

Speech type: **DISALLOWANCE**

Date: **29 November, 2005**

Exposing the building industry star chamber

(Please note – this document is an edited version of speech notes and may not exactly match the speech as delivered).

I am moving this motion of disallowance to stop bad regulations implementing bad laws. I do so reluctantly, as I consider a disallowance a blunt instrument and an act of last resort – but I feel it is urgent and essential that I do so in response to recent events in my home state of Western Australia.

I am doing so because I have been confronted by chilling news of how the Building Industry Taskforce and then the Australian Building and Construction Commission (ABCC) have been implementing these regulations since the chamber passed the Building and Construction Industry Improvement (BCII) Act.

It is not a pretty story, and it is not the kind of tale you expect to hear emerging within Australia.

Now when this legislation passed through this chamber just a couple of months ago I spoke up against its passing into law, and I raised my concern that these laws would remove the basic civil and democratic rights of workers, that they would be denied the right to silence. I raised my concern that the ABCC was being given what were clearly coercive powers.

Well it gives me absolutely no pleasure to say I told you so.

I have been hearing some very scary stories of workers families being intimidated by burly inspectors, who appear to have waited until a worker has set off to work to serve his wife or partner with a notice – pointing out in a heavy-handed manner that they are liable to a large fine or a jail term if they don't cooperate fully.

I've heard stories of apprentices and migrant workers (for whom English is a second language) being picked on, intimidated and tricked into answering questions without being informed of their legal rights.

I've heard about workers being invited to have an informal conversation by an ABCC inspector, only to learn that the discussion has been recorded without their knowledge or consent.

I've heard stories about workers being separated from their counsel in ABCC hearings, being seated tightly between two burly inspectors, and being badgered into answering questions.

About their counsel being ignored and denied the opportunity to intervene in heavy-handed and inappropriate line of questioning. I've heard about workers and their counsel being denied the right to particulars that detail the matter under investigation, and of counsel being man-handled by ABCC inspectors.

What I've heard are reports about a hearing process that amounts for all intensive purposes to being a "star chamber" in which the Deputy Commissioner, sitting beneath a Commonwealth coat of arms, acts in a imperious manner claiming the regulations give him the right to determine who can or cannot represent a worker and how they fulfill their moral, ethical and legal obligations.

One of the worrying things about the Building and Construction Industry 'Improvement' Act and its regulations is the manner in which it has been made retrospective.

This means that the ordinary Australian workers now fronting this star chamber with no right to silence and the threat of six months jail – are being pursued and threatened with prosecution for taking part in or possibly knowing of actions that were not illegal at the time they purportedly occurred.

Let me run that by you again – no right of silence, limited access to bona fide legal representation and the threat of six months jail for being involved in or possibly having knowledge of industrial actions that were not illegal at the time they are said to have occurred.

These workers are being denied basic democratic rights to procedural fairness and natural justice that all of us take for granted. These workers - who have not been charged with anything and may only be suspected of knowing about an offence committed by someone else - are being treated with less rights than someone who has committed a very serious criminal offence.

The ABCC has wasted no time in moving on the BCII Act and making use of its sweeping inquisitorial powers. With the ink on the legislation barely dry we already have had at least 8 examples of building workers within WA being targeted.

From these incidents a clear picture of the bread-and-butter tactics being used by the ABCC inspectors have emerged. Tactics that I believe are deliberately designed to intimidate, bully and spread fear among ordinary workers.

How do I know this? Suffice to say that I have been contacted by a number of very distressed WA constituents, building and construction workers who have been subject to the bully-boy tactics of the ABCC.

I cannot share with you the details of their matters; I do not know them. Each of these workers were threatened with criminal prosecution if they revealed any of the questions asked, answers given or agreements made during their inquisition to anyone other than a legal practitioner – if they were lucky enough to be able to afford one. I cannot characterise those practitioners as true ‘legal representatives’ because their ability to act as counsel for their clients was obstructed by the Deputy Commissioner that presided over their hearings like an imperial magistrate.

And I am unwilling to identify the individuals due to legitimate fears that it will invite vindictive retribution on them, their families or fellow workers from the ABCC.

But as best I can determine, there is no prohibition against describing the process and procedure to which ABCC targets are subject and it’s high time that this chamber took responsibility for the consequences of this undemocratic legislation.

Before receiving a formal notice to appear, it seems that most witnesses were approached using a variety of unethical tactics – including friendly ‘you-can-tell-me-off-the-record phone calls, or a letter of invitation to come in and have an informal chat. Others received what they clearly perceived as threatening phone calls or letters that outlined in great detail the penalties they could be subject to under the act, but did not touch on their corresponding rights to refuse, to have legal counsel present or to seek written particulars.

These informal approaches would then be followed up by a couple of burly inspectors turning up to the family home when the worker was not present to formally serve notice on their families. In at least a couple of these incidents it seemed apparent that they had waited until the worker had left for work to serve the notice in a manner clearly designed to intimidate the family. ABCC inspectors do not seem to be interested in serving the notice to the worker on the job, despite this being a more forthright, convenient and appropriate course of action. In one case the investigators tried to serve a nine year old child (who appears to have outsmarted them by refusing to open the door).

There is a serious question as to whether service of a summons on a person’s family constitutes ‘valid service’. In most court jurisdictions, a witness summons needs to be served personally and cannot be served on family, friends or the like. Where there are quite serious penalties for failing to attend, the notice should be served personally.

As I said, at least eight workers to our knowledge have been served notice to appear before the ABCC in Perth. They are ordinary building and construction workers who coincidentally appear to belong to the building and construction union – but none of them are union officials, delegates or stewards or union organisers of any kind.

From what I’ve been told, the ‘notices to appear’ are consistent in their lack of detail or particulars regarding the matter under investigation. The worker is given fourteen days to

appear but given no information to allow them to prepare for the inquisition. The notices apparently state a time and date where an alleged breach occurred and spent the rest of the notice outlining the consequences if the worker fails to appear and answer questions. These workers have to approach their inquisition blind.

Imagine the state of mind of an ordinary working Australian as they approach their interview. They are not accused of committing an industrial crime, but they are threatened with jail if they fail to appear or answer and they are offered immunity from prosecution if they testify to participating in retrospectively illegal industrial action.

But the prelude is nothing compared to the actual interrogation. It is by no means an informal interview to answer questions. It is a full blown formal hearing, held in an adversarial courtroom-like setting in which the normal rules of fair play and jurisprudence are suspended.

Nigel Hadgkiss, former head of the Building Industry Taskforce, former NCA liaison to the Cole Royal Commission and now deputy commissioner of the ABCC presides over the hearing like a magistrate. But unlike a magistrate, Mr. Hadgkiss appears only to be bound by the procedures that he and the ABCC choose to follow.

And Mr. Hadgkiss (who himself is not understood to be a legal practitioner) appears to have the unfettered right to use the only procedures that he knows – procedures used by the National Crime Authority and previously reserved for investigations into the mob and organized crime.

He is not bound by democratic procedures set forth in the law and regulations by parliament. He is not subject to parliamentary or independent oversight to ensure that the principles of our democratic institutions are upheld. He is only accountable to his boss the Minister who has created these laws and reserved for himself the right to oversee them (who happens to have been the former head of the WA Building Industry Taskforce under Richard Court and Graham Kierath).

Building workers called before Mr. Hadgkiss have been forced to sit between the big and burly ex-police ABCC inspectors that work for Mr. Hadgkiss, while their legal practioner that they engaged to support them during the hearing is forced to sit on the opposite side of the room

The preliminary monologue issued by Mr. Hadgkiss and his counsel assisting prior to questioning does not inform the worker of his rights, few that they are. They reiterate the notice and recite the consequences for workers that are not obedient or do not comply. It is clearly designed to intimidate the worker rather than a process designed to encourage cooperation and willing participation.

When a solicitor appeared in order to represent a client, having already appeared with another before the ABCC, that solicitor was denied the right to represent their client by Mr. Hadgkiss on the grounds that they might have 'a potential conflict of interest' if the ABCC decides to pursue a prosecution. He proceeded to interrogate the solicitor, asking them to divulge privileged information about their relationship with their client, before they were manhandled out of the hearing room.

Under criminal law it is permissible and perfectly normal for one lawyer to be representing different clients facing the same set of allegations. However, Deputy Commissioner Hadgekiss is not only using tactics more appropriate to the National Crime Authority, but he is claiming that dated NCA court decisions in relation to conspiracy give him the right to dismiss counsel who has already appeared for a different worker on the grounds of a possibly hypothetical future "conflict of interest." I am assured that these NCA court decisions are peculiar to the National Crime Authority Act and designed specifically to deal with organized crime and mob activities – they are not appropriate to an ABCC hearing whose only purpose is to gather information. These are not people who have been charged or are even necessarily likely to be charged with a criminal offence – and yet they are denied basic legal rights.

Now, it states quite specifically in Section 52(3) of the Building and Construction Industry Improvement Act 2005 that

"A person attending before the ABC Commissioner, or before an assistant ... may, if the person so chooses, be represented by a person who, under the Judiciary Act 1903, is entitled to practice as a barrister or solicitor, or both, in a federal court."

Further, when a legal representative has been 'granted leave' to be present by the Deputy Commissioner, he is seeking to impose restrictions on the role that legal representative can take during the hearing so that all they can do is:

- a) object to questions asked if they are unclear, unfair or irrelevant to the subject matter of the examination;
- b) re-examine the witness to clarify their response to an earlier question which requires clarification;
- c) make submissions at the completion of the examination as to any relevant matter.

This seems to exclude legal practitioners from being able to advise their client in relation to questions they are being asked. There is nothing in the Act to say this is permissible, nothing in the Act that says the legal representative must be granted leave or that such leave can be withheld.

The point of concern with the manner in which Mr. Hadgkiss presides over the examination is that he is both the examiner and the presiding commissioner. So in essence, he determines the validity of any objections to his own questions – which is arguably an extraordinary conflict of interest.

Furthermore, in most court jurisdictions, if you summon a witness, you are responsible for their costs of attending. In the Local Court, you need to provide them with "conduct money" (i.e. bus fare) if you summons someone to attend. In the ABCC, the witness (who may have done absolutely nothing wrong) is responsible for their own lost wages, conduct money and legal expenses regardless of the circumstances.

Now, if the Work Choices legislation passes through this chamber into law, there will be nothing to stop workers for being unfairly dismissed because they have been compelled to respond to an ABCC summons and were absent from the workplace.

So - Why is it that I am moving to disallow the regulations?

I'm sure some of my colleagues will be quick to point out that there's nothing in the regulations about the ABCC running a star chamber. There is nothing in the regulations about intimidating workers families, limiting access to legal representation or excluding them on the basis of 'conflict of interest'.

This is precisely my point. The BCII Act gives the ABCC sweeping coercive powers to compel witnesses without any checks and balances. It seems to give Deputy Commissioner Hadgekiss the latitude to exercise self-defined, wide powers of interpretation of the regulations and carte blanche to implement the Act in a heavy-handed unregulated fashion.

My question to this chamber is – Is this the way we want the commission to run? Do we believe that this is how justice should operate in this day-and-age? Let me remind you that an ABCC interview is meant to be an information gathering exercise to pull together information that may have some value as evidence in a hypothetical future prosecution, and that the people caught up in this net may not even be suspected of any criminal involvement or intent.

So, I am suggesting that there is insufficient regulation of the activities of the ABCC. That these regulations before us do not provide sufficient guidance, place clear obligations on the conduct of the ABCC and contain sufficient checks and balances to stop the investigators of the ABCC and its inspectors from crossing the line and infringing on the legal, industrial and democratic rights of ordinary working people.

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There were a few other items that I didn't have time to fit into my earlier speech that I'd like to quickly draw to the attention of the chamber.

The first is the recent ruling on this legislation by the ILO, the second is some nasty warning signs we're seeing in relation to workplace safety.

The **International Labour Organisation** (ILO) handed down its finding on the Building and Construction Industry Improvement Bill earlier this month. It found that this Bill directly contravenes international obligations under conventions that Australia has ratified - the Freedom of Association and Protection of the Right to Organise Convention (number 87) and the Right to Organise and Collective Bargain Convention (number 98).

It requested that this government take the necessary steps to amend this legislation – to ensure that references to “unlawful industrial action” in the bill conform with the principles of freedom of association, and to remove financial penalties and disincentives that contain undue restriction on collective bargaining.

It also requested that the government introduce the ability for workers to lodge an appeal before the courts against an ABCC notice prior to handing over documents and introduce safeguards into the Act to ensure the functioning of the ABC commissioner and inspectors does not lead to interference in the internal affairs of trade unions.

The ILO did not look favorably on the provision of a penalty of six month’s imprisonment and strongly suggested that penalties should be proportional to the gravity of the offence. It suggested that the government needed to enter into full and frank consultations with all the stakeholders involved – with representatives of employers and worker’s organisations to develop amendments to the legislation to bring in into line with Australia’s international obligations.

Quite frankly this legislation is embarrassing us internationally. It is taking a very retrograde step at a time in which we should be looking at creative ways we can collaborate to develop collective bargaining agreements that can boost productivity, help us balance work and family, and address our looming skills shortage through lifelong workplace learning.

I am also very concerned about the impacts that the BCII Act and the lack of regulation surrounding the activities of the ABCC is having on **safety** on our construction sites.

We have heard reports recently about some union Occupational Health and Safety reps, responsible to the OHS legislation in their state as well as their employer, being stood down for objecting to unsafe work practices. The impact this is likely to have on the health and safety of building and construction workers is a major concern. Already safety officers are pulling their heads in – deciding to protect their job so they can feed their families rather than stand up to bosses demanding 60-80 hour week, demanding workers work two weeks in a row with no day off.

There are 4 reps we know of in the weeks since this legislation was passed who have been stood down. Others have been transferred to different tasks or different sites – which effectively stops them performing their safety role.

Union safety inspections have shown that this has corresponded with a serious drop in workplace standards and compliance. We know of at least one CEO who, to his credit, has taken on these union safety reports and claimed he will work with the union to take the necessary taken steps to fix things.

While this is something that we've seen on a small-scale in the past in some areas with low levels of union health and safety participation its something we can expect to see on a large scale into the future.

Let me remind you that safety is a serious issue on our building and construction sites – that this is an industry that accounts for 50 worker deaths per year. That is one worker dying every week on a construction site in our country. Now we are concerned that this will get much worse.

Let me remind you that the rates of death and serious injury used to be much higher – that safety on our worksites is something that workers have fought hard for. We believe that it is fundamental that workers have the right to act to protect their lives from dangerous equipment or unsafe work practices.

The BCII Act has limited the participation of building and construction industry workers in pursuit of their own health and safety – and has created a situation in which the onus is on the workers to prove a direct and immanent threat to their health and safety before they can stop work to prevent unsafe practices.

And so we see another fatal flaw in this Act and its regulations. The government justified this legislation on the basis that too many days were lost in the industry to industrial action. It did not investigate the reasons why action was taken, whether that action was legitimate under the law and the extent to which safety issues in a dangerous industry played a role in industrial action taken.

The government did not undertake research to determine the reason why far more days of work are lost in the building and construction industry to injury – by most estimates by a factor of four. Nor did the government grant the ABCC powers to investigate incidences that allegedly compromise the health and safety of building and construction workers. The government in fact did just the opposite. It imposed a regime where the improvements made to ensure the health and safety of workers are already dissipating over night. Yet another reason why members of this Chamber who claim to care about the working Australians that they were elected to represent should throw this despicable legislation and, more immediately the regulations that implement it, on the scrapheap.

In conclusion

This might seem like there are only a few building workers being affected by the activities of the ABCC.

Of course this is also about the impact that these activities have on their families – and their sense of security and well-being.

However there is a much larger issue at stake here.

If we through our actions, or our failure to act, are sending the signal that we think that this sort of thing is acceptable – how long will it be before it is nurses or teachers or bus-drivers who are at the receiving end of this kind of ill-treatment.

I know that I probably shouldn't be shocked by this, but I am.

I find it deeply shocking that this sort of thing is going on – deeply shocking that this is thought to be acceptable.

I know that there is a strong stereotype out there of your 'typical' construction worker. A stereotype that portrays them as being pretty rough around the edges, of them commanding large salaries and holding the government and big contractors to ransom – leading to timeline and budget blowouts on major infrastructure projects.

I'd like to have a quick go at debunking some of these myths so that we can put the kernel of truth they contain into context.

Much has been made in parliament and the press about the salaries received by construction workers taking advantage of the Howard government's skill shortage. We regularly hear about greedy building workers on up to 90-100,000 a year.

What is it we don't we hear about?

We don't hear that those are 'projected salaries' on the basis that the worker works every hour of overtime and works throughout the calendar year. Few do. Most construction workers are casual and itinerate and most only work on a specific stage of even the largest and longest projects. Even during boom times, when their small part of the project finishes, they need to live off of their savings while they search for the next job.

We don't hear about the profits made by the building contractors, even prior to the passage of the BCII Act. Last year, for instance, Leighton Holdings was only able to hold on to almost ¼ billion dollars worth of profit on revenues approaching \$7 billion.

And the all-up salary of was clearly unduly curtailed by the unreasonable salary of his employees whose labor builds his empire.

According to The Australian on 14 November, poor Leighton CEO Wal King is due to pocket an additional \$23 million bonus after taking home \$36 million last financial year.

We keep hearing that the building industry is rife with corrupt and criminal activity.

My Coalition colleagues have spoken at length about the allegations made by the Cole Royal Commission – a \$60 million exercise to vilify by implication or association every building and construction worker in Australia. Their children were taunted at school and, during the rare chances that a building worker these days gets to be a parent on the weekend, were shunned when they took their kids to Sunday footy. Yet, despite the wide-ranging criminal justice powers available to the AFP and NCA, the commission only resulted in one prosecution – and that was of an employer.

Why weren't building and construction workers or their union prosecuted?

Because at the time, the universal principle that workers own their labour and consequently control the choice to withdraw their labour as a last resort were not criminal activities.

The Howard government swept away that universal right with the passage of BCII and can now proudly claim responsibility for repressive laws that target a distinct group of the workforce, laws that do not exist in other democratic countries in the world.

The new ABCC Commissioner, at the media conference announcing his appointment, did not invite confidence in his commitment to impartiality when he confirmed by implication that building and construction workers in WA are now criminals under the new laws.

The new laws now impose criminal penalties if workers or their union are found to have failed to follow the disputes procedures in an agreement or contract. Now that the right to take industrial action has effectively been extinguished, what recourse will the average working Australian have if his or her employer fails to fulfil *their* responsibilities?

The government chooses not to know or couldn't care less about the workers perspective and their limited powers in resolving a dispute with an employer, and particularly if the employer is one of the multinational giants that dominate commercial and resource construction in my state of Western Australia.

Most of their employees are working virtually round the clock, are often working for long periods away from home and rarely see their families. They are increasingly tired and exhausted, dramatically increasing the risk to their health and safety. Yet those same

employers have sought to dismiss a number of safety representatives since the legislation came into effect.

Has anyone on the government side of the Senate chamber ever tried to raise and resolve a dispute with a multi-billion dollar multinational corporation? Most dispute procedures require that, if a matter cannot be amicably resolved at the local level, responsibility ascends up the corporate ladder and, if unresolved, goes to the independent umpire for conciliation or arbitration. Putting aside the fact that the powers of the independent umpire have been severely curtailed, can the government cite the number of times that a worker on the shop floor has been able to resolve a dispute with the CEO of such a corporation?

Dispute resolution requires good will and commitment from both sides. What does a worker do if a corporate employer simply stonewalls the dispute settlement process, and in the meantime, demands that the status quo of unacceptable working conditions remains uninterrupted.

What would you do as a worker on Leighton's Perth to Mandurah railway? Normal reasonable working hours are defined as 56 hours per week, after which genuine consultation with workers and/or their representatives is required. A few weeks back, a group of Leighton employees had worked 13 long days straight without a break and were told that they had no choice but to work the forthcoming weekend as well. When they refused, the company sought orders from the AIRC to compel them, and threatened them with the scrutiny of the ABCC and prosecution.

On an adjoining project, under construction by one of Leighton's multinational stable mates, a crane operator was told that he was engaging in illegal industrial action and threatened with the ABCC if he took longer than five minutes each morning to perform his pre-start safety checks before beginning the day's work.

Is this the kind of action we want to demonise?
Are these the sort of people we want to treat as criminals?

We need a fair and just industrial relations system in this country – one that balances the needs of productivity and the economy with the health and safety of workers – the right to a decent wage and a reasonable family life – one that encourages collaboration between all parties concerned and delivers justice to those who are mistreated or wronged and in which any penalties are in proportion to the offence committed.

We don't need a star chamber or an inquisition.

The activities of the ABCC need to be properly regulated to make sure this is so.