

**THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION:  
AN APPROPRIATE USE OF PUBLIC POWER?**

Forum on Industrial Laws Applying in the Australian Construction Industry  
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I have been asked to talk about the coercive and investigatory powers of the Australian Building and Construction Commission (ABCC) under the *Building and Construction Industry Improvement Act 2005*.

I approach these powers not as someone who has ever worked in the construction industry, but as a public lawyer whose focus is on the use, and occasional misuse, of public power by Australian institutions since Federation in 1901.

Set against this background, the powers conferred on the Commission are exceptional. In fact, they are not just exceptional, they are unwarranted.

**SCOPE OF COERCIVE POWER**

The *Building and Construction Industry Improvement Act* states:

**52 ABC Commissioner's powers to obtain information etc.**

(1) If the ABC Commissioner believes on reasonable grounds that a person:

- (a) has information or documents relevant to an investigation; or
- (b) is capable of giving evidence that is relevant to an investigation;

the ABC Commissioner may, by written notice given to the person, require the person:

- (c) to give the information to the ABC Commissioner, or to an assistant, by the time, and in the manner and form, specified in the notice; or
- (d) to produce the documents to the ABC Commissioner, or to an assistant, by the time, and in the manner, specified in the notice; or

(e) to attend before the ABC Commissioner, or an assistant, at the time and place specified in the notice, and answer questions relevant to the investigation.

This power could be used to require a person to:

- reveal all their phone and email records, whether of a business or personal nature.
- report not only on their own activities, but those of their fellow workers.
- reveal their membership of an organisation, such as a union.
- report on discussions in private union meeting or other meetings of workers.

The provisions can be applied not only to a person suspected of breaching the law, but to:

- workers in the building industry not in any way suspected of wrongdoing.
- innocent bystanders.
- the families, including children of any age, of workers in the industry.
- journalists and academics (or even, to take what might seem a farfetched example, a priest regarding what someone has told them in the confession box).

I am not saying that the law has often or will be used in this way, but the problem is that the law permits this to occur. It is a basic principle of the rule of law that a statute should go no further than its justified use. The proper scope of the law should not depend upon the discretion and goodwill of the holder of the power.

Lest there was any doubt as to its scope, the Act also states:

**53 Certain excuses not available in relation to section 52 requirements**

(1) A person is not excused from giving information, producing a document, or answering a question, under section 52 on the ground that to do so:

- (a) would contravene any other law; or
- (b) might tend to incriminate the person or otherwise expose the person to a penalty or other liability [but *Use/derivative use indemnity*]; or
- (c) would be otherwise contrary to the public interest.

Section 52(7) is remarkable in further overriding secrecy provisions in other laws:

(7) The operation of this section is not limited by any secrecy provision of any other law (whether enacted before or after the commencement of this section), except to the extent that the secrecy provision expressly excludes the operation of this section.

For this purpose, *secrecy provision* means a provision that prohibits the communication or divulging of information.

Section 52(7) has the potential to even override national security laws relating to ASIO. Even if information must be kept secret to protect the community or the national interest, it may need to be revealed under the ABCC Act. The possibility puts the ABCC law at a higher level than the national security laws themselves.

These sections ensure that the Commission's coercive powers override:

- any protection of journalists sources.
- privacy law.
- possibility even Cabinet confidentiality.

#### *Low threshold*

A further problem is the low threshold for the use of the ABCC's powers. There are broad definitions of key terms like 'building work' and 'unlawful industrial action', and of 'investigation' itself in s 52(8):

***investigation*** means an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law.

***designated building law*** means:

- (a) this Act, the *Independent Contractors Act 2006* or the Workplace Relations Act; or
- (b) a Commonwealth industrial instrument.

***industrial instrument*** means an award or agreement ...

Hence the ABCC's powers extend beyond criminal activity to the most minor or petty award breaches. In aid of this, confidentiality and secrecy can be overridden and the Commission can compel someone to provide incriminating evidence. Even then the information sought need not be necessary for the investigation of the breach, it need only be '*relevant to an investigation*'.

### *Penalties*

Failure to comply with the Commission's s 52 powers means that a person can be jailed under s 52(6) for 6 months. Surprisingly, there is no option for a fine in lieu of imprisonment.

Elsewhere, such as for unlawful industrial action, civil penalties are imposed of up to \$22,000 for a person (nearly half of average annual wage) or \$110,000 for an organisation.

These big fines are not just a union problem. For example, the Act imposes the \$110,000 penalty in regard to:

**59(14)** The occupier of premises must not refuse or *unduly delay entry* to the premises by an ABC Inspector exercising powers under this section.

Civil penalties apply not only to the person but under s 48(2) to 'a person who is involved in a contravention' This is defined in extremely broad terms to include a person who:

(c) has been in any way, by act or omission, directly or *indirectly, knowingly concerned in* or party to the contravention.

A person is also defined to include 'an industrial association'.

## WHERE ARE THE SAFEGUARDS?

The following safeguards are all absent:

Warrants:

- None is required from a judicial officer (as is common in other areas like phone tapping) or even the Attorney-General as per ASIO powers.

Review under the *Administrative Decision (Judicial Review) Act*:

- is excluded (despite this even applying to decisions to ban terrorist organisations under the federal *Criminal Code*). The grounds of review excluded for ABCC decisions include:
  - a breach of the rules of natural justice
  - procedures required by law not observed
  - making of the decision an improper exercise of power
  - fraud has taken place
  - power exercised in bad faith
  - abuse of power

ABCC powers balanced against democratic rights like freedom of speech and the right to silence:

- There is no such backstop in Australian law because we, alone among all democratic nations, lack a national bill or charter of rights. While that is another story, it does mean that we lack the mechanism that other nations have to ensure that the worst excesses of power are blunted. We may like to talk about ‘our rights at work’, but the reality is that until these rights are put into law they can often be merely rhetoric, and, as this law shows, can be too easily taken away. There are few better examples of why Australia needs a national charter of rights than the ABCC and its powers.

It is bad enough to ever give such unchecked powers to a government minister, it is even worse to confer them on an unelected body that is not answerable in Parliament. This represents a concentration of executive power of the worst kind.

## ONE OTHER ISSUE

The definition of 'building industrial action' in s 36 rightly excludes:

(g) action by an employee if:

- (i) the action was based on a reasonable concern by 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 for the employee to perform.

However, it goes on to say:

- (2) Whenever a person seeks to rely on paragraph (g) of the definition of *building industrial action* in subsection (1), that person has the burden of proving that paragraph (g) applies.

This can put workers in an impossible bind.

They need not only have a reasonable concern about an imminent risk to health or safety, but need to be sure can prove this as a matter of admissible evidence in court, something that may well require legal advice. Workers may not take the risk of breaching the law and so may endanger themselves.

It is possible to find this shifting of onus of proof in some of the Howard government's anti-terror laws. It should not be there, and certainly should not be here.

## ASSESSMENT

Each of these elements is, by itself, legally objectionable.

But, taken together, they are of even greater concern.

The ABCC has been given extraordinary powers that exceed even those given to police in investigating major crimes. The ABCC's powers cannot even be described as police powers because they go far beyond what the police have been given.

They make a mockery of the object expressed in s 3 of the *Building and Construction Industry Improvement Act* to promote 'respect for the rule of law'.

### **LIKE POWERS ELSEWHERE?**

It has been said that the ABCC law copies powers found elsewhere. Indeed, there are similarities to the powers given to bodies like the Australian Competition and Consumer Commission and Australian Securities and Investments Commission (ASIC).

However, the context is of vital importance. A power appropriately given to ASIC to catch corporate criminals may be inappropriate when given to a body dealing with industrial disputes.

In any event, the ABCC regime is different, and more problematic, because:

- Other regimes do not operate in such a discriminatory manner (for example, a body like ASIC is not given coercive powers for, say, just the automotive industry).
- Other regimes do not suffer from the same problems of over-wide definitions and low thresholds for the use of power, let alone such an absence of safeguards and oversight.
- The ABCC law applies a criminal investigatory model to a non-criminal, industrial context (indeed the only imprisonment under the Act is for not complying with the ABCC's powers). The closest Australia has come to this in an industrial context is a First World War law. The *Unlawful Associations Act 1916* was directed at the radical labour organisation, the Industrial Workers of the World (IWW). In its first months, 103 members of the IWW were imprisoned, usually for six months with hard labour, and many others were sacked.

- The ABCC law normalises extraordinary powers that should not have been taken out of their criminal context. This creates a precedent that may make common place what should be limited and exceptional. The model could be extended to other industries and out of the industrial context to other fields.

These powers should have no place in a body directed at preventing unlawful industrial action whose remit includes minor award breaches. These powers could not be justified when policing breaches of the criminal law, let alone industrial disputes.

## **WHAT RESPONSE?**

I went back to the parliamentary debates that led to the *Building and Construction Industry Improvement Act 2005* to see what ALP members then had to say. They got it right by opposing the law. Indeed, they raised many of the same concerns, even taking them further, such as in the speech of Dr Craig Emerson in the House on 11 August 2005

[A]n investigator can go up to a building industry worker and ask such questions as: ‘Are you or have you ever been a member of a trade union? Are you or have you ever been a member of the Australian Labor Party?’ That person may have done nothing wrong and there may be no suspicion of that person having done anything wrong, but if that person does not answer that question then this legislation can send that person to jail for not answering a McCarthyist question.

Other speeches are similar vein, such as that of Stephen Smith who argued against the law because ‘The ABCC will have much stronger powers than any police force in the country.’

Even people like Bob Katter said:

all of us should hold some grave apprehensions with respect to the Building and Construction Industry Improvement Bill.

Nothing has altered the correctness of these assessments.

Could the law be fixed by greater oversight? I believe not as we are dealing with a law that should not, in this form, be on the books at all. It has no place in a modern, fair system of industrial relations, let alone one of a nation that prides itself on its political and industrial freedoms.

Given this, I believe that the minister should immediately act as an interim measure under s 11 of the Act to, as far as is possible, prevent the worst possible future uses of the ABCC's powers. That provision reads:

**11 Minister's directions to ABC Commissioner**

- (1) The Minister may give written directions to the ABC Commissioner specifying the manner in which the ABC Commissioner must exercise or perform the powers or functions of the ABC Commissioner under this Act.
- (2) The Minister must not give a direction under subsection (1) about a particular case.
- (3) The ABC Commissioner must comply with a direction under subsection (1).

This should be followed by the repeal of the powers of the ABCC. Even if the body is retained until 2010, it should not hold its current powers.

After 2010, whatever the new specialist division within the inspectorate of Fair Work Australia is based on, it should not be the *Building and Construction Industry Improvement Act*.