

Building Industry Thuggery – Storm Clouds on the Horizon

John Lloyd

1. **The Past.** Be mindful of the past. Royal Commission commenced 10 years ago.
2. It was the last of numerous inquiries. It lifted the lid on the nature and extent of unlawful conduct. It found an entrenched culture of lawlessness. Many in the industry saw themselves as above the law.
3. The BITF and ABCC emerged and they had an impact on the culture. 234 - 1996 v 1.6 - 2006. The recent trend has been up – address later.
4. The ABCC was resolute. Inspectors skilled and robust. A good legal team. A concentration on the serious side of unlawful conduct – illegal strikes, coercion, intimidation, freedom of association, breach of orders and right of entry.
5. The results:
 - Westagte
 - Perth-Mandurah
 - Small sites and contractors.
6. **Lessons.** The lesson from the past of which all involved should be mindful is – the conduct of the industry participants improved. However, it required strong powers for the regulator, active on-site presence and investigations, high penalties, an aggressive legal strategy and a determined application of the National Code.
7. The culture of many in the industry did not change. Some continued to break the law. Others are keen to revert to old ways.
8. The factors that contribute to this are:
 - The history, culture and leadership of the unions;
 - The industry's operating environment and the commercial imperatives that emerge. Contractors carry the risk and the sequencing of work intensifies the pressure.
9. The conduct of the industry will only improve if the unions and contractors know there is a tough powerful body to take them on. A body ready to address flagrant and serious thuggery and breaches of the law. A body prepared to stand behind those in

the industry who want to work in a law abiding industry and who do not tolerate thuggery. Talking reason, making concessions and sound argumenst do not work. Never have and never will.

10. One of the CFMEU's emblems is a snake poised to strike. This is suited to the current circumstances. The unions quickly pick up the nuances of any relaxation in the regulatory environment and rapidly take full advantage.
11. **Storm Clouds.** The tasks and role of the ABCC have been transformed. It now parades as the all-encompassing regulator. It follows up complaints about under payment of employee entitlements. FWO used to do this. This can be an intensive and time consuming activity. Many cases will present complex initial jurisdictional questions.
12. A sham contracting inquiry has been instigated and the issue is now pursued by the ABCC in an active and curious manner.
13. More elaborate procedures are now associated with the use of the compulsory examination power. It will be interesting to read reports about the frequency of the use of the power.
14. The ABCC could now be renamed the TBCC – the Trendy Building and Construction Commission.
15. **Legislation.** The Bill to abolish the ABCC lapsed with the 2010 election. A new Bill is not yet introduced.
16. The ALP's policy is to abolish the ABCC and replace it with a new body a Directorate with the current trendy term Fair Work mixed up in its name. The Greens want the ABCC abolished and no special regulator to exist.
17. The 2010 Bill followed the Wilcox Inquiry. It was promoted as a Bill to retain a tough cop on the beat. The reality would have been different. I consider the Bill combined with decisions about the National Code would have resulted in a diminished regulator.
18. Penalties were reduced by 2/3rds. The penalties for unions and contractors were to fall from \$110,000 to \$33,000. The compulsory examination power was retained but with several caveats. An independent assessor could exempt certain projects from the use of the power. Elaborate and prescriptive procedural requirements were to be imposed involving the AAT and the Ombudsman. Cost arrangements for attendance were relaxed.

19. An overseeing board with employer and union representation was to have been appointed, a very novel structure for a law enforcement body. Ministerial direction was strengthened and Ministerial access to confidential information was relaxed. These changes would inevitably impact in the independence and therefore the authority of the body.
20. The enforcement of National Code as a condition to be eligible for Government was a very effective tool in the reform effort. This has been weakened. The tests for industrial agreements to satisfy code compliance are less stringent – approval by a tribunal will suffice. Wow! Exemptions can now be granted for government work. The emphasis on code compliance on private sector projects has been reduced.
21. It will be interesting to see what type of Bill is introduced. If it is presented after 1 July 2011 how much of the Greens agenda will it contain?
22. The unions and contractors who opposed the ABCC must be looking forward to the coming months. Their long cherished goal of no ABCC and a relaxed regulatory environment is imminent.
23. **Real Solutions.** The vehemence of the attacks on the ABCC, including the treatment of ABCC inspectors on site, suggests that we were effective in curbing arrogant and unlawful conduct.
24. A resolute regulator with strong powers is needed to secure reasonably lawful conduct. The agency needs to be vigilant, accessible, prepared to prosecute without fear or favour. It must be determined to ensure the terms of agreements, tribunal orders and court injunctions are upheld. Breaches should be prosecuted with vigour.
25. An effective compulsory examination power must be retained.
26. The governments of Australia, as major clients of building and construction, must ensure the National Code is strictly enforced.
27. The agency should be one that wins the respect of most engaged in the industry. Also, it should work at having other law enforcement bodies, such as the police and the ACCC, pay more attention to the conduct of those in the industry who break the law.
28. The industry employs about 900,000 people. It plays a key role in the national economy. Massive activity in infrastructure and mining is scheduled in coming years. The economic cost of an unlawful industry can be immense. We do not want a repeat of earlier years when capital investment in building was reallocated elsewhere. This is not done with fanfare and the consequences, although severe, take time to become

apparent.

29. The future years I think are likely to be stormy.