

HR Nicholls Society

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**Reform in the
Construction Industry**

Hon. John Lloyd

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(ABCC Commissioner)

The creation and role of the Australian Building and Construction Commissioner (ABCC) is a unique approach in the regulation of workplace relations in the Australian federal system.

The unique features of the approach are:

- a. the legislation creates an industry specific scheme; and
- b. the scheme is centred on a regulator, the ABCC.

Industry specific approaches, although largely removed from the federal system in the last decades of last century, have been adopted in the past. The approaches have applied to industries like: the public service, flight crew, coal mining, and defence.

It is reasonable to argue that workplace relations laws are so fundamental they should apply to all sectors of the labour market without fear or favour or differentiation. Also, it is reasonable to argue that industry specific schemes become captured by the special interests of the particular industry. This over time can lead to introspection and a disconnect from industry and economic conditions at large.

The record of the building and construction industry is such that special arrangements are justified. The Cole Royal Commission comprehensively analysed the industry and in an extremely thorough report identified serious shortcomings. The Royal Commissioner found that the industry was marked as singular in its disregard for the law¹.

The industry has been subject to numerous Royal Commissions, inquiries, taskforces, special conferences, etc. It has demonstrated a special talent for avoiding any discernible change in conduct. It has continued with an outlook accepted by many of its participants that unlawful and improper practices are the way this industry operates.

¹ Final Report of the Royal Commission into the Building and Construction Industry, Part 1, Volume 3, para 11.

This highlights the challenge facing me and my staff. I will now address how we will go about achieving our mission that:

Workplace relations laws are enforced in building and construction industry workplaces.

Labour market reform is required to make Australia a modern, prosperous and competitive economy. In the absence of labour market reform wealth and new jobs that are lasting will not be created. It is curious and disappointing that the ACTU has opposed every reform initiative proposed by the Howard Government since 1996. Fortunately most Australian employers and employees understand the need for reform, although all do not endorse every reform initiative.

The years 2005–07 will be a crucial period for workplace reform. The three key legislative underpinnings of the reform agenda will become operative:

- a. the WorkChoices amendments;
- b. the *Building and Construction Improvement Act 2005* (BCII Act); and
- c. the Independent Contractor legislation.

All three legislative initiatives impact on the building and construction industry and the role of the ABCC.

The BCII Act establishes the Office of the ABCC. The object of the BCII Act² is:

‘to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.’

The Act gives the ABCC a number of special roles and powers directed to this central reform goal.

First, the definitions of building industry participants³ and building work⁴ are broad. This ensures that all those engaged in the industry—owner, client, contractor, industry association, union, organiser and worker are subject to the Act. Building work covers a broad spectrum of activities, both on and off site. This means if you are engaged in

² BCII Act section 3(1)

³ BCII Act section 4

any building and construction activity, except in the housing sector, you are covered by the Act. If you are engaged in activities such as working on ventilation, electrical, sanitation, communications, you are covered. In respect of housing, if your project is four dwellings or less you are not covered; five dwellings or more and you are covered.

Second, the ABCC has a responsibility to promote and inform industry participants about their rights and obligations. This responsibility is the corollary to the ABCC having strong powers and the provision of strong penalties in Act. We undertake this role through a variety of mediums: an internet site, journal articles, media coverage, a national hotline, distributional material and addressing meetings and conferences. Regrettably, the unions have not invited the ABCC to address their members or officials. A particular challenge is to get our message through to second and third level contractors and their workers. In order to meet this challenge every investigator will be equipped and prepared to advise participants about their rights and obligations.

Third, the ABCC will investigate and prosecute breaches of workplace relations laws⁵. We will have a visible team of investigators in all states and territories. They will mostly be people with law enforcement backgrounds. Prosecutions will be launched against any participant who contravenes the law. This will occur irrespective of whether they are a union, union official, contractor, sub-contractor, owner/client or worker.

Fourth, the ABCC is afforded with the right to⁶:

- a. initiate proceedings in courts and tribunals to secure adherence to workplace relations laws. This will commonly be pursued through the seeking of injunctions against unlawful conduct; and
- b. intervene in proceedings that are commenced by other parties.

The BCII Act gives the ABCC a strong right to intervene in any building industry matter that comes before the Australian Industrial Relations Commission (AIRC) and the courts⁷. We have used the power on some 12 or more occasions to date. We are able to keep track of building and construction industry matters before the AIRC and

⁴ BCII Act section 5

⁵ BCII Act section 10

⁶ BCII Act section 39

the courts. The Australian Industrial Registrar informs us of industry applications. Building industry participants are obliged to inform us of any building industry application they are involved in before the courts. A failure to do so exposes them to a penalty. I have used the intervention right to ensure the parties to disputes are:

- a. aware of their rights and obligations under the BCII Act and the *Workplace Relations Act*; and
- b. advised of the potential penalties to which they could be exposed.

In all cases involving industrial disputes the ABCC has supported the making of orders to achieve an immediate return to work. Over the years industrial tribunals have not serviced the industry well. The protracted hearings and consultations that typically characterise tribunal proceedings ignore the severe time and cost pressures that confront the industry. I am prepared to use the intervention power to attempt to truncate such processes.

Fifth, the penalties under the BCII Act are substantial. Most offences attract penalties of up to \$110,000 for a body corporate and \$22,000 for an individual⁸.

An additional type of penalty provided by the Act, I believe, will become influential in changing conduct. The Act allows a court to make an order requiring a defendant to pay a specified amount to another person as compensation for the damages suffered as a result of a contravention. Building contractors can quickly incur big losses if denied access to sites or work contracts. The awarding of compensation from losses resulting from unlawful conduct has the capacity to send a message that people need to think before they disrupt building work or threaten, coerce and intimidate others.

A real challenge for the ABCC is to have the courts impose penalties that are commensurate with the maxima endorsed by the Parliament. This is a constant concern in the workplace relations jurisdiction. A pervasive view is that workplace relations is a tough field where the tolerance levels for improper conduct should be high. Another rationalisation is that union officials in offending are simply protecting the rights of their members in an enthusiastic manner. I totally reject these notions. The ABCC will argue strongly for the imposition of penalties that act as a deterrence against unlawful conduct. This is the intention of the Parliament. Unlawful conduct in

⁷ BCII Act sections 71 and 72

the industry can often jeopardise the viability of a contractor's business and the jobs of employees.

I am encouraged by recent comments by the Federal Court in a recent decision on a case brought by the previous Building Industry Taskforce. Merkel J noted

'In previous cases the Court appears to have taken a lenient approach to contraventions of s 187AA of the Act by imposing penalties that can fairly be described as modest'

*'However, the prohibition contained in s 187AA should by now be known and any future contraveners of s 187AA should not assume that the leniency of the past will continue.'*⁹

Similar issues are encountered on occasions when we deal with state police forces. It sometimes appears that unlawful trespass and violent pickets are tolerated as part of the cut and thrust of workplace relations. We are working with the police to have them take a more serious approach to crimes committed on building and construction sites.

Sixth, the ABCC works closely with other organisations involved in securing lawful conduct. The ABCC has MOUs with the ACCC, the Department of Employment and Workplace Relations, the Federal Safety Commissioner and the Australian Industrial Registrar. We also maintain close working relationships with the AFP, the ATO, ASIC and state agencies responsible for OHS and workplace relations. The purpose of these relationships is to ensure information is exchanged consistent with legislative requirements.

Seventh, is the use of the ABCC powers to obtain information¹⁰. Information for the purpose of an investigation is mostly assembled through ABCC inspectors using the powers conferred on them by the BCII Act. These powers are very similar to the powers of labour inspectorates throughout the country.

⁸ BCII Act section 49

⁹ Pine v Multiplex [2005] FCA 1428, paragraph 9

¹⁰ BCII Act section 52

The ABCC is also empowered to require persons to answer questions or produce documents. This power is often referred to as our 'compulsory power'. The person the subject of the powers is given a written notice, is allowed legal representation and evidence is taken under oath. Importantly, the evidence elicited through this process is inadmissible against the person in court proceedings. A failure to give the information or answer questions incurs a penalty of up to 6 months imprisonment.

I consider the power to be a last resort option. It has been used on a number of occasions already and we will continue to use the power when required.

Finally, the ABCC will be visible and accessible. Access is guaranteed to any industry participant through our internet site and hotline. However, it is important that ABCC Inspectors be visible. The ABCC is well resourced. I intend that it have about 150 staff, the majority of whom will be inspectors. The inspectors will be able to respond quickly to complaints from participants and attend sites at short notice. A visible presence is important in demonstrating to the industry that we are serious about reform.

The WorkChoices reform package will obviously impact on the conduct of workplace relations in the building and construction industry. This impact will emerge in a number of ways in such areas as changes to freedom of association, the content of agreements, the requirements for taking industrial action including secret ballots and right of entry. As I have said earlier labour market reform is necessary to facilitate further productivity improvements and lasting job opportunities. The changes have significant potential to improve the conduct and enhance the productivity of the building and construction industry.

The content of the independent contractors legislation is unknown at the moment. I anticipate that its principal thrust will be protecting the right of people to engage in independent contracting. This right should be free from interference or regulation by industrial tribunals. Independent contracting is a predominant form of activity throughout much of the building and construction industry. Legislation which promotes and protects the right to genuine independent contracting is to be welcomed.

I had the pleasure of working as a senior member of the AIRC for 14 months. I mentioned earlier that industrial tribunals do not serve the building and construction

industry particularly well. The tribunals often give scant regard to compelling time and cost pressures that operate on most building and construction projects.

I was struck when serving on the AIRC that much of its business involved the old, traditional and unionised sectors of the workforce. Many of the sectors which in 2006 are experiencing business and jobs growth were not evident as regular customers of the AIRC. This is to some extent exacerbated by the reluctance of the AIRC to seriously engage in electronic commerce. I also found that many aspects of the AIRC role were overlaid with excessive formality and jurisprudence. This is particularly so in regard to unfair dismissals and agreement certification. It is my view that such limitations adversely affect the standing of the AIRC.

It should be recognised that the AIRC has the expertise and capacity to be effective in assisting industrial protagonists settle disputes. This is likely to be its main focus in the future. It is to be hoped it discharges this role effectively.

In conclusion, the ABCC will carry out its role with vigour, fairness and imagination. We are given the responsibility of taking the lead to ensure that workplace relations laws are adhered to throughout the building and construction industry. We are determined to do all we can to improve the workplace relations practices and culture of this important industry. It is an industry whose costs are reflected in so much of our economic activity. The initial signs are encouraging to some extent. The degree of unlawful and improper conduct appears to have moderated in 2006. This does not mean that we have turned the corner. It is of concern that a disregard for the law seems entrenched amongst elements of the industry in Western Australia. To achieve lasting cultural change the industry participants will have to take a stand and repudiate unlawful conduct.