

HR Nicholls Society
XXXth Conference
Melbourne 17 April 2010

The Experience of the ABCC

1. I addressed the 27th renewal of this conference in March 2006. That was five months after taking up my appointment. I took the opportunity to outline the powers the ABCC had been given and how I proposed we would go about our role.
2. I came across an article in *The Economist* in December 2009 about gambling and match fixing in European football. The thrust of the article was along the following lines. This resonated with me as a rationale for the regulation of some activities and industries.

“When unlawful conduct brings high rewards and low penalties, unlawful conduct is likely. Add complacency and it becomes a near certainty.”

The Economist 5 December 2009 Own Goals Match-fixing in football.

3. This is a neat summary of what applied in the Australian building and construction industry over many years. The findings of the Royal Commission support such a conclusion. Many people or organisations of influence were either unaware or chose to ignore the extent of unlawful conduct in the industry.
4. The ABCC in early 2006 faced considerable challenges. I will address some of the challenges later.
5. The conduct of the industry has improved since the ABCC was established. The incidence of unlawful conduct has reduced. Industrial disputation has fallen to historically low levels. However, the culture for exploiting any complacency in regulation is intact. We have not eradicated this culture. This undoubtedly poses risks for the future.
6. The numbers give an indication of our energy and success. We have grown from 49 staff in 2005 to 150 today with offices in all states. My staff have discharged their responsibilities in a very professional manner. We have commenced 100 legal proceedings. Of these cases 66 have been finalised and we have been successful in 86 per cent of cases with a recorded result. Penalties totalling \$2,094,900 have been imposed. There are currently 34 cases before the courts.
7. I turn now to the challenges we have faced.
8. First, a significant part of our constituency is hostile and vehemently opposes the ABCC's role and powers. I refer to the unions, ACTU, some contractors and employees.

The trade unions have not ventured even a modicum of support to the ABCC and appear to refuse to recognise that unlawful conduct such as coercion and intimidation is a serious issue in the industry.

9. Second, the Wilcox review was conducted in 2008/09 and reported to the Government. A bill tabled in June 2009 that replaces the ABCC and makes substantial changes to its regulatory powers remains before the Parliament. We have had to manage the resultant uncertainty created amongst staff and to ensure that our standards on the job were not compromised. The industry has also had to cope with a degree of uncertainty during this process.
10. Third, are the grossly inaccurate statements and commentary about the role, powers and influence of the ABCC. We are at times alleged to be able to jail people, to have caused deaths in the industry and to have penalised those that contravene the law. I accept that we are a controversial agency but I would prefer those making public statements about the ABCC to take some care to be reasonably accurate in what they place in the public domain. We attempt to correct the record whenever inaccurate statements are made. Acknowledgement of the false statements is generally not forthcoming.
11. Fourth, the industry is acknowledged as being robust. Some embrace this culture to such an extent that they appear unaware of the level of unethical and unlawful conduct that occurs on a regular basis. The industry exhibits standards of conduct that are often extreme and would not be tolerated elsewhere.
12. Fifth, ABCC inspectors can expect to encounter confrontation when going about their duties. Their role is to enforce civil law and they are trained to be resilient. However, at times the confrontation they experience crosses the boundary of what is reasonable. I have, and will continue to refer conduct that is clearly unreasonable to the police.
13. Sixth, I recognised from the start that the compulsory examination power would attract considerable comment and scrutiny. We have used the power on about 200 occasions. We put in place very thorough procedures for considering and approving the exercise of the power. It has proved to be an effective aid to the conduct of thorough investigations. It has helped immeasurably to break down the industry's code of silence and the aggression shown against those cooperating with the regulator.
14. Seventh, the National Code and associated guidelines had been administered in a lacklustre fashion. Our challenge, along with other agencies, was to make National Code compliance an important feature of working in the industry. We devoted considerable resources to our National Code role and the results have been most encouraging. National Code compliance is now an integral feature of hundreds of projects across the country at any one time. This has a positive impact on the efficiency of the projects.
15. I consider that we have successfully met these challenges. Overall the results are satisfying.
16. The ABCC has undertaken a number of high profile cases. These include the Perth to Mandurah railway and the Maryvale pulp-mill cases. We have currently before the courts the West Gate Bridge, Royal Children's Hospital and Woodside Pluto cases. The high profile cases are only part of the story.

17. Just as important to the credibility of the ABCC are the numerous small cases that we undertake. It is wrong for any employee or subcontractor to go to work facing the prospect that they will encounter threats, coercion and intimidation. If such conduct is allowed to persist, the economic and commercial consequences are potentially serious. Also, respect for the rule of law and social cohesion can suffer.
18. I will now outline some of the ABCC cases that have involved unlawful conduct targeted at small contractors and their employees.
19. In December 2009 the Federal Court in Brisbane penalised the CFMEU and organiser \$49,000 after an ABCC investigation revealed they attempted to coerce an elderly company director into making a union agreement.
20. The well-established shop-fitting company had an AIRC-certified agreement in place. Showing no regard for this contractor's existing lawful arrangements, the union organiser visited their site and threatened to 'blackball' the company and ban them from all building sites in Australia, unless they terminated their agreement and entered into a new one with the CFMEU.
21. Without seeing the company's workshop, the union warned this elderly gentleman that they would do a workplace health and safety audit of the workshop that would require more than \$30,000 worth of improvements. The Court regarded the union's conduct as *'extreme and completely unacceptable.'*
22. A similar disregard for lawful rights occurred at the Westfield Doncaster Shoppingtown project in Victoria in 2008. The CFMEU's OHS representative told employees at the site that they wouldn't be allowed to use the toilet or smoko sheds until they paid their union membership. Another organiser tried to ban workers on the same project because they hadn't paid their membership fees.
23. The Federal Magistrates Court penalised the organisers and the union \$14,000 for undermining the right of these industry participants to freedom of association.
24. In a third case, the major contractor LU Simon unlawfully discriminated against two small subcontractors at a Docklands construction site, because one of the subcontractors didn't have a CFMEU agreement. This occurred in March 2007.
25. LU Simon engaged Axiom Design to install a glass handrail on the project. Axiom then subcontracted the work to Vanderkley who employed two people. Vanderkley's two employees were not covered by a CFMEU agreement.
26. LU Simon refused Vanderkley entry to the site on three occasions. The LU Simon site foreman told Vanderkley to go to the CFMEU office and sign a CFMEU agreement. He was told he needed to do this before he would be allowed to begin work at the site. After about a three week stand off LU Simon varied Axiom's contract so that it was no longer required to install the handrail. Vanderkley did not work at the site.
27. LU Simon admitted to infringing the rights of Axiom and Vanderkley. The Federal Court imposed a penalty of \$55,000.

28. These are just a few examples where the ABCC has stood up for the rights of vulnerable industry participants. These cases may not always make a splash in the national news. Nevertheless, the ABCC pursues such matters to demonstrate that industry participants, irrespective of where they work, do not have to withstand bullying, discrimination, intimidation and threatening behaviour in their workplaces.
29. At the ABCC we are mindful never to lose sight of the objects of the Act. They contain the notions of;
- having building work carried out fairly, efficiently and productively;
 - promoting respect for the rule of law;
 - ensuring respect for the rights of building industry participants;
 - ensuring that industry participants are accountable for their unlawful conduct; and
 - encouraging genuine bargaining at the workplace level.
30. My perspective on the industry from nearly five years in the job is that it is characterised by intense competitive pressures and strong organisations in both the contactor and union domains. The industrial strategies of many are dictated by short-term commercial and industrial goals. This can readily lead to exploitation of the less-strong, through unethical and unlawful conduct. Such conduct can do enormous damage to the Australian economy and our commercial building reputation. The industry has and will continue to require an effective regulator with strong powers
31. The ABCC has been tireless, successful, innovative, resolute and professional in discharging its responsibilities. Such a body will be required in the future.

John Lloyd
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