration. The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action

36 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 7.

37 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 11.

38 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 11.

39 Article 22 of the ICCPR, as cited in the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 12.

40 Article 8(3) of the ICESCR, as cited in the Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 12.

> which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise (art.8)[41]

Right to organise and bargain collectively

3.43 The PJCHR noted the bills, while resurrecting many features of the previous legislation would also require the examination of ILO criticism of the original act. Specifically, the PJCHR noted that the ILO Committee on Freedom of Association and the ILO Committee on the Application of Conventions and Recommendations (CEACR) made numerous criticisms of section 26 of the 2005 Act, namely:

> The Committee emphasizes that according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority [see Digest, op. cit., para. 851]. The Committee therefore requests the Government to take the necessary steps with a view to revising section 64 of the 2005 Act so as to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law, by decision of the administrative authority or the case law of the administrative labour authority. The Committee requests to be kept informed in this respect.[42]

3.44 The PJCHR stated that the right to organise includes the right to bargain collectively, and is guaranteed by Article 22 of the ICCPR and Article 8 of the ICESCR. The ILO supervisory bodies, having taken the view the previous legislation was not consistent with the right to bargain collectively, lends great support to the arguments that the newer bill would have the same effect. The primary bill also introduces provisions allowing for unenforceability agreements[43] that would be unenforceable if made with the intention of standardising employment conditions for employees working across multiple sites. The PJCHR questioned whether the inclusion of the unenforceability agreements prevents workers from organising and bargaining collectively.

Right to freedom of assembly and freedom of expression

3.45 The PJCHR raised the inclusion in the statement of compatibility of the proposed unlawful picketing provision, found in clause 46 of the bill, and its restriction on the right to freedom of assembly:

> However, even if the proposed prohibition of certain types of picketing were justified as a legitimate restriction on the freedom of assembly and other relevant rights, that is not sufficient. If some groups are permitted to

41 ACTU, *Submission 14*, p. 24.

42 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 15.

43 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 13.

> exercise a right to a greater extent than others, then issues of discrimination in relation to the right arise.
>
> As set out above, both the ICCPR and ICESCR guarantee the fulfilment of the rights in the respective Covenants without discrimination, which would include discrimination on the basis of status as a worker in a particular industry. The statement of compatibility does not explicitly address the issue of discrimination in the fulfilment of rights, in relation to this right or other rights.[44]

3.46 Further, the PJCHR noted no justification is provided as to why picketing should be made illegal by the bills, but only in respect of the building and construction industry. The PJCHR queried why non-building workers and unions would not be subject to the same information gathering powers or penalties as those involved in the building industry, and suggested this distinction made by the bills questions whether there is an objective and reasonable basis for the distinction.[45]

Right to privacy – coercive information-gathering powers

3.47 The Law Council of Australia submitted that it had significant concerns relating to Chapter 7, especially relating to the ABC Commissioner's investigative and coercive powers. The Law Council argued that the powers listed in the bill put numerous common law rights and privileges at risk.[46]

3.48 The PJCHR noted that Chapter 7 of the primary bill confers significant powers on the ABCC. These include the creation of a criminal offence for failing to cooperate with an investigation by the Commissioner if a person is aware of or has evidence of a contravention by a building industry participant or is capable of giving evidence otherwise relevant to an investigation.[47] With respect to the proposed coercive powers, the PJCHR argued that:

> These powers and associated provisions give rise to significant human rights concerns because of their breadth, the deployment of coercive powers in relation to civil wrongdoing rather than serious criminal offences, their application only to one part of the workforce, the limited procedural safeguards restricting and monitoring their use, the abrogation of the right of persons not to incriminate themselves, and the significant maximum penalty available for a failure to cooperate.[48]

3.49 The PJCHR also suggested that on the basis of the explanatory materials provided by the Government, the powers are necessary to enable information gathering and to enable the identification of persons involved in unlawful industrial action. The PJCHR agreed that such powers, to the extent that they mirror the coercive

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44 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp. 15-16.

45 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 16.

46 Law Council of Australia, *Submission 17*, p. 4.

47 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 17.

48 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 18.

powers provided to the ACCC under the *Trade Practices Act 1974* are 'deemed to be necessary to bring about greater harmony in the industry and higher levels of productivity.'[49]

3.50 However, the PJCHR also argued that:

- The powers proposed under clause 61 (that would compel attendance and the production of documents and information) are unusual in the context of industrial relations legislation in Australia;
- Neither the explanatory memorandum nor the statement of compatibility with human rights provides any information about the extent of the use of similar powers under the previous or current Acts and does not provide an assessment as to whether they were necessary for the achievement of the purpose of the legislation;
- It does not consider the explanatory material as having proven that the provisions are reasonable and proportionate, and that if the compulsory examination notices power is to remain in the bill, additional safeguards are required;
- The provisions, as drafted, engage Article 2(1) of the ICCPR, article 2(2) of the ICESR and article 8 of the ISCESR, as they apply higher penalties and a stronger enforcement regime to building industry participants than would apply to non-building industry participants.[50]

Right to privacy – disclosure of information

3.51 The PJCHR discussed whether proposed clause 61(7) of the primary bill, that provides for the ABCC to compel the disclosure of evidence, is not limited by any provision in any other legislation that prohibits the disclosure of information.[51] The PJCHR noted that:

> Previous non-disclosure or secrecy provisions reflect legislative decision[s] that seeks to ensure that the intrusion on personal privacy necessary for achieving the legislative purpose is not excessively broad. This is achieved by providing that information obtained through the use of coercive information-gathering powers may be disclosed only to those involved in the administration of the law in question or for the purposes of related legislation.[52]

3.52 The PJCHR does not accept that the measure is reasonable and proportionate,[53] due to the lack of information provided in the statement of

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49 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 19.

50 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 22.

51 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 23.

52 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 23.

53 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 24.

compatibility. The PJCHR suggested that the clause does not take into account the balance in existing legislation between private and other interests.

Right to privacy – powers of entry into premises

3.53 The PJCHR noted proposed clause 72 of the primary bill provides the authorised officers' powers to enter businesses and residential premises for the purpose of compliance measures.[54] The PJCHR argued that the powers of entry proposed by the bill raise compatibility issues with respect to the right to privacy guaranteed by Article 17 of the ICCPR.

3.54 The Scrutiny of Bills Committee also raised concerns about the right to privacy noting:

> Clause 72 does not permit forced entry and the inspector must reasonably believe that there is information or a person relevant to a compliance purpose at the premises. However, entry is authorised regardless of whether consent is given and there is no requirement for a warrant to be sought.
>
> …
>
> It appears that the explanatory material do not contain a compelling justification of departure from the general principle … that authorised entry to premises be founded upon consent or a warrant.[55]

Right to a fair hearing – imposition of a burden of proof on the defendant

3.55 The PJCHR noted clause 57 of the primary bill provides for a reverse onus of proof in court applications for contraventions on the proposed prohibition of unlawful picketing, as contained in clause 47.[56] This would also apply in to other civil remedy provisions found in chapter 6 of the primary bill, and provides that such actions were allegations where persons took actions with a particular intent, and the intent being contravention of the clause or provision.

3.56 Further, the PJCHR noted the statement of compatibility acknowledged the effect of the provisions is to require defendants to discharge their legal burden, to prove that on the balance of probabilities they did not take the action in question or with that intent. The PJCHR argued the imposition of a burden of proof on a defendant in civil proceedings engages the right to a fair hearing, as contained in Article 14(1) of the ICCPR.

3.57 The PJCHR shared the concerns of the Scrutiny of Bills Committee, who argued that:

> Although it may be accepted that a person's intent is a matter peculiarly known to the person, intentions and motivations (whether lawful or unlawful) may be difficult to prove as they will not necessarily be reflected

54 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 25.

55 Senate Scrutiny of Bills Committee, Alert Digest No 9 of 2013, pp 13-14, as cited in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 25.

56 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 27.

> in objective evidence. That is, although peculiarly within a person's knowledge, matters of intention may nonetheless remain difficult to prove. In this respect it is noted that the explanatory materials do not indicate why, in practice, it is considered that a person will, in this context, be able to produce evidence of a lawful intention. **As such the committee seeks the Minister's further advice as to the justification for, and fairness of, the proposed approach**.[57]

Prohibition against self-incrimination

3.58 The Law Council argued the objective pursued by the Government does not justify the removal of the prohibition against self-incrimination. The Law Council submitted:

> These coercive information gathering powers, and special inspection powers, put a number of common law rights and privileges at risk. For example, clause 102 expressly removes the privilege against self-incrimination by providing that a person is not excused from providing information to the ABC Commissioner because to do so would contravene another law or might tend to incriminate or otherwise expose the person to a penalty or other liability. This is a clear breach of the right to silence and the privilege against self-incrimination which is recognised under common law and international law as fundamental right.. Although there are some protections in subclause 102(2) that protect against the use of information disclosed to the ABC Commissioner from being used in certain other proceedings, these limited protections do not appear to be a sufficient safeguard against the misuse of this power and of the information obtained, particularly when the circumstances in which these powers can be exercised is expansive and the thresholds for exercising the powers is low.[58]

3.59 The PJCHR noted clause 102(1) engages the right to protection from self-incrimination. Specifically, the right is engaged by the inclusion in the bill of the powers to issue:

- examination notices under clause 61;
- requests made by authorised Federal Safety Officers or inspectors who have entered premises under clause 74(1); and
- notices under clause 77(1) that would be issued by an authorised officer to produce records of documents.[59]

3.60 Further, the PJC argued that:

> Proposed new section 102(1) of the main bill provides that a person is not excused from providing information or documents in response to certain

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57 Senate Scrutiny of Bills Committee, Alert Digest No 9 of 2013, p 14, as cited in Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 27.

58 Law Council of Australia, *Submission 17*, p. 4.

59 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp 27-28.

> requests for that information or material, on the ground that to do so would contravene any other law or might tend to incriminate the person or otherwise expose the person to a penalty or other liability.[60]

3.61 The PJCHR acknowledged the statement of compatibility with human rights relied on a recommendation from the 2003 Cole Royal Commission that the right to refuse to comply on self-incrimination immunity grounds should be removed, 'subject to the provision of use and derivative use immunity in both criminal and civil matters.[61] The PJCHR undertook to write to the Minster to ascertain whether the abrogation of the privilege (against self-incrimination) is justifiable in light of the experiences of the former ABCC and the Fair Work Building Industry Inspectorate.[62]

Committee view

3.62 The Committee does not accept the assertion made by the Minister to the effect that the government will pick and choose at its discretion which of Australia's human rights obligations it will respect and the circumstances in which it will respect them. The Committee agrees with the criticism of the PJCHR and the Scrutiny of Bills Committee that the explanatory memorandum and statements of compatibility are not sufficient for the purposes of Parliamentary inquiry.

3.63 Given the additional misgivings of the MUA and the ACTU, the Committee agrees there is no clearly demonstrated need for the legislation. The Committee notes that previous legislation under which the ABCC was established, failed to meet requirements under ILO instruments that are meant to protect the interests of both employers and employees to freely participate in the Australian industrial relations system.

5.1 The Committee accepts that, on the balance of evidence provided by the PJCHR and the Scrutiny of Bills Committee, there are significant questions relating to the proposed powers of the bills and how they affect Australia's human rights legislative framework.

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60 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 28.

61 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, p. 29.

62 Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, pp 28-29.

CHAPTER 4

Productivity

4.1 Along with a desire to adhere to the findings from the Cole Royal Commission, the government has contended that the legislation is required on economic grounds. The grounds provided as an example in the *Explanatory Memorandum* are that during the period when the Australian Building and Construction Commission (ABCC) existed,[1] productivity in the building and construction industry improved, consumers were better off and there was a 'significant reduction in days lost through industrial action'.[2]

4.2 The impact of the ABCC on the productivity of the building and construction industry has been a key theme in the evidence provided to the committee. It is also an issue that has polarised submitters. Proponents of the bill cited data that suggests productivity within the sector increased in the periods between 2005 and 2012. In contrast, opponents pointed to: inconsistencies in the productivity data for those years; discredited estimates based on flawed assumptions used in economic modelling; and fallacious findings that mistake correlation for causation.

4.3 The centre of this controversy is a report commissioned in 2007 by the ABCC and drafted by Econtech Pty Ltd (now trading as Independent Economics), (the Report). The Report has been updated several times since 2007, with an update commissioned by the ABCC in 2008, and further updates commissioned by Master Builders Australia in 2009, 2010, 2012 and 2013.[3]

4.4 The Report considers the impact of industry specific regulation on building and construction industry productivity. The versions of the Report up to 2012 assessed whether the Building Industry Taskforce and the ABCC had a significant impact on building industry productivity, while the 2013 Report also considered the effect of the Fair Work Building Industry Inspectorate that succeeded the ABCC.

4.5 Independent Economics make a number of key claims in their reports. The central claim is that building industry productivity has outperformed productivity in the rest of the economy during the period up to 2012 and the major contributory factor in this finding was the presence of the ABCC.

Independent Economics Methodology

4.6 The Report compares productivity data for the periods before the Building Industry Taskforce was established in 2002; the period from 2002 to 2012 when the

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1 The ABCC was established by the Building and Construction Industry Improvement Act 2005 as a result of recommendations of the Cole Royal Commission. It was abolished in 2012 under the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012.

2 Explanatory Memorandum, p. 2.

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

Taskforce and then the ABCC were in operation; and then finally the period from mid-2012 when the ABCC was replaced by the Fair Work Building Industry Inspectorate (FWBII).

4.7 In explaining the methodology used in the Report, Independent Economics initially say three types of productivity indicators are used to 'determine the extent of any shifts in industry productivity from changes in industry regulation between regulatory regimes.'[4] According to the Report these indicators are:

- **Year-to-year comparisons** of construction industry productivity are made using data from the Australian Bureau of Statistics (ABS), the Productivity Commission (PC) and academic research.
- **The difference in costs in the commercial construction and those in the housing construction sector**. Rawlinsons data[5] is used to compare the timing of any changes in this cost gap with the timing of the three regulatory regimes.
- **Case studies of individual projects**, undertaken for earlier reports by Econtech Pty Ltd and by other researchers, are used to provide comparative information on productivity performance between the three regulatory regimes.[6]

4.8 However in the section: *Productivity comparisons in the building and construction industry,* Independent Economics add a fourth productivity indicator to their analysis, the **number of days lost to industrial action**.[7]

Critiques of Independent Economics' Report

4.9 The findings of Independent Economics have been challenged by a number of stakeholders and experts over the years. The committee received evidence that discredits the Report by analysing the assumptions and methodology used by Independent Economics. The figure of 9.4 per cent productivity gain is central to the findings of the reports, and arguably the entire economic case for re-establishing the ABCC. The data used to establish that figure was challenged by a number of submitters.

4.10 Professor David Peetz, from Griffith Business School, the ACTU, and most recently the Productivity Commission, systematically question each element of the Report and the figures and assumptions that are fed into the Independent Economics'

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

5 Rawlinsons is a construction cost consultancy in Australia and New Zealand that produces a number of annual publications detailing constructions costs data.

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

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

Computable General Model (CGE) model that finds the existence of the ABCC was responsible for substantial gains to the economy as a whole.

Year-to-year comparisons

4.11 The report uses a number of figures when discussing the year-to-year comparisons of construction industry productivity. The first is the 21.1 per cent over performance against predictions 'based on historical performance relative to other industries'.[8]

4.12 The ACTU submission and evidence before the committee addressed what it claims is spurious methodology. The ACTU contends that the predictions the reported gains are measured against have been derived from a 'deeply flawed' methodology using a regression model. While the methodology used is not explicit in the Independent Economics report, ACTU has come up with a model that generated identical findings in relation to the construction industry.[9] ACTU explained how the model works:

> The model used to generate the 'predicted productivity' line is not made explicit in the report…The report's approach appears to be to estimate a regression model using data for the period 1985-86 to 2001-02, with the level of construction industry productivity as the dependent variable and the level of productivity for the total economy as the explanatory variable.
>
> Independent Economics use the estimated coefficients from this regression to calculate what the level of labour productivity in the construction industry would have been in each year in the ABCC period if the relationship between construction productivity and total economy productivity had remained unchanged from the earlier period…It compares this to the actual level of labour productivity in the industry. The difference between the two lines is ascribed to the influence of the ABCC.
>
> The approach is deeply flawed. Construction industry productivity grew faster, relative to the all industries average, in the ABCC period than it had done in the earlier period not because construction industry productivity grew particularly rapidly, but because the all industries average growth rate fell.[10]

4.13 The ACTU then applied the methodology to other industries and found that other industries also 'over performed':

> If you replicate that same methodology for a range of other industries—in fact, the majority of industries—you will find a, so-called, overperformance of much the same sort in a whole range of industries like agriculture, retail,

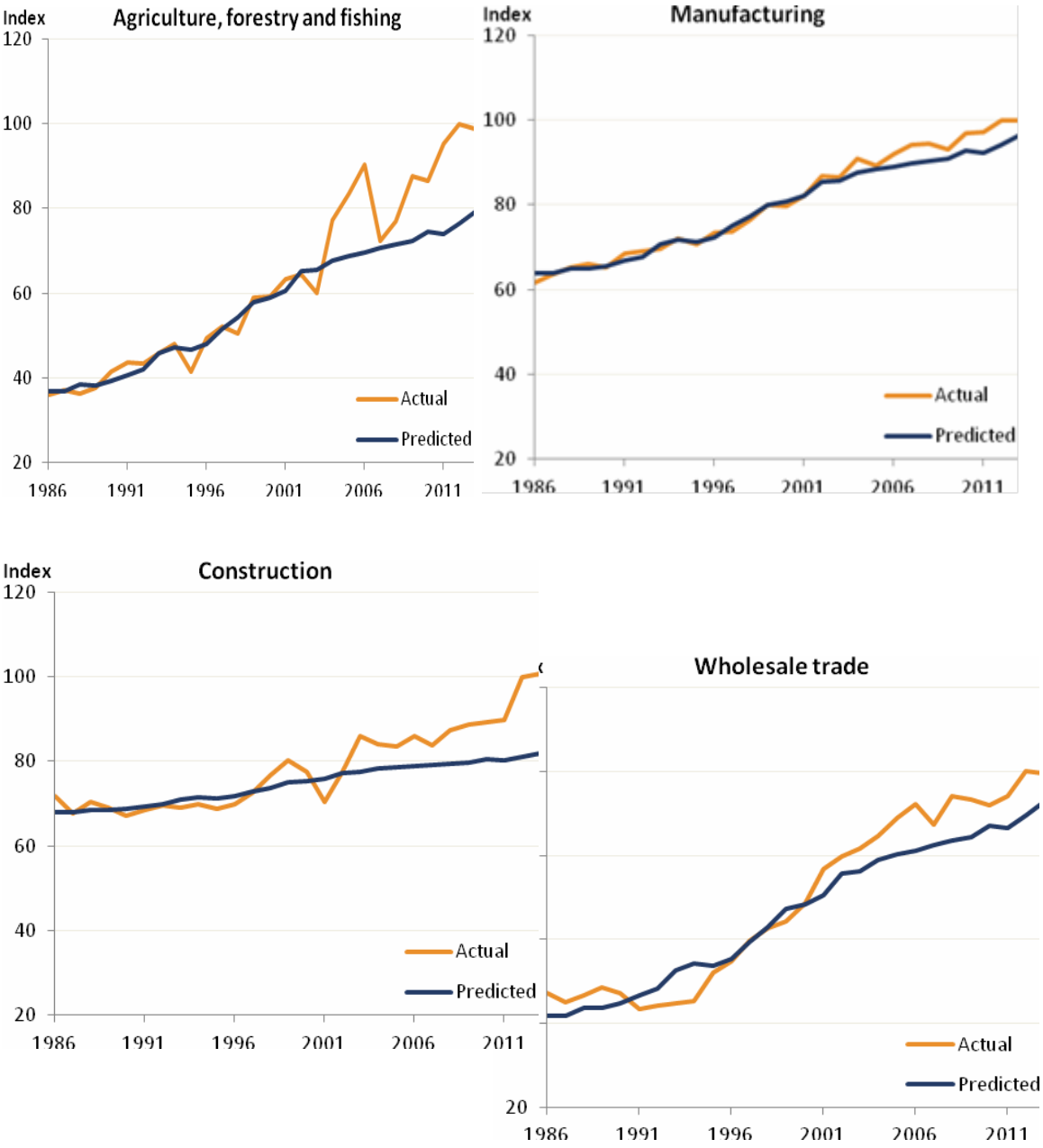
8 Master Builders Australia, *Submission 3,* Attachment A: *Economic Analysis of Building and Construction Industry Productivity: 2013 Update, Independent Economics,* August 2013, p. 27.

9 Mr Matt Cowgill, ACTU, *Proof Committee Hansard,* 12 March 2014, p. 19.

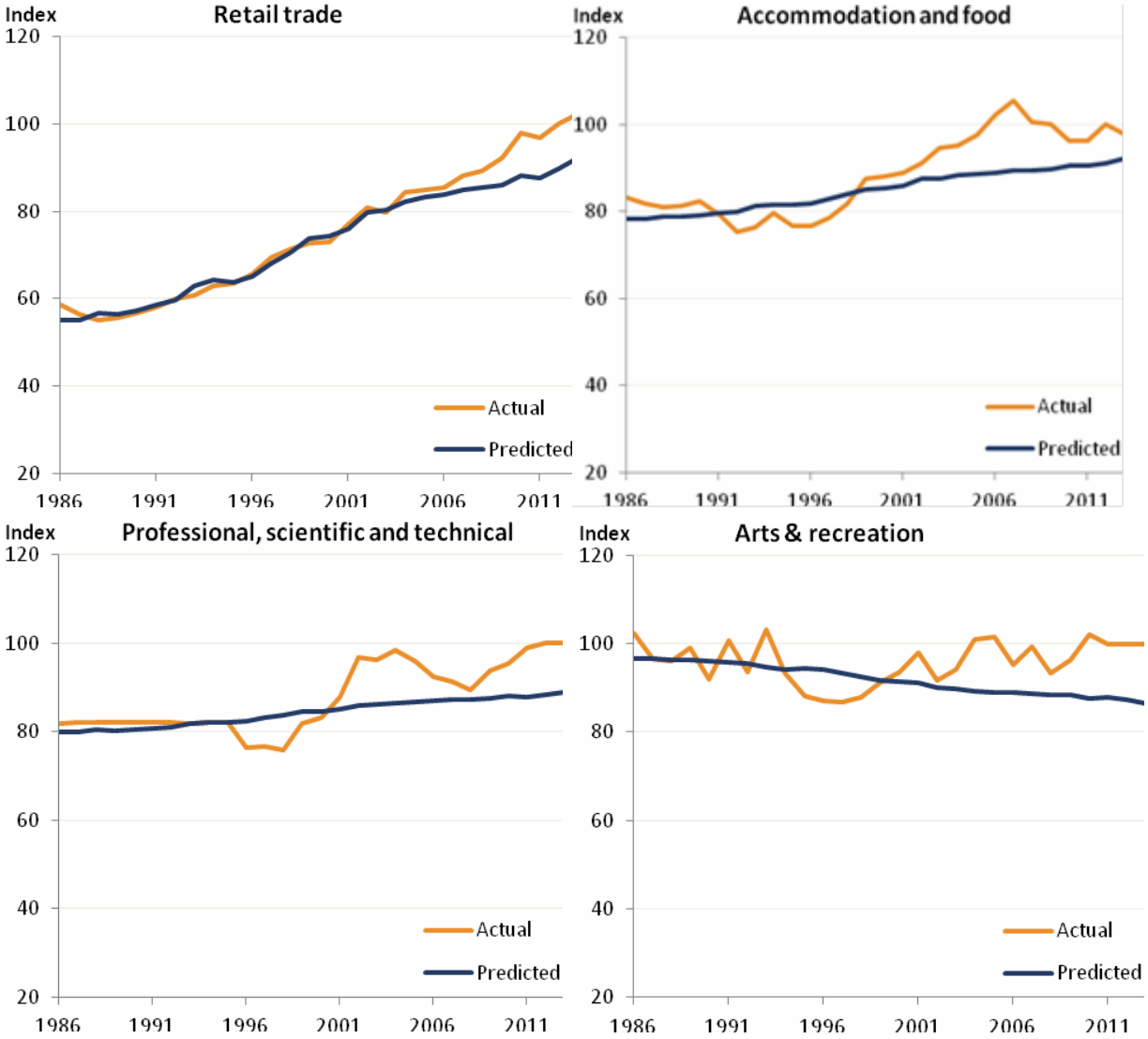
10 ACTU, *Submission 14,* pp 15-16.

accommodation and food, that have nothing to do, whatsoever, with the ABCC.[11]

4.14 The ACTU provide a number of graphs to illustrate their findings:



11 Mr Matt Cowgill, ACTU, *Proof Committee Hansard*, 12 March 2014, p. 14.



Source: Actual productivity growth figures from ABS 5204, table 15. 'Predicted' productivity growth figures based on estimation of the model $LP_{i,t} = a + \beta LP_{total,t} + e_t$ for each industry 'i', using data for the period 1985-86 to 2001-02, as per Equation 1.[12]

4.15 If the Independent Economics' assumption that the ABCC caused the overperformance of the construction industry, then according to the ACTU, it must have equally caused the overperformance in the other eight industries that saw productivity gains against predictions.

> For it to be accepted that the outperformance of the construction industry is due to the ABCC, it must be accepted either:
>
> - that the ABCC exerted an influence on productivity in a range of industries other than construction; or
> - that some economy-wide factor like mining affected the relationship between predicted and actual productivity in all industries other than construction; or

12 ACTU, *Submission 14*, pp 18-19.

- that the ABCC lifted productivity in construction while some other factor served to lift productivity relative to its predicted level in a majority of other industries at exactly the same time while not affecting construction.[13]

4.16 Professor Peetz was also sceptical of the argument that there is a causal relationship between the construction sector and the rest of the economy to the extent that productivity could be predicted:

> There is no particular reason to presume that one can accurately predict what productivity will be in the construction sector on the basis of what productivity is in the rest of the economy. Moreover, according to Econtech, construction industry productivity began to rise above its 'predicted' level back in 1997. By 1999, three years before even the Building Industry Task Force, construction industry productivity was exceeding Econtech's 'predictions' by almost as much as in 2007, making the claim of a 'reform' effect unwarranted.[14]

4.17 Professor Peetz continues the critique of the approach taken by Independent Economics when considering another year-to-year comparison figure used.

4.18 As discussed earlier the Report found that 'construction industry multifactor productivity accelerated to rise by 16.8 per cent in the ten years to 2011/12.'[15] According to Professor Peetz the 16.8 per cent differential between the market sector and the construction sector was heavily influenced by 'the large decline in productivity in mining and resources'. Furthermore Professor Peetz points out that construction multifactor productivity through the period when the ABCC was in existence, was 'pretty much in the middle amongst industries.'[16]

4.19 Similar to ACTU, Professor Peetz accuses Independent Economics of repeatedly seeking to 'find causality when none might be due'.[17]

The difference in costs between commercial and housing construction sectors

4.20 Independent Economics' next indicator is the gap between the domestic and commercial construction sectors. In the 2007 version of the Report this is the indicator that provided the 9.4 per cent productivity gain that has remarkably been found using this indicator on its own, as well as a being found using this and a combination of other indicators.

4.21 As discussed earlier in this report the reasoning used in the Independent Economics' Report is that commercial construction sites are more likely to be subject

13 ACTU, *Submission 14*, p. 19.

14 Professor David Peetz, *Submission 8*, p. 5.

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

16 Professor David Peetz, *Submission 8*, p. 9.

17 Professor David Peetz, *Submission 8*, p. 8.

to 'industrial disputes' and 'poorer work practices', in contrast to the domestic sector which is more 'flexible'.[18]

4.22 This is not the first time the assumption that a unionised workforce is the cause of differences in building costs between the two sectors has been subject to critique. The early Econtech reports of 2003 and 2007 were criticised for using this method because they discounted other factors in explaining the gap. According to a paper in the *Journal of Industrial Relations* by Cameron Allan and others:

> Other structural factors could also explain them, including greater on-site complexity (it costs more to affix a plasterboard wall on the 10th floor of a high rise than on a ground floor cottage), higher capital intensity and higher profit margins in the commercial sector.[19]

The Domestic housing is not a model industry

4.23 The Report cites the productivity of the domestic housing sector as being something the commercial sector should aspire to. However recent reports from the Fair Work Ombudsman's audit program show the terms and conditions of people working in the industry are routinely and comprehensively undermined by employers. These contraventions include non-compliance with hourly rates of pay, allowances, record-keeping and play slip obligations.

4.24 The figures were particularly damning for the apprentices in the domestic building industry. As the audit report highlights, 'Apprentices are usually young workers, in their first job and may be unaware of their rights.'[20] The audit of the 164 employers in Victoria showed that only 6.1 per cent of employers were compliant with regard to the pay, terms and conditions of their apprentices.[21] The table below[22] illustrates the areas that employers did not meet their legal obligations:

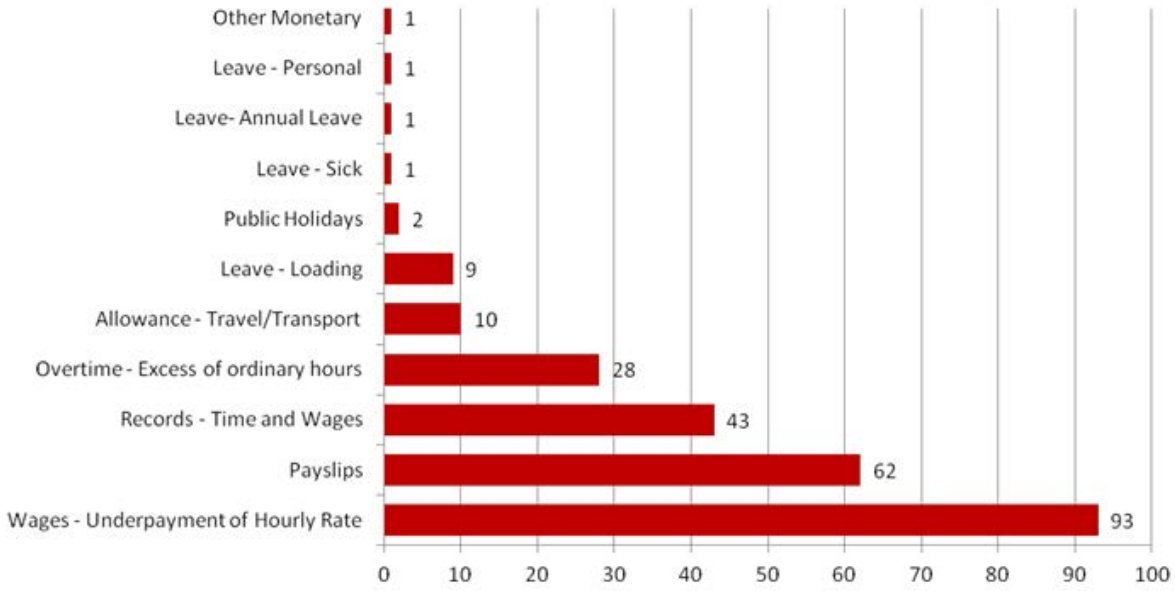
18 Master Builders Australia, *Submission 3,* Attachment A: *Economic Analysis of Building and Construction Industry Productivity: 2013 Update, Independent Economics,* August 2013, p. 17.

19 Professor David Peetz, *Submission 8,* Attachment A, p. 63.

20 Fair Work Ombudsman, *Victorian building industry apprenticeship audit program,* 2012, p. 2, http://www.fairwork.gov.au/ArticleDocuments/2256/Vic-building-apprenticeship-industry-report-2011.pdf.aspx?Embed=Y (accessed 14 March 2014).

21 Fair Work Ombudsman, *Victorian building industry apprenticeship audit program,* 2012, p. 2.

22 Fair Work Ombudsman, *Victorian building industry apprenticeship audit program,* 2012, p. 4.



4.25 Of the 164 employers, 154 were found to be in contravention:

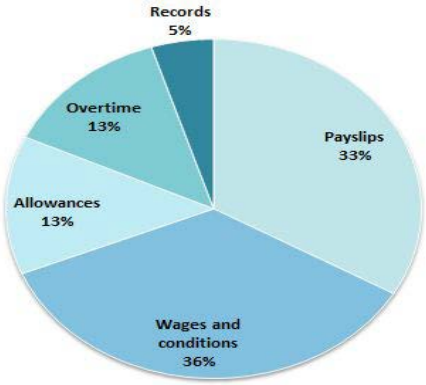
- 60 (39%) had monetary contraventions
- 60 (39%) had record-keeping contraventions
- 34 (22%) had both monetary and non-monetary contraventions

The audit recovered $192 793.01 for 121 employees.[23]

4.26 Figures from the Tasmanian domestic building audit show similar non-compliance across the sector, again in relation to the most vulnerable employees, apprentices. The audit found that of the 150 employers audited, 60 per cent were in contravention of legally binding awards and conditions for apprentices. The chart below[24] shows where those contraventions occurred:

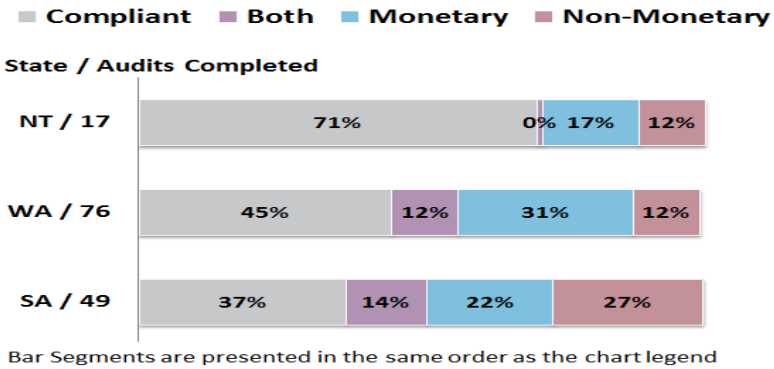
23 Fair Work Ombudsman, *Victorian building industry apprenticeship audit program*, 2012, p. 2, http://www.fairwork.gov.au/ArticleDocuments/2256/Vic-building-apprenticeship-industry-report-2011.pdf.aspx?Embed=Y (accessed 24 March 2014).

24 Fair Work Ombudsman, *Tasmanian residential building apprentices program, Final report*, August 2013, http://www.fairwork.gov.au/ArticleDocuments/2250/Tasmanian-Residential-Building-Apprentices-Program-Final-Report-August-2013.pdf.aspx?Embed=Y, (accessed 24 March 2014).



The audit recovered $116 000 for 86 employees.

4.27 A similar audit of the domestic building sectors in SA/NT and WA also showed extensive contraventions. In SA, 49 audits found 31 employers in contravention; in NT, 17 audits found 5 in contravention; in WA, 76 audits found 42 employers in contravention. The table below[25] breaks down the types of contraventions:



The audits recovered $67 000 for 76 employees.[26]

4.28 The figures show that there is what could be described as a culture of non-compliance in the domestic housing sector in relation to the proper payment of awards and conditions of apprentices. The Victorian figures are startling in that 93.9 per cent of employers are acting outside the law. The other audits reveal this is endemic in other states as well.

25 Fair Work Ombudsman, *WA/SA/NT residential building industry apprentices and trainees campaign*, September 2013, p.7 http://www.fairwork.gov.au/ArticleDocuments/2254/WA-SA-NT-Residential-building-industry-apprentices-and-trainees-campaign-report-2013.pdf.aspx?Embed=Y, (accessed 24 March 2014).

26 Fair Work Ombudsman, *WA/SA/NT residential building industry apprentices and trainees campaign*, September 2013, p.3 http://www.fairwork.gov.au/ArticleDocuments/2254/WA-SA-NT-Residential-building-industry-apprentices-and-trainees-campaign-report-2013.pdf.aspx?Embed=Y, (accessed 24 March 2014).

Individual Projects

4.29 The use of case studies as one of the elements that informs the figure of 9.4 per cent productivity gain has also attracted criticism. Many of the studies were undertaken as part of the 2007 Report and include claims that 'industry participants have also found that improved workplace practices have contributed to cost savings for major projects'.[27]

4.30 The difficulty with the use of case studies is that the results cannot be objectively measured for validity and cannot be said to be representative of industry-wide practice. Professor Peetz criticised case studies as not being a sound methodology because much of the data is unverifiable:

> Case studies lend themselves strongly to cherry-picking of data, as – unlike with analyses of, say, ABS data where others can obtain access to the data and attempt to verify results – the full data in case studies collected are typically not revealed, rather only those selected by the writer are revealed. If cherry---picking is observed in the use of quantitative data, then there is little reason to believe it has not occurred in the use of qualitative data.[28]

4.31 Allen and others in their *Construction Industry Productivity in Australia* paper have specific concerns over the case studies used by Independent Economics, and the data that confuses working days lost to industrial action with productivity:

> The 'case studies' (which were identical in the 2007 and 2008 reports) comprised one undertaken by the Institute of Public Affairs, a conservative lobbyist and 'think tank' (Murray, 2004), and two by Econtech, which boiled down to the qualitative claims of two leading construction companies and data on reduced working days lost due to industrial action, supported in 2009 by extracts from three submissions by advocates of coercive powers. Here and elsewhere, Econtech appeared to confuse reduced industrial action with higher labour productivity. Labour productivity is the amount of real output per unit of labour input (such as the number of houses built per hour worked). Strikes normally mean no output is produced during a period in which no labour is used or paid for, and so have no direct relationship with output per unit of labour input. If reduced industrial action has led to increased productivity, this should be visible in the productivity data.[29]

4.32 A further example of cherry-picking and the flawed assumptions of the Econtech reports, the 2008 report in particular, lies in its reliance on a pamphlet authored by Ken Phillips for the Institute of Public Affairs in 2006[30] which Econtech claims, 'support the findings from the other subsections (of the Econtech report) that

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27 Master Builders Australia, *Submission 3,* Attachment A: *Economic Analysis of Building and Construction Industry Productivity: 2013 Update, Independent Economics,* August 2013, p. 28.

28 Professor David Peetz, *Submission 8,* pp 12-13.

29 Professor David Peetz, *Submission 8,* Attachment A, p. 71.

30 Phillips, K. Institute of Public Affairs Briefing Paper, *Industrial Relations and the Struggle to Build Victoria,* November 2006.

the existence of the ABCC and the supporting regulatory framework has led to significant improvements in productivity.'[31]

4.33 The pamphlet purported to analyse the impact of industrial relations on the cost and timeliness of one of Victoria's largest ever civil construction projects, the EastLink Tollway. The purpose of the paper appears to be a justification for the operation of both the former ABCC and the WorkChoices industrial relations regime. In doing this, the paper seeks to draw a comparison between the cost and timeliness of the WorkChoices/ABCC era EastLink project with the pre-WorkChoices/ABCC CityLink project.

4.34 The paper employs a highly speculative series of 'assumptions', 'estimates', 'expectations', 'likelihoods' and 'probabilities' to arrive at 'estimated', 'probable' and 'likely' total additional costs to EastLink, 'assuming continuous construction' of 'likely' to be $295 million.[32]

4.35 In order to estimate the differential cost advantage to Eastlink over CityLink, the author sets out what he claims are 'probable' excessive labour costs that would have been incurred by the EastLink project but for the existence of the ABCC and Work Choices. Among these probable additional costs are what the author deems 'unproductive days'. All of them include basic conditions such as annual leave, statutory public holidays (including Christmas Day) and rostered days off which for the uninitiated are days off in lieu of additional hours worked during the ordinary hours of work.

4.36 Phillips claimed that since EastLink could be subject to an industrial relations regime that would allow a 'theoretical' 365 days per year construction schedule its cost advantage over CityLink could be $184 million on labour costs alone.[33]

4.37 The author states that '[i]t is not clear if the Eastlink industrial undertakings require non-working union delegates' but that didn't stop him claiming that they cost '$5 million plus',[34] a figure which inexplicably blows out in the table on the following page to $58.5 million.[35]

Committee View

4.38 The author also makes up figures of $9.2 million for 'assumed' industrial action over renegotiation of industrial agreements that didn't happen and $43.3

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31 Econtech Pty. Ltd., *Economic Analysis of Building and Construction Industry Productivity: 2008 Report*. 30 July 2008, pp 14-15.

32 Phillips, K. Institute of Public Affairs Briefing Paper, *Industrial Relations and the Struggle to Build Victoria*, November 2006, p. 8.

33 Phillips, K. Institute of Public Affairs Briefing Paper, *Industrial Relations and the Struggle to Build Victoria*, November 2006, p. 7.

34 Phillips, K. Institute of Public Affairs Briefing Paper, *Industrial Relations and the Struggle to Build Victoria*, November 2006, p. 7.

35 Phillips, K. Institute of Public Affairs Briefing Paper, *Industrial Relations and the Struggle to Build Victoria*, November 2006, p. 8.

million for occupational health and safety stoppages that never occurred. For good measure he adds the cost of 'sham weather disputes' that didn't happen that 'would add an unknown amount in overheads' and yet the author was still able to give a 'likely' cost of $31 million.[36]

4.39 Reinforcing the vague, imprecise and speculative additional cost estimates arrived at by the author, he concludes by saying that his 'posited' figure of $295 million 'could be too high or low, but … is likely to be conservative.'[37] It could also be a fantasy.

4.40 It is the Committee's view that the adoption by Econtech of these assumptions further diminishes the value of Econtech's analysis of productivity in the building and construction industry.

Days lost to industrial action

4.41 Independent Economics contends that the unwinding of the gains established through the years of the ABCC is illustrated by the number of days lost through industrial action. The figures used show the actual days lost from financial years 1995/96 through to the third quarter of the financial year 2012/13, and incorporates an 'estimate for the June quarter of 2013 [that] has been made by assuming that the growth rate for the full financial year is the same as the growth rate in the first three quarters of the financial year'.[38] The Report concludes that:

> …more than one half of the improvement in lost working days achieved in the first five years of the Taskforce/ABCC era has already been relinquished in the first year of the FWBC era. In fact, in 2012/13, the working days lost in construction was the highest since 2004/05.[39]
>
> …
>
> This sharp increase in work days lost to industrial disputes in only the first year of operation of the FWBC is consistent with the expected reversal of the productivity benefits achieved during the Taskforce/ABCC era.[40]

4.42 Master Builders attempt to quantify the cost of the days lost due to industrial action, and although they concede it is not possible to cost the impact on each project. They roll together a number of assumptions of potential costs to come to their figure:

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36 Phillips, K. Institute of Public Affairs Briefing Paper, *Industrial Relations and the Struggle to Build Victoria*, November 2006, p. 8.

37 Phillips, K. Institute of Public Affairs Briefing Paper, *Industrial Relations and the Struggle to Build Victoria*, November 2006, p. 9.

38 Master Builders Australia, *Submission 3,* Attachment A: *Economic Analysis of Building and Construction Industry Productivity: 2013 Update, Independent Economics*, August 2013, p. 25.

39 Master Builders Australia, *Submission 3,* Attachment A: *Economic Analysis of Building and Construction Industry Productivity: 2013 Update, Independent Economics*, August 2013, p. 25.

40 Master Builders Australia, *Submission 3,* Attachment A: *Economic Analysis of Building and Construction Industry Productivity: 2013 Update, Independent Economics*, August 2013, p. 26.

> While it is not possible to accurately calculate the construction cost of a day lost[…] If it is assumed that the direct cost of a strike is $100,000 per day then 89,000 days lost to industrial action would equate to $8.9 billion.[41]

4.43 Other submitters argued the assumptions made by the Report do not support the claims that the number of days lost since the ABCC was abolished is evidence 'consistent with the expected reversal of the productivity benefits achieved during the Taskforce/ABCC era'. Firstly, there is the problem with conflating industrial days lost with labour productivity figures discussed in the previous section. The second substantive criticism is that the figures do not actually support the argument put forward in the Report.

4.44 Professor Peetz calls the use of the estimate of the final quarter as 'wildly erroneous'. What the figures actually show when the final data was available was that the number of days lost was actually 61,600, and not the estimated 89,000. Professor Peetz also quotes figures from the last 12 months that data that show that there was a slight reduction in that 12 months from the last 12 months of the ABCC. This supports Professor Peetz's proposition that:

> The reality is that disputation data vary substantially from one quarter to the next, and Econtech conveniently overlooked this fact when attempting to justify a major deterioration of construction industrial relations under the FWBC.[42]

4.45 The ACTU supported the argument that days lost due to industrial action since the abolition of the ABCC infers a trend that the number will rise through industrial disputes:

> During the ABCC's operation, there was an average of 9.5 working days lost to disputes per 1000 employees per quarter in the construction industry. In the four quarters after the abolition of the ABCC, the rate of disputation in the industry has been below the ABCC-era average twice (in December 2012 and June 2013) and above it twice (in September 2012 and March 2013).[43]

4.46 In evidence to the Legislation Committee in November the ACTU also suggested that each dispute in the industry had the capacity to severely alter the figures because of the low number of disputes in the industry, and indeed across the whole economy:

> [I]n this industry, in fact, as in all others when you look at the industrial action statistics, the overall level of industrial disputation in our economy is so low—so low—that a very small number of disputes can cause a spike in the graph. Because the incidence of industrial disputes is orders of

41 Master Builders Australia, *Submission 3,* Attachment B, November 2013, p. 6.

42 Professor David Peetz, *Submission 8*, p. 11.

43 ACTU, *Submission 26,* p. 26.

> magnitude lower even than it was under early iterations of Howard government industrial law, one or two disputes move the needle.[44]

4.47 To add further weight to this argument the latest quarterly figures on days lost per employee due to industrial action was the second lowest since 1985 and the lowest since 2008 when the ABCC was in operation.[45]

4.48 The other point made during the inquiry in relation to days lost was whether they were as a result of lawful or unlawful industrial action. As far as the committee understands, the ABS figures from any period do not disaggregate the figures by days lost through protected and unprotected industrial action.

Productivity Commission assessment construction productivity

4.49 The long list of stakeholders unconvinced of the figures and conclusions of the Report now includes the Productivity Commission (the Commission). In its draft report on public infrastructure the Commission expresses doubt on the claimed productivity growth rates that Master Builders Australia rely on through their commissioned report from Independent Economics.

4.50 The Commission agreed on the importance of the Report to the debate on economic implications of changes to industrial relations in the construction industry:

> The series of studies have been highly influential in debates about the effectiveness of the ABCC on construction productivity, and by inference, relevant to various conjectures about the degree to which diminished union power affects productivity at the macro level. Most umbrella groups representing construction and other businesses have highlighted the studies and claimed that they are valid… The validity and interpretation of these studies are therefore key issues.[46]

4.51 The Commission noted that the Report was two-pronged in its approach to measuring productivity. The first uses historical data to predict growth and then measures that against actual growth. The Commission then notes that the model's appropriateness cannot be measured because 'no statistical model (or specification tests of that model) was provided', and that the 'likelihood of misspecification is high'. The Commission concludes that 'As it stands, IE's predictive model should be given little weight'.[47]

4.52 The second modelling approach used in the Report was the measurement of the domestic versus commercial costs discussed earlier in this chapter. The

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44 ACTU, *Committee Hansard*, 26 November 2013, p. 7.

45 ABS, 6321.0.55.001 - Industrial Disputes, Australia, December 2013.

46 Productivity Commission, *Draft Report on Public Infrastructure, Volume 2*, March 2014, p. 452. http://www.pc.gov.au/__data/assets/pdf_file/0009/134676/infrastructure-draft-volume2.pdf (accessed 24 March 2014).

47 Productivity Commission, *Draft Report on Public Infrastructure, Volume 2*, March 2014, p. 452. http://www.pc.gov.au/__data/assets/pdf_file/0009/134676/infrastructure-draft-volume2.pdf (accessed 24 March 2014).

Commission considered the premises of the argument and the conclusions reached by Independent Economics and make the following comments:

> First, no judgment can be made about the effects of the FWBC from the data currently available. There is only one year of data and the conclusion ignores the fact that, even during the ABCC period, relative costs sometimes rose.
>
> Second, over a longer period, the link between the IR regimes and productivity is not robust.
>
> Third, even if the IE numbers were robust, concluding that IR is the exclusive factor explaining the trend fails to consider a range of rival explanations and considerations.[48]

4.53 The Commission concludes its analysis by stating that Independent Economics' results are neither reliable nor convincing indicators of the impact of the BIT/ABCC', and cites the views of major business consultants who have also expressed doubts about the findings:

> Major business consulting firms have expressed doubts as well (ACG 2013; PwC 2013a, p. 8). For example, Allen Consulting argued in a report to the Business Council of Australia:
>
> > It is not feasible to link the size of the productivity shock to definitive evidence of recent performance. Events that have given rise to concerns about industrial relations unrest are too recent to appear in economic statistics. (ACG 2013, p. 39) [49]

Committee View

4.54 The report from Independent Economics is pivotal in the debate over the purpose and effectiveness of the ABCC and the FWBC regime that replaced it. Almost every single argument by proponents of the legislation travels through this prism to arrive at conclusions and ultimately recommendations for action, based on the impact that the ABCC had on the productivity of the building and construction industry. The difficulty the Committee has with this approach is that the evidence suggests the methodology and assumptions used by Independent Economics throughout its series of reports are at best, not robust.

4.55 The Committee is deeply concerned that the fundamental figure of 9.4 per cent productivity gain, initially arrived at through a flawed analysis of the gap between residential and commercial construction only, is regurgitated in all of the reports since. The Committee does not find that reaching this figure afresh each year is plausible, despite the calculations being based on more variables and updated data.

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48 Productivity Commission, *Draft Report on Public Infrastructure, Volume 2*, March 2014, p. 453-454. http://www.pc.gov.au/__data/assets/pdf_file/0009/134676/infrastructure-draft-volume2.pdf (accessed 24 March 2014).

49 Productivity Commission, *Draft Report on Public Infrastructure, Volume 2*, March 2014, p. 453-454. http://www.pc.gov.au/__data/assets/pdf_file/0009/134676/infrastructure-draft-volume2.pdf (accessed 24 March 2014).

4.56 The second fundamental flaw in the Report is that it does not prove any productivity gains are as a direct result of the existence of the ABCC. The evidence received throughout the inquiry raised a number of economic and administrative factors that could and do impact the economic performance of any sector of the economy. The report discounts all of these in favour of the view the ABCC alone is responsible for the productivity growth. Again the Committee does not find this conclusion plausible.

4.57 The committee is highly sceptical of the findings of the Report, and the methodology used by Independent Economics. The report appears to continually 'beg the question' it sets out to answer, confuses correlation for causation, and repeatedly relies on estimates based on spurious assumptions.

4.58 The Wilcox Review found that the 2007 Report is 'deeply flawed', and 'ought to be totally disregarded'.[50] This was after Econtech, as they were then trading, had had the opportunity to respond to the criticisms put to them by Justice Wilcox. In 2014, the Productivity Commission finds it neither reliable, nor convincing. The list of other detractors comes from across the political spectrum, and includes academics, unions and major business consultancies. The Report, its methodology, and its conclusions should be disregarded in its entirety.

50 Honourable Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009, p. 46.

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

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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

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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

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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:

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

14 Vitoria 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

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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 that 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 (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.

CHAPTER 6

Powers, Safeguards and Oversight

Obtaining Information

6.1 The powers to obtain information in relation to an investigation of a suspected contravention of the bill or a designated building law are set out in Chapter 7. The bill would give the ABC Commissioner the power to issue an examination notice to a person directing them to provide documents or information relevant to the investigation. The person would have 14 days to comply.

6.2 These powers were first introduced in the Building and Construction Industry Improvement Bill 2005. The powers were retained in the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012 but with a requirement to notify the Commonwealth Ombudsman of the issue of an examination notice. This provision has been retained in the bill.

6.3 The Bill enables the Australian Building and Construction Commissioner to compel witnesses to attend an examination or to produce documents where he/she reasonably believes that the person has information or documents relevant to an investigation into a suspected contravention of workplace relations laws.[1]

6.4 Again the question of the building and construction industry being a special case, and whether this was proportionate was raised by submitters. Master Builders Australia were of the view that the powers in the bill were similar to those granted to other regulatory bodies:

> Our submission is that coercive powers are used by other agencies and that coercive powers are not unique.[2]

6.5 The Department's submission also argued that the similar powers applied elsewhere:

> The powers under this act are similar to those granted to a range of other Commonwealth regulatory bodies such as the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission, the Australian Taxation

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1 Minister for Employment, *Submission 1,* Attachment, Department of Employment submission to Senate Education and Employment Legislation Committee's inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, tabled on 2 December 2013. p. 5.

2 Master Builders Australia, *Proof Committee Hansard,* 12 March 2014, p. 32.

Office, Centrelink and Medicare. A comparison of the powers available to Centrelink and Medicare is at Attachment A.[3]

6.6 The ACTU argued strongly that the powers under the Acts cited by the government were not the same as those provided to the ABCC, and furthermore, those Acts provide powers to single regulators in areas where there is no other regulation. The ABCC bill proposes powers in an area that is already heavily regulated and there is no evidence that that regulation is not working. The ACTU submitted their analysis of the Acts the government says are similar, pointing out critical differences:

- Under the *Competition and Consumer Act* 2010, ACCC inspectors are only able to utilise coercive powers to examine on oath where they reasonably believe that goods, services or their misuse poses a risk of injury. The powers do not exist in respect of the whole of the conduct regulated by the legislation. Nor is non compliance with those powers (or powers to ask questions after an authorised entry) subject to imprisonment.
- The Australian Prudential Regulation Authority's powers under section 61 of the *Banking Act* 1959 do not explicitly abrogate the right to silence. Its powers (and those of Medicare, the Commissioner of Taxation and ASIC) under the *Superannuation Industry {Supervision) Act* 1993 and the *Retirement Savings Accounts Act* 1997 to require a person to attend an examination are not punishable by imprisonment for non compliance.
- Failure to comply with a requirement by the Australian Securities and Investment Commission to attend an examination under the *Australian Securities and Investment Commission Act* 2001 is only offence where the non compliance is intentional, reckless, and without reasonable excuse.
- The requirement to attend for an examination before the Commissioner of Taxation is clearly a provision that is central to the protection of Commonwealth funds. It is an offence to not comply with such a requirement, however imprisonment is not available for a first offence and the financial penalty for a first offence is $3,400.
- The powers afforded to the *Social Security {Administration Act)* 1999 to compel persons to attend examinations[41] are also clearly directed to the protection of multi billion dollar Commonwealth programs from fraud. It is an offence to not comply with such

3 Minister for Employment, *Submission 1*, Attachment, Department of Employment submission to Senate Education and Employment Legislation Committee's inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013 and the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013, tabled on 2 December 2013. p. 6.

> requirements, however no offence is committed where there is a reasonable excuse.[4]

6.7 The purpose of the ABCC's compliance powers was questioned by Professor Peetz in his submission. His argument is that if the coercive powers are ultimately supposed to ensure compliance with the legislation, and that legislation is designed to ensure growth in productivity in the industry, then there should be a clear drop in productivity when the ABCC was abolished. He contends that the Independent Economics report relied on by the government does not support this hypothesis:

> Econtech pointed to 'a sharp decline' in 'the use of these powers' in 2010-11 which was sustained in 2011-12, due, it said, to a 'change of investigative technique' and 'shift in agency emphasis' (Econtech 2013:9-10)…

6.8 Professor Peetz analysis the difference in the costs between domestic and construction costs, (one of the key productivity indicators used by Independent Economics), and concludes that changes in these figures do not suggest a link between application of coercive powers and increased productivity:

> If changes in this gap can, as Econtech argues, be attributed to changes in construction industry regulation (a highly dubious proposition), then Econtech has failed to demonstrate that the use of coercive powers leads to any gains in relative costs between commercial and domestic residential building.[5]

6.9 Professor Peetz also contends that multifactor productivity increased substantially after the cessation of the ABCC's coercive powers:

> Only after the virtual abandonment of the ABCC's use of its coercive powers did MFP grow substantially in construction, with a 10 per cent increase recorded in 2011-12, almost sustained in 2012-13, so that, under the FWBC, MFP was 9 per cent higher than it had been in 2009-10, the last year of major use of coercive powers.[6]

6.10 Aside from the effectiveness in terms of raising productivity in the industry, the New South Wales Council for Civil Liberties questioned how appropriate it was for legislation that governs the operation of a regulatory body in a civil jurisdiction to include criminal penalties for non-compliance:

> The practical effect of the proposed ABCC is to be a specialist industrial regulator in civil jurisdiction with, almost exclusively, civil penalties available for punishment. It is extraordinary to provide such a body with coercive powers that force people to appear in front of the Commission, to answer questions and to cooperate under penalty of imprisonment. The proposed powers available to the ABCC are clearly unnecessary and disproportionate to its regulatory role.[7]

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4 Australian Council of Trade Unions, *Submission 14,* p. 31.

5 Professor Peetz, *Submission 8,* p. 4.

6 Professor Peetz, *Submission 8,* p. 9.

7 New South Wales Council for Civil Liberties, *Submission 13,* p. 2.

6.11 The PTEU suggested that the extensive coercive powers available to the ABCC were similar to those applied in terrorism cases, a comparison shared by other submitters[8]:

> The coercive powers proposed to be granted the ABCC infringe on the human rights of a section of society – they are inherently discriminatory and would be in breach of international covenants to which we are not only signatories, but champions of. The ABCC reduces construction workers and their union to the status of terrorists, with their rights diluted in a discriminatory environment.[9]

6.12 The Law Council of Australia also commented on the appropriateness of the legislation in terms of upholding traditional certain law principles, rights and privileges:

> [E]ven from a preliminary consideration of the 2013 Bill, it is clear that a number of features of the Bill are contrary to rule of law principles and traditional common law rights and privileges such as those relating to the burden of proof, the privilege against self-incrimination, the right to silence, freedom from retrospective laws and the delegation of law making power to the executive.[10]

6.13 The issue of safeguards in the context of these powers was considered by the committee. While the committee understands that the Ombudsman would have examination notices provided to it and the Ombudsman would then report to parliament, the bill does not require the ABCC to apply to the Administrative Appeals Tribunal (AAT). The Law Council cites concern from the Ombudsman that this would not provide for effective scrutiny of the coercive powers in the bill:

> While an oversight role for the Commonwealth Ombudsman is provided in the 2013 Bill, for example that requires copies of the examination notice to be provided to the Ombudsman and reports to be provided by the Ombudsman to Parliament, the Ombudsman has submitted that this oversight role would need to be extended effective scrutiny of the coercive powers proposed in the 2013 Bill were to be provided.[11]

6.14 The Australian Mines and Metals Association (AMMA) were strongly supportive of the coercive powers and suggested that the involvement of the AAT as artificial and redundant. [12] Master Builders Australia was of a similar view, terming supervision by the AAT as 'clunky and unwarranted'.[13]

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8 For example New South Wales Council for Civil Liberties; C. Allan, et al, *Submission 8, Attachment A*, p. 61.

9 Plumbing Trades Employee's Union, *Submission 16*, p. 5.

10 The Law Council of Australia, *Submission 17*, p. 2.

11 The Law Council of Australia, *Submission 17*, p. 4.

12 Australian Mines and Metals Association, answer to question on notice, 6 February 2014, p. 14.

13 Master Builders Australia, answer to question on notice, 6 February 2014, p. 12.

6.15 However an example of why this oversight is required was found in Commonwealth Director of Public Prosecutions v. Ark Tribe,[14] the Magistrates Court of South Australia found that the compulsory examination notice issued to Tribe by then Deputy ABC Commissioner Hadgkiss was defective. Mr Hadgkiss had been delegated by then ABC Commissioner Lloyd to issue compulsory examination notices under s.52 of the Building and Construction Industry Improvement Act 2005. However the Court found that the Commissioner had not delegated his functions to his Deputy.[15]

6.16 In the course of the 2011-2012 budget estimates, the ABCC was asked whether it had reviewed other s.52 compulsory examination notices to determine whether or not any other s.52 notices suffered from the same defect as that in the Tribe case and if so, how many?[16]

6.17 The answer to the question revealed that the ABCC had reviewed the s.52 notices it had issued and found that all 203 s.52 notices issued from the time of the ABCC's establishment until 24th November 2010 (the date of the judgment in the Tribe case) were defective.

Committee View

6.18 The Committee is of the view that safeguards such as those that currently govern the issue of compulsory examination notices by the Fair Work Building and Construction, in particular the requirement for an application to be made to the Administrative Appeals Tribunal, are a significant contributing factor to ensuring the integrity of the process.

6.19 It is the Committee's view that it was the lack of oversight over the issue of compulsory examination notices by the ABCC that was a contributing factor to a situation where any and all evidence obtained in compulsory examinations conducted in accordance with the defective notices from 2005 to 2010 was arguably tainted by the defect, prosecutions were prejudiced and the time of the courts potentially wasted.

6.20 It is the Committee's view that before-the-event oversight, such as the current process requiring applications to be made to a presidential member of the AAT, is a necessary feature of the use of powers such as those to be conferred on the ABCC if the integrity of the use of the powers is to be guaranteed.

6.21 The committee does not share the view that safeguards for such extensive powers are artificial, redundant, unwarranted, or otherwise inconvenient. The powers that will be available to the ABCC are extraordinary in the context of being those of an industry regulator. As evidence has shown there is no justification in terms of

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14 Magistrates Court of South Australia, MCPAR-09-216, Whittle SM, 24 November 2010.

15 Magistrates Court of South Australia, MCPAR-09-216, Whittle SM, 24 November 2010, para 127.

16 Australian Building and Construction Commission, *Budget Estimates 2011-2012, answer to question on notice; Question No. EW0119_12.* Senate Standing Committee on Education, Employment and Workplace Relations.

criminality in the industry, or increased productivity that supports the re-introduction of these draconian powers. They not only discriminate against individuals by virtue of their place of employment, but they also blur the lines between civil and criminal jurisdiction that could have far reaching consequences.

Discrimination – Penalties

6.22 The principle of equality before the law is a fundamental legal principle. The committee heard evidence from a number of organisations that supported the principle that a penalty should be applied to an offender on the basis of the offence committed, and not on the basis of the industry that person worked. The ACTU highlighted the view espoused by Justice Wilcox in his 2009 report:

> We […] note that the Hon Mr Wilcox QC, in his 2009 review of the building and construction laws, recommended that there be no differences between building and other employees in relation to penalties. He stressed:
>
> *'There is a substantial difference in penalties, between the BCII Act and Fair Work Bill. However, by enacting that Bill, Parliament has recently determined the maximum penalties appropriate for particular contraventions. There is no justification for selecting a different maximum penalty, for the same contravention, simply because the offender is in a particular industry. Of course, both the circumstances of the contravention and the offender's previous contraventions {if any} will be taken into account by the court in determining the actual penalty in the particular case; but that will be so regardless of the offender's industry.'*[17]

6.23 This view that equality before the law was a human right was put to the Minister for Employment who urged caution when discussing what human rights actually are and whether they can be universally applied:

> **Senator Abetz:** What are human rights? One person's human right may not necessarily be another person's human right, so let us be careful in relation to that. Equality before the law: if that is one, then yes, clearly that is an established traditional human right.[18]

6.24 The Minister specifically defended the provisions in the bill to apply different penalties for the same offence in another industry as being analogous to legislation governing assaults on emergency services personnel:

> **Senator Abetz:** Special penalties apply, as I think they should, for people assaulting emergency service personnel. The states all around Australia, I think, have passed legislation—the same punch being thrown, the same degree of violence, but extra penalties applying. Are you saying that is discriminatory? [19]

6.25 However this view was challenged in the basis that in the emergency services legislation it was the person who subjected to the offence, i.e. the emergency services

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17 Australian Council of Trade Unions, *Submission 14*, p. 28.

18 Senator Abetz, *Proof Committee Hansard,* 12 March 2014, p. 51.

19 Senator Abetz, *Proof Committee Hansard,* 12 March 2014, p. 53.

worker that determined the increased penalty which was not the case in this legislation:

> **Senator Wright:** In this case the defendant, the person who is being charged or who is being brought before the commission, is treated differently based on who they are not on the behaviour that they have used. It is based on where they are employed.[20]

6.26 The Minister responded by referring the committee to the election result of 7 September 2013 where he contended that the Australian people supported the principle that special penalties should be applied in cases where the offender works in the construction industry.[21]

6.27 The ACTU argued that the penalties are 'grossly disproportionate to the public harm (if any) that may be occasioned by the taking of unprotected industrial action', and that:

> The level of penalties proposed in the Bill are at around the level associated with people smuggling, unauthorised mining operations in the Antarctic, carrying out electrical work without the requisite qualification/license, and sex offenders loitering around schools.[22]

6.28 The ACTU also pointed out the penalties under the Fair Work Act already provide for judicial discretion to allow the circumstances of an offence to be taken into account:

> We point out that the penalties and civil remedy provisions under the Fair Work Act itself are subject to judicial discretion, so there is already the ability for judicial officers, in ordering penalties, to take account of circumstances. The point—and this is the criticism that was made by the international organisation—is that the availability per se of differential penalties for the same conduct was inappropriate.[23]

6.29 The Department for Employment submitted that Industry Specific Penalties were re-instated as a key recommendation of the Cole Royal Commission but also that the Courts would be informed by considerations of proportionality when deciding cases:

> The Bill provides for higher penalties… These industry specific penalties were a key recommendation of the Royal Commission.
>
> The Courts will determine the appropriate penalty to apply within the limits set out in the legislation as informed by considerations of proportionality.[24]

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20 Senator Wright, *Proof Committee Hansard,* 12 March 2014, p. 54.

21 Senator Abetz, *Proof Committee Hansard,* 12 March 2014, p. 53.

22 Australian Council of Trade Unions, *Submission 14*, p. 29.

23 Australian Council of Trade Unions, *Proof Committee Hansard,* 12 March 2014, p. 13.

24 Minister for Employment, *Submission 1,* Attachment, p. 5.

Health and Safety Impacts of the Bill

6.30 While the ABCC does not have a role in the management or administration of health and safety regulation, the Bill does amend how issues of health and safety concerns are raised. Clause 7 specifically defines the meaning of ***industrial action*** and Clauses 7(2)(c) and 7(4) specify the circumstances where action taken due to health and safety concerns determines whether that action is lawful or not:

> (2) However, ***industrial action*** does not include the following:
>
> […]
>
> (c) action by an employee if:
>
> (i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and
>
> (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.
>
> (4) Whenever a person seeks to rely on paragraph (2)(c), the person has the burden of proving the paragraph applies.[25]

6.31 Unions NSW was concerned over the power the ABCC will have in relation to health and safety issues raised on sites. Because the health and safety issue must relate to the individual, and the individual is the only person who can raise it, there is a risk that the individual could feel intimidated:

> The problem with this bill is that it creates an atmosphere in which workers are told, 'Do what we tell you, otherwise you are going to lose your job.' The unions are then placed in a position where they do not have OH&S representatives who are game to put their hand up in the workplace and say there is a problem—for fear of getting penalised, losing their job or being the subject of an inquiry. That is the concern we have and that is not anecdotal. [26]

6.32 The Maritime Union of Australia (MUA) was also concerned of the implications of the onus being on the individual to prove that there is a legitimate health and safety concern. According to the MUA this scenario has implications for working in vessels where it may be difficult for employees to prove a safety issue, or to identify 'safe and appropriate' alternative work:

> We have vessels that come out from developing nations that are appalling in terms of the living conditions on board—filthy, water is polluted, soiled water on occasions, air conditioning does not work…when the crew refuse to sail on these vessels because they are filthy and no-one will live in a place like them, how do we prove to the ABCC that that is a safety issue?[27]

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25 Clause 7, Building and Construction Industry (Improving Productivity) Bill 2013.

26 *Proof Committee Hansard,* 6 February 2014, p. 33.

27 Maritime Union of Australia, *Proof Committee Hansard,* 6 February 2014, p. 20.

6.33 Master Builders Australia had an alternative view. They are fully supportive of the onus of proof being on the employee to show that the industrial action is based on a legitimate health and safety concern:

> Master Builders contends that the reverse onus of proof provision contained in the repealed BCII Act is essential if disruption of work on dubious WHS grounds is to be eliminated. Master Builders therefore strongly supports the provisions contained in clauses 7(2)(c) and 7(4) of the Productivity Bill which essentially forestall the misuse of safety but protect the rights of employees to refuse to perform duties which are genuinely unsafe.[28]

6.34 However they would like the bill to go further and remove the obligation on the employer under Clause 7(2)(c) to provide other available work that is 'safe and appropriate' to perform. Master Builders argue that the appropriateness of the work is not a relevant health and safety issue, and the bill should replicate what was in the original Act that established the ABCC:

> Master Builders submits that clause 7(2)(c) of the Productivity Bill should replicate section 36(1)(g) of the repealed BCII Act; namely, the performance of other available work need only be safe for the employee to perform, not 'safe and appropriate' for the employee to perform. The appropriateness of the work is irrelevant in considering whether the other available work presents a risk to the health or safety of the employee and hence this flawed criterion from the FW Act should not be carried over into the Productivity Bill.[29]

6.35 The onus on the employee under Clause 7(4) to somehow prove that there was other work that was 'safe and appropriate' also drew criticism from the unions on the grounds that identifying alternative work was not something that should be in the purview of the employee. The ACTU spoke of their concerns at the committee's hearing in Melbourne:

> Most particularly, there is a concern about the way the onus provisions work in relation to the exemption from industrial action related to a reasonable concern about health and safety. You have no doubt heard from the submissions that there is a reverse onus provision in relation to that, but where it is extremely inappropriate is insofar as it requires the worker to demonstrate that there is not other work available for them to perform. That is not a matter which is normally peculiarly within the knowledge of the worker. It is peculiarly within the knowledge of the employer. So that second level of reverse onus in relation to the industrial action exemption on health and safety is highly appropriate.[30]

6.36 Submitters also commented on the cultural impact of involving the ABCC in decisions on the safety or otherwise of a workplace. New South Wales Council for

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28 Master Builders Australia, *Submission 3,* Attachment A, p. 18.

29 Master Builders Australia, *Submission 3,* Attachment A, pp 15-16.

30 Australian Council of Trade Unions, *Proof Committee Hansard,* 12 March 2014, p. 11.

Civil Liberties was of the view that the role of the ABCC in health and safety could be intimidating for employees on construction sites:

> There may be areas where, for example, people want to have a meeting about safety because they believe their lives are at risk at work. The construction industry is a very dangerous industry. We have a number of deaths every year, and I do not think it is useful to create a culture where people feel as though they cannot meet and discuss their working environment with other people or where they may be subject to an inquiry by a standing commission.[31]

Committee view

6.37 The legislation provides for the ABCC to take over occupational health and safety. However the inclusion of the reverse onus of proof provisions and the role of the ABCC in deciding whether action is taken as a result of health and safety considerations, politicises the issue in a very dangerous industry. Furthermore the committee does not believe that Clauses 7(2)(c) and 7(4) of the bill appropriately assign responsibility for health and safety concerns and instead abrogates the employer's responsibility to respond to health and safety concerns raised by employees.

Expanding the definition of Building work

6.38 The bill extends the scope of building work to include work that which takes place on 'any resources platform, and to certain ships, in the exclusive economic zone or in the waters above the continental shelf'. The bill also allows for subordinate legislation to extend the Act further.[32]

6.39 The Australian Mines and Metals Association (AMMA) strongly supported the scope of the bill being extended to apply to offshore industry. AMMA emphasised the size of the offshore oil and gas industry and its importance to the Australian Economy:

> Around $170 billion of Australia’s resource industry value lies in offshore hydrocarbons projects. These projects are highly exposed to any unlawful union activities in the supply chain / in construction.[33]

6.40 AMMA's submission cites two court cases as to support the claim that the standards of industrial behaviour in the offshore industry do not meet community expectations:

> [S]tandards of industrial conduct exhibited in the offshore construction sector represent a significant departure from that in the rest of the Australian economy/community expectations; see, for example, *United*

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31 New South Wales Council for Civil Liberties, *Proof Committee Hansard,* 6 February 2014, p. 29.

32 Clause 6(2) and Clause 11, Building and Construction Industry (Improving Productivity) Bill 2013.

33 Australian Mines and Metals Association, *Submission 2,* Attachment A, p. 37.

Group Resources Pty Ltd v Calabro (No 7) [2012] FCA 432 and *Fair Work Ombudsman v Offshore Marine Services Pty Ltd* [2012] FCA 498.[34]

6.41 However AMMA do have specific concerns around how the extension of the scope of the bill to the offshore oil and gas industry will practically apply. They comment that issues may arise because the legislation in its current form is ambiguous and not detailed enough to provide clarity in terms of how it will interact with current regulation, state and federal laws:

> The clear and precise meaning of terms used is vital to the achievement of the legislative objective of the bill - fairness, efficiency and productivity for the benefit of building industry participants and the Australian economy. It is a principle of legislative drafting that terms should be sufficiently defined, particularly when they may have substantial consequences… Given the complexity and current uncertainty regarding the combined effect and application of all regulatory frameworks applying to offshore hydrocarbons projects, any practical difficulties and concerns arising from the extended geographical application of the bill may take some time to emerge.

6.42 On the other side of the debate, the MUA were confused over why the ABCC would have jurisdiction over the offshore oil and gas industry. They agreed with the AMMA on the point that the application of the bill is unclear and could have unintended consequences:

> In the MUA's submission, the uncertainty surrounding the scope of the BCIIP Bill […] will only lead to increased transactional costs for employees, unions, and union members, as well as employers in the Maritime Industry.[35]

6.43 The MUA suggested that the ambiguity of the bill's scope would increase the need for professional advice to be sought and for the courts to ultimately consider more cases to establish case law on the issue:

> Whilst case law will no doubt develop around these issues over time, uncertainty and confusion will reign for a significant period of time as the proposed legislation is implemented at the cost of increased transactional costs. Increased transactional costs will potentially lead to a corresponding drop in productivity in the Maritime Industry and other industries placed on the cusp of the 'dividing line' artificially imposed by clause 6 of the BCIIP Bill.

Committee View

6.44 The committee does not understand why the scope of the ABCC should be extended to cover the maritime and offshore oil and gas industries. The provisions of the bill do not provide any assurance. There appears to be no evidential basis for the scope to be extended, nor does there seem to be any gaps where any sectors of the

34 Australian Mines and Metals Association, *Submission 2*, Attachment A, p. 37.

35 Maritime Union of Australia, *Submission 12*, p. 8.

maritime or oil and gas industries are not subject to industrial regulation. The impact of ambiguous legislation could be a substantial increase in the regulatory burden, for both employers and employees without bringing stakeholders any of the supposed benefits.

Recommendation 1

6.45 The committee recommends that in view of the failure of the government and proponents of the re-establishment of the ABCC to:

- **Establish an economic or productivity case for the ABCC;**
- **Address the very serious incursions on human rights in the bills;**
- **Establish the uniqueness of the building and construction industry sufficient to warrant draconian powers and penalties;**
- **Establish that the coercive powers proposed for the ABCC are subject to sufficient oversight and safeguards;**
- **Establish that the ABCC would improve occupational health and safety in the building and construction industry;**

the Senate not support the re-establishment of the Australian Building and Construction Commission and accordingly, not pass the Building and Construction Industry (Improving Productivity) Bill 2013 and related bill.

Senator Sue Lines

Chair

COALITION SENATORS' DISSENTING REPORT

1.1 Coalition Senators express deep concern at the decision of the Labor Party and the Greens to refer this legislation for further review, immediately following an inquiry into this exact legislation by the Legislation Committee.

1.2 This References Committee's inquiry has at best been an abuse of process and at worst a meaningless exercise, given that the same witnesses did or could have appeared at the Legislation Committee inquiry.

1.3 Coalition Senators urge Labor and Greens Senators to carefully consider this approach which places at risk the reputation and high standing of the Senate Committee process.

1.4 Coalition Senators stand by the Legislation Committee's report and recommendations of December 2013.

Senator Chris Back **Senator Bridget McKenzie**

Deputy Chair

APPENDIX 1

Submissions received

1	Senator the Hon Eric Abetz, Minister for Employment
2	Australian Mines and Metals Association (AMMA)
3	Master Builders Australia
4	Australian Industry Group
5	The Australian Manufacturing Workers' Union
6	Housing Industry Association
7	Commonwealth Ombudsman
8	Professor David Peetz
9	Business SA
10	Australian Institute of Building
11	Transport Workers Union of Australia
12	Maritime Union of Australia
13	NSW Council for Civil Liberties
14	Australian Council of Trade Unions
15	Queensland Government
16	Plumbing Trades Employee's Union
17	Law Council of Australia
18	Construction, Forestry, Mining and Energy Union
19	Master Electricians Australia

Answers to Questions on Notice

1 Answers to Questions on Notice from the Australian Mines and Metals Association (AMMA) resulting from the committee hearing on 6 February 2014.

2 Answers to Questions on Notice from Master Builders Australia resulting from the committee hearing on 6 February 2014.

3 Answers to Questions on Notice from the Maritime Union of Australia resulting from the committee hearing on 6 February 2014.

4 Answers to Questions on Notice from the Department of Employment resulting from the committee hearing on 12 March 2014.

5 Answers to Questions on Notice from Master Builders Australia resulting from the committee hearing on 12 March 2014.

6 Answers to Questions on Notice from the Australian Crime Commission resulting from the committee hearing on 17 March 2014.

7 Answers to Questions on Notice from Victoria Police resulting from the committee hearing on 17 March 2014.

APPENDIX 2

Public Hearing

Sydney, 6 February 2014

BARKLAMB, Mr Scott Cameron, Executive Director, Policy and Public Affairs, Australian Mines and Metals Association

CALVER, Mr Richard Maurice, National Director, Industrial Relations, and Legal Counsel, Master Builders Australia

DEGUARA, Mr Shay, Industrial Officer, Unions NSW

DOLEMAN, Mr Michael (Mick), Deputy National Secretary, Maritime Union of Australia

LE COMPTE, Mr Lindsay, Executive Director, Australian Constructors Association

LENNON, Mr Mark Roy, Secretary, Unions NSW

MOREY, Mr Mark, Deputy Assistant Secretary, Unions NSW

MURPHY, Mr Cameron, Committee Member, New South Wales Council for Civil Liberties

NEAL, Mr Aaron, Senior National Legal Officer, Maritime Union of Australia

SMITH, Mr Stephen, Director, National Workplace Relations, Australian Industry Group

Melbourne, 12 March 2014

ABETZ, Senator the Hon. Eric, Minister for Employment

CALVER, Mr Richard, National Director Industrial Relations and Legal Counsel, Master Builders Australia

CLARKE, Mr Trevor, Senior Industrial Officer, ACTU

COWGILL, Mr Matt, Economic Policy Officer, ACTU

HADGKISS, Mr Nigel, Director, Fair Work Building Industry Inspectorate

JONES, Mr Peter, Chief Economist, Master Builders Australia

KIBBLE, Mr Steve, Group Manager, ABCC Re-establishment Taskforce, Department of Employment

LLOYD, The Hon. John, Chair, Advisory Board, Fair Work Building Industry Inspectorate

LYONS, Mr Tim, Assistant Secretary, ACTU

NOONAN, Mr Dave, National Secretary, Construction, Forestry, Mining and Energy Union

PARKER, Ms Sandra, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Employment

ROBERTS, Mr Tom, Senior National Legal Officer, Construction, Forestry, Mining and Energy Union

ROSS, Ms Justine, Senior Executive Lawyer, Workplace Relations Legal Group, Department of Employment

Canberra, 17 March 2014

ASHTON, Mr Graham, Deputy Commissioner, Victoria Police

JEVTOVIC, Mr Paul, Acting Chief Executive Officer, Australian Crime Commission

McRAE, Mr Findlay, Director, Legal Services, Victoria Police

PHELAN, Mr Michael, Deputy Commissioner, Operations, Australian Federal Police

APPENDIX 3

International Labour Organisation conventions in effect in Australia

Fundamental

Convention	Ratification date	Status
C029 – Forced Labour Convention, 1930 (No. 29)	2 January 1932	In Force
C087 – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)	28 February 1973	In Force
C098 – Right to Organise and Collective Bargaining Convention, 1949, (No. 98)	28 February 1978	In Force
C100 – Equal Remuneration Convention, 1951 (No. 100)	10 December 1974	In Force
C105 – Abolition of Forced Labour Convention, 1951 (No. 105)	7 June 1960	In Force
C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 182)	15 June 1973	In Force
C182 – Worst Forms of Child Labour Convention, 1999 (No 182)	19 December 2006	In force

Governance (Priority)

Convention	Ratification date	Status
C081 – Labour Inspection Convention, 1947 (No. 81) *Excluding Part II*	24 June 1975	In Force
C122 – Employment Policy Convention, 1964 (No. 122)	12 November 1969	In Force
C144 – Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)	11 June 1979	In Force

Technical

Convention	Ratification date	Status
C002 – Unemployment Convention, 1919 (No. 2)	15 June 1972	In Force
C010 – Minimum Age (Agriculture) Convention, 1921 (No. 10)	24 December 1957	In Force
C011 – Right of Association (Agriculture) Convention, 1921 (No. 11)	24 December 1957	In Force
C012 – Workmen's Compensation (Agriculture) Convention, 1921 (No. 12)	7 June 1960	In Force

C018 – Workmen's Compensation (Occupational Diseases) Convention, 1925 (No. 18)	22 April 1959	In Force
C019 – Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)	12 June 1959	In Force
C026 – Minimum Wage–Fixing Machinery Convention, 1928 (No. 26)	9 March 1931	In Force
C027 – Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27)	9 March 1931	In Force
C042 – Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 (No. 42)	29 April 1959	In Force
C080 – Final Articles Revision Convention, 1946 (No. 80)	25 January 1949	In Force
C088 – Employment Service Convention, 1948 (No. 88)	24 December 1949	In Force
C099 – Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99)	19 June 1969	In Force

C112 – Minimum Age (Fishermen) Convention, 1959 (No. 112)	15 June 1971	In Force
C116 – Final Articles Revision Convention, 1961 (No. 116)	29 October 1963	In Force
C123 – Minimum Age (Underground Work) Convention, 1965 (No. 123)*Minimum age specified: 16 years*	12 December 1971	In Force
C131 – Minimum Wage Fixing Convention, 1970 (No. 131)	15 June 1973	In Force
C135 – Workers' Representatives Convention, 1971 (No. 135)	26 February 1993	In Force
C137 – Dock Work Convention, 1973 (No. 137)	25 June 1974	In Force
C142 – Human Resources Development Convention, 1975 (No. 142)	10 September 1985	In Force
C150 – Labour Administration Convention, 1978 (No. 150)	10 September 1985	In Force
C155 – Occupational Safety and Health Convention, 1981 (No. 155)*Has ratified the Protocol of 2002*	26 March 2004	In Force

C156 – Workers with Family Responsibilities Convention, 1981 (No. 156)	30 March 1990	In Force
C158 – Termination of Employment Convention, 1982 (No. 158)	26 February 1993	In Force
C159 – Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159)	7 August 1990	In Force
C160 – Labour Statistics Convention, 1985 (No. 160) *Acceptance of all the Articles of Part II has been specified pursuant to Article 16, paragraph 2, of the Convention.*	15 May 1987	In Force
C162 – Asbestos Convention, 1986 (No. 162)	10 August 2011	In Force
C173 – Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)*Has accepted the obligations of Part II*	8 June 1994	In Force
C175 – Part–Time Work Convention, 1994 (No. 175)	10 August 2011	In Force

MLC – Maritime Labour Convention, 2006 *In accordance with Standard A4.5 (2) and (10), the Government has specified the following branches of social security: medical care; sickness benefit; unemployment benefit; old–age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit and survivors' benefit.*		