



## ISSUES PAPER

# CONSTRUCTION INDUSTRY ROLLBACK - DON'T DERAILED AN EFFECTIVE REGULATOR

**S**ince 2005, the Australian Building and Construction Commission (ABCC) has had significant success in improving construction industry workplace relations, evidenced in no small part by unparalleled reductions in days lost to strikes and bans. However the future of the ABCC is uncertain. The Opposition has indicated that it would retain the ABCC only until 2010, thereafter returning the construction industry to mainstream enforcement through a specialist division of its proposed Fair Work Australia mega-regulator.

### COLE ROYAL COMMISSION

Following decades of industrial, commercial and criminal concern, the Australian Government initiated a Royal Commission to inquire into a range of matters relating to the Australian building and construction industry. The Cole Royal Commission commenced its work in August 2001 and reported in February 2003.

The Royal Commission sat for 171 days, issued 1,489 summonses and 1,677 notices to produce, heard 765 witnesses, and accumulated 16,000 pages of transcript. In all, 7.2 million pages of documentation were received and 11 discussion papers and 23 volumes of final reports were published. Rarely would conduct and activities in any industry in any country have been so comprehensively reviewed.

The Royal Commission exposed significant problems in parts of the Australian construction industry arising from an unacceptable and highly damaging industrial relations environment.

Key findings in the Royal Commission's 22 public reports included:

- widespread breaches of freedom of association;
- widespread requirements for employees to join unions;
- widespread disregard of the terms of agreements;
- widespread application of inappropriate industrial pressure;
- unlawful strikes and threats of unlawful strikes;
- threatening and intimidatory conduct;

- disregard of Commission and Court orders; and
- disregard for the rule of law.

The final product of the Cole Royal Commission was not only a comprehensive understanding of what was wrong with parts of the Australian construction industry, but it also extended to recommending solutions. The final report of the Royal Commission contained numerous specific recommendations for structural and regulatory reform based on the evidence received.

### THE ABCC

The regulatory and structural changes recommended by the Cole Royal Commission led to the creation of the Australian Building and Construction Commission (ABCC) and the *Building and Construction Industry Improvement Act 2005* it administers. This new agency and legislation is the key ongoing response of the Australian legal system to the findings of the Royal Commission into the construction industry.

It is analogous in that regard to the creation of the Crime and Misconduct Commission in Queensland in the wake of the Fitzgerald Royal Commission. The ABCC is the dedicated regulatory structure a Royal Commissioner has recommended to the Australian Government to address the criminal and coercive activities revealed by the evidence.

The ABCC has been in operation since October 2005, replacing an earlier interim regulator that preceded the handing down of the Royal Commission report.

The ABCC seeks to improve workplace relations in the construction industry by:

- ensuring workplace relations laws are enforced;
- investigating contraventions of laws, the National Code of Practice and industrial instruments;
- instituting proceedings against those who contravene the law;
- providing advice and assistance to building industry participants;
- educating employers, unions and employees on rights and obligations; and
- promoting appropriate standards of conduct.

The ABCC provides a national service through offices in Melbourne, Sydney, Brisbane, Perth, Adelaide and Hobart. It has gradually expanded its staffing, now employing 134 people across its investigation, prosecution and information functions. It has an annual budget of approximately \$32 million.

### THE ACT AND THE CODE

The ABCC is only one component of the integrated regulatory structure the Cole Royal Commission recommended to improve the Australian construction industry. The creation of the ABCC was accompanied by the passage of the *Building Construction Industry Improvement Act 2005*. The ABCC is also responsible for the administration of the *National Code of Practice for the Construction Industry 1997*.

Three interlinked mechanisms - the ABCC, the *Building and Construction Industry Improvement Act*, and the National Code of Practice, form an indivisible system of industry

regulation that has been proven to be essential to improving and maintaining outcomes in the construction industry.

Headed by the ABCC, the combination of the new regulator, the new legislation and a better enforced industry code, are the enduring outcome of the Royal Commission. They represent the ongoing enactment of the Royal Commissioner's recommendations.

Without these three mechanisms, any system of regulation and enforcement would cease to give effect to the specific reform recommendations of a major national Royal Commission.

### THE SUCCESSES OF THE ABCC

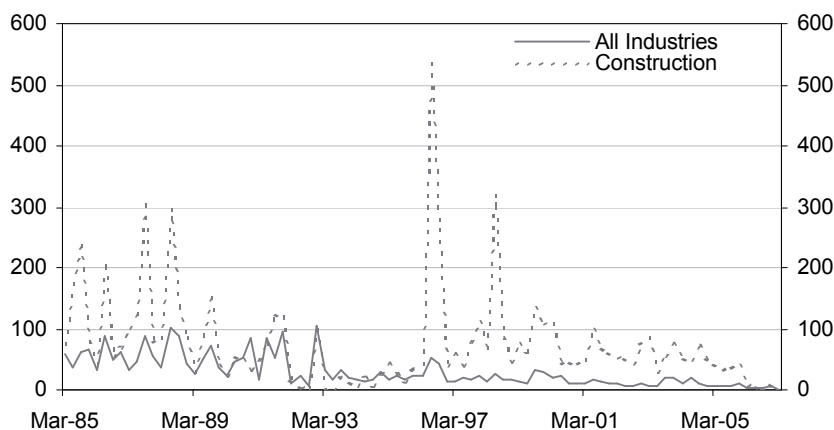
The work of the ABCC has been a resounding success in generating real change in the Australian construction industry. It is a daily 'cop on the beat' in an industry whose industrial behaviour governments have for a generation failed to adequately restrain.

The key measure is days lost to industrial action, which for many years has been intrinsically linked to a culture of coercion and intimidation in the industry.

Through the combination of economic change, the *WorkChoices* reforms (including measures such as secret ballots), and the operation of the ABCC, industrial action in the construction industry has fallen remarkably.

Construction has gone from one of the worst industries for days lost due to strikes and bans to one of the better ones. Figure 1 illustrates the fall in days lost per 1000 employees in construction, and for the community generally.

**Figure 1**  
**Working Days Lost Per 1000 Employees 1985-2007**



Source: ABS, March 2007, 6321.0.55.001 Industrial Disputes, Australia.

The construction industry has gone from regularly and consistently exceeding national averages for days lost due to industrial action, to levels consistent with the community generally, or below.

In the wake of the *WorkChoices* reforms, the construction industry has averaged just 5.1 days lost per 1000 employees - just a fraction of the construction industry average for the 5 years prior to the *WorkChoices* reforms (57 days lost to industrial action per 1000 employees per quarter).

The period of operation of the ABCC and the preceding interim Building Industry Taskforce (17 quarters from October 2002) has seen an overall average of 38.3 working days lost per 1000 employees in the industry. In contrast, the preceding 17 quarters (1998-2002) saw an average of 68.7 days lost to industrial action per 1000 employees. In 1996, an average of 221 working days were lost per quarter.

In September 2006, construction industry industrial action was lower than the national average – something quite remarkable given the history of disputation in the industry, and the power and culture of construction unions.

This means a faster, more reliable construction industry and a greater capacity to deliver projects on time and on budget. Clearly, the combination of the ABCC and the *WorkChoices* reforms is making a difference.

## THE WORK OF THE ABCC

The services the ABCC offers the construction industry are far reaching and its workload considerable:

### Inquires

Between October 2005 and May 2007 the ABCC received 4,486 inquiries via its telephone hotline. This is an average of 128 calls per week, or 26 calls per day. Half of these calls came from construction industry employers.

### Site Visits

Between October 2005 and April 2007, the ABCC conducted 1,800 site visits - an average of 60 per week.

### Investigations

In June 2007 the ABCC had 95 matters under investigation arising from inquiries, site visits and contacts.

## Prosecutions

In June 2007 the ABCC had 21 major cases underway covering alleged cases of unlawful industrial action, coercion, breaches of freedom of association, right of entry and claims for strike pay. Court action by the ABCC to date (61 cases, including completed matters) has been balanced between actions against unions and actions against employers - union prosecutions accounted for 51 per cent of cases and employer prosecutions 33 per cent. Remaining prosecutions concerned a combination of union, employer, employee and government parties.

## Interventions

The ABCC may intervene in Australian Industrial Relations Commission (AIRC) proceedings as a right and court proceedings in the public interest. To date, the ABCC has intervened in 56 AIRC and court proceedings.

## Education and Information

The agency is dedicating extensive resources to educating and informing the industry on legal obligations and its activities and responsibilities. This includes an extensive website, information sheets, presentations and media releases.

A number of conclusions can be drawn:

- The construction industry faces unique workplace relations challenges due to the culture of parts of the industry, the conduct and culture of industry unions, and the resources unions can bring to bear in support of patently unacceptable outcomes.
- There is industry demand not only for information, but also for effective regulation and an effective regulator. If there were no demand for the ABCC and the industry did not need its assistance, the body would not have its extensive workload.
- The ABCC is clearly an agency with significant daily work to do. Conduct in the Australian construction industry clearly needs an effective regulator, resourced and empowered to take inquiries and act upon matters which come before it.
- Abolishing the ABCC would abolish an agency which has real work to do. There are clearly contraventions of the law in this industry arising from the everyday conduct of industry unions in particular, and this is unfortunately an innate characteristic of the industry

unless controlled. This must be addressed by an effective regulator.

## HOW THIS BENEFITS THE AUSTRALIAN COMMUNITY

The ABCC has been very successful in generating real change in the construction industry and in the unacceptable outcomes found by the Royal Commission.

These improvements are a function of the regulatory activities of the ABCC, which include enforcing the *Building and Construction Industry Improvement Act 2005* through investigations and where necessary prosecutions and compliance.

This has generated real operational and commercial improvements for the Australian construction industry:

- Economic modelling indicates that during the five years following the Cole Royal Commission, reported construction input increased by 56 per cent and 250,000 new jobs were created.
- Output from the sector is reported to have increased by 75 per cent during this period.
- Labour productivity, as reported by the ABS, was 2.3 per cent in 2006, well above the 0.7 per cent all industry average.

The industry is seeing project completion on time, and even ahead of time as days lost to industrial action continue to fall.

Reform in the construction industry is also vitally important to the wider Australian community.

The construction industry creates the built infrastructure in which we trade, work and prosper. Australia needs to be able to viably construct new generations of commercial infrastructure to be able to maintain productivity and investment. Reductions in cost overruns and fewer delays make construction of more productive and modern infrastructure more affordable.

An increasingly reliable and cost effective construction industry also encourages investment. When an international investor is tossing up whether to head its regional operations in Singapore or Sydney, Australia is no longer handing our competitors a leg up in ensuring infrastructure can be built on time and on budget. Due to the efforts of the industry and reforms such as creation of the ABCC, Australia is a more viable place to build and invest.

At the time of the Royal Commission, independent economic analysis indicated that if labour productivity in the commercial construction sector matched that in the domestic building sector, there would be a \$2.3 billion gain in economic benefits, a 1 per cent decrease in CPI and a 6.5 per cent decrease in the cost of construction.

Industrial relations in the construction industry also influences the wider national industrial relations climate. The construction industry has arguably been something of a bell-weather for the wider industrial climate. It can be argued that it is no accident that various reforms in the construction industry across 15 or 20 years have preceded or been concurrent with important changes to both the law and practice of Australian industrial relations generally.

The ABCC provides a standing mechanism to address illegal and unacceptable conduct on an ongoing basis. The day to day work of the ABCC is ultimately an ongoing validation of the work of the Cole Royal Commission, and is its key legacy.

## CONTRASTING APPROACHES – RETAINING OR ABOLISHING THE ABCC

In this election year, the future for the ABCC is unclear.

- The Government would retain the agency, with its present powers and composition, and continue to implement the findings of the Cole Royal Commission.
- The Opposition opposes unlawful behaviour, but is committed to abolishing the ABCC in early 2010.

The Opposition is proposing that the power, financial and legal resources of construction industry unions, and the industry, be regulated through a specialist division of the regular inspectorate applying to all industries.

Industry is concerned that Opposition policy could revert to the type of inspection and enforcement arrangements which generated the problems found by Commissioner Cole - namely unlawfulness, coercion, intimidation and widespread disregard for the rule of law.

Those inspection and enforcement arrangements oversaw levels of industrial action in the construction industry 25 times higher than they presently are, and which have been proven to be incapable of protecting employers in the industry from pattern bargaining, coercion and unlawfulness.

Enforcement within the standard bureaucratic framework

has proven itself as incapable of combating the serious problems affecting some parts of the construction industry, as the established institutions in Queensland were of stopping the corruption revealed in the Fitzgerald inquiry. Like Tony Fitzgerald, Commissioner Terrence Cole recommended a new regulatory model to stop unacceptable conduct where mainstream institutions had been proven to have failed.

Federal Opposition Leader Kevin Rudd made two pertinent statements in his National Press Club address of 17 April 2007.

*“Working families understand that... this country cannot afford to see increases in industrial disputes which put at risk Australia’s global reputation....”*

*“There can be no going back to the industrial culture of an earlier age.”*

It is also worth indicating that in contrast to the 22 published volumes of detailed findings of the Cole Royal Commission, the Opposition has provided no substantive policy justification for abolishing the ABCC from 2010 and the *Building and Construction Industry Improvement Act 2005*.

It should also be reinforced that the ABCC is not a creation of the *WorkChoices* reforms of March 2006. The ABCC and the *Building and Construction Industry Improvement Act 2005* were products of a pre-*WorkChoices* process and a pre-*WorkChoices* Senate before the government had a Senate majority.

Following industry concerns with the Opposition policy on the ABCC, the Deputy Opposition Leader and Shadow Minister for Industrial Relations, Julia Gillard MP, has announced that the Opposition would not abolish the ABCC until January 2010.

Whilst this is welcome so far as it goes, this announcement raises significant questions:

- Retaining the ABCC as a body is one thing, but it is not clear that the Opposition has committed to retaining its staffing or functions for the full period until January 2010. The commitment to retain the ABCC has not extended to a commitment to retain the full investigation and prosecution powers of ABCC staff. The body could be rendered significantly less effective were the powers and responsibilities of ABCC officers watered down at earlier dates.
- There also appears to be a risk of workplace culture in the industry declining from day one if it becomes

known that the ABCC is being neutered by attrition. Under the banner of an ongoing transfer of its functions and staff to the Fair Work Australia mega-regulator, the ABCC, whilst nominally retained, could become little more than a shell of the current operation well prior to January 2010.

- There has also been no commitment to the *Building and Construction Industry Improvement Act 2005* or the National Code of Practice. Even with a nominal retention of the ABCC for some temporary period, it is not clear that these instruments will remain in place or in their current very effective form. Unless the complete package of reforms exists (the ABCC, the Act and the Code) the Opposition would no longer be implementing the recommendations of the Royal Commission or providing effective regulation for the construction industry.
- The Opposition has not ruled out amending the legislation and the Code with the effect of watering down their regulatory impact and capacity to regulate unacceptable conduct. There is a very real risk of an ABCC being retained, but with compromised and ineffective laws to enforce.

Significant questions remain on the extent to which there will continue to be effective regulation of the Australian construction industry, even prior to 2010.

Whatever the approach in the transitional period, ultimately the Opposition seems prepared to unwind key aspects of construction industry reform. This is directly contrary to interests of employers and employees in the construction industry and the wider Australian community.

## **THIS ISN'T A SIMPLE TRANSFER OF REGULATOR**

Some may argue that the proposal to replace the ABCC with the Fair Work Australia mega-regulator is no more than a name change, and that this is a mere transfer of functions from one agency to another.

However, the ABCC model works because it is an industry-specific regulator seeking changes to behaviour and culture, harnessing construction industry expertise and construction industry contacts, and working with the industry day to day. It is able to tailor its services to the industry, liaise with the industry and work with the industry. It is able to develop a level of regulatory expertise and focus which is not possible within a mega-inspectorate, dealing with cases from all industries.

The ABCC has also developed a profile of officers and investigators able to undertake their roles in the unique and often challenging climate of construction industry work sites, including projects. It is not clear that an inspectorate composed of those usually investigating underpayments, or preparing desk-based calculations, will be capable of gathering necessary evidence in this tough industry.

Another consideration is the specific compliance powers of senior officers of the ABCC. Section 52 of the *Building and Construction Industry Improvement Act 2005* gives the Commissioner power to compel a person to provide information, produce documents, or attend to answer questions at an examination. The powers may be used where the Commissioner believes on reasonable grounds that a person has information or documents, or is capable of giving evidence relevant to a Commissioner's investigation. They are only used after other avenues available to the ABCC to obtain the required information have been explored unsuccessfully. It is far from clear that the Opposition proposes to empower Fair Work Australia officers in this way, nor to retain these powers in the enforcement of workplace laws in the construction industry.

Ultimately of course a key question in considering contrasting policies on the regulation of the Australian construction industry is why industry unions are comfortable with the proposal to have the Fair Work Australia mega-regulator assume the functions of the ABCC, and in turn why they oppose the ABCC and its work?

Union agitation for even earlier abolition of the ABCC gives the game away. The proposal cannot simply be a name change and transfer of full powers and responsibilities from one agency to another. If it were, industry unions would be as vitriolic in their opposition to Fair Work Australia as they have been to the ABCC.

## LINKS TO WIDER INDUSTRIAL RELATIONS POLICY ROLLBACK

The Opposition also intends to abolish the ABCC in an environment in which it has implemented its wider industrial relations policy, and potentially wider party platform on workplace relations.

A strong regulator keeping union excesses in check in the construction industry would be removed at the same time as other policy changes all but require bargaining with unions, and potentially reduce controls on industrial action. It is also far from clear that the Opposition's proposed new legislation will control or prohibit pattern

and industry bargaining. Removal of restrictions on the content of bargaining would give unions a green light to place demands on industry beyond mere wages and conditions matters.

Whilst there is a commitment to the retention of secret ballots in the Opposition policy, it is not clear whether the ALP would retain their current scope, application (and importantly) timing and administrative requirements. It is also not clear from Opposition policy statements to date whether there would still be:

- scope to secure orders and injunctions against industrial action; or
- other proven controls such as the ACCC and the secondary boycott provisions of the Trade Practices Act.

## THE IMPACT OF POLICY ROLLBACK

The impact of abolishing the ABCC carries the risk of:

- levels of industrial action in the construction industry many times the national and international average;
- industrial action which is unpredictable, petty and divorced from bargaining; and
- pattern bargaining and employment arrangements which do nothing to make the industry more efficient and productive.

Former ACCC head Alan Fels (writing in the AFR of 8 May 2007), is in no doubt that abolishing the ABCC will see a return to what he describes as "union excesses."

Seizing on the Opposition's industrial relations policy including the abolition of the ABCC, Dean Mighell of the Victorian ETU predicted that industrial relations will be "fun" for unions with the ABCC no longer in place. This is the type of outcome that follows if unions are offered the prospect of an umpire who cannot keep up with the play – which is precisely what could happen if the ABCC were abolished in favour of a return to an old system of regulation.

The Opposition has recently attempted to distance itself from the remarks of industry unions such as the ETU. However, the Opposition policy places considerable trust in construction unions to act responsibly given that it removes a range of regulatory checks and balances.

Alan Fels also identified the threat of a return to union violence as one of the prospects of abolishing the ACCC.

Professor Fels' fears were backed up by comments from Western Australia's employment protection minister, Michelle Roberts. In the West Australian of 21 April, Ms Roberts is reported to have said:

*"Mr Rudd's plan to dismantle the ABCC risks a repeat of the industrial action that damaged WA's construction industry until the watchdog was introduced in 2005."*

Whilst these comments were subsequently 'corrected' by the Western Australian Government, these are precisely the sort of outcomes which industry fears will flow from abolishing the ABCC.

## OVERTURNING ROYAL COMMISSION RECOMMENDATIONS

Abolishing the ABCC, and potentially the Act and the Code, would overturn specific structural reforms arising from a Royal Commission. The proposition that any Australian government should reverse laws giving effect to the regulatory and institutional recommendations of a Royal Commission is a most concerning one.

The ABCC, the Act and the Code are not just general policy settings to be adjusted based on the ebb and flow of political debate. A Royal Commission, with all the force, independence and gravity that attaches to such bodies, has specifically recommended structural and regulatory reform which has been operationalised through the creation and work of the ABCC.

Abolishing the ABCC and returning to standard enforcement will cease to give effect to the Royal Commission's recommendations.

No incoming Queensland government would abolish the Crime and Misconduct Commission in favour of a return to the run of the mill 1970s and 1980s style enforcement which gave rise to widespread corruption and illegality.

## CONCLUSION

Perhaps the greatest impact of abolishing the ABCC lies in the signal this would send to construction industry unions and the industry generally.

Putting to one side clear illegality, violence and breaches of the law, abolishing the ABCC and reversing construction industry reform will (whatever the intent) signal to construction industry unions that it is acceptable to return to a culture in which day to day industrial relations is based on coercion, intimidation, fear and threats.

This includes:

- breaching freedom of association;
- requiring employees to join unions;
- disregarding the terms of agreements entered into;
- applying inappropriate industrial pressure;
- creating and threatening unlawful strikes;
- using threatening and intimidatory conduct; and
- disregarding the rule of law.

It will also threaten the emergence of healthier industrial relations in the construction industry. Chris Corrigan recently canvassed the key lessons to be drawn from the reform of the Australian waterfront, indicating that:

*"What I cherish the most is the restoration of the employees' dignity because under the waterfront reforms employees are now treated as individuals and can be proud of their work achievements."*

*"Employee satisfaction has never been higher and relationships between management and the workforce have been normalised from the poisonous environment that existed when I joined the industry."*

(Source: *The Australian* – 17 May 2007)

A longer term question for the Australian construction industry and the community as a whole, is where abolishing the ABCC and boosting the coercive power of unions will leave the dignity of employees in the industry, and their capacity for pride in their working achievements.

How would abolishing an effective regulator, specifically established at the recommendation of a Royal Commission, advance entrepreneurship, productivity and efficiency? How would it support the Australian community in building the infrastructure it needs to create a better society? How would it help protect small business people in the construction sector?

Abolishing the ABCC, either in one hit or by attrition, will force employers in the construction industry to again review whether it is worth their while to take on particular project work, or to take work in particular areas (like our CBDs). As the Master Builders Association recently pointed out, constructors will also be forced to price in substantially greater risk and delays in the cost of specific projects.

Investors may again need to consider whether it is worth the trouble of locating major operations in Australia given the costs and extended time frames which could again plague parts of the construction industry.