



Australian Government

Transition to Fair Work Australia for the Building and Construction Industry

Report

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Transition to Fair Work Australia for the Building and Construction Industry

Report

This paper is written and issued by the Honourable Murray Wilcox QC, who was appointed by the Minister for Employment and Workplace Relations to undertake consultations surrounding the creation of the specialist division for building and construction work within Fair Work Australia.

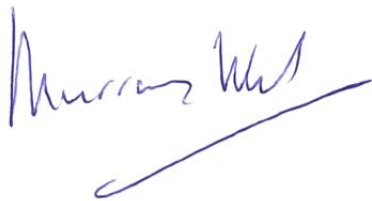
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**The Honourable Julia Gillard MP,
Deputy Prime Minister and Minister for Employment and Workplace Relations**

On 19 June 2008, you appointed me "to undertake consultation and prepare a report on matters related to the creation of a Specialist Division of the Inspectorate of Fair Work Australia." You asked me to report by 31 March 2009.

This is my report.

A handwritten signature in blue ink, appearing to read 'Murray Wilcox', with a long, sweeping underline.

Murray Wilcox QC

31 March 2009

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CHAPTER ONE—SUMMARY OF PRINCIPAL CONCLUSIONS

Background

- 1.1 On 29 August 2001, the (Coalition) Government appointed the Honourable TRH Cole QC to conduct a Royal Commission into the Australian building and construction industry. In his report, dated 24 February 2003, Mr Cole recommended the establishment of a special regulatory authority, to be called the Australian Building and Construction Commission.
- 1.2 This recommendation was implemented. The *Building and Construction Industry Improvement Act 2005* ("the BCII Act") created the Australian Building and Construction Commissioner ("ABCC"), a body slightly different to that recommended by Commissioner Cole, and conferred upon it substantial investigative and prosecutorial powers. Section 52 empowered the ABC Commissioner, and each Deputy Commissioner, to summon any person to attend before the ABC Commissioner, or an assistant, and answer questions relevant to an investigation. It was made an offence, punishable by up to six months' imprisonment, for a person to fail to attend or to answer questions.
- 1.3 The BCII Act imposed some legal rules on "building industry participants" (building employers, building employees, building contractors and their respective industrial associations) that did not apply to participants in other industries. In particular, even after the "WorkChoices" amendments to the *Workplace Relations Act 1996* ("the WR Act") took effect in 2006, building industry employees were still exposed to penalties for taking industrial action in a wider range of circumstances than were employees in other industries. Furthermore, the penalties available under the BCII Act were much higher than those applying to employees in other industries, under the WR Act.
- 1.4 The ABCC commenced operations on 1 October 2005. Between that date and 3 February 2009, it conducted 128 compulsory interrogations and launched 36 court proceedings seeking the imposition of a civil penalty upon one or more "building industry participants". Most of the completed proceedings have been successful; many because of information acquired by the ABCC at compulsory interrogations.
- 1.5 The BCII Act provisions have always been, and remain, highly controversial. Many employees, and their unions, regard them as harsh and unjustifiably discriminatory. They say the Act ought to be repealed, and not replaced. On the other hand, many employers, and their representative bodies, argue the Act has led to significant behavioural improvement within the industry; this, in turn has resulted in more harmonious workplaces and increased productivity. They contend the BCII Act ought to remain in place.
- 1.6 The policy position of the Australian Labor Party, at the 2007 federal election, was that the ABCC would remain in existence until 1 February 2010, and then be replaced by a Specialist Division of Fair Work Australia ("FWA"). The policy statement left open detail about the Specialist Division.
- 1.7 On 19 June 2008, I was appointed to consult and report on matters related to the creation of the Specialist Division. I will summarise the principal recommendations in my report.

The location, structure and role of the Specialist Division

- 1.8 The Fair Work Bill provides for the establishment of FWA, as an adjudicative body. It will not have an investigative function; accordingly, it would be inappropriate for the Specialist Division to be part of FWA. However, the Bill also establishes the Office of the Fair Work Ombudsman ("the OFWO"), comprising the Fair Work Ombudsman ("FWO"), staff and inspectors. The FWO and inspectors are given extensive investigative and prosecutorial powers.
- 1.9 One option is to make the Specialist Division a semi-autonomous unit of the OFWO. That would enable sharing of specialised services, accommodation and other infrastructure.
- 1.10 Another option is to make the Specialist Division completely independent of the OFWO, answerable only to the Minister. Those who urge this option see it as the best way of guarding against loss of focus on the building and construction industry and/or the whittling away of the resources available for that purpose.
- 1.11 The ABCC has made a significant contribution to improved conduct and harmony in the building and construction industry; but there is still some way to go. It is important the Specialist Division have adequate earmarked funds and be focussed on that industry. If I believed this could only be assured by complete independence, I would recommend that option. However, I am satisfied these requirements are not inconsistent with the semi-autonomous model. I recommend the creation of a Building and Construction Division ("the BCD") of the OFWO.
- 1.12 The BCD should be headed by a Director, appointed by the Minister, who would be answerable to the FWO in relation to administrative, financial and personnel management but not in respect of operational matters. There should be an advisory board comprising the Director, the FWO and up to five part-time members, being people experienced in the industry and drawn from a variety of locations. The board should determine the policies, programs and priorities of the BCD, but not exercise executive powers.
- 1.13 The BCD should investigate and prosecute suspected breaches of federal workplace laws, including industrial instruments, whether by building employers, building employees or unions. Desirably, it would also undertake industry improvement activities, such as training and OHS awareness programs. Except, perhaps, in rural and remote areas, the BCD should have its own dedicated staff, who would acquire a specialised knowledge of the building and construction industry.
- 1.14 The BCD should receive earmarked funds linked to an Outcome approved by the Government and specified in each Workplace Relations Portfolio Budget Statement.

Different rules for building employees?

- 1.15 The Fair Work Bill represents a complete rewriting of federal industrial law. It constrains the behaviour, in numerous respects, of employers, employees and unions. Any further constraints, applying to employees in only one industry, require justification by reference to conditions special to that industry.
- 1.16 When the Fair Work Bill comes into operation, there will remain a theoretical difference between the circumstances under which industrial action by building employees is unlawful (and, therefore, liable to be penalised) and those applying to other employees. Under the BCII Act, industrial action is unlawful if it is not "protected", by following prescribed procedures. Under the Fair Work Bill, industrial action is unlawful if it occurs during the currency of an industrial instrument.

- 1.17 However, the Fair Work Bill actively encourages enterprise agreements. In the long term, in the federal system, there will be an enterprise agreement governing almost every building employee almost all the time. This will mean that industrial action in the building industry will almost always be unlawful. The difference in the test of unlawfulness will be semantic rather than real. Neither that difference, nor any of the few other minor differences between the BCII Act and the Fair Work Bill, justifies perpetuating special constraining rules for building employees.
- 1.18 There is a substantial difference in penalties, between the BCII Act and Fair Work Bill. However, by enacting that Bill, Parliament has recently determined the maximum penalties appropriate for particular contraventions. There is no justification for selecting a different maximum penalty, for the same contravention, simply because the offender is in a particular industry. Of course, both the circumstances of the contravention and the offender's previous contraventions (if any) will be taken into account by the court in determining the actual penalty in the particular case; but that will be so regardless of the offender's industry.
- 1.19 I recommend there be no difference, between building and other employees, in regard to substantive behavioural rules or penalties.

Compulsory interrogation

- 1.20 The most contentious issue in my consultations was whether the new legislation should contain a power, similar to that granted to the ABCC by section 52 of the BCII Act, enabling the BCD to require a person to answer questions relevant to an investigation. On each side of this debate, opinions were strongly held.
- 1.21 Opponents of the power argued it violated the human rights of those who were summoned to testify. They spoke of the right of silence that applies, even in relation to most criminal accusations. They argued it was iniquitous, and discriminatory, to expose workers in a particular industry to a procedure that did not apply to others. The opponents acknowledged there were other statutes providing for compulsory interrogation, but argued these statutes were concerned with suspected behaviour far more significant than unlawful (not even criminal) workplace conduct.
- 1.22 Supporters of the power pointed to the protections conferred by sections 53 and 54 of the BCII Act which, they accepted, would be repeated in any new legislation; especially protection against the person's evidence, or anything derived from it, being used against that person in any later proceeding. Primarily, however, they put a pragmatic argument: such is the code of silence in the building and construction industry that, without the power of compulsory interrogation, the BCD would be gravely handicapped in its investigations of suspected contraventions; the rule of law in the industry would be defeated; there would be an increase in lawless and disruptive behaviour, with consequential loss of working time and production.
- 1.23 It is understandable that workers in the building industry resent being subjected to an interrogation process, that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power. However, that would not be a responsible course. I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the BCD to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.

- 1.24 Accordingly, I have reached the conclusion that the new legislation should contain a power of compulsory interrogation; but subject to several safeguards, none of which exist under the BCII Act and none of which need delay an investigation. The safeguards would use existing agencies, thereby minimising bureaucratic burdens and costs. They should ensure that compulsory interrogation is not used unnecessarily and the interrogated person is treated fairly and courteously.
- 1.25 I propose that the notice to attend for questioning be issued, not by the BCD, but by an independent person, a presidential member of the Administrative Appeals Tribunal. The member would have to be satisfied of certain things, including the importance to the investigation of the information, evidence or documents likely to be obtained from the person to be summoned; and that it is reasonable to require that person to attend, having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact of that requirement on that person, insofar as this is known. The interrogation would have to be conducted by the Director or a Deputy Director of the BCD, not a more junior officer, and a video-recording of the interrogation, and any transcript of evidence, would have to be sent, routinely and whether or not there was any complaint, to the Commonwealth Ombudsman, for review by a member of a specialist team in that office. The Commonwealth Ombudsman would report to Parliament annually, and whenever else was necessary, about the use of the interrogation power.
- 1.26 The BCII Act allows a person attending for interrogation to be legally represented but it contains no provision for payment of the cost of representation, or even for the person to be reimbursed travelling and accommodation expenses or lost wages. This is unacceptable. The new legislation should so provide.

The Code and Guidelines

- 1.27 The *National Code of Practice for the Construction Industry 1997* ("the Code") was issued by the Commonwealth in 1997, with the support of the States and Territories. The idea was that governments would use their purchasing power to impose some standards on the industry, or at least those members with whom they chose to contract. The content of the Code is uncontroversial. I make no recommendations about it.
- 1.28 In 1998, acting alone, the Commonwealth Government issued *The Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry* ("the Guidelines"). On several subsequent occasions, they were amended, each time by the Commonwealth acting alone. The amendments extended the reach of the Guidelines to include, not only projects constructed on behalf of the Commonwealth, but also projects indirectly funded by the Commonwealth, privately funded work undertaken by Commonwealth tenderers and projects of tenderers' related entities. The rules were made to apply, not only to entities doing on-site work, but also to those who worked off-site and material suppliers.
- 1.29 Nobody suggested to me the Guidelines are wrong in principle, although there was concern about particular provisions. There is widespread support for the idea behind the Guidelines. They are seen as "raising the stakes" on employer misbehaviour; it is one thing to expose oneself to a relatively small monetary penalty, another thing to render oneself ineligible to tender for a project that is funded, even indirectly, by the Commonwealth. I recommend the Guidelines be retained, although in a revised form.

- 1.30 The main criticism made to me was that the Guidelines made an entity non-compliant, and therefore ineligible to tender for projects even indirectly funded by the Commonwealth, if it was bound by a State award containing certain provisions. This created a major problem for State-owned entities that were required, by State law, to adhere to the State award. However, that problem has recently been resolved by a direction from you, as Minister, that entities complying with their obligations under State or Territory industrial law are to be treated as compliant with the Guidelines.
- 1.31 Another major criticism was the extension of the Guidelines to cover off-site contractors and material suppliers. If the purpose of the Guidelines is to improve construction site harmony and productivity, it is difficult to see the justification for these extensions. Moreover, they have caused problems of interpretation. I think these extensions ought to be reversed.
- 1.32 There was complaint about some of the content of the Guidelines, on the ground of ambiguity or unnecessary micro-management of construction site behaviour. There is substance in those criticisms. If the Guidelines are to be retained, as I recommend, it would be desirable for them to be revised, perhaps in consultation with a working group representing both building employers and building unions. There may be scope, in that exercise, for introducing requirements that reflect the Commonwealth's wider policy goals; whether in the employment field, such as stimulating job opportunities for apprentices, Indigenous people and women; or relating to the environment, such as materials recycling and energy and water efficiency.
- 1.33 An unsatisfactory feature of the Guidelines is that they are merely an instrument issued by the Minister of the day, without the necessity for Parliamentary, or even Cabinet, approval. There is no opportunity for disallowance by either House of the Parliament. Despite the possible ramifications of an adverse decision upon an entity's business, there is no meaningful way for the entity to procure independent review of that decision. The legislation should provide access to both judicial and merits review.

Recommendations

Recommendation 1:

The proposed Specialist Division be located within the Office of the Fair Work Ombudsman but have:

- (i) operational autonomy under a Director, appointed by the Minister, who would implement policies, programs and priorities determined by an advisory board comprising the Fair Work Ombudsman, the Director and a number of part-time members appointed by the Minister; and
- (ii) funds allocated each year against an Outcome related only to the Specialist Division.

Recommendation 2:

The provisions of the Fair Work Bill governing:

- (i) the conduct of employers, employees and industrial associations; and
- (ii) penalties for contraventions of the Fair Work Bill;

apply, unchanged, to participants in the building and construction industry.

Recommendation 3:

The Director of the Building and Construction Division be invested with a power, similar to that contained in section 52 of the *Building and Construction Industry Improvement Act 2005*, to cause people compulsorily to attend for interrogation, but subject to the safeguards contained in Recommendation 4; and

- (i) the grant of this power be reviewed after five years;
- (ii) in order to ensure review, the provisions in the new legislation providing for compulsory interrogation be made subject to a five-year sunset clause.

Recommendation 4:

The use of compulsory interrogation be subject to the following safeguards:

- (i) a notice to a person compulsorily to attend for interrogation be issued only by a presidential member of the Administrative Appeals Tribunal who is satisfied by written material, which may include evidence on the basis of "information and belief", that:
 - (a) the Building and Construction Division has commenced an investigation into a particular suspected contravention, by one or more building industry participants, of the Fair Work Act, an "industrial law", as defined by that Act, or an industrial instrument made under that Act;
 - (b) there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation, or is capable of giving evidence that is relevant to that investigation;
 - (c) it is likely to be important to the progress of the investigation that this information or evidence, or those documents, be obtained; and

- (d) having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact upon the person of being required to do so, insofar as this is known, it is reasonable to require that person to attend before the Director or a Deputy Director and answer questions and/or produce documents relevant to the investigation;
- (ii) the Director or a Deputy Director of the Building and Construction Division preside at all compulsory interrogations;
- (iii) the Commonwealth Ombudsman monitor proceedings at all compulsory interrogations and for that purpose the Director:
 - (a) promptly notify the Commonwealth Ombudsman of the issue of all notices to attend for interrogation; and
 - (b) promptly after the interrogation, supply to the Commonwealth Ombudsman a report, a video recording of the interrogation and a copy of any written transcript; and
- (iv) the Commonwealth Ombudsman report to Parliament annually, and otherwise as required, concerning the exercise of the power of compulsory interrogation.

Recommendation 5:

The legislation authorising compulsory interrogation provide for:

- (i) payment to persons summoned for interrogation of their reasonable expenses (travelling, accommodation and legal, as may be) and any loss of wages or other income; and
- (ii) recognition and availability of client legal privilege and public interest immunity.

Recommendation 6:

- (i) A new Division 4 be added to Part 5-2 of the Fair Work Bill relating to the “building and construction industry”, as therein defined.
- (ii) The definition of “building and construction industry” follow the definition of “building work” in the *Building and Construction Industry Improvement Act 2005*, but excluding off-site work.

Recommendation 7:

The Director of the Building and Construction Division have all the functions, powers and responsibilities, in relation to the “building and construction industry”, as defined in the new legislation, that the Fair Work Ombudsman has in respect of other industries; including, in particular, investigation of suspected unlawful behaviour by any building industry participant (whether employer, employee or industrial association) and the prosecution of penalty and other legal proceedings.

Recommendation 8:

Except perhaps in rural and remote areas, the Building and Construction Division have its own dedicated operational staff, including inspectors.

CHAPTER TWO—THE CONSULTATION PROCESS

- 2.1 Terms of Reference for the consultation were finalised on 21 July 2008. A copy of that document is **Attachment 1**.
- 2.2 During the period 21 July to 17 September 2008, I had 29 “first round” meetings with a total of 103 people concerned with the building and construction industry. Subsequently, up to 10 December 2008, I had a further seven meetings with interested persons, including, at the invitation of John Holland Group Pty Limited (“JHG”), an all-day visit to the BlueWater Desalination Project site at Kurnell. There I was able to have conversations with many people, at different levels in the workforce, about some of the issues before me. I also met with a small number of people in early 2009. The people with whom I consulted throughout this process are listed in **Attachment 2**.
- 2.3 On 9 October 2008, I published a Discussion Paper.¹ The purpose of the paper was to stimulate public debate on the identified major issues. Printed copies of the paper were supplied to those who had participated in the earlier meetings and, on request, to others. An electronic copy of the paper was also posted on a special website created by the Department of Education, Employment and Workplace Relations (“DEEWR”).² Newspaper advertisements called attention to that fact.
- 2.4 I see no advantage in now repeating the material that appears in the Discussion Paper. However, the Discussion Paper sets out background information that is important to an understanding of this Report, so I include a copy of it at the end of this report omitting only introductory material and logistical information.
- 2.5 Between the date of publication of the Discussion Paper and the end of 2008, I participated in three conferences at which some or all of the major issues were discussed. These conferences were organised, respectively, by *The Australian Financial Review* newspaper, The Australian Industry Group (AIG) and Victoria Police. The conferences were welcome opportunities to expose some of the issues to wider audiences and receive comment from them.
- 2.6 The Discussion Paper invited public submissions by 5 December 2008, with provision for reply submissions by 23 January 2009. In the event, 41 different persons or organisations lodged a total of 48 submissions. Not all the submissions were submitted by the due dates; nonetheless, all were received and have been carefully considered. All were posted on the special DEEWR website. **Attachment 3** is a list of the persons and organisations that made written submissions.
- 2.7 One reason why I took a relaxed attitude to the late lodgement of submissions was that I wished their authors to have a full opportunity to take into account the terms of the Fair Work Bill, which you introduced into the House of Representatives on 25 November 2008. Disappointingly, many authors did not do so. This was one reason why I decided to have a further round of discussion before I settled on my final recommendations.
- 2.8 Opinion on some issues is polarised. There were times when I wondered whether my discussants appreciated even the existence of a contrary view, still more its arguable merit and the passion of its adherents. So I thought it might be useful to bring interested parties together, in a situation where they would be confronted by opposing views on what I saw to be four critical issues. My idea was that lead speakers should put arguments, on each side of each issue, but with time for contributions from the floor. I thought it important that the forums be open to all members of the public, with no charge for attendance.

1 Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008.

2 <http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/>

- 2.9 Members of the Faculty of Law at each of three universities (Sydney, Melbourne and Western Australia) accepted my suggestion that they host such a forum. I selected the topics for discussion. The universities chose the lead speakers. Details of the forums, including the names of the lead speakers, are set out in **Attachment 4**.
- 2.10 I found the forums interesting and helpful. Because of the fundamental importance of the four issues discussed at the forums, it is useful for me to discuss those issues at an early stage. My conclusions about them will influence my recommendations about other issues.
- 2.11 I have been assisted in this project by many people. I wish particularly to thank my secretariat and research team at DEEWR, Paul Dwyer and Kate Driver, also Michael Maynard and Jeff Willing of that Department, and the organisers of the three forums, Professors Ron McCallum and Joellen Riley (Sydney), John Howe (Melbourne) and William Ford (WA). I also express appreciation to all those who met with me and/or supplied a submission and/or attended a forum. Some people did all three. I have benefited enormously from the input of all these people.
- 2.12 We live in an age of acronyms. I have used them freely. In order to assist lost readers, I set out a glossary as **Attachment 5**.
- 2.13 The Fair Work Bill was passed by Parliament on 20 March 2009, by which date this report was almost complete. The Bill was extensively amended but, I understand, the amendments did not change any of the provisions I have mentioned. However, the amendments will have affected the clause numbers. At this moment, no table setting out the new clause/section numbers is available. Rather than delay the report, I have, therefore, retained the clause numbers as in the Bill you introduced into Parliament last November. If the report is to be publicly released, you may care to attach a table showing the new numbers of the cited clauses.

CHAPTER THREE—SPECIALIST DIVISION OF WHAT?

The Terms of Reference and the Fair Work Bill

- 3.1 My Terms of Reference were finalised before the drafting of the Fair Work Bill had been concluded. Perhaps for that reason, there is an inconsistency between the Terms of Reference and the Bill.
- 3.2 The Terms of Reference state: “The Australian Government has committed to establish a Specialist Division within the Inspectorate of Fair Work Australia with responsibility for the building and construction industry.”
- 3.3 Chapters 2-4 of the Fair Work Bill deal with numerous matters concerning the relationship between employers and employees. Chapter 5 is headed “Administration”. It establishes two separate entities, FWA³ and the OFWO.⁴
- 3.4 Clause 575 of the Fair Work Bill provides that FWA is to consist of the President, and a number of Deputy Presidents, Commissioners and Minimum Wage Panel Members. Its composition will be much like that of the Australian Industrial Relations Commission (“AIRC”), which will be abolished upon the repeal of the WR Act.
- 3.5 Clause 576 gives to FWA the functions conferred by the Bill in relation to 19 subjects. These are all adjudicative functions. It is apparent that FWA is expected to operate in the same manner as the Australian Industrial Relations Commission (“AIRC”) now does; that is, by determining matters placed by parties before it. There is no provision, and there would be no need, for FWA, as such, to have its own Inspectorate. Whatever might have been the thinking at an earlier time, it is now clear that the Inspectorate referred to in the Terms of Reference will not be located in FWA itself.
- 3.6 On the other hand, the OFWO is to include an Inspectorate.⁵
- 3.7 There is to be a Fair Work Ombudsman (“FWO”), appointed by the Governor-General.⁶ The FWO will have several functions, including:
- (a) *to promote:*
 - (i) *harmonious and cooperative workplace relations; and*
 - (ii) *compliance with this Act and fair work instruments;*
including by providing education, assistance and advice to employees, employers and organizations;
 - (b) *to monitor compliance with this Act and fair work instruments;*
 - (c) *to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;*
 - (d) *to commence proceedings in a court, or to make applications to FWA, to enforce this Act, fair work instruments and safety net contractual entitlements;*⁷

3 Part 5-1 of the Fair Work Bill.

4 Part 5-2 of the Fair Work Bill.

5 Clause 696 of the Fair Work Bill.

6 Clauses 681 & 687 of the Fair Work Bill.

7 Clause 682 of the Fair Work Bill.

- 3.8 By force of clause 701, the FWO is also a Fair Work Inspector. Inspectors are given extensive investigatory powers.⁸
- 3.9 Having regard to these provisions, there would be no conceptual difficulty in making the Specialist Division, mentioned in the Terms of Reference, a part of OFWO and subject to the direction of the FWO.⁹

The submitters' positions

- 3.10 The Australian Council of Trade Unions ("ACTU") and State and Territory Labour Councils, the Combined Construction Unions ("CCU"),¹⁰ and the Geelong West Branch of the Australian Labor Party made submissions opposing the creation of any Specialist Division. Their position is that participants in the building and construction industry should be regulated in exactly the same way, and by the same regulatory authorities, as participants in every other industry; there should be no special rules.¹¹
- 3.11 Other submitters, whilst less explicit, obviously have major reservations about the creation of a Specialist Division. For example, the New South Wales Government said:
- [T]he Fair Work Bill 2008 (Cth) is intended to provide sufficient protections against right of entry provisions, freedom of association, coercion and other general protections, as well as tough restrictions on industrial action and remedies for unprotected industrial action across the Australian economy. Accordingly there is no rationale for the retention of industry specific legislation (such as the BCII Act) for the construction or any other industry.¹²*
- 3.12 However, New South Wales, like many others, recognised that the Australian Government had made a policy decision that there would be a Specialist Division, as stated in my Terms of Reference, and went on to put submissions about its form, responsibilities and powers.
- 3.13 No doubt because of the terms of the Fair Work Bill, most of the people who made submissions did so on the basis that the Specialist Division would be part of the OFWO. Others, however, argued that the proposed Specialist Division should be a separate statutory authority led by a chief executive officer who is appointed by the Governor-General and is answerable directly to the Minister. That authority would be totally independent of the OFWO and FWA, in the same way as the ABCC is independent of the present Workplace Ombudsman ("WO") and the AIRC.
- 3.14 The Australian Industry Group and Australian Constructors Association ("AIG/ACA") argued that location of the Specialist Division within the OFWO would, in all probability, result in:
- *A loss of autonomy;*
 - *The dilution of specialist resources;*
 - *The loss of resources over time;*
 - *A loss of focus.¹³*

⁸ Clause 706-714 of the Fair Work Bill.

⁹ Clause 704 & 705 of the Fair Work Bill.

¹⁰ The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; the Australian Workers Union; the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Services Union of Australia; and the Construction, Forestry, Mining and Energy Union.

¹¹ Australian Council of Trade Unions, *Submission to the Wilcox Consultations on behalf of the ACTU and State and Territory Labor Councils*, Submission 25, December 2008, pages 14-15; Combined Construction Unions, *Joint Submission on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Australian Workers Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and Construction, Forestry, Mining and Energy Union*, Submission 36, December 2008, page 110; and Geelong West Branch ALP, *Submission to the discussion paper: Proposed Building and Construction Division of Fair Work Australia*, Submission 6, December 2008, page 1.

¹² New South Wales Government, *Submission to the Wilcox Inquiry on the proposed Building and Construction Division of Fair Work Australia*, Submission 37, page 12.

¹³ Australian Industry Group and Australian Constructors Association, *Joint Submission to the Hon Murray Wilcox*, Submission 27, December 2008, page 16.

3.15 AIG/ACA argued:

An effective Inspectorate presence in the construction industry requires:

- *An independent high-level leader;*
- *The support of strong legislative powers;*
- *Defined resources for the construction inspectorate at current levels for at least five years;*
- *A well-trained specialist construction industry inspectorate focussed on compliance and enforcement.*

*The Discussion Paper proposes a construction division of the Inspectorate headed by a mid-tier public servant. The administrative arrangements would leave the resourcing of the Specialist Division open to attack over time.*¹⁴

3.16 AIG/ACA proposed the Specialist Division be an independent agency, outside the OFWO, with “a small statutory board (say three people) headed by an eminent person preferably with judicial experience.” The agency would have powers similar to those provided by the BCII Act and its own dedicated resources and construction industry inspectors. The agency would be headed by an officer equal in rank to the FWO.

3.17 The Civil Contractors Federation (“CCF”) was also concerned about loss of focus. It said:

*One of the most critical reforms that has been brought about by the ABCC is the ability for issues when they arise on site to be dealt with expeditiously. Our concern with the new regulatory structure proposed is that it will lead to a loss of focus on building and construction and the natural competition for resources will mean building and construction issues will not have priority.*¹⁵

3.18 CCF argues strongly for a separate regulatory body to deal with building and construction issues.

It is our view that by placing the former ABCC powers and responsibilities within the Office of the Fair Work Ombudsman poor outcomes will follow for the reasons outlined below:

- *Loss of focus - The loss of focus on construction and building issues – they become but one “stream” of regulatory and enforcement action;*
- *Competition for Resources leading to a decline in activity - The new division will need to compete for resources with regulation and enforcement more generally – there is no guarantee that issues arising in this part of the industry will have priority or indeed continued focus;*
- *Perception that the compliance with the law in building and construction is no longer a priority - As noted previously serious cultural change still needs to be driven in the industry, it is important that the regulator is perceived to have not just the legislative ability to take strong action but the “mindset” to do so.*
- *Need for experienced and senior leadership - The history of wrongdoing within the industry, the culture of the industry and the decisions that will need to be taken all require senior and experienced leadership. This is best achieved through the appointment of a person or a commission as a statutory appointment through Executive Council.*¹⁶

14 *ibid.*

15 Civil Contractors Federation, *Civil Contractors Federation Submission to Discussion Paper: Proposed Building & Construction Division of Fair Work Australia*, Submission 12, December 2008, page 16.

16 *ibid* 20-21.

3.19 Others who clearly favoured a separate statutory body, not part of the OFWO, included the Australian Chamber of Commerce and Industry Inc ("ACCI"),¹⁷ Master Builders Australia ("MBA"), the Institute of Public Affairs ("IPA"),¹⁸ and JHG.¹⁹ Some of these parties supported the idea of statutory Commissioners, along the lines proposed by Commissioner Cole for the ABCC but never implemented.

3.20 The Western Australian Government said:

If the Federal Government opts to abolish the ABCC, the Western Australian Government considers that the Specialist Division should retain its independence identical to that of the ABCC. The ABCC has demonstrated that it performs its functions in an appropriate manner and has been able to consistently identify, investigate and litigate the laws within its jurisdiction. Accordingly, the independence enjoyed by the ABCC should be mirrored by the Specialist Division and include the Director of the Specialist Division having autonomy outside the remaining structure of Fair Work Australia, with a direct report to the relevant Minister.

The unique industrial relations characteristics of the industry, including its culture of fear and intimidation and predominance of contracting arrangements, dictate that inspectors should work exclusively in the Specialist Division. The effectiveness of the ABCC has been substantially enhanced by its investigators developing expertise on the application of the industry specific laws and their familiarity with the industry's culture and unique employment arrangements.

In an industry where there is clear reluctance on behalf of its participants to access lawful avenues of redress, it is imperative that the Specialist Division's inspectors have sufficiently frequent contact with industry participants to develop trust and appropriate rapport. The most effective measure to ensure scope for the development of such trust is for the inspectors to remain exclusively within the Specialist Division.²⁰

3.21 Other submissions were unclear on the matter of separation, or expressly accepted that the Specialist Division would be part of the OFWO. Nonetheless, most shared Western Australia's view that the Specialist Division should have its own staff who would concentrate their attention on the building and construction industry. The exception was SafeWork SA, on behalf of the South Australian Government. It said:

SafeWork SA submits that its current operational structure should be considered by the Inquiry as a model for the organisation of the Fair Work Inspectorate incorporating any specialist division. Under SafeWork SA's current arrangements, inspectors are assigned into four teams; Prevention, Investigation, Response and Country and are given the opportunity to rotate between teams. The rotation system is integral to the success of our service delivery. This model facilitates professional development, career progression and also business process consistency, efficiency, flexibility and ultimately customer service.

Both IR and OHSW inspectors are invited to regularly nominate preferences for a particular team. A Rotation and Development Committee collates inspectors' preferences for consideration.

17 Australian Chamber of Commerce and Industry Inc, *Proposed Building & Construction Division of Fair Work Australia*, December 2008, Submission 14, para 89.

18 Institute of Public Affairs, *Submission to the Wilcox Review of the Australian construction industry reforms*, Submission 21, December 2008, page 14.

19 John Holland Group Pty Ltd, *Proposed Specialist Division of Fair Work Australia*, Submission 9, December 2008, page 30.

20 Western Australian Government, *Submission of the Western Australian Government*, Submission 33, December 2008, page 11.

The Committee considers individual staff preferences, skills, and experience and business requirements. "Business requirements" entails the need to balance within and across each team a blend of skills and experience.

Rigid structures tend to compartmentalize inspectors into their area of expertise. SafeWork SA's current structure increases the breadth of knowledge and experience of inspectors across a wide range of industries and occupations.

SafeWork SA's service delivery structure also avoids duplication through the use of a single Help and Early Intervention Centre (HEIC), which provides a call centre telephone advisory service on both OHSW and IR matters.²¹

My view

- 3.22 As I understand the position, the Australian Government is keen to reduce the present proliferation of Commonwealth workplace relations agencies. It would be consistent with that objective for it to make the Specialist Division part of the OFWO. Efficiencies and costs savings should result from amalgamation of what is now the ABCC, with what is now the Office of the Workplace Ombudsman. The amalgamated units could then share not only accommodation and other infrastructure, such as computer and other communications systems, but also expensive supporting services, and financial, human resources, legal and IT personnel.
- 3.23 However, the ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain. It would be unfortunate if the inclusion of the ABCC in the OFWO led to a reversal of the progress that has been made.
- 3.24 One of the most impressive aspects of the ABCC's work, as recounted to me by several people in management positions (head contractors and subcontractors), is the speed with which the ABCC responds to requests for assistance. Apparently, it is not unusual for the ABCC to have somebody on a building site within an hour of receiving a telephone call. I was told that, once the ABCC inspector explains the parties' legal positions, the dispute often resolves itself. It would be a pity if amalgamation with the OFWO diminished this standard of service. That will happen unless steps are taken to guard the resources available to the Specialist Division from being gradually whittled away.
- 3.25 It is also important to avoid the "loss of focus", that some people fear. That too will happen, unless an appropriate divisional structure is put in place.
- 3.26 I envisage that the Specialist Division, although within the OFWO, would have its own executive officer, whom I will call "the Director", appointed by the Minister. The Director would be accountable to the FWO in relation to general administrative matters, and financial and personnel controls, but would have autonomy in operational matters. As I will later explain more fully, I envisage an advisory board, comprising the FWO, the Director and a number of part-time members appointed by the Minister. The board would determine the policies and programs to be followed by the Division, and its priorities, leaving to the Director the implementation of those determinations. Provided there is no room for dispute over resources, that structure should obviate conflict between the FWO and Director about the activities of the Specialised Division.

21 Safework South Australia, *Safework SA's Submission in response to the Discussion paper on the proposed Building and Construction Division of Fair Work Australia*, Submission 32, December 2008, page 4.

3.27 I considered whether it is possible, without making the new Specialist Division a separate statutory body like the ABCC, to ensure it receives earmarked resources, sufficient to enable it to provide high-standard, focussed services to the industry. I raised with DEEWR the possibility of the Specialist Division, although within the OFWO, having its own one-line Budget allocation. I was informed this would not be unprecedented but was probably unnecessary.

3.28 I was told the allocation and expenditure of Australian Government funds proceeds in accordance with a financial framework administered by the Department of Finance and Deregulation. That framework is designed to enable departments and agencies to achieve Outcomes specified by the Government. Performance indicators allow scrutiny of the effectiveness and efficiency of the department or agency in achieving the stated Outcome. The advice tendered to me went on:

Departments are held to account in their use of funds via the following means:

- *reporting on expenditure against each Outcome in the annual Portfolio Budget Statements and audited Annual Reports;*
- *being accountable to the Parliament on expenditure and achievements via the Senate Committee enquiries held three times per year; and*
- *being subject to an annual review of budgetary allocations by Government as part of the Budget preparations.*

By way of example, DEEWR has separate Outcomes for each of the major areas of its responsibility which aids transparency in reporting on expenditure and performance – e.g. Outcome 1 – Office of Early Childhood Education and Child Care; is clearly distinguished from Outcome 9 – Workplace Relations; etc.

In relation to the OFWO, it would be possible and perhaps desirable, to create Outcomes for each of the specialist divisions (i.e. building and construction; and hospitality) separate from those which relate to the broader functions of the OFWO. This would allow public and parliamentary scrutiny of expenditure in the specialist division, without the bureaucratic limitations associated with separate appropriations.²²

Recommendation 1:

The proposed Specialist Division be located within the Office of the Fair Work Ombudsman but have:

- operational autonomy under a Director, appointed by the Minister, who would implement policies, programs and priorities determined by an advisory board comprising the Fair Work Ombudsman, the Director and a number of part-time members appointed by the Minister; and**
- funds allocated each year against an Outcome related only to the Specialist Division.**

²² Email Correspondence from Mr Michael Maynard, Group Manager, Workplace Relations Implementation Group, DEEWR to the Hon Murray Wilcox, 6 March 2009

CHAPTER FOUR—THE CONTENT OF THE RULES GOVERNING BUILDING WORKERS

The issue

- 4.1 The first issue selected for discussion at the law school forums was as follows:
- “Having regard to the terms of the Fair Work Bill, is there any justification for imposing on building workers rules of conduct and provisions concerning penalties that differ from those applied to other workers, in particular concerning:
- (i) the circumstances under which industrial action attracts a civil penalty;
 - (ii) the range of available penalties for unlawful industrial action;
 - (iii) industrial action arising out of alleged safety concerns; and
 - (iv) rights of entry to workplaces?”
- 4.2 In discussing this issue, I propose, for the moment, to ignore those provisions of the Code and the Guidelines that might be argued to affect building workers’ rights.²³ At this stage, I will look only at the statutory provisions.

The differences

- 4.3 The Bill for the statute that became the BCII Act was introduced into the Parliament on 9 March 2005. The Bill became law on 12 September 2005 and commenced to operate, in part, immediately and, otherwise, retrospectively to 9 March 2005. The BCII Act was, therefore, in operation for several months before the commencement, on 27 March 2006, of the *Workplace Relations Amendment Act 2006*, generally called “WorkChoices”, which heavily amended the previous general workplace statute, the WR Act.
- 4.4 The BCII Act rules apply to building workers, not because Parliament thought it desirable to apply to the building and construction industry some accepted, generally-applicable rules; but because those rules had been devised, in response to the report of the Cole Royal Commission,²⁴ solely for, and as a discipline of, that industry. Only later, when they were already in operation in the building and construction industry, did the (then) Government decide to apply some of those rules (or variants of them) more generally.
- 4.5 Under these circumstances, it is not surprising that some rules applicable to building workers differ from those relating to other workers.
- 4.6 I endeavoured to summarise these differences, under the heading “Different Rules”, in the Discussion Paper. I there observed that the “basis for the complaint by the building unions about section 38 of the BCII Act is that it treats industrial action by building workers much more harshly than industrial action by other workers”.²⁵ I mentioned “the circumstances under which industrial action attracts penalties, the size of penalties, the BCII Act provision of statutory remedies against employees and unions and the reverse onus of proof concerning an imminent threat to safety.”²⁶

23 Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, pages 13-14.

24 Cole, RFD, *Royal Commission into the Building and Construction Industry*, Final Report, February 2003.

25 Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, page 21.

26 *ibid.*

- 4.7 Three points should be made about my summary. First, I am grateful to a correspondent for drawing my attention to section 420(4) of the WR Act, which contains a provision regarding onus of proof on a safety issue that is similar in effect to that of the BCII Act. Onus of proof is not a relevant difference. Second, a person affected by unlawful conduct outside the building industry might bring an action for damages in reliance on the *Trade Practices Act 1974*, alternatively or additionally to tort law. Third, a contravention of section 38 of the BCII Act depends on proof that the unlawful action was “industrially-motivated”: see the definition of “unlawful industrial action” in section 37 of that Act. However, given the width of the definition of that term in section 36, especially that it may be satisfied merely by the accused person having the purpose of “disrupting the performance of work”, this requirement will readily be satisfied.
- 4.8 In the result, there are three significant differences between the rules applicable to building workers under the BCII Act and those presently governing other workers, under the WR Act, as amended by WorkChoices:
- (i) the width of the circumstances under which industrial action attracts penalties;
 - (ii) the exposure of building workers, but not other workers, to statutory compensation orders;²⁷ and
 - (iii) the higher penalties available against building industry participants, as compared with people in other industries, at both the individual (\$22,000 against \$6,600) and corporate levels (\$110,000 against \$33,000).²⁸

Comparison between the BCII Act and the Fair Work Bill

(i) Terms of the BCII Act

- 4.9 Of course, given that the Fair Work Bill proposes a regime that will replace the WR Act, the useful comparison is not between the terms of the BCII Act and those of the WR Act, but between the terms of the BCII Act and those included in the Fair Work Bill. The Fair Work Bill contains provisions, applicable to all industries, concerning the four matters listed as (i) to (iv) in the issue set out at paragraph 4.1 above. In these circumstances, having regard to the terms of the Fair Work Bill, is there any justification for imposing on building workers rules different from those governing other workers?
- 4.10 Chapter 5 of the BCII Act deals with industrial action by building industry participants. Section 36(1) sets out a series of definitions, including of “building industrial action”. This definition is widely framed; it not only includes failure or refusal to work, but also bans, limitations and restrictions on performance of work and performing work in an unusual manner. However, the definition excepts action “based on a reasonable concern by the employee about an imminent risk to his or her health or safety”, where the employee did not “unreasonably fail to comply” with the employer’s direction to perform other “available work”, whether at the same or a different workplace. Subsection (2) provides that the burden of proof of this exception lies upon the employee.

²⁷ See section 49(1)(b) of the BCII Act.

²⁸ See section 38 of the BCII Act and section 494 of WR Act.

- 4.11 Section 37 makes building industrial action unlawful if it is “industrially-motivated”, “constitutionally-connected” and is not “excluded action.” As mentioned, the definition of “industrially-motivated” is extremely broad, as is the definition of “constitutionally-connected”. The latter term includes any action taken by a federally-registered union and any action that adversely affects a corporation in its capacity as a building industry participant. There will rarely be any doubt that industrial action by building workers, and/or their unions, satisfies the first two elements of the definition of “unlawful building work” in section 37.
- 4.12 The more significant question will usually be whether particular industrial action is “excluded action”. This term is defined to mean “building industrial action that is protected action” or “AWA industrial action” under the WR Act. In the long run, given the phasing out of Australian Workplace Agreements (“AWAs”), the only building industrial action that would escape unlawfulness under the BCII Act would be industrial action that is “protected action” under the WR Act.
- 4.13 Section 38 of the BCII Act provides: “A person shall not engage in unlawful industrial action.” Civil penalties may be imposed for contravention of this provision, up to a maximum of \$22,000 for individuals and \$110,000 for corporations, including unions.

(ii) Terms of the Fair Work Bill

- 4.14 Part 3-3 of the Fair Work Bill deals with industrial action by “national system” employees and employers. The term “national system employer” includes a corporation and a “national system employee” is defined as an employee of a national system employer.²⁹ Most building industry workers will be national system employees and, therefore, governed by the new Act.
- 4.15 Clause 19 of the Fair Work Bill defines “industrial action” in terms that are almost identical with the wording of “building industrial action” in the BCII Act, after making the adjustments needed for the Fair Work Bill definition to fit all industries. The only substantive difference seems to be that, under the Fair Work Bill, the alternative work offered by the employer, where there is a health or safety issue, must be both “safe and appropriate”, not merely “safe”, as in the BCII Act.
- 4.16 The Fair Work Bill continues the concept of “protected industrial action”. Employee industrial action is protected only if it is “employee claim action” in support of a proposed enterprise agreement or is organised action in response to industrial action by the employer.³⁰ In either case, a number of conditions and limitations apply. They include conditions about prior written notice of the industrial action and, in the case of employee claim action, prior authorisation by a protected action ballot conducted pursuant to an order made by FWA. It is apparent from the Bill that the circumstances under which industrial action will be “protected” are extremely limited.
- 4.17 Whether or not particular industrial action is “protected” is important in relation to immunity, under State and Territory law, for the consequences of that action. Clause 415 confers such immunity (except from defamation proceedings) upon *protected* industrial action provided the action did not involve personal injury or destruction of, damage to, or unlawful taking or keeping of, property. The courts may award damages against persons engaging in *unprotected* action that has occasioned damage to others.

²⁹ Clauses 13 and 14 of the Fair Bill 2008.

³⁰ Clause 409 of the Fair Bill 2008.

(iii) The differences between the BCII Act and the Fair Work Bill

- 4.18 Unlike the BCII Act, the Fair Work Bill does not make exposure to civil penalties depend upon the question whether the relevant industrial action is, or is not, protected action but, rather, upon the time at which the industrial action is taken. Clause 417 provides that an employer, employee, or employee organisation (or its officer), to which an approved enterprise agreement or workplace determination applies, “must not organise or engage in industrial action” from the day the enterprise agreement was approved, or the workplace determination came into operation, until, in either case, its nominal expiry date has passed. This applies “whether or not the industrial action relates to a matter dealt with in the agreement or determination.” The situation is similar to that presently applying, to most employees, under the WR Act. If the provisions of Chapter 5 of the BCII Act were left in place, or repeated in new legislation relating to the BCD, the first identified difference between building workers and other workers would remain.
- 4.19 The second difference relates to liability to pay compensation or damages. Statutory compensation is not available just because the action is unprotected action, as is the position under the BCII Act. It is available where the industrial action occurs during the life of an enterprise agreement or workplace determination. This is because clause 545(2) of the Fair Work Bill empowers the Federal Court and Federal Magistrates Court to make compensation orders against persons who have contravened civil penalty provisions, one of which is clause 417.
- 4.20 Thirdly, the Fair Work Bill retains the present difference in potential penalties between building workers, and their unions, under the BCII Act, and other workers. The maximum penalty for contravention of clause 417 is 60 penalty points (currently \$6,600).³¹ This becomes 300 penalty points (\$33,000) in the case of a body corporate, including a union.³²
- 4.21 Finally, the MBA has called attention to several linguistic differences between the BCII Act and the Fair Work Bill. Questions arise whether these are differences in substance and, if so, what is their significance.

The first two Fair Work Bill differences

- 4.22 In their written submissions, only AIG/ACA and the Australian Mines and Metals Association (“AMMA”) argued for the retention of either of the first two differences I have identified. AIG/ACA thought it would be “desirable and appropriate to maintain the special building and construction industry penalty for unprotected industrial action.”³³ AMMA recommended that the “continued prohibition on the taking of unlawful industrial action contained in section 38 of the BCII Act, remain so as to sufficiently deter and punish unlawful industrial action in the building and construction industry.”³⁴ Without specifically addressing the circumstances in which industrial action is unlawful, ACCI recommended that “[a]ll elements of the BCII Act... should be retained”.³⁵ None of these submissions mentioned the Fair Work Bill.
- 4.23 Possibly other employers, and employer bodies, felt that, having regard to the terms of the Fair Work Bill, they would not be worse off under rules that penalised only industrial action during the currency of an enterprise agreement, or workplace determination, rather than all unprotected action. If that is their view, they are probably correct.

31 Clause 539 of the Fair Work Bill 2008.

32 Clause 546(2)(b) of the Fair Work Bill 2008.

33 Australian Industry Group and Australian Constructors Association, *Joint Submission to the Hon Murray Wilcox*, Submission 27, December 2008, page 10.

34 Australian Mines and Metals Association, *Submission to the Wilcox Review of the transition of the Australian Building and Construction Commission to Specialist Division of Fair Work Australia*, Submission 29, December 2008, page 31.

35 Recommendation 10, Australian Chamber of Commerce and Industry, *Proposed Building & Construction Division of Fair Work Australia*, Submission 14, December 2008, page 27.

- 4.24 A purpose of the Fair Work Bill is to encourage and facilitate the making of enterprise agreements, including on the initiative of employers.³⁶ I note the statement, in the Explanatory Memorandum of the Fair Work Bill: “The expectation is that in the overwhelming majority of cases bargaining will result in an enterprise agreement being submitted to FWA for approval”.³⁷ In the long term, it may be assumed, the relationship between most employers and employees will be governed by enterprise agreements.
- 4.25 However, recognising the possibility that enterprise bargaining may fail, Part 2-5 of the Fair Work Bill provides for the FWA, in certain circumstances, to make a workplace determination.
- 4.26 It seems to me that, during most of the time, in almost all federal workplaces, either an enterprise agreement or a workplace determination will be in operation, with the result that any industrial action will be unlawful. Persons who organise or engage in such action will be vulnerable to civil penalties and compensation orders. This will be the position whether or not the action relates to a matter dealt with in the agreement or determination.
- 4.27 It is also necessary to note clauses 418-420 of the Fair Work Bill, discussed at paragraphs 4.54 to 4.56 below. The effect of those clauses is to *require* FWA promptly to terminate unprotected action.
- 4.28 It became apparent to me, during my meetings with employers and employer representative bodies, that their main concern, in relation to industrial action, was not so much the set battle that may precede or accompany negotiations for a new enterprise agreement, and which has always been lawful (subject to conditions), but, rather, “wildcat” stoppages and bans that occur suddenly and, in the employer’s view, unnecessarily and irrationally; and are often hugely disruptive of the job. This type of action was described by the Master Plumbers and Mechanical Services Association of Australia (“MPMSAA”) in this way:
- The type of industrial action found to exist by the Cole Royal Commission and that which had twice led to deregistration of the Builders Labourers Federation was not industrial action that was in support of legitimate industrial demands. It was action taken in support of trivial matters: action taken in support of matters for which there was a legitimate disputes resolution process; action of a punitive kind; action in support of additional payments that could have been dealt with during the negotiation process for statutory agreements; action in support of a closed shop or demarcation issues and action in support of claims for payments of wages for periods of previous industrial action. Much of this action whilst not unique to the construction industry was commonplace in that industry whilst rare in other industries.*³⁸
- 4.29 The effect of clause 417 of the Fair Work Bill is that, if an enterprise agreement or workplace determination is then in place, those involved in such a stoppage or ban will be exposed to both penalty and compensation orders. If the stoppage or ban has caused significant loss to the employer, a large compensation payment may be ordered.
- 4.30 In the present context, it is relevant also to note clause 474 of the Fair Work Bill. Wildcat action will never be “protected” action, if only because of the lack of written notice. So clause 474 will apply. That clause prohibits the employer paying the employee for the period of the industrial action, with a minimum deduction of four hours’ wages.

³⁶ See Part 2-4 of the Fair Work Bill, especially clause 181.

³⁷ Explanatory Memorandum of the Fair Work Bill 2008 para 1076.

³⁸ Master Plumbers and Mechanical Services Association of Australia, *Proposed Building & Construction Division of Fair Work Australia*, Submission 13, December 2008, para 3.3.6.

- 4.31 The saving of wages that flows to an employer because of adherence to clause 474 may not come close to offsetting the loss caused by the industrial action. However, clause 474 may be expected to affect the attitude of employees to wildcat action. I note a comment by the Chamber of Commerce and Industry of Western Australia ("CCIWA"), in its submission: "4 hours loss of pay is a significant disincentive for industrial action."³⁹ Employees can be expected to ask themselves and their co-workers: is this issue worth four hours pay? Of course, that will be so only if the employees truly believe their pay will be docked. The key to that belief is their being made aware that clause 474 is a penalty provision, so the employer must comply with it or be penalised itself.
- 4.32 Although there is clearly a technical difference between the circumstances under which industrial action is unlawful under the BCII Act (not "protected action") and the Fair Work Bill (during the operation of an enterprise agreement or workplace determination), I found it difficult to find a scenario under which this would make a practical difference. Accordingly, at each of the forums, I invited the help of the employers' representatives who were present. They each undertook to consult with others and let me know if they could imagine such a scenario. None of them have done so. This confirms my view that the difference has no practical importance.

Different penalties

(i) The employers' arguments

- 4.33 Several employer interests argued for continuation of the present position; namely, that penalties for contraventions of the relevant industrial laws, even the same laws, are higher for building and construction industry participants than for people in other industries. None of these employer interests advocated a particular penalty level. However, it seems they all would favour the levels prescribed by the BCII Act.
- 4.34 These interests argued that the building and construction industry was both enormously important to Australia and peculiarly vulnerable to damage by industrial action; there is, therefore, need for a significant deterrent of unlawful action. The argument was well put by JHG:

The building and construction industry is fundamentally different to other industries. A building or civil engineering project must be constructed using the resources and systems locally available. Unlike a manufactured product, there is no alternative or offshore supply chain available. Even the mining and resources industries have the option of leaving a deposit untouched if the company concerned is unable to obtain the requisite labour productivity levels and efficiencies. In the building and construction industry there is no such ability. Once a contractor is engaged to construct a project, it has to be delivered using the locally available resources. In addition to this lack of an alternative supply chain, a construction contract operates on a very short time horizon, and the contractor will generally accept most, if not all of the risk associated with delayed completion. The commercial imperative to complete the project and avoid liquidated damages associated with late completion create an environment where it is commercially rational to settle industrial issues pragmatically. In the past each such 'win' was progressively built in to standard terms and conditions of employment, and flowed on to sub-contractors. Over time, and over a series of projects, terms and conditions of employment increase with no corresponding increase in productivity. Thus the commercially sensible and pragmatic solutions at the project level will tend to reduce the productivity and efficiency of the building and construction industry as a whole.

39 Chamber of Commerce and Industry of Western Australia, *Proposed Building and Construction Division of Fair Work Australia*, Submission 24, December 2008, page 33.

This means that the regulatory framework must be sufficiently robust to ensure that unlawful conduct is actively and promptly prevented and where it occurs, is subject to effective investigative and enforcement action. Failure to maintain an effective deterrent against unlawful conduct will, without any doubt, result in decreases in labour productivity of at least the magnitude of the increases achieved to date.

Where unions and their members organise and take unlawful industrial action they damage the economic interests of all those Australians who rely on the construction of that infrastructure to create wealth and jobs and to improve the quality of their lives. Where unions and construction employers collude to agree to pay employees when they have actually been taking industrial action; or collude in forcing sub-contractors to pay rates higher than might be necessary; or collude in reducing labour productivity by imposing blanket restrictions on when work can be carried out; they are in fact defrauding not only the client but also the end users of the infrastructure. This is a form of fraud perpetrated on the entire community.⁴⁰

4.35 BHP Billiton Limited ("BHP") added another consideration:

The building and construction industry has one feature which is very different from most other industries. It is characterised by considerable diversity in the employers engaged in projects. Although there will be a head contractor, it is typically the case that this entity is not a significant employer of labour. Rather, relays of employees covering different callings and employed by a variety of employers are called upon to work in an interlocking way over the life of the project. Industrial action taken by just a few employees can impose acute pressures on all other employers, none of whom has any direct or indirect influence upon the employees taking the industrial action. This is a long-standing and notorious feature of the building and construction industry. It is to be contrasted with a mine, manufacturing plant or transport operation where, typically, just one employer will be involved.

The shortcut route to sanctions to deal with non-protected industrial action in the building and construction industry has been one of the important factors which has led to the remarkable improvements in the industrial relations performance of the industry over the last 2 to 3 years.⁴¹

4.36 The CCF said:

The particular features of the industry are:

- *Time criticality – which include issues such as strict completion timelines for which there are substantial penalties and the progressive nature of construction which means there are particular points of extreme vulnerability for employers ie the concrete pour; and*
- *Project based/site based work – which encourages employers to think only 'of that particular job' and not the long term implications of the granting of particular entitlements on one site and its potential to escalate costs in the industry generally.*

These factors create a climate where employers can be acquiescent to union demands which are not tied to productivity or other outcomes. For smaller to medium sized contractors this climate is particularly pernicious as they often lack bargaining power and to undertake work on a project they are required to meet the demands already placed on larger contractors.⁴²

⁴⁰ John Holland Group Pty Ltd, *Proposed Specialist Division of Fair Work Australia*, Submission 9, December 2008, page 14.

⁴¹ BHP Billiton Pty Ltd, *Submission of BHP Billiton: Proposed Building & Construction Division of Fair Work Australia*, Submission 10, December 2008, paras 61-62.

⁴² Civil Contractors Federation, *Civil Contractors Federation Submission to Discussion Paper: Proposed Building & Construction Division of Fair Work Australia*, Submission 12, December 2008, page 6.

4.37 AIG/ACA itemised factors imposing “particular vulnerability” on employers in the building and construction industry:

- *Time is a vital element in virtually all projects because construction contracts apply strict completion requirements that often do not take into account lost time for industrial disruption.*
- *The need to finish a particular job and collect progress or final payment places an employer in a position where it is easier to grant benefits so as to stave off deliberate delays, than to be engaged in a frustrating industrial dispute that leads to substantial financial losses in all events.*
- *The ‘critical path’ nature of construction work leads to vulnerable situations where a stoppage with one contractor in one aspect of the project can cause a major hold up to multiply the time lost by different parties.*
- *The crucial nature of certain steps in the construction process allows inordinate industrial pressure to be applied to employers at particular crucial stages in construction. This situation has been exploited on many occasions over the years to derive the most damaging effects from stoppages of work.*
- *There are other similar stages that lead to employers being highly vulnerable at particular times.*
- *The number of different contractors normally working on a site can lead to worker envy of perceived better comparative entitlements of workers engaged on the same project, if exploited.*
- *The essential need to continually acquire new projects to replace completed projects, leads to a consciousness of vulnerability by employers that discourages them from doing anything that will attract disapproval by unions and workers. Reporting illegal industrial conduct can result in subsequent vindictive actions that can destroy a business. Being known to be in “bad grace” with a union can easily dissuade head contractors from engaging a sub-contractor bearing that reputation.*
- *Generally the place of employment is a temporary site that changes from time to time leading to workforce permanency being rare and lack of familiarity with other workers and employers being common. This factor reduces loyalty of workers.*
- *Employers rightly or wrongly do not view concessions granted by them to get a job finished, as concessions that will have a long term effect on that particular employer’s business. There is an attitude that getting the job finished is all important irrespective of setting standards that could flow on to the rest of the industry. In fact, concessions that may flow on to the rest of the industry may be viewed by some as being unimportant, as those concessions will have to be passed on by all competitors.*
- *Shortage of skills in the industry is leading to strong wage pressures, and when this is exacerbated by the pressures applied as a result of industrial action, there is a resultant blow-out in entitlements that is not fair to workers in other industries.⁴³*

4.38 The MBA put the second argument in favour of higher penalties for building workers:

The rationale for the section 38 stipulation that a person must not engage in unlawful industrial action, with a maximum penalty of \$110,000 for breaches, is based on the additional dire consequences of the effects of industrial action in the building and construction industry over that normally suffered. By undertaking lawful industrial action, building workers have the potential to inflict heavy financial penalties upon builders.⁴⁴

43 Australian Industry Group and the Australian Constructors Association, *Joint Submission to the Hon Murray Wilcox*, Submission 27, December 2008, pages 7-8.

44 Master Builders Australia Inc, *Submission to the Hon Murray Wilcox on Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, Submission 16, December 2008, para 9.4.

(ii) The ACTU argument

- 4.39 On the other hand, several non-employer submissions argued there should be no difference between the legal rules, including on penalties that apply to different categories of workers. Their argument was typified by the ACTU: the higher penalties imposed by the BCII Act “violate the fundamental legal principle of the equality of all persons before the law”.⁴⁵ ACTU sought to debunk four alleged “myths” about the building and construction industry.
- 4.40 The first “myth” is that the industry is dominated by powerful unions which are able to impose their wishes upon vulnerable employers. On the contrary, says the submission, the industry is dominated by large companies. Using data collected from the Housing Industry Association (“HIA”), ACTU asserted that, in 2006-07, the top ten construction companies accounted for 55% of the \$55.3 billion in awarded contracting work. According to the Leighton Holdings Limited 2008 Annual Report, the Leighton Group, won \$11 billion in new work; its 2007-08 revenue was \$14.5 billion and after-tax profit \$608 million.⁴⁶
- 4.41 The submission also cites old (2002-03) Australian Bureau of Statistics (“ABS”) data that shows companies with an annual turnover of more than \$10 million accounted for 51% of income earned in the construction sector. ACTU calculates they directly employed 24% of all employees in the sector (about 105,000 people) and provided subcontracts worth \$13.9 billion, the equivalent of work for about 292,000 full-time people. “In other words, large businesses employed, or controlled the work of, over 397,000 people”,⁴⁷ 55% of the entire sector workforce.
- 4.42 The second “myth” claimed by the ACTU is that the industry is characterised by high job turnover, with low employee commitment to the employer and employee readiness to pursue short-term objectives without regard to the long-term impact on the business. ACTU cites ABS data showing that 78% of all employees in the sector have been with their employer for more than 12 months, 66% for over two years and 24% for more than ten years. “These percentage figures are exactly consistent with the all-industries average. In other words, the construction industry is *not* a high-turnover industry.”⁴⁸ (Original emphasis)
- 4.43 The submission goes on to claim that the “real reason for any lack of commitment on the part of some employees to their employers is that many employees are exploited by their employer”.⁴⁹ Reference is made to wages levels, the proportion of building workers who are denied standard leave entitlements, the prevalence of underpayment and non-payment of entitlements and the number of employers who avoid their obligations by engaging workers as “independent contractors” or “phoenixing” the business in order to escape debts owed to workers. The submission calculates that, under current law, less than 5% of the total industry workforce have unfair dismissal protection.
- 4.44 The ACTU says the third “myth” is that the absence of international competition means “the industry is protected from the competitive forces that would otherwise limit, or prevent, industrial disruption. The argument is that, in the absence of these market forces, state regulation is needed to ensure that workers’ wage claims are kept in check, and that industrial disruption is minimised.”⁵⁰

45 Australian Council of Trade Unions, *Submission to the Wilcox Consultations on behalf of the ACTU and State and Territory Labor Councils*, Submission 25, December 2008, page 15.

46 *ibid* page 6.

47 *ibid* page 6-7.

48 *ibid* page 7.

49 *ibid* page 7.

50 *ibid* page 9.

4.45 The submission claims “there is no link between the degree of international competition in an industry and either wage outcomes or levels of industrial disruption. . . the hospitality industry also faces a very low level of international competition, but has perhaps the *lowest* rate of industrial disputation, and pays some of the *lowest* wages in the economy. At the other end of the spectrum, mining (non-coal) is one of the *most* trade exposed industries, but has an extremely low level of industrial disputation, and pays the highest wages in Australia”.⁵¹ (Original emphasis)

4.46 The fourth “myth” identified by the ACTU “is that union activity in the industry undermines economic growth and productivity. A related myth. . . is that the introduction of the BCII Act regime has boosted growth and productivity.”⁵²

4.47 The ACTU submission says:

The construction industry has grown reasonably steadily at an average rate of 3.9% over the last 20 years (in terms of value added, in volume terms). There was a drop of 14% in value added output following the introduction of the GST in 2001, but there has been a strong recovery since then, with a construction boom (some would say ‘bubble’) fuelled by a low inflation rate and high levels of investment in the mining sector. Over the long term, however, construction is classified as a ‘low growth’ sector, compared to a sector like telecommunications, which has grown at 8% per year for the last 20 years.

The evidence shows that most of the growth in the sector has come from an increase in the quantity of labour inputs – that is, additional employment and/or additional hours worked by existing workers. This accounts for 2.3 percentage points of the 3.9% average annual increase, or 60% of the total. A further percentage point (25%) of the growth rate can be explained by an increase in capital investment in the industry each year. Only 0.7 percentage points (18%) can be explained by an increase in ‘multifactor productivity’, that is, increases in the quality or efficiency of capital and labour inputs (i.e. more skilled and efficient workers, working with faster and more effective machines and technology).

It is not possible to establish what part of the 0.7% annual increase in multifactor productivity is due to better quality capital, rather than better quality labour, inputs. However, given that the last 20 years has been one in which the application of new information, communication and design technologies have resulted in significant (capital) productivity increases in many industries, it is reasonable to assume that the introduction of computers and computerised equipment in the sector represent a large part of the 0.7 percentage points. This interpretation is given weight by the figures showing that investment in equipment in the sector has skyrocketed since the late 1990s, especially investment in ‘electrical and electronic equipment’, which doubled between 2000 and 2006. Greater levels of capital investment have been accompanied by greater returns to capital: in 1985/86, capital owners took 16 per cent of the income generated in the construction sector. By 2005/06, that share had doubled, to 32 per cent.

In summary, then, we think that the true economic picture for the building and construction industry can only be understood if one considers all of the evidence over a sufficiently long period of time, and by considering the underlying causes of long-term productivity improvements. These causes are usually diffuse, and slow to show results. They include technological changes, improvements to workers’ education and training, the development of more sophisticated and efficient management and industrial relations practices, and so forth.

51 ibid pages 9-10.

52 ibid page 10.

To simply focus on an arbitrary measure (whether 'labour productivity' or 'commercial cost differentials') in a particular year is misleading. It is even more misleading to attribute short-term fluctuations to factors, such as short-term legislative changes, which are unlikely to affect the quality of capital or labour inputs. Does anybody really think that the BCII Act has induced a single employee to work smarter, harder, and more efficiently? Does anybody seriously contend that the passage of the Act has motivated a single employer to introduce a piece of new equipment that, without the passage of the law, they would not have introduced?

And so we would submit that the true picture of the building and construction industry is of an industry that is enjoying the productivity benefits of new technology, and a range of other factors, and is likely to continue growing at, or near, its long-term average of 3.9% per annum (ignoring the effects of any short-term slowdown which might occur in the next couple of years because of the present economic difficulties).⁵³

- 4.48 The figures set out in this passage are sourced from ABS data. The commentary about their meaning is provided by the ACTU.
- 4.49 Against this background, the ACTU argues that if, contrary to its preference, there is to be a Specialist Division, the laws applying to the industry should be identical to those applying to participants in every other industry, the only difference then being enforcement by a specialist agency.

The first three differences: should any of them remain?

- 4.50 As I have indicated, no reasoned case was put to me for retention of either of the first two differences in the rules applying to building workers, on the one hand, and the remainder of the workforce, on the other. I see no such case. Even leaving aside the point of principle advanced by the ACTU, the retention of these differences would serve only to complicate the law.
- 4.51 I turn to the difference in penalties.
- 4.52 While I do not doubt the factual correctness of most of the statements made in the quoted extracts from the submissions of JHG, BHP, the CCF and the MBA, it is necessary to remember there are many other industries in which industrial action may cause great loss to an employer, and even the national economy, and/or considerable public inconvenience. One has only to think of our major export industries, most components of the transport industry, the gas and electricity industries, the telecommunication industry and emergency services such as police, ambulances and hospitals. There is no less need to regulate industrial action in those industries than in the building and construction industry.
- 4.53 Recognising the serious consequences of industrial action in virtually any industry, the Fair Work Bill proposes a number of severe constraints upon its occurrence. Those constraints will, of course, apply equally to the building and construction industry.
- 4.54 Clause 418 requires FWA to make a termination order in relation to any non-protected industrial action that comes to its notice, whether or not an affected person has applied for an order. Clause 419 makes a similar provision in relation to industrial action by non-national system employees (or employers) if the action will, or would, be likely to have the effect of "causing substantial loss or damage" to a constitutional corporation.

⁵³ *ibid* pages 10-12.

- 4.55 If practicable, FWA must determine any application for an order under clause 418 or 419 within two days. If FWA is unable to do this, it must make an interim termination order, unless this would be contrary to the public interest: see clause 420.
- 4.56 Clause 421 subjects contravention of an order under clause 418 or clause 419 to a civil penalty and, importantly, exposes those responsible for the contravention to a compensation order under clause 545 of the Fair Work Bill.
- 4.57 It should also be noted that Division 6 of Part 3-3 empowers FWA to make an order, in a variety of circumstances, for suspension or termination of even protected industrial action.
- 4.58 At the Sydney forum it was argued on behalf of the MBA that the possibility of being required to pay compensation will not deter unlawful industrial action because, historically, building companies have been unwilling to sue their employees and building unions. However, clause 545 does not limit compensation to the applicant in the penalty proceeding.
- 4.59 Clause 545(2)(b) speaks of “an order awarding compensation for loss that *a person* has suffered because of the contravention” (my emphasis). Item 14 in the Table contained in clause 539 allows “an inspector” to apply to the Federal Court or the Federal Magistrates Court for orders in respect of a contravention of clause 417 (unlawful industrial action). By clause 12 of the Fair Work Bill, an “inspector” is a person appointed as a Fair Work Inspector under clause 700 of the Bill or the FWO. If, on the application of an inspector or the FWO for a penalty, the court finds a contravention of clause 417, clause 418 or clause 419, the court can order the contravener to pay compensation to any person shown to have suffered loss by reason of the contravention; including, of course, the employer.
- 4.60. Whilst legislation must fix an upper limit to a penalty, the compensation recoverable under clause 545 is limited only by the extent of the loss. Thus clause 545 not only provides an opportunity for affected persons to recover their losses, it is also a significant deterrent to unlawful conduct.
- 4.61 It is argued that penalties should be higher in the building and construction industry because of the past unlawful behaviour of some union officials and the unions they represent. However, any penalty is a maximum figure. In selecting the penalty to be imposed in a particular case, the court will always take into account the person’s previous record. Where there is no earlier contravention, the imposed penalty will usually be well below the available maximum. If a particular individual or union has previous contraventions, that will be a powerful reason for imposing a heavier penalty than otherwise; in a bad case, perhaps up to the maximum.
- 4.62 Selection of an appropriate penalty is always an exercise of judgment. No doubt after taking into account many factors, Parliament chooses the maximum penalties it considers appropriate; always, other people may disagree with the choice. Some people might have preferred the Fair Work Bill to have set higher penalties than it does. I understand that. Nevertheless, these penalties have recently been adopted by the Parliament as suitable, across the board, for all industries. That being so, I would need very powerful reasons, special to the building and construction industry, in order to justify a recommendation for different penalties in this one particular industry.
- 4.63 The history of the building and construction industry may provide a case for the retention of special investigative measures, to increase the chance of a contravener in that industry being brought to justice. However, I do not see how it can justify that contravener then being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and

happened to be brought to justice. To do that would be to depart from the principle, mentioned by ACTU, of equality before the law. It is not inconsistent with that principle for a court, in determining the penalty to be imposed in the particular case, to take into account the facts of that case, including the circumstances surrounding the contravention and the prior record of the contravener; but it is inconsistent with the principle to use a yardstick that varies according to the identity of the contravener's industry.

Onus of proof in respect of occupational health and safety ("OHS")

- 4.64 Section 36(1)(g) of the BCII Act contains a definition of "building industrial action" that does not include action by an employee that "was based on a reasonable concern by the employee about an imminent risk to his or her health or safety", where the employee did not unreasonably fail to comply with a direction to perform other available work that was safe for the employee to perform. Subsection (2) specifies that a person who seeks to rely on this paragraph "has the burden of proving that (it) applies."
- 4.65 As previously mentioned, clause 19(1) of the Fair Work Bill contains a definition of "Industrial action". This definition must be read in conjunction with subclause (2), which provides that "industrial action" does not include, amongst other things:
- (c) *action by an employee if:*
 - (i) *the action was based on a reasonable concern of 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 and appropriate for the employee to perform.*
- 4.66 The Fair Work Bill contains no statement as to which party bears the burden of proving the matters detailed in paragraph (c).
- 4.67 In a paper tabled at the Sydney forum, the MBA argued this omission "means that an employer potentially has the burden of proof to show that the employee's action was not related to OHS concerns. The current provisions should be retained to ensure that unions do not use OHS as a back-door means to defeat the unlawful industrial action provisions and then require an employer to show that a real OHS problem did not exist."⁵⁴
- 4.68 Cases rarely turn on onus of proof provisions. Judges draw their conclusions from a web of established facts and the inferences to be drawn from them. However, to the extent that it matters, I think the MBA's concern is misplaced. There are well-understood legal principles governing the situation where a statute lays down a rule or principle, but provides an exception or excuse. In such a case, in the absence of an indication of a contrary legislative intention, it is for the person relying on the exception or excuse to establish its applicability.⁵⁵ In the present case, there is no indication of a contrary legislative intention.

54 Master Builders Australia Inc, *Presentation to the Sydney University Faculty of Law ABCC Forum*, 4 March 2009, page 15, as attached to Master Builders Australia Inc, *Submission to the Hon Murray Wilcox on Issues arising from the Law School Debates*, Submission 45, March 2009.

55 See *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520 and see generally Heydon, JD, *Cross on Evidence [Online]*, Lexis Nexis, 2008, paras 7035- 7075 and 7150.

4.69 Without commenting on the desirability or otherwise of this result, I would expect the courts to interpret clause 19 of the Fair Work Bill by holding that:

- (i) the applicant for orders has the burden of proving that the respondent took, or was concerned in, action falling within one of the paragraphs in clause 19(1); but,
- (ii) once this is done, it is for the respondent to establish the exception provided by clause 19(2)(c).

4.70 In substance, the situation is the same as under the BCII Act.

Discrimination, coercion and unfair contracts

4.71 Chapter 6 of the BCII Act contains some prohibitions that attract civil penalties. These prohibitions apply to everyone, whether or not they are building industry participants; but, of course, they include such persons.

4.72 Section 43(1) of the BCII Act provides that a person must not organise or take action, or threaten to organise or take action, with intent to coerce another person:

- (a) to employ, or not employ, a person as a building employee; or*
- (b) to engage, or not engage, a person as a building contractor; or*
- (c) to allocate, or not allocate, particular responsibilities to a building employee or building contractor; or*
- (d) to designate a building employee as having, or not having, particular duties or responsibilities.*

4.73 Subsection (2) provides the necessary constitutional link by requiring that one or other of the first two mentioned persons be constitutional corporations, the first mentioned person be a registered industrial organisation or the conduct occurred in a Territory or Commonwealth place.

4.74 Clause 355 of the Fair Work Bill repeats the four actions set out in subparagraphs (a) to (d) of section 43, except that the reference to building employees and building contractors is replaced by references to “a particular person” and “a particular independent contractor”. Plainly, and as the MBA concedes, clause 355 covers the situations envisaged by section 43 of the BCII Act.

4.75 Section 44(1) of the BCII Act forbids any person to take or threaten any action, or refrain or threaten to refrain from doing so, with intent to coerce, or apply undue pressure to, another person, to agree, or not agree, to make, vary, terminate, or extend a building agreement under the WR Act or to approve doing so. Subsections (3) and (4) impose restrictions on employers’ conduct in relation to requests under section 335(1) and (2) of the WR Act.

4.76 The repeal of the WR Act will make section 44 of the BCII Act redundant. However, it is necessary to consider the equivalent provision, controlling conduct in respect of industrial instruments under the Fair Work Act.

4.77 Clause 343 of the Fair Work Bill, when read with clause 340, covers the same ground as section 44 of the BCII Act, but in the context of the Fair Work Bill.⁵⁶ The only difference of substance is that, whereas section 44 covers both an intention to “coerce” and an intention to “apply undue pressure”, clause 343 of the Fair Work Bill speaks only of an intention “to coerce”.

⁵⁶ Clauses 340 and 343 of the Fair Work Bill.

- 4.78 It is not clear whether this makes any difference, in practical terms. According to the Australian Oxford Dictionary, “coerce” means “persuade or restrain (an unwilling person) by force”. In the context of the Fair Work Bill, physical force would not be necessary. Perhaps there is an issue of degree; but, ordinarily at least, I believe, the application of undue pressure would be regarded as force, and therefore a form of coercion. If I am wrong, the difference hardly warrants a different rule for the building and construction industry.
- 4.79 Section 45 of the BCII Act prohibits discrimination against a person on the ground that the second person’s employment is, or is proposed to be, covered by a particular kind of industrial instrument, or an industrial instrument made with a particular person. Clause 354 of the Fair Work Bill will perpetuate this prohibition.
- 4.80 Finally, section 46 of the BCII Act deals with coercion in relation to superannuation. However, as superannuation is payable under a Commonwealth law that governs relationships between employers and employees, perhaps supplemented by provisions of an industrial instrument, the case is covered by clause 343 of the Fair Work Bill.⁵⁷
- 4.81 There is nothing in Chapter 6 of the BCII Act that needs to be carried forward into the new legislation.

Recommendation 2:

The provisions of the Fair Work Bill governing:

- (i) the conduct of employers, employees and industrial associations; and**
- (ii) penalties for contraventions of the Fair Work Bill;**

apply, unchanged, to participants in the building and construction industry.

⁵⁷ See the definition of “workplace law” in clauses 12, 341 & 342 of Fair Work Bill.

CHAPTER FIVE—COERCIVE INTERROGATION

The issue

5.1 The second issue selected for discussion at the law school forums was:

“Should the proposed Specialist Division of the Office of the Fair Work Ombudsman be given the powers regarding compelled interrogation presently held by the ABCC?”

The BCII Act provisions

5.2 Section 52 of the BCII Act confers on the ABCC power, by written notice to a person, to compel that person to provide information, or produce documents, to the ABCC or to attend before the ABC Commissioner, or an assistant, and answer questions relevant to an investigation. The criterion for giving a notice is that “the ABC Commissioner [or a Deputy Commissioner]⁵⁸ believes on reasonable grounds” that the person has the required information or documents or “is capable of giving evidence that is relevant to an investigation.” There is no requirement for the Commissioner or Deputy Commissioner to consider either the apparent seriousness of the conduct under investigation or the possibility of procuring the information or documents in another way.

5.3 Subsection (2) requires the time specified under the notice to be at least 14 days.

5.4 Subsection (3) of section 52 gives a person attending for interrogation the right to be represented by a barrister or solicitor. However, the Federal Court has held that the ABC Commissioner or his assistant may refuse to permit a particular lawyer to appear if that person considers that lawyer’s appearance may be detrimental to the investigation, for example, because the lawyer has already appeared for another interrogee.⁵⁹

5.5 The BCII Act does not require the ABCC to reimburse interrogees the expenses they incur in connection with their attendance; for example, travelling expenses, lawyer’s fees and lost wages. Nor does the ABCC usually do this.

5.6 Subsection (6) of section 52 makes it an offence for a person, who has been given a notice, to fail to comply with its requirements; that is, by supplying the required information, producing the required document, or attending for questioning. It is also an offence for a person to fail to take the oath or make an affirmation, when required to do so, or to fail to answer questions relevant to the investigation. The maximum penalty, in each case, is imprisonment for six months.

5.7 Subsection (7) contains an extraordinary override provision:

*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.*

⁵⁸ Section 13(2) BCII Act.

⁵⁹ See *Bonan v Hadgkiss* (2006) FCA 1334; (2007) FCFA 113.

- 5.8 In their submission, two members of the Faculty of Law at the University of New South Wales, Professor George Williams and Ms Nicola McGarrity, ("Williams/McGarrity") commented that section 52(7) enables the ABC Commissioner's investigative powers to override, for example, the protection of journalists' sources, privacy law and even the confidentiality of Cabinet proceedings. They said:

Section 52(7) also overrides national security laws relating to, for example, the confidential gathering of intelligence by the Australian Security Intelligence Organisation (ASIO). Even if the disclosure of the information would be prejudicial to national security, the ABCC is nonetheless empowered to request that information. This elevates the ABCC, and its objective of eliminating unlawful conduct in the building and construction industry, above even the protection of national security.⁶⁰

- 5.9 Section 53(1) provides that 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 would contravene any other law, tend to incriminate the person or expose him/her to a penalty or "would be otherwise contrary to the public interest." However, by subsection (2), neither the information nor answer given, the document produced nor "any information, document or thing obtained as a direct or indirect consequence of giving the information or answer or producing the document", is admissible against the person in proceedings, other than for an offence under section 52(6) or a failure to tell the truth.

The ABCC's use of compelled interrogation

- 5.10 In its Annual Reports, the ABCC discloses information about its use of the coercive interrogation power conferred upon it by section 52 of the BCII Act. In addition, it periodically publishes on its website a document entitled *Report on the Exercise of Compliance Powers by the ABCC*.
- 5.11 The most recent Compliance Report covered the three year period from the inception of the ABCC, on 1 October 2005, to 30 September 2008. During that period, the ABCC issued 142 notices, under section 52, requiring a person to attend for interrogation. As at 30 September 2008, 121 examinations had been conducted. Four notices were withdrawn, one was unable to be served, two were re-issued, one was disobeyed and 13 examinations were still pending.⁶¹
- 5.12 The majority (78) of the 121 examinations were held in Victoria. There were 19 in Western Australia, 15 in Queensland, six in Tasmania and three in New South Wales. The examinees were overwhelmingly employees (83). There were 27 management people, nine union officials and one each in the categories "government official" and "independent witness". Sixty-seven (55%) examinees were legally represented; 54 were not.⁶²
- 5.13 In an email to me dated 13 February 2009, the ABC Commissioner, the Hon John Lloyd, brought these figures up to date. He said 128 examinations had been conducted up to 3 February 2009. He broke them up as follows;
- (i) 25 examinations relate to ten matters in which penalty proceedings have been instituted in a court;
 - (ii) five examinations relate to a section 67 report published by the ABCC;

60 Williams, G, & McGarrity, N, *The Investigatory powers of the Australian Building & Construction Commission*, Australian Journal of Labour Law, Edition 21, 2008; Submission 3, November 2008, page 258.

61 Office of the Australian Building and Construction Commissioner, *Report on the Exercise of Compliance Powers by the ABCC: For the period 1 October 2005 to 30 September 2008*, 2008, page 1.

62 *ibid* pages 2-3.

- (iii) 33 examinations relate to other closed matters (no court proceedings or section 67 report); and
 - (iv) 65 examinations relate to 27 ongoing investigations.
- 5.14 To put the first item into context, it should be noted that, as at 3 February 2009, the ABCC had instituted a total of 36 penalty proceedings in a court. In a later email, Mr Lloyd said:
- In six investigations, a proceeding would not have been commenced without the use of the examination power. In three investigations, the basis for commencing a proceeding became much firmer as a result of the use of examination power. In one investigation, the exercise of the power was of some benefit but was not critical in the decision to commence proceedings.*⁶³
- 5.15 Because of the constraints imposed by section 65 of the BCII Act on the disclosure of “protected information”, Mr Lloyd felt unable to go into further detail. However, on his analysis, information obtained at section 52 interrogations has been important to the decision to prosecute nine of the 36 penalty proceedings commenced by the ABCC up to 3 February 2009. Even leaving aside the 27 ongoing investigations, one-quarter is not an insignificant proportion. Moreover, I have been told there were cases in which information obtained at an interrogation persuaded the ABCC that a penalty proceeding was unlikely to succeed; thereby obviating waste of the ABCC and court resources and infliction of an unnecessary burden on the prospective respondent.

The debate about coercive interrogation

(i) The opponents’ argument

- 5.16 The opponents of coercive interrogation generally argue their case in terms of principle. Williams/McGarrity, said:

*The common law privilege against self-incrimination has been described as a ‘cardinal principle of our system of justice’⁶⁴ and a ‘bulwark of liberty’.⁶⁵ In *Environment Protection Authority v Caltex Refining Co Pty Ltd*,⁶⁶ McHugh J noted that the privilege is important in preventing abuses of power by the executive in the exercise of its coercive powers.⁶⁷ The privilege also assists by protecting the quality of evidence⁶⁸ and by maintaining an accusatorial system of justice in which the burden of proof rests on the prosecution.⁶⁹ At an individual level, the privilege protects a person from the ‘cruel trilemma’ whereby he or she must choose between refusing to provide the evidence, providing the evidence or lying — each of which carries with it the risk of criminal sanction.⁷⁰ As Murphy J further stated in *Pyneboard Pty Ltd v Trade Practices Commission*,⁷¹ the privilege ‘protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society’s acceptance of the inviolability of the human personality’.⁷² Given these rationales for the privilege against self-incrimination, it should only be abrogated where a compelling justification has been demonstrated. As the Victorian Council for Civil Liberties stated:*

⁶³ Email from the Hon John Lloyd, Australian Building & Construction Commissioner to the Hon Murray Wilcox dated 17 February 2009.

⁶⁴ *Sorby v Commonwealth* (1983) 152 CLR 281 at 294 per Gibbs CJ; 46 ALR 237.

⁶⁵ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340 per Mason ACJ, Wilson and Dawson JJ; 45 ALR 609.

⁶⁶ (1993) 178 CLR 477; 118 ALR 392.

⁶⁷ *ibid* at CLR 544.

⁶⁸ Australian Law Reform Commission (ALRC), Report 26, Evidence (Interim), Vol 1, AGPS, Canberra, 1985, p 487.

⁶⁹ *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543; 192 ALR 561 at [31] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

⁷⁰ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 498 per Mason CJ and Toohey J; 118 ALR 392.

⁷¹ (1983) 152 CLR 328; 45 ALR 609.

⁷² *ibid* at CLR 346.

*“Such a justification may arise where investigators are dealing with organised crime and suspected terrorism. For example, in order to fully investigate organised crime, the Australian Crime Commission Act 2002 abrogates the privilege against self-incrimination at a compulsory examination”.*⁷³

*However, at no time has a sufficient justification been provided for abrogating the privilege against self-incrimination in regard to the investigation of industrial matters in the building and construction industry. During the second reading debates on the 2005 Bill, the Coalition Government only made general comments such as: ‘The Commissioner clearly needs these improved powers in order to fulfil their mandate — that is, bringing order and a respect for the rule of law to the industry’.*⁷⁴
*Such statements are insufficient to justify the abrogation of an important common law principle.*⁷⁵

- 5.17 The ACTU argues that the BCII Act provisions allowing the ABCC compulsorily to interrogate people “are extreme laws that violate people’s fundamental legal right to silence, as well as the right to legal representation. They overturn the presumption that it is the State which must prove a person’s breach of the law, and that citizens are not compelled to assist the State to develop a case against themselves or against another person, unless they are ordered to by a court.”⁷⁶
- 5.18 The ACTU submission rejects any analogy between the BCII Act provisions and the use of subpoenas to procure evidence in courts. It says:

[T]here are significant important differences between the coercive interview process and a subpoena process.

The most important difference is that the latter process is controlled in an open fashion by an independent court, which acts to balance the interest of the applicant for the subpoena in obtaining relevant information, and the interest of the addressee in not being subjected to harassment, oppression or abuse. In contrast, the coercive interview process occurs in a closed interrogation room, and is controlled by Commissioners who are not obliged to consider the interests of the witness.

For example, as part of its control of proceedings, a court has discretion to set aside, or refuse to issue, a subpoena where:

- the applicant is seeking irrelevant information, or information that the addressee does not possess;*
- the applicant is seeking relevant information, but it is not sufficiently particularised (ie the applicant is on a ‘fishing expedition’);*
- answering the subpoena would be oppressive to the addressee; or*
- the information held by the addressee is privileged (for example, under legal professional privilege).*

73 Liberty Victoria, Victorian Council for Civil Liberties Inc, *Submission No 67 to the Senate Employment, Workplace Relations and Education References Committee, Building and Construction Industry Inquiry*, Melbourne, 2004, page 4.

74 Hansard, House of Representatives, 5 September 2005, page 108 (Senator Santoro).

75 Williams, G & McGarrity, N, *The Investigatory powers of the Australian Building & Construction Commission*, *Australian Journal of Labour Law*, Edition 21, 2008; Submission 3, November 2008, pages 258-259.

76 Australian Council of Trade Unions, *Submission to the Wilcox Consultations on behalf of the ACTU and State and Territory Labor Councils*, Submission 25, December 2008, page 17.

On the other hand, there is little to stop ABC Commissioners (apart from the protests of the interviewee's lawyer, if present), in their zeal to obtain information, from calling persons in for 'fishing expedition' interviews; from harassing witnesses (through, for example, holding long interrogations, or badgering the interviewee with oppressive questions); from asking interviewees to reveal privileged information (which the witness might not know they have the right to withhold), and so forth.

Secondly, a court has the discretion to decide the form in which the subpoena will be answered: whether the examination is held in public or in private, who may conduct the examination, to whom the information evidence may be disclosed, etc. If (as is the usual case for oral information) the subpoena is answered in open court, the witness has the protection of:

- the fact that the prosecutor is restrained in their questioning by ethical duties owed to the court;*
- the defence of a legal representative of their choosing (who is able to insist on the witness being given a chance to respond to allegations made against them); and*
- the presence of an independent judge who monitors and controls the proceedings, and who can stop the examination if it becomes oppressive.*

On the other hand, the ABCC interviewers do not have formal ethical duties to the interviewee or the community at large (besides their statutory employment duties to conduct themselves properly); they are not subject to the immediate oversight of a judge; and interviewees do not necessarily have the right to have their say (unless permitted by the interviewers).

The third difference is that a person who is subpoenaed is entitled to conduct money and, in addition, may be entitled to be reimbursed for their expenses in complying with the subpoena. In contrast, persons interviewed by the ABCC may be put to considerable expense in attending an interview (for example, in lost wages), but are not entitled to compensation.

In summary, we consider that the subpoena process is the appropriate mechanism for workplace inspectors to use if they wish to obtain relevant information from persons about possible breaches of workplace law.⁷⁷

The ACTU submission also denies comparability with other areas of law in which coercive interrogation is permissible. It asserts:

[T]his is only permitted where there is a public interest in the strictest enforcement of the law. This occurs in those areas where non-compliance with the law would jeopardise:

- national security;*
- public revenue and the capacity of government to function;*
- effective and democratic governance by those in public office (including the police);*
- the functioning of the economic system (as in cases of corporate fraud or anticonsumer conduct); or*
- the safety of people at work.*

77 ibid pages 17-19.

*The enforcement of industrial law (whether in the building and construction industries, or generally) simply does not go to these issues of vital public importance. It does not raise questions of public safety, national security, the functioning of government, or the smooth operation of the economic system. Industrial law is merely concerned with the relationship between employers, employees and unions, just as rental tenancy law is concerned with the relationship between landlords and tenants. Inasmuch as it would be outrageous for an 'Australian Residential Tenancies Commissioner' to have powers to coercively interrogate people (including innocent bystanders) to investigate breaches of leases, it is wholly inappropriate for the ABCC to have coercive powers to enforce industrial law.*⁷⁸

5.19 The CCU argued, that, as a general proposition, "...there should be a single set of industrial laws applying uniformly to all employers and employees in the federal jurisdiction, without artificial distinctions. This is not just because such a position is generally consistent with the current move to a single nationally regulated system of industrial relations. Nor is it because, necessarily, different laws create problems associated with drawing clear lines of application. Both of these are important considerations. However as a matter of fundamental principle, and as a matter of fairness, the starting point for our lawmakers should be that Australian employees (and employers) be subject to the same national industrial laws."⁷⁹

5.20 The CCU said "there is now sufficient material available to allow this Inquiry to be satisfied that there is no good reason for any difference in substance between the regulatory arrangements that should apply to the construction industry and those for all other industries."⁸⁰

5.21 In dealing specifically with coercive interrogation, the CCU said:

The coercive powers conferred on the ABCC and the criminal sanctions attached to those powers are unprecedented in Australian industrial law and raise a basic issue about the appropriateness of such powers and sanctions in an industrial relations context.

We are not aware of any other industrial jurisdiction in the world with equivalent provisions.

*The ACTU has advanced the argument that coercive powers should have no place in industrial law. This is because the industrial jurisdiction generally deals with matters that do not warrant the introduction of coercive powers in the same way as other areas of the law might. For example industrial issues do not generally raise matters of national security, fraud on the public revenue, serious corruption or criminality or public safety. Consequently the public interest considerations that might weigh in favour of coercive powers in aid of strict enforcement in other areas are not present in the industrial context. We adopt that submission. We add that, to the contrary, the public interest very much favours keeping such powers out of the industrial arena to ensure that the exercise of industrial rights such as the right to associate, organise and take collective action is not tainted with the quasi-criminal overtones and general opprobrium reserved for these other areas.*⁸¹

⁷⁸ *ibid* pages 19-20.

⁷⁹ Combined Construction Unions, *Joint Submission on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Australian Workers Union, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Construction, Forestry, Mining and Energy Union*, Submission 36, December 2008, page 1.

⁸⁰ *ibid* page 7.

⁸¹ *ibid* pages 47- 48.

- 5.22 I note, also, submissions opposing coercive interrogation powers, on principle, received from Gareth Davies,⁸² Kelvin Thomson MP,⁸³ The Police Association (Victoria),⁸⁴ the Geelong West and Gwandalan Summerland Point ALP Branches,⁸⁵ and G Lloyd Smith.⁸⁶

(ii) **State governments' positions**

- 5.23 Two State governments, New South Wales,⁸⁷ and Queensland,⁸⁸ explicitly oppose conferring special interrogation powers on the proposed Specialist Division. Two States, South Australia and Victoria, have serious reservations.

- 5.24 SafeWork SA said:

[T]here should be a single set of industrial laws applying uniformly to all employers and employees in the federal jurisdiction, without artificial distinctions... there is a very high onus on any party that proposes different and discriminatory arrangements should apply... These include... the ABCC's power to require persons to attend and answer questions in relation to an investigation.⁸⁹

- 5.25 In its submission, Victoria said:

Although it is true that the types of coercive powers currently enjoyed by the ABCC are available to some other statutory bodies, there are important differences in the way such powers may be employed by the ABCC. For example, organisations such as the Australian Crime Commission may exercise coercive powers to investigate matters such as threats of terrorism and organised crime – matters of serious magnitude that pose a significant threat to national security. Further, powers of this nature may be appropriate in some circumstances where they are used to interrogate persons under suspicion of a crime and not simply against a person who may be able to assist with an investigation.

The Victorian Government has grave concerns about the use of coercive powers by the ABCC. If they are to be retained, their use should be subject to a greater investigatory threshold than merely being relevant to an investigation.

The Victorian Government further submits that if such coercive powers are retained it is imperative that adequate safeguards are instituted in order to ensure that such powers are exercised appropriately, and due regard is paid to an affected person's rights.⁹⁰

82 Davies, G, *Submission re "proposed building and construction division of fair work Australia"*, Submission 7, November 2008.

83 Thomson, K, *Building and Construction Industry Improvement Act 2005 and the ABCC: A Political Exercise Not Genuine Reform*, Submission 8, December 2008, pages 7-10.

84 The Police Association of Victoria, *Response to the Proposed Building & Construction Division of Fair Work Australia Discussion Paper*, Submission 11, December 2008, page 2.

85 Geelong West Branch ALP, *Submission to the discussion paper: Proposed Building and Construction Division of Fair Work Australia*, Submission 6, December 2008; and Gwandalan Summerland Point Branch of the ALP, *Submission to the Hon Murray Wilcox*, Submission 15, December 2008.

86 Lloyd-Smith, G, *Commonwealth ABCC - Victorian OPI - ASIC etc - Coercive Powers?* Submission 40, December 2008.

87 New South Wales Government, *New South Wales Government submission to the Wilcox Inquiry into the proposed Building and Construction Division of Fair Work Australia*, Submission 37, December 2008, pages 73-74.

88 Queensland Government, *Wilcox Consultation Process on the Proposed Building and Construction Division of Fair Work Australia*, Submission 34, December 2008, page 18.

89 Safework South Australia, *Safework SA's Submission in response to the Discussion paper on the proposed Building and Construction Division of Fair Work Australia*, Submission 32, December 2008, pages 1-2.

90 Victorian Government, *Victorian Government response to the Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, Submission 44, January 2009, paras 29-31.

- 5.26 Victoria went on to advocate a higher threshold for the decision to issue a summons to attend for interrogation, concurrence in that decision by an independent person and external monitoring of the interrogation process.⁹¹
- 5.27 In contrast to these four States, the Western Australian government favours reproducing the current situation in the new legislation, including coercive interrogation powers. Western Australia said its view was “based on evidence of a prevailing climate of fear and intimidation in the industry, which serves as a barrier to its participants accessing appropriate legal remedies and formalising complaints of unlawful behaviour. Industry participants have genuine apprehension that accessing such legal remedies will result in significant repercussions for them either personally, professionally, or both.”⁹²

(iii) **The supporters’ case for coercive interrogation powers**

- 5.28 Retention of a coercive interrogation power is strongly supported by all the employers and employer organisations which made submissions. Between them, they made a number of points:
- (a) The provision of a coercive interrogation power was a key recommendation of Commissioner Cole. Although there has been an improvement in industry conduct since then, all employers agree, there is still such a degree of unlawfulness in the industry as to make it essential to retain coercive interrogation, at least for the moment;
 - (b) Historically, in Australia, there has been an absence of effective regulation of industrial laws. Until recent times, the most effective regulator has been the Australian Competition and Consumer Commission (“ACCC”), using the coercive interrogation power given to it by section 155 of *the Trade Practices Act 1974* (“TPA”). Only since the advent of the ABCC, with a similar power, has there been an effective regulator within the building and construction industry itself;⁹³
 - (c) The power of coercive interrogation may prove critical to effective legal action. CCF’s submission noted the Building Industry Taskforce’s account of the Patricia Baleen Gas Plant case, as set out in its September 2005 report *Upholding the law: Findings of the Building Industry Taskforce*:

On commencing its enquiries, the Taskforce found that key parties and witnesses... would not provide any information. In the absence of powers to compel people to provide information, the Taskforce had to refer the matter to the Australian Competition and Consumer Commission (ACCC) for investigation under the Trade Practices Act ...

*By using the coercive powers provided under s. 155 of the TPA, the ACCC was able to compel people to provide the necessary information in order to develop a Brief of Evidence for action in the Federal Court.*⁹⁴

CCF notes the Court found two unions to be in contravention of the TPA and imposed on each of them a fine of \$100,000 and a four-year good-behaviour bond.

- (d) AMMA cited from an earlier (March 2004) report of the Building Industry Taskforce, *Upholding the law-one year on: findings of the interim building industry taskforce*:

⁹¹ *ibid* para 32-4.

⁹² Western Australian Government, *Submission of the Western Australian Government*, Submission 33, December 2008, page 9.

⁹³ John Holland Group Pty Ltd, *Proposed Specialist Division of Fair Work Australia*, Submission 9, December 2008, pages 17-21.

⁹⁴ Civil Contractors Federation, *Civil Contractors Federation Submission to Discussion Paper: Proposed Building & Construction Division of Fair Work Australia*, Submission 12, December 2008, page 23.

*[T]he Taskforce has investigated over 380 matters in its 17 months of operation. Of this number, **the Taskforce has had to finalise approximately 50% of these investigations due to the lack of powers to gather information.** These investigations have had to be finalised because witnesses would not make a statement or victims have simply given up.*

The investigation of complaints by the Taskforce is greatly impeded by the limited powers provided by the [Workplace Relations] Act. On 132 occasions between 1 October 2002 and 31 December 2003, the Taskforce required and requested further assistance from complainants but it was not forthcoming.

In the absence of greater powers to gather evidence, the Taskforce has been unable to proceed with investigations. ... This almost wholly limits the ability of the Taskforce to introduce the rule of law to the industry.⁹⁵ (AMMA emphasis)

- (e) Proof of much of the conduct that would contravene the WR Act and/or BCII Act (and Fair Work Bill) is dependent on obtaining evidence which:
 - (i) *is not readily available to the injured party;*
 - (ii) *goes to establish a mental element (such as intention, purpose or motive) of the person or persons suspected of contravening the workplace relations laws and, in respect of bodies corporate, ascertaining who the actual decision makers were, or who acted as the controlling mind of the corporation (or employer or employee organisation);*
 - (iii) *is not necessarily available in documentary form, but with access to documents such as diaries, emails etc. and interviews or examinations on oath establish the true and complete or more complete picture.*⁹⁶
- (f) It is not unusual for an Australian parliament to confer a coercive interrogation power upon a regulatory agency. In addition to the ACCC, the Commonwealth Parliament has given such a power to the Australian Taxation Office, the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, the Australian Crime Commission and the Inspector-General of Intelligence and Security. State Parliaments have conferred the power on corruption and police integrity investigatory agencies.⁹⁷ The question, always, is whether the circumstances of the case necessitate conferral of the power;
- (g) ACCI noted that “the ABCC has published policy guidelines on the use of s.52 powers which appear to be modelled on those of the ACCC’s use of coercive powers”.⁹⁸
- (h) There is “no evidence that the s 52 powers governing coercive interrogation have been misused or abused”.⁹⁹ There has yet to be a substantiated complaint to the Commonwealth Ombudsman about ABCC misusing its power of coercive interrogation; and

⁹⁵ Building Industry Taskforce, *Upholding the law-one year on: findings of the interim building industry taskforce*, Department of Employment and Workplace Relations, 25 March 2004, pages 18-19, as cited by Australian Mines and Metals Association, *Submission to the Wilcox Review of the transition of the Australian Building and Construction Commission to Specialist Division of Fair Work Australia*, Submission 29, December 2008, page 33.

⁹⁶ See opinion of HJ Dixon SC, Attachment A, page 4, Master Builders Australia Inc, *Submission to the Hon Murray Wilcox on Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, Submission 16, December 2008.

⁹⁷ Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, para 111.

⁹⁸ Australian Chamber of Commerce and Industry Inc, *Proposed Building & Construction Division of Fair Work Australia*, Submission 14, December 2008, para 115.

⁹⁹ Australian Industry Group and the Australian Constructors Association, *Joint Submission to the Hon Murray Wilcox*, Submission 27, December 2008, pages 11-12.

- (i) It is wrong to suggest the power given to ABCC, under section 52 of the BCII Act, denies building industry participants a right of silence. This is because section 53 of the Act makes answers given at a section 52 interrogation “not admissible in a later prosecution relating to activities uncovered.”¹⁰⁰

5.29 BHP tackled the human rights argument head on:

Any consideration of human or other rights in the building and construction industry needs to take account of the rights of all industry participants – principals, employers, contractors, subcontractors, employees, unions and union officials – to go about their affairs in a lawful way without fear of intimidation or being impeded by the lawless conduct of others. These industry participants are entitled to enjoy the rule of law in their work and business. The suggestion that the powers available under sections 52 and 53 of the (BCII Act) are a limitation on human rights in the building and construction industry may in fact be a perverse reversal of the true position. It overstates the supposed detriment to a person under investigation by the ABCC ...and pays no regard to the rights of industry participants to go about their businesses and occupations free of illegitimate pressure in an environment in which others respect the law.

It is well known that the building and construction industry involves the work of many small contracting businesses. A law-abiding subcontractor bound by and honouring a lawful contract or industrial instrument covering his or her employees should be able to pursue his or her contracting business under that industrial instrument free from industrial threats or coercion from industry participants pursuing issues of no immediate relevance to the subcontractor or the subcontractor's employees. This right was routinely compromised ... over many years. The new mechanisms actually working to protect industry participants should not be watered down. Any step liable to allow the resurrection of a former lawless culture is contrary to the public interest and risks a substantive interference with the genuine human and other lawful rights of industry participants – their rights to belong or not to belong to a union, their rights to conduct a business, their rights to work in their trade or occupation lawfully and free of harassment, their rights to participate or not participate in industrial action, their rights to agree or not to agree to agreements proposed by their colleagues, by the Union or by their employer to regulate their employment.¹⁰¹

Should coercive interrogation be retained?

- (i) Increased productivity?

(a) The Discussion Paper

5.30 I included in the Discussion Paper a box entitled “Building Industry Productivity” in which I said:

The only possible justification of having specially restrictive rules for the building and construction industry must be that this is necessary to provide industrial peace and an acceptable level of productivity. Many people assert that the industry's present happy position, in these respects, is attributable to the BCII Act and the activities of the ABCC. Is there any hard evidence that supports that assertion?¹⁰²

100 BHP Billiton Pty Ltd, *Submission of BHP Billiton: Proposed Building & Construction Division of Fair Work Australia*, Submission 10, December 2008, para. 42.

101 *ibid* paras 49-50.

102 Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, page 17.

5.31 I referred in the box to two reports of Econtech Pty Ltd:

During each of the last two years, the ABCC has commissioned Econtech Pty Ltd, an economics researcher, to report on productivity changes in that part of the construction industry that lies in the ABCC's domain, the 'commercial' sector. For each report, Econtech decided to measure the changes by examining the differential between the cost incurred by 'commercial' builders, on the one hand, and single dwelling builders, on the other, for eight selected building items. Apparently, it is usual for the cost of an item provided to dwelling house builders to be lower than the cost of the same item supplied to 'commercial' builders. Costs were obtained from the relevant year's edition of Rawlinsons Australian Construction Handbook. An edition is published each January, reflecting costs as at the end of the preceding year.

In 2007, Econtech calculated the differential, in respect of the sum of the eight items, for each of the years 1994 to 2007 in each mainland state; also the five-state ('Australian') average. Purportedly on this basis, Econtech said the Australian 1994-2003 average differential was 10.7 per cent, that it was 17.2 per cent in 2004, 14.3 per cent in 2005 and 11.4 per cent in 2006, and fell to 1.7 per cent in 2007. Using those figures, Econtech went on to calculate the boost to the Australian economy that had been achieved by reform of the 'commercial' building sector.

This result was widely publicised. However, some people doubted the 1.7 per cent figure. It would mean the differential had dropped by 85 per cent in one year. It seems 1.7 per cent was, indeed, incorrect. The figure was not the average of the five states' 2007 figures that were set out in the relevant Table; nor was its provenance otherwise explained in the report.

In the 2008 report, which was limited to the years 2004-08 and used adjusted Rawlinsons data, 2004 is still the spike year, but the reduction from 2004 to 2008 is less steep. Comparison between costs in January 2006 (three months after the start of the BCII Act and the establishment of the ABCC) and January 2008 reveals a differential drop of only 6.75 per cent, over the two years (16.3 per cent to 15.2 per cent).

Because of Econtech's adjustments to Rawlinsons' figures, it is difficult to be sure, but the 2008 differential (15.2 per cent) seems to be higher than for the 1994-2003 average and for all but one of those 10 years.

The lack-lustre result reported by Econtech in 2008 is perplexing. Over the period 1996-2007, there was a significant reduction in time lost in the construction industry due to industrial disputes. If only for this reason, one would expect significant productivity gains to show up in any study. Perhaps the explanation of their non-appearance in the 2008 report is that, contrary to Econtech's assumption, the suppliers of the eight selected items did not pass on all their productivity gains in lower prices.¹⁰³

5.32 The 2007 Econtech report estimated that, as a result of the BCII Act and the ABCC's activities, labour productivity in the building and construction industry had increased by 9.4 per cent; the Consumer Price Index had been reduced by 1.2 per cent and the Gross Domestic Product had increased by 1.5 per cent. This had, apparently, all been achieved in the 15 months between the commencement of the ABCC's activities (1 October 2005) and the end of 2006, the date as at which Rawlinson's prices had been taken.

103 *ibid* page 16.

- 5.33 In the Discussion Paper, I noted a report by Allen Consulting Group (“Allen”) that suggested a more gradual rise in productivity. Allen claimed that, with the exception of a fall in 2001 most likely associated with the introduction of the GST, for many years “construction industry labour productivity has consistently exceeded labour productivity in the economy as a whole.”¹⁰⁴ Allen went on:

*Multi-factor productivity in the non-residential construction industry has displayed similar trends to those of labour productivity. The multi-factor productivity index measures industry gross value added per unit of capital and labour input. Multi-factor productivity increased strongly throughout the 1990s and peaked just prior to the introduction of the GST. Following a short but sharp fall in productivity following the introduction of the GST, multi-factor productivity rebounded quickly and has been increasing since 2001.*¹⁰⁵

- 5.34 Finally, I noted that, although ABS statistics for 1996 to 2007 inclusive revealed a dramatic fall in time lost in the building and construction industry because of industrial disputation, there were similar falls in both the coal mining and manufacturing industries and an even steeper fall in the All Industries table.¹⁰⁶

(b) The need for “hard evidence”

- 5.35 It was because I regarded the material then before me as inconclusive that I invited “hard evidence” supporting the link between the BCII Act, and the ABCC’s activities, on the one hand, and the present level of industry harmony and productivity, on the other.
- 5.36 Disappointingly, the submissions did not include much “hard evidence” about this matter. Many people who wrote submissions contented themselves with quoting Econtech’s extrapolation from its 2007 *Rawlinson* calculations; in doing so, ignoring the difficulties about the 2007 report that I had mentioned in the Discussion Paper and the fact that the 2007 conclusions were inconsistent with Econtech’s 2008 report.
- 5.37 The 2007 Econtech report was subjected to critical comment in two submissions, those of the Queensland Government, and Professor David Peetz.¹⁰⁷

(c) Queensland’s comments on the 2007 Econtech report

- 5.38 Queensland revealed that, in June 2007, officers of the Department of Employment and Industrial Relations (“DEIR”) “attempted to recreate the (2007 Econtech) study, using the same source materials in order to assess whether the findings were supportable”.¹⁰⁸ The result, reproduced as Chart 2 in the submission, shows a 2007 commercial/residential cost ratio that is almost identical to that in the base year of the study (1995) and with little fluctuation in between.

¹⁰⁴ The Allen Consulting Group, *The Economic Importance of the Construction Industry in Australia - Report to the Australian Constructors Association*, 21 August 2007, page vi.

¹⁰⁵ *ibid.*

¹⁰⁶ Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, page 17.

¹⁰⁷ Peetz, D, *Submission to the Wilcox Consultations on the creation of the Specialist Division for the building and construction industry within the inspectorate of Fair Work Australia*, Submission 28, December 2008; and Peetz, D, *Submission-in-Reply to the Wilcox Consultations on the creation of the Specialist Division for the building and construction industry within the inspectorate of Fair Work Australia*, Submission 42, January 2009.

¹⁰⁸ Queensland Government, *Wilcox Consultation Process on the Proposed Building and Construction Division of Fair Work Australia*, Submission 34, December 2008, para 49.

5.39 The submission went on:

The DEIR study was based on cost data derived from the annual Rawlinson's Australian Construction Handbook (Rawlinson's). Rawlinson's lists the costs of construction and building activities in mainland capital cities for both the commercial and the domestic sectors. Unfortunately, the Econtech study was unclear on how the Rawlinson data had produced the relevant results. After attempting and failing to reproduce the effects noted in the Econtech report, the department provided its sources and methodology to the ABCC and sought clarification from it as to how the study had been constructed. The ABCC has not responded directly to this request.¹⁰⁹

5.40 Queensland noted that the 2008 Econtech study did not show "the massive productivity savings reported in the 2007 study"; the 2008 results were "much closer to the data generated by DEIR. However, there are still unexplained discrepancies and anomalies".¹¹⁰

5.41 Queensland concluded:

If the findings of the new study are accurate, it would appear to show that the impact of the ABCC and the BCII Act are not as dramatic as originally claimed and that, while there has been a significant drop in disputation levels, costs in the industry have generally remained steady across Australia. Productivity gains from lower levels of disputation do not appear to have flowed into lower building costs in the commercial building sector. Therefore, it is doubtful if the economic benefits outlined in the 2007 report will be realised. As a result the economic arguments for maintaining a separate regulatory regime have not been made out and that the information contained in the Econtech reports should be treated with extreme caution.¹¹¹

(d) Professor Peetz' criticisms of the 2007 Econtech report

5.42 Professor Peetz is Professor of Employment Relations at Griffith University. He co-authored a paper, *Constructing figures: The mythology of productivity in the Australian building and construction industry* that was presented at the Annual Conference of the Australian Sociological Association in December 2008. The paper is included in the professor's submission. It deals extensively with the 2007 Econtech report and the conclusions that have been extrapolated from its comparison between commercial and residential costs.

5.43 I will not set out all the points made by Professor Peetz and his co-authors. It is sufficient to say they used the same data and methodology as Econtech claimed to have used in its 2007 study but found "wildly different" results. They said:

[F]or the eight tasks selected by Econtech, we found only a small drop of 1.3 percentage points in the cost differential between 2006 and 2007, which was pretty much the normal size of the movement from one year to the next. This was only one seventh the size of the movement claimed by Econtech.

For 2006, we detected a fall of just 1.5 points, barely half the 2.9 point fall claimed by Econtech and, again, within a fairly normal range. So, over the period January 2005-January 2007, we discovered that the actual fall in the cost differential was not 12.6 percentage points as claimed by Econtech, but 2.8 points.

¹⁰⁹ *ibid* para 50.

¹¹⁰ *ibid* para 51.

¹¹¹ *ibid* para 53.

Notably, the cost differential in 2007 was still 11.7 per cent. This was actually slightly higher than the gap of 10.8 per cent in January 2002, before even the establishment of the Building Industry Task Force. In fact the cost differential was higher in 2007 than in each of the early years for which we had collected data: 1993 (8.6 per cent), 1995 (9.8 per cent), 2001 (10.6 per cent) and 2002.¹¹²

5.44 Professor Peetz and his co-authors noted that the “huge drop in the cost differential in 2007, that appeared in the 2007 report, has disappeared from the 2008 report. Instead, the cost differential shows a gently sloping line that falls slightly by 2007 but then, without comment, rises by 2008.”¹¹³

5.45 Professor Peetz was also concerned about the extrapolations that Econtech had made. In a supplementary submission, the professor referred to Econtech’s extrapolation of a 9.4 per cent increase in productivity since the establishment of the ABCC. He said:

[I]nstead of assuming productivity growth, it is more instructive to consider what the ABS labour productivity data actually show in relation to the building and construction industry, in comparison to other industries. If there has been a 9.4 per cent increase in productivity attributable to the ABCC, it should be clearly evident in the ABS data, which should show construction industry productivity growth well above that in other industries.

Figure A depicts the latest annual national accounts data (released 31 October 2008) on developments in value added per hour worked by industry since June 2003. It shows that, in the period since 2003, labour productivity in construction has fluctuated (as is normally the case), but that by June 2008 it was only 1.7 per cent higher than in June 2003. Moreover, labour productivity growth per hour worked in construction was the third lowest of the 13 industries for which productivity data are published. This is not what one would expect if the ABCC had led to a 9.4 per cent boost in productivity above what would have happened in the industry anyway.

Although those arguing that the ABCC has generated great productivity gains often refer to data over such a five year period, in fact the ABCC has only been in existence since October 2005. However, the chart also shows no evidence of a 9.4 per cent boost to productivity since that date. Unfortunately the national accounts productivity data are only published by reference to June, and ... productivity data from year to year bounce around quite a lot. Since June 2006, labour productivity growth in construction has totalled 1.8 percent (an annual rate of 0.9 per cent), ranking construction eighth out of 13 industries, just below the middle one. If we change the base date to June 2005, labour productivity growth in construction has totalled 5.5 percent (an annual rate of 1.8 per cent), ranking construction fourth out of 13 industries, somewhat above the middle one. Neither suggests the ABCC has created a 9.4 per cent boost to productivity in construction above what would otherwise have occurred. (Original emphasis.)

112 Peetz, D, *Submission to the Wilcox Consultations on the creation of the Specialist Division for the building and construction industry within the inspectorate of Fair Work Australia*, Submission 28, December 2008, page 10.

113 *ibid* page 12.

Figure A—Gross value added per hour worked, 2003-2008

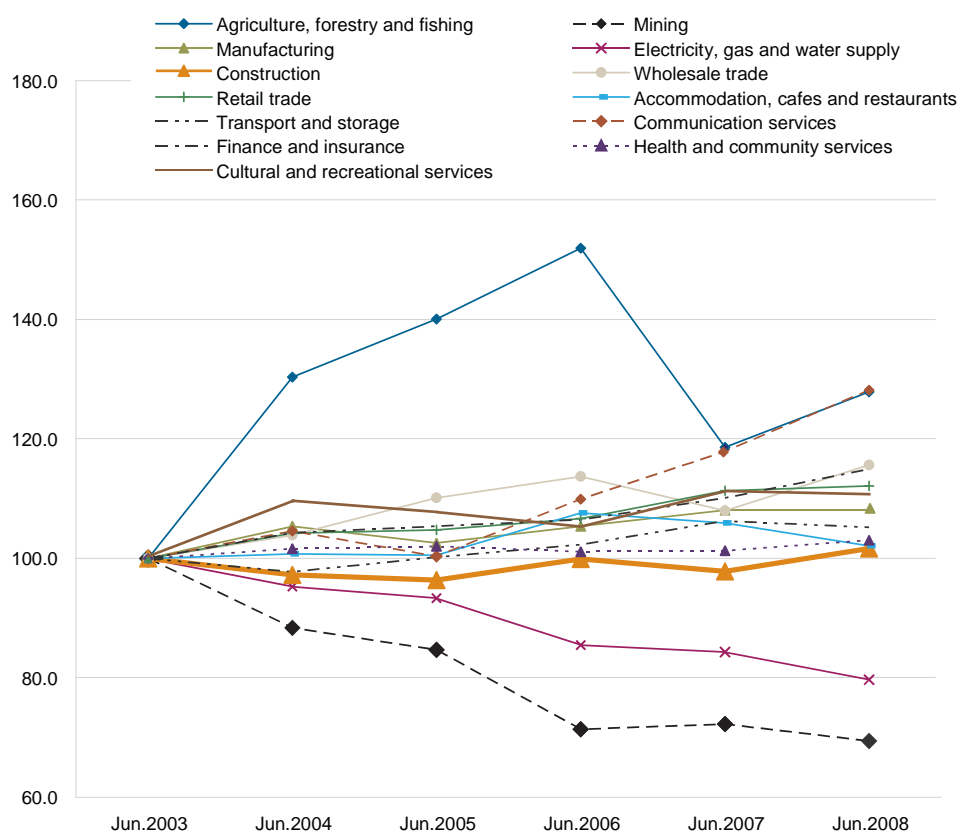


Figure created by David Peetz, and set out in *Supplementary Submission-in-Reply to the Wilcox Consultations on the creation of the Specialist Division for the building and construction industry within the inspectorate of Fair Work Australia*, January 2009, page 5. Data source: ABS 5204.0 Australian System of National Accounts, 2007-08, Table 15. Labour Productivity and Input, Hours worked and Gross Value Added (GVA) per hour worked - by Industry.

In fact it is difficult to discern any ABCC productivity effect in these figures, especially as it is hard to believe that the boost would be concentrated in the first eight months of ABCC operation when it was necessarily less active than it was in the two years subsequent. The most sensible way to interpret the industry level labour productivity data is to say that:

- *there are significant variation from year to year in industry labour productivity growth, most of which appear due to industry circumstances rather than policy interventions;*
- *if the ABCC had created a 9.4 per cent boost to labour productivity above what would otherwise have occurred, it would be large enough to be reflected in a major spike of that magnitude above and beyond the normal year to year movements;*
- *there is no evidence of such a spike and hence no evidence in the national accounts of a 9.4 per cent construction industry labour productivity boost attributable to the ABCC.¹¹⁴*

114 Peetz, D, *Supplementary Submission-in-Reply to the Wilcox Consultations on the creation of the Specialist Division for the building and construction industry within the inspectorate of Fair Work Australia*, Submission 42, January 2008, pages 4-5.

(e) Econtech's response to the criticisms

- 5.46 It seemed to me these criticisms of its 2007 report, if justified, reflected poorly on Econtech's professional competence; it would be unfair to reach any conclusions about them without first giving Econtech an opportunity to respond. Consequently, at my request, a letter was sent to Econtech, drawing attention to the criticisms and inviting any response Econtech wished to make.
- 5.47 Mr Chris Murphy, Executive Director of Econtech, responded to this invitation on 15 March 2009. He did not attempt to defend the 2007 report or to rebut the criticisms made of it by Queensland and Professor Peetz. Rather, he criticised Professor Peetz for having devoted "25 pages to an analysis of results that were reviewed and updated in our 2008 report, without going beyond this nitpicking of superseded results to provide a new analysis to inform the debate."¹¹⁵
- 5.48 Of course, Professor Peetz was not attempting his own analysis. He was concerned at the possibility that an economic analysis, obtained at public expense and widely publicised, had grossly exaggerated the contribution to productivity made by the BCII Act and ABCC. As Mr Murphy implicitly concedes, Professor Peetz' concern was justified. The 2007 Econtech report is deeply flawed. It ought to be totally disregarded.
- 5.49 As mentioned in the Discussion Paper, the 2008 Econtech report indicated a much less dramatic narrowing of the difference between commercial and residential building costs. There was a drop of only 6.75 per cent over the two years from January 2006, three months after the commencement of the BCII Act and the ABCC's activities, to January 2008. What that drop says about improvement in labour productivity may depend upon one's opinion about the soundness or otherwise of the assumption underlying the Econtech methodology.

(f) The John Holland assessment

- 5.50 The only party who responded to my plea for industry-wide "hard evidence" was JHG. In a supplementary submission, JHG referred to an assessment it had completed in June 2007 which "concluded that the post Cole Royal Commission reforms had delivered a productivity dividend of 10% to the entire industry - an improvement equating to 1% of GDP."¹¹⁶
- 5.51 The author of the JHG assessment started with the assumption that all, or virtually all, the reduction in building industry lost time since the Cole Commission had stemmed from the BCII Act and the activities of the ABCC. Given what was happening in other industries over that same period, this assumption is highly questionable. The author sought to quantify that reduction by comparing the average of 150,000 man days per year reported for the ten years ending in 2006 with the 15,000 reported for 2006. The "improvement in lost time following the improved regularity framework", 135,000 man days, was then valued at \$60 million.¹¹⁷
- 5.52 Noting that ABS counts only those industrial actions that result in "ten or more working days lost", the author then assumed that "up to 10% of programme time could be lost due to unlawful industrial action that would not be reported via ABS".¹¹⁸ The author valued the improvement in unreported lost time at \$6,233 million. This is curious. Having assumed that up to ten per cent of lost time might be left unreported, the author took a value for that ten per cent that was over one hundred times the value of the reported 90 per cent.

¹¹⁵ Letter from Mr Chris Murphy, Executive Director, Econtech Pty Ltd, to the Hon Murray Wilcox, dated 15 March 2009, Submission 48.

¹¹⁶ John Holland Group Pty Ltd, *Preliminary Assessment of the Economic Benefits of Industrial Relations Reform in the Construction Industry*, Submission 43, June 2007, page 2.

¹¹⁷ *ibid* page 6.

¹¹⁸ *ibid* page 7.

- 5.53 Even the ten per cent assumption is questionable. The ABS Explanatory Notes, which are attached to the assessment, make clear that the minimum “ten working days lost” does not necessarily mean a stoppage that extends over ten working days. The test is satisfied if ten employees stop work for one day, or 40 for two hours.
- 5.54 The author of the JHG assessment took the hypothetical case of a stoppage on a site where there were 25 different employers, each with less than ten employees, all of whom stopped work for one day. The author assumed ABS would not count this.
- 5.55 The scenario seems unlikely; the assumption doubtful. The explanatory notes say: “Industrial disputes are included within the scope of the ID collection if the work stoppages amount to ten or more working days lost.”¹¹⁹ They do not specifically require that the strikers all be employed by the same employer. Indeed, the document seems to imply the contrary. The explanatory notes say that sympathy strikes are included and that a “dispute affecting several locations is counted as a single dispute if it is organised or directed by the same organisation (e.g. a trade union) or person.”¹²⁰
- 5.56 The author of the assessment went on to calculate what savings could be made if current rostering restrictions were lifted (\$205 million) and also the cost to employers of paying non-working delegates (\$20 million). The former item seems to be something for the future; the relationship between the latter item and the BCII Act/ABCC not made clear.
- 5.57 Finally, the author included \$2,219 million as the cost of “coercion of subcontractors.” This is explained as the difference in costs suffered by a subcontractor who is subjected to pattern bargaining, as compared with assumed costs under a negotiated agreement.
- 5.58 The JHG assessment critically depends upon a series of assumptions, whose validity is not demonstrated. The result is irreconcilable with the ACTU’s compelling analysis of the ABS data on industry growth: 0.7 percentage points per year after allowing for increased labour and capital inputs (see paragraph 4.47 above). It is also inconsistent with the material cited by Professor Peetz in his supplementary submission.¹²¹
- 5.59 JHG also mentioned an improvement in productivity at its own sites “since the reform process”. It claimed an “average annual increase in labour productivity of 15% per annum.”¹²² This equates to a doubling of *productivity*, not output, each five years. Indeed, the graph at page 3 of the supplementary submission seems to indicate this for the five years 2003-08. If the claim is correct, it is an astonishing achievement. In the absence of details of the calculation, I can say no more.

(g) Two project comparisons

- 5.60 The Econtech and JHG studies seek to assess productivity growth at the national level. Neither is persuasive. Perhaps more assistance can be obtained locally. I have been supplied with information about two pairs of projects which throw some light on productivity improvement at project level.

119 Australian Bureau of Statistics, *Private Construction Industry Australia*, Cat No 8772.0, 2002-03, Explanatory Notes, para 3.

120 *ibid* para 4 & 9.

121 Peetz, D, *Supplementary Submission-in-Reply to the Wilcox Consultations on the creation of the Specialist Division for the building and construction industry within the inspectorate of Fair Work Australia*, Submission 42, January 2008, pages 4-7.

122 John Holland Group Pty Ltd, *Preliminary Assessment of the Economic Benefits of Industrial Relations Reform in the Construction Industry*, June 2007, Submission 43, page 3.

- 5.61 The first case study comes from the submission of Grocon Pty Ltd ("Grocon"), a Melbourne-based construction company. Grocon said:

On our sites, we have seen increased productivity since 2002 due to less industrial disputation – an example is a comparison between the QV site in Melbourne (1999 – 2002) and the AXA site (2005 – 2007). On the former, there were 1156 working days, with lost time totalling 206 days. Of the 206, 120 were due to inclement weather but 86 days were due to industrial disputation. At AXA, we had 565 working days, with lost time totalling 22 days – 21 due to inclement weather and one due industrial disputation.

We believe the construction industry has always been a tough industry with tough players and the need for a tough but fair regulator has been demonstrated over a number of years. Many inefficient practices existed before the establishment of the ABCC as we believe it has not only helped to eliminate those practices and improve productivity and efficiency, but also to an increase in benefits in terms of improved OHS&E standards with the introduction of the Australian Government Building and Construction Occupational Health and Safety Accreditation scheme. This scheme has resulted in a marked decrease in serious injuries and has improved understanding how both unions and employers must conduct themselves to ensure a safe workplace. Grocon has improved its internal company policies during the past few years to reflect the relevant acts and regulations. We believe the ABCC has been instrumental in bringing about compliance to lawful conduct in the building and construction industry.¹²³

- 5.62 The second case comes from the Chamber of Commerce and Industry of Western Australia ("CCIWA"). The CCIWA attached to its submission an affidavit made by Mr Ian Masson of Woodside Energy Limited, the natural gas exporter. Mr Masson set out comparative details of two projects, LNG Long Train 4 and LNG Long Train 5. He said:

The following comparison of these two projects is provided in relation to the industrial relations performance.

LNG Train 4 Project

<i>Financial Investment Decision (FID)</i>	<i>2 April, 2001</i>
<i>Ready for start-up (RFSU)</i>	<i>2 July, 2004</i>
<i>Total capital cost</i>	<i>\$2.7 Billion</i>
<i>Peak site workforce</i>	<i>2,800</i>
<i>Total on-site construction man-hours</i>	<i>11,000,000</i>
<i>Man hours lost due to industrial action</i>	<i>254,460</i>
<i>Number of disputes resulting in industrial action</i>	<i>26</i>
<i>Number of stoppages of 2 days or more</i>	<i>17</i>
<i>Matters the subject of AIRC applications</i>	<i>10</i>

¹²³ Grocon Pty Ltd, *Submission to the Hon Murray Wilcox*, Submission 22, December 2008, page 1.

LNG Train 5 Project

<i>Financial Investment Decision (FID)</i>	<i>10 June, 2005</i>
<i>Ready for start-up (RFSU)</i>	<i>1 September, 2008</i>
<i>Total capital cost</i>	<i>\$2.6 Billion</i>
<i>Peak site workforce</i>	<i>2,000</i>
<i>Total on-site construction man-hours</i>	<i>7,500,000</i>
<i>Man hours lost due to industrial action</i>	<i>27,424</i>
<i>Number of disputes resulting in industrial action</i>	<i>9</i>
<i>Number of stoppages of 2 days or more</i>	<i>3</i>
<i>Matters the subject of AIRC applications</i>	<i>4</i>

The above comparison highlights the dramatic reduction both in the incidence and duration of industrial action. Whereas on Train 4 construction unions, their officials and members were willing to take prolonged and repeated industrial action, that preparedness was absent on Train 5.

Whilst part of the improved industrial performance from Train 4 to Train 5 may be attributable to proactive management of workplace relations, the most significant contributor to the improvement in behaviour was in Woodside's view the threat of compliance powers under the BCII Act, the activities of the ABCC and the Code and Guidelines.¹²⁴

(ii) Building and construction industry harmony

(a) **Four Years On**

- 5.63 Amongst the material supplied to me are two surveys that seek to ascertain the extent to which there has been a change in the degree of harmony, within the building and construction industry, since the commencement of the BCII Act and the ABCC's activities.
- 5.64 The first survey, *Four Years On*, was undertaken by Jackson Wells Morris Pty Ltd ("JWM"), on the instructions of ACA, in July-August 2007. Four JWM personnel conducted individual interviews, mostly face-to-face, with 42 people in four States: New South Wales (10 people), Victoria (12 people), Queensland (11 people) and Western Australia (9 people). The interviewees were drawn from three groups of personnel: project/site managers (20 people), superintendents/foremen (12 people) and sub-contractors (10 people). They came from six national construction companies and ten sub-contracting companies.

¹²⁴ Affidavit of Mr Ian Masson, General Manager Employee Relations, Woodside Energy Ltd, paras 10-12, as attached to Chamber of Commerce and Industry of Western Australia, *Proposed Building and Construction Division of Fair Work Australia*, Submission 24, December 2008.

5.65 Some of the questions included in the survey were not particularly relevant to industrial harmony. I will set out those that were, and the JWM break-up of the answers: ¹²⁵

(a) "Do you find it easier or harder to operate in the construction industry than you did a few years ago?"

Easier-32.	Harder-6.	Depends-4.	Total 42.
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(b) "Do you think, in general, people get on better now compared with a few years ago?"

Yes-31.	No-2.	Variable-9.	Total-42.
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(c) "Overall, how would you sum up employee reaction to these changes made in the industry over the last few years?"

Positive-30.	No change-6.	Negative-4.	Total-40.
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(d) "Overall, has the relevance and importance of unions in the workplace changed in recent years?"

Yes-29.	No-11.	Depends-1.	Total-40(sic).
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(e) "Have you noticed any change in union behaviour over the last 3 or 4 years?"

Yes-39.	No-2.	Total-41.
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(f) "Has safety grown or diminished as an issue in recent years?"

Grown-28.	Diminished-7.	No change-4.	Total 39.
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(g) "Are there more or fewer disputes related to safety?"

More-1.	Fewer-34.	No change-0.	Total-35.
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(h) "Have you had any personal experience of the ABCC?"

Yes-26	No-16.	Total-42.
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(i) "Was your experience positive or negative?"

Positive-17	Negative-6.	Mixed-3.	Total-26.
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(j) "Is the ABCC a good or bad thing?"

Good-35	Bad-1	Total-36.
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¹²⁵ Jackson Wells Morris Pty, *Four Years On, A report on the changes following the Building & Construction Industry Royal Commission as observed by managers, superintendents and subcontractors*, August 2007, pages 9-48.

5.66 The interviewers sought comments and reasons from the interviewees. These were reproduced in the report. They are too lengthy to set out here. However, the Preamble captures their essence:

The respondents are people who have been responsible for managing and supervising projects in the industry for many years. They conclude that the climate in the construction industry has improved markedly in recent times. According to them, the industry is now characterised by greater stability, fewer unnecessary disruptions and more cooperation. These improvements have made it easier to work in the industry and this has led to significantly better productivity and improved efficiency for many operators as well as, in the main, a more satisfied workforce.

In reaching these conclusions it must be pointed out that the construction company employees interviewed in the compilation of this study were at the middle management or senior supervisor level. Similarly, the sub-contractors interviewed were generally senior people in medium-sized firms. Hence this study does not purport to represent the views of all employees but of people who are working in a managerial or supervisory capacity on construction sites. The report is an insight in to what it is like to manage a construction project today.

The quite remarkable transformation in the industry was most commonly attributed by respondents to those legislative changes which prevent union officials from accessing worksites unannounced and disrupting work and calling stoppages. Commonly, union officials justified such action by citing a spurious or marginal safety issue.

Respondents were also clear in their belief that the Australian Building and Construction Commission, as the enforcer of workplace legislation, has a critical role in maintaining this better environment. Even where respondents have had negative personal experiences of the ABCC, they still strongly support its role and activities. The National Code of Practice is also seen as important in clarifying what can be done and what can't be done in industrial arrangements.

Together, these changes appear to have been highly successful in removing, or at least constraining, instances of needlessly negative or aggressive behaviour on the part of union officials which had previously been common in the industry.

That said, respondents overwhelmingly expressed the view that they see a continuing role for unions in the industry. They commonly stressed that their concerns were with the tactics often used by union representatives, and not with the unions themselves or the concept of unionism. Many respondents further limited their complaints to the behaviour of particular union officials, noting that many officials are also reasonable, even if tough, to deal with.¹²⁶

Many of the people interviewed work for national companies or had recent experience on projects in States other than their own and were able to compare workplace climates across different States.

There were clear State differences in perceptions of the impact of the legislative and other changes. Respondents generally believed that NSW and Queensland have significantly better industrial relations climates than Victoria and Western Australia, even though improvements were reported in the latter two States, especially in Victoria.

126 *ibid* pages 3-4.

Respondents in NSW, and to a somewhat lesser extent Queensland, were more likely to report that the changes in the industry in recent years had not affected them directly, or that they had had a minimal impact. Although respondents in these States also reported a reduction in stoppages and an improvement in productivity, they tended to view the industry in their States as having been pretty good compared to Victoria and WA both prior to and since the changes.

Respondents in NSW and Queensland were more likely to report good relationships with unions and union officials that predated the recent changes. Some of these had direct experience with union officials in both NSW and Victoria and reportedly starkly different experiences and approaches between them.

Western Australia was considered the worst State by far in terms of relationships with union officials, with Victoria somewhat better.

Although many respondents reported strong improvements in both these States, others said they had observed no change or that, despite the changes, these States were still far behind NSW and Queensland in establishing a harmonious industrial climate.¹²⁷

(b) Chant Link

- 5.67 In response to my request to parties to submit "hard evidence" concerning the impact of the ABCC on the industry, MBA commissioned Chant Link and Associates ("CLA") to undertake a survey in which managers, supervisors and site workers were asked questions about changes in their work environment since the establishment of the ABCC three years earlier. The results were attached to MBA's submission.
- 5.68 CLA conducted telephonic interviews with what was said to be 1,058 people engaged in the building and construction industry: "408 owner/managers, 400 supervisors and 252 site workers (including 70 union members)."¹²⁸ The numbers add up to 1060.
- 5.69 The respondents in all groups were spread over all States and Territories; the proportions perhaps roughly corresponding to the spread of work in the commercial construction industry. About two-thirds of respondents were located in metropolitan areas.
- 5.70 The survey covered numerous matters. I will set out the answers most relevant to this report. In doing that, I have lumped together categories of degree, for example "improved significantly" and "improved somewhat". The percentages never add up to 100; there are "don't knows" in each category. The most relevant answers were:¹²⁹

(a) "What impact has the existence of the ABCC had on your overall satisfaction with your job?"

Supervisors:	improved-39.3%	no real change-50.8%	worse-6.3%
Managers:	improved-38.7%	no real change-49.0%	worse-5.6%
Site workers:	improved-43.7%	no real change-49.2%	worse-6.8%

¹²⁷ *ibid* pages 4-5.

¹²⁸ Chant Link & Associates, *Research on Industry Attitudes to ABCC, prepared for Master Builders of Australia*, November 2008, page 4, as attached to Master Builders Australia Inc, *Submission to the Hon Murray Wilcox on Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, Submission 16, December 2008.

¹²⁹ *ibid* pages 22-59.

- (b) "What impact has the existence of the ABCC had on industrial relations in your job?"
- | | | | |
|--------------|----------------|--------------------|-------------|
| Supervisors: | improved-29.6% | no real change-59% | worse -5.3% |
| Managers: | improved-37.5% | no real change 48% | worse -4.9% |
- (c) "What impact has the existence of the ABCC had on your feeling that your job is secure?"
- | | | | |
|---------------|----------------|----------------------|-------------|
| Site workers: | improved-32.1% | no real change-46.4% | worse-19.9% |
|---------------|----------------|----------------------|-------------|
- 182 non-union/70 union
- (d) "What impact has the existence of the ABCC had on your relationship with site workers (or, for site workers, supervisors and managers)?"
- | | | | |
|---------------|-----------------|-----------------------|-------------|
| Supervisors: | improved-26.5%; | no real change-66.3%; | worse 2.3%. |
| Managers: | improved-26.1%; | no real change-64.0%; | worse 2.5%. |
| Site workers: | improved-40.1%; | no real change-49.2%; | worse-6.0%. |
- Perhaps significantly, about 49% of both union and non-union site workers thought there had been no real change in their relationship with management.
- (e) "What impact has the existence of the ABCC had on overall work productivity in your organisation (or, for site workers, your work productivity)?"
- | | | | |
|---------------|-----------------|----------------------|------------|
| Supervisors: | improved-38.8% | no real change-49.9% | worse-5.1% |
| Managers: | improved-39.4%; | no real change-45.8% | worse-8.6% |
| Site workers: | improved-46.4% | no real change-45.6% | worse-6.8% |
- (f) "What type of impact has the union movement had on your working environment from 2005 to now?"
- | | | | |
|---------------|-----------------|------------------|----------------|
| Supervisors: | positive-18.8%; | no impact-62.0%; | negative-14.8% |
| Managers: | positive-17.8%; | no impact-58.6% | negative-19.4% |
| Site workers: | positive-22.2% | no impact-53.6% | negative-17.5% |
- Interestingly, the union members included in the site workers sample returned higher figures for both "positive" (40.0% v. 15.4%) and "negative" (22.9% v. 15.4%) than non-union site workers.
- (g) "What type of impact has the ABCC had on your working environment from 2005 to now?"
- | | | | |
|---------------|----------------|-----------------|----------------|
| Supervisors: | positive-38.8% | no impact-49.5% | negative-4.3% |
| Managers: | positive-39.6% | no impact-46.6% | negative-4.7% |
| Site workers: | positive-24.6% | no impact-52.4% | negative-11.2% |
- Union member site workers were much more negative than non-unionists (28.6% v. 4.3%).

- (h) "How important is it for your industry to have an Industry watchdog-that is, an organisation whose responsibility it is to ensure that both workers and employers behave in a suitable manner?"

Supervisors: important-86.8%; neither important nor unimportant-7.5%.
unimportant-4.8%;

Managers: important-88.3%; neither-3.9%; unimportant-7.1%.

Site workers: important-83.3%; neither-4.4%; unimportant-10.3%

72.8% of unionist site workers thought it important to have an industry watchdog.

- 5.71 Answers (a) to (e) and (g) above must be considered in the light of the interviewees' answers to the question: "Do you have any knowledge of the ABCC?" This question was answered in the negative by 44.3% of supervisors, 37.2% of managers and 55.6% of site workers.¹³⁰ As CLA commented; "The level of awareness of the ABCC was surprisingly poor amongst managers and supervisors with around 40% claiming they lacked awareness of the ABCC".¹³¹ Perhaps this extensive ignorance explains the high scores for the neutral options ("no real change", "no impact").

(c) Anecdotal material

- 5.72 There are reasons for caution about the conclusions of the JWM and CLA studies. Both studies were commissioned by employer bodies with a history of long-standing support for the BCII Act and the work of the ABCC. The interviewee group in each study was small, very small in the case of *Four Years On*. Neither report disclosed the method of recruitment of interviewees. The CLA results have to be read against the surprisingly high ABCC unawareness level.
- 5.73 Having said that, I am not prepared to ignore the findings in the two reports. I see no reason to doubt that the surveys were conducted in an honest and competent way. If CLA had been minded to distort the survey results, it might have been expected, for example, to reduce the numbers of interviewees who claimed ignorance even of the existence of the ABCC; or to increase the proportion of negative views about unions. The fact that the CLA findings were balanced, and internally consistent, and also consistent with *Four Years On*, so far as the latter study goes, encourages me to accept the CLA findings as a reasonable reflection of attitudes, at three different levels, within the industry.
- 5.74 I am also encouraged by the circumstance that the responses elicited by CLA are consistent with the broad impression I gained from my conversations with people in the industry. The number of people with whom I conversed was small, in a survey sense, and those people were not, of course, selected as a statistically representative sample. However, during the course of my inquiry, I had conversations with upwards of 200 individuals, the majority of whom have had long participant experience in the building and construction industry. Many of these people occupy senior management positions, but I also had conversations with people at middle management and site worker level.
- 5.75 I found widespread agreement, at all levels, that it is essential for there to be a strong industry watchdog; "a tough cop on the beat", to use your phrase. It was also generally agreed that, during recent years, there has been a significant improvement in harmony within the building and construction industry.

¹³⁰ ibid pages 38 & 69.

¹³¹ ibid page 38.

5.76 There is diversity of opinion about the cause of this improvement. Many people, not all at management level, attribute this improvement in harmony to the work of the ABCC. This is true even of many who are critical of the ABCC for what they see as its preoccupation with the transgressions of workers, and their unions, whilst ignoring those of employers. Others are inclined to attribute the improvement to other factors. They tend to emphasise the statistics that show there has been a significant reduction in time lost from industrial disputes in comparable industries and across the board.

(iii) The industry today

5.77 The ABS data shows that, in all industries in recent years, there has been a significant reduction in time lost due to industrial action. Community-wide factors must be in play. They probably include changing public attitudes to, and recent legislative restraints on, strike action. I believe most of the improvement in days lost in the building and construction industry would have occurred anyway, even if the BCII Act had never been enacted. However, I have been impressed by statements made to me by many people, some in relatively lowly positions, about the role of the ABCC in settling wildcat strikes. Apparently, the ABCC has established a reputation for responding speedily to calls for assistance, often coming to a site within an hour of being called, and quickly resolving the problem in discussion between the parties. No doubt resolution is assisted by the fact that the ABCC enjoys special powers, but the ABCC often does not need to use those powers. Because they are speedily resolved, these short wildcat industrial actions may not show up in the ABS statistics for time lost, and they may not significantly affect the site's labour productivity; nonetheless, their prompt resolution must assist in maintaining industrial harmony on that site.

5.78 Building and construction has always been a tough industry. Especially when work is scarce, there may be fierce competition between tenderers to obtain contracts, both at head contract and sub-contract level. Price is always a major, sometimes the only, criterion in determining who will get the work. Therefore tenderers have a strong incentive to trim their prices and, if successful, then cut their costs in order to make a profit on the job. Inevitably, there will be occasions when their employees feel costs have been cut too deeply, to their detriment.

5.79 Then there is the human factor. A large construction project requires the interaction of many people, of diverse backgrounds and expertise, who must "live together" for weeks or months at a time. Many of them will be physically tough, independent-minded, assertive people. Much construction work is arduous. It is often performed under demanding weather conditions. People may become stressed.

5.80 Given all this, it is inevitable that disputes will arise. It is unrealistic to expect otherwise. However, it is reasonable to expect that, at such times, agreed disputes procedures will be followed. The Fair Work Bill requires dispute resolution clauses in each type of industrial instrument for which it provides: see clauses 139(1)(j) and 146, modern awards; clauses 186(6) and 737, enterprise agreements; and clause 273(2), workplace determinations.

5.81 I have no doubt that the overwhelming proportion of building industry participants are decent people who try to treat others in a fair and reasonable way. Unfortunately, as in every other field, this is not true of everyone. Many people mentioned to me the existence of "cowboy" employers in the industry, who cut corners on safety precautions and are ever ready to "rip-off" their employees, even to the point of seeking to avoid paying them their entitlements. I also heard allegations that, actuated by malice or ego, some union officials choose to exploit their position, and their members' loyalty to the union, by unnecessary confrontation and industrial action.

- 5.82 It is not necessary for me to determine the extent of these abuses. In relation to the latter abuse, I note that all the employers, and employers' representatives, with whom I spoke, agreed there has been a big improvement since the Cole report in 2003.
- 5.83 However, they asserted, and this was accepted even by some union officials, that there is still some way to go; particularly in Victoria and Western Australia. That belief lies at the heart of the argument put by those who wish to perpetuate, in the new regime, the ABCC's power of coercive interrogation. They say union conduct, generally, has improved, but the underlying culture is unchanged; until the culture does change, it is necessary to retain an ABCC-like enforcement body with all the ABCC's powers of investigation, including the power of coercive interrogation.

(iv) The arguments of principle

- 5.84 At paragraphs 5.16 to 5.22 above, I referred to the arguments of principle put against the use of coercive interrogation in the building and construction industry.
- 5.85 For nearly 400 years, since the days of the Stuart kings, Anglo-Australian law has recognised a "right of silence"; that is, the right of a person accused of an offence to refuse to answer questions posed by police or other government agents and to put a prosecutor to proof of the alleged offence. Unless they freely choose to confess their guilt or to make an admission, people are not to be convicted out of their own mouths.
- 5.86 The question under present discussion is not whether the proposed BCD should be enabled to convict people out of their own mouths. If the terms of sections 52 and 53 of the BCII Act were replicated in the new legislation, any information or answer supplied by an interrogated person could not be admitted into evidence against that person in any legal proceeding, other than a proceeding for failing to answer questions or for giving false evidence. And if any information, document or thing was obtained as a consequence, direct or indirect, of the person's information or answer, that also would be inadmissible in evidence. We are not talking about self-incrimination; rather whether people should be put in the position, as I said in the Discussion Paper, of being "summoned to give evidence about work-related events, with a view to building up a case against their co-workers and/or their union."¹³² We are not talking about people putting themselves at risk, but rather whether it should be possible to deprive people of the freedom to determine for themselves whether or not they will co-operate with an investigative body.
- 5.87 There are already circumstances under which a person may be deprived of this freedom. The person may be caught up in an investigation by a statutory authority that has been granted coercive interrogation powers: see paragraph 5.28(f) above. The case may be one to be heard in a court, and the court has issued a subpoena requiring the person to attend to give evidence.

¹³² Wilcox, M. *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, para 115.

- 5.88 It is true, as argued by ACTU and others, that these other cases are all different from that under present discussion. All the other Australian statutory authorities holding powers of coercive interrogation are concerned with matters of major public importance: national security, the management of the national economy and national tax system, the suspected corrupt behaviour of public officials and the suspected misconduct of police officers. Generally speaking, although not always, the suspected behaviour would amount to serious criminality. In contrast, a notice may be given under section 52 of the BCII Act in order to obtain information relevant to an investigation concerning conduct that may not be, and usually is not, a criminal offence; but merely a contravention of an industrial statute or industrial instrument.
- 5.89 It is also true that, in the case of a subpoena, the court has a discretion whether to issue the subpoena, in the first place, and a judge or magistrate supervises the giving of evidence by the subpoenaed person.
- 5.90 Conceding all those differences, it remains true that there is no fixed rule or principle that people should not be statutorily deprived of the freedom to determine for themselves whether or not to co-operate with an investigatory body. No doubt any parliament will be reluctant to deprive people of that right, but the attitude taken by the Commonwealth Parliament, and at least most of the States, is that it is for that parliament itself to determine whether the subject-matter, objects and scheme of the relevant legislation, and the circumstances surrounding its enactment, justify the deprivation and, if they do, what safeguards should be put in place to guard against unnecessary use, or any abuse, of the power of coercive interrogation.
- 5.91 There is always scope for argument about the parliamentary judgment in a particular case but, so far as I am aware, that attitude has never been called wrong in principle. Only last May, the Administrative Review Council ("ARC"), the Commonwealth Government's statutory adviser in relation to administrative law, published a report, *The Coercive Information-Gathering Powers of Government Agencies*,¹³³ in which it did not contest the attitude I have mentioned. The ARC set out 20 principles, "as a guide to government agencies, to ensure fair, efficient and effective use of coercive information-gathering powers."¹³⁴ Nothing was said about the circumstances under which those powers might be granted.

(v) The judgment in this case

- 5.92 I have already mentioned my Discussion Paper comment that the "only possible justification for having specially restrictive rules for the building and construction industry must be that this is necessary to provide industrial peace and an acceptable level of productivity."¹³⁵ I apply the comment to the question whether there should be a special rule permitting coercive interrogation in the building and construction industry, although not in other industries.
- 5.93 I am not persuaded that the BCII Act, and the work of the ABCC, has lifted labour productivity in the industry by 9.4%, as claimed by Econtech in 2007; or 10%, as assessed by JHG. As Professor Peetz' submission demonstrates (see paragraph 5.45 above), increases of this magnitude are irreconcilable with the ABS National Accounts data.

133 Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No. 48, May 2008.

134 *ibid* page xi.

135 Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, page 17.

- 5.94 I accept there has been an increase in building industry labour productivity over the last few years, but only a modest one. I reach this conclusion because it is consistent with the ABS data. I believe, as the ACTU submission concedes, that part of this increase is ascribable to improved on-site industrial relations. And it is reasonable to attribute part of this improvement to the existence of the ABCC, and its promptness and skill in resolving on-site problems.
- 5.95 The fact that the BCII Act/ABCC contribution to building industry labour productivity is much less than has been claimed does not mean it is insignificant. A multifactor annual productivity growth of up to 0.7%, in an industry that, on 2007 figures, accounted for about 7.5% of Australia's gross domestic product is nationally important.¹³⁶
- 5.96 Human factors are also important. The CLA study is instructive. The positive answers to each of the quoted questions, about the effect of the ABCC, comfortably outnumber the negatives. It is not unimportant that, on balance, interviewees felt the ABCC had increased their level of job satisfaction and had had a positive effect on their working environment and sense of job security, site industrial relations and productivity and their personal relationships with people on the other side of the industrial divide.
- 5.97 The CLA interviewees were not asked to distinguish between the ABCC's various activities. The CLA report says nothing about the ABCC's power of coercive interrogation. The interviewees may not have known about that power. We cannot treat the responses as an affirmation of the coercive interrogation power. However, the answers do indicate a significant level of satisfaction with the way the ABCC has done its work and, as we know, it has done this with the aid of a coercive interrogation power.
- 5.98 I am conscious of the arguments of principle made by Williams/McGarrrity and others. However, I have reached the opinion that it would be unwise not to endow BCD (at least for now) with a coercive interrogation power. Although conduct in the industry has improved in recent years, I believe the job is not yet done. I have already mentioned the anecdotal evidence that there is still a significant degree of contravention of the relevant industrial laws; particularly in Victoria and Western Australia. This anecdotal material is supported by information, about penalty proceedings, contained in the ABCC's three Annual Reports.
- 5.99 The ABCC took over 19 penalty proceedings that had been commenced by its predecessor, the Building Industry Taskforce ("BIT").¹³⁷ In the nine months between its commencement of operations and 30 June 2006, the ABCC itself instituted another seven penalty proceedings;¹³⁸ in the 2006-07 year, a further nine proceedings;¹³⁹ and 14 in 2007-08;¹⁴⁰ a total of 30 to that date.
- 5.100 Mr Lloyd told me that, by 3 February 2009, the penalty proceeding figure had reached 36, meaning six new penalty proceedings in the previous seven months. Some of the recently instituted proceedings may relate to events that occurred some time ago, but the rate of commencement of proceedings is not declining.¹⁴¹
- 5.101 Many of the proceedings commenced by the ABCC are not yet concluded. However, the Annual Reports claim considerable success amongst those that are.

¹³⁶ Reserve Bank of Australia, *Statement on Monetary Policy, Developments in Construction Sector*, August 2007.

¹³⁷ Office of the Australian Building & Construction Commissioner, *Annual Report 05-06*, page 32.

¹³⁸ *ibid.*

¹³⁹ Office of the Australian Building & Construction Commissioner, *Annual Report 06-07*, page 35.

¹⁴⁰ Office of the Australian Building & Construction Commissioner, *Annual Report 07-08*, page 41.

¹⁴¹ Email from the Hon John Lloyd, Australian Building & Construction Commissioner to the Hon Murray Wilcox dated 17 February 2009.

- 5.102 The results in 2005-06 were patchy. Six applications were dismissed.¹⁴² In two cases, the court found a contravention but declined to impose a penalty. Penalties were imposed in the remaining four cases. Some of these cases must have been inherited by the ABCC from BIT; this may explain the high failure rate.
- 5.103 It seems that eight penalty proceedings were concluded in 2006-07. Two were discontinued. Penalties were imposed in the remaining six cases.
- 5.104 In 2007-08, eight proceedings were finalised, penalties being imposed in all of them.
- 5.105 Consistently with the statistics about the venues of the ABCC coercive interrogations, Victoria is the dominant venue for ABCC's penalty proceedings.
- 5.106 The high success rate achieved by the ABCC, in relation to penalty proceedings launched at the rate of about one per month, suggests there is still a significant degree of non-compliance with the rules governing the industry.
- 5.107 The most frequently recurring types of contravention, amongst those cases in which penalties were imposed, seem to be unlawful industrial action, coercion of strike pay and breach of the freedom of association provisions. In all these types of contravention, evidence about conversations may be essential; if not to establish the basic facts, in order to sheet home responsibility to particular people.
- 5.108 As Mr Dixon SC pointed out in his Opinion, it is a characteristic of most of the types of conduct of employees, and their unions, that might fall foul of the Fair Work Bill (when it becomes law), that it will not be documented; the only way to ascertain exactly what happened in conversations and meetings will be to ask somebody who was there.¹⁴³
- 5.109 It follows from all this, it seems to me, that any tough new regulator in the building and construction industry will need a power of coercive interrogation; at least under present conditions.
- 5.110 However, the position may change. Even some of the employer associations concede it may not always be necessary for the regulator to have a coercive interrogation power. They suggest it may be desirable to review the situation in (say) five years and, for that purpose, impose a sunset clause on the relevant part of the new legislation. I think there is merit in this.
- 5.111 Of course, if the BCD is given a power of coercive interrogation, that power will be available for use in the investigation of employers' conduct. If BCD is to avoid the reproach of one-sidedness, it ought to be so used whenever necessary. It may not often be necessary. Many transgressions of employers, such as non-payment or under-payment of entitlements, are ordinarily provable without the need for coercive interrogation.
- 5.112 I appreciate the ACTU's point about the difference between the nature of the misconduct, that is likely to be suspected by those exercising coercive interrogation powers under existing Australian legislation (other than the BCII Act), and the conduct that would ordinarily be the subject of an investigation by BCD. Considering each item of suspected misconduct in isolation, it is fair to say the latter would rarely be of comparable seriousness.

142 Office of the Australian Building & Construction Commissioner, *Annual Report 05-06*, page 34-35.

143 Attachment A, Master Builders Australia, *Submission to the Honourable Murray Wilcox on Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, Submission 16, December 2008.

- 5.113 However, this may be too narrow an approach. It is necessary to take into account any cumulative effect of numerous contraventions, even though each individual contravention may be relatively minor. Repeated contraventions of the law, even if only industrial law, as distinct from criminal law, may cause considerable disruption to a building project. If the project is sufficiently large or urgent, or the conduct is replicated elsewhere, the breaches may take on national significance.
- 5.114 I do not think it is useful to try to specify those categories of suspected conduct that may warrant coercive investigation. It is preferable, I believe, to make a pragmatic judgment about the particular case after taking into account all its circumstances.
- 5.115 In coming to my conclusion about coercive interrogation by BCD, I have not overlooked the ACTU suggestion that there is an alternative: use of court subpoenas to establish the facts of a case.
- 5.116 The difficulty about the ACTU suggestion is that subpoenas are available only after the commencement of a substantive legal proceeding. The purpose of a provision such as section 52 of the BCII Act is to determine, in advance, whether there is a proper basis for commencement of a proceeding and, if so, against whom. The interrogation is intended to be a step in an investigation about a possible legal proceeding, not a step in the proof of a claim already formulated and before the court. The price of a regulator relying extensively on subpoenas to learn, for the first time, the facts of a case would be that it would find itself frequently having to amend or withdraw claims, as the facts emerged in court. This would be wasteful of the resources of both the regulator and the court and unfair to the person against whom the case was brought.
- 5.117 Of course, a subpoena also deprives its recipient of the decision whether or not to disclose information about a particular event. ACTU makes the point that a judge (or magistrate) supervises a court examination of a person summoned by subpoena. That is so, but the point does not go to the question of principle some people have argued, but rather the protections that may be necessary to avoid inappropriate use, or misuse, of the interrogation power.

Recommendation 3:

The Director of the Building and Construction Division be invested with a power, similar to that contained in section 52 of the *Building and Construction Industry Improvement Act 2005*, to cause people compulsorily to attend for interrogation, but subject to the safeguards contained in Recommendation 4; and

- (i) the grant of this power be reviewed after five years;**
- (ii) in order to ensure review, the provisions in the new legislation providing for compulsory interrogation be made subject to a five-year sunset clause.**

CHAPTER SIX—SAFEGUARDS

The issue

- 6.1 The third question discussed at the forums was whether there should be any safeguards against misuse of the power of coercive interrogation, if this power be granted to the Specialist Division.

The case for safeguards

- 6.2 In the Discussion Paper, I commented on the importance of safeguards:

If the compulsory interrogation power is to be retained, a question arises as to the safeguards that ought to be built into the legislation to reduce the possibility of inappropriate exercise of those powers. Safeguards are of prime importance. However desirable it may be for the new legislation to include the compulsory interrogation power, in the interests of industrial peace and productivity, exercise of the power will usually cast a burden on the recipient of the summons. It must normally be distressing for a person to receive a summons requiring him or her to attend a formal interrogation, upon pain of a gaol sentence for failure to attend or answer questions, about events at work that involve one's workmates. No doubt this is particularly the case if the recipient is not a confident personality and/or is inexperienced in the ways of the law and the bureaucracy. Moreover, at least so far as the Act is concerned, the recipient is left to bear any lost wages and the expense of obtaining legal assistance.¹⁴⁴

- 6.3 The New South Wales Government said, in its submission:

Any agency which is granted extraordinary powers should be subject to strong safeguards.

For example, in order to ensure that the rights are not tampered with beyond that which is justifiable, it is vital to ensure that whatever threshold test is used to trigger the use of coercive powers, it strikes a balance between the agency's goals and the rights of the person being investigated.

Before using the powers, an agency should be required to consider alternative means of gaining information and weigh up the probable importance of the information with the cost to the person providing it.

At a minimum, agencies should also be required to keep records of the decision making process which show how the agency arrived at a conclusion that the requisite threshold had been crossed for the use of the powers. The agency should also be required to regularly publish information on its use of the powers.

The legislation should always be explicit about who may authorise the use of an agency's powers, and the agency should be required to have measures in place to ensure that these powers are only delegated to suitably senior and experienced agency officers.

Importantly, client legal privilege should be maintained and the legislation should explicitly state this.¹⁴⁵

¹⁴⁴ Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, para 117.

¹⁴⁵ New South Wales Government, *New South Wales Government submission to the Wilcox Inquiry into the proposed Building and Construction Division of Fair Work Australia*, Submission 37, December 2008, page 85.

- 6.4 Many employer interests have argued that the ABCC has shown that safeguards are unnecessary; it has done no wrong. It is not my task to determine whether or not the latter assertion is correct. As will appear some people, rightly or wrongly, feel there is room for criticism about the manner in which the ABCC has exercised its compulsory interrogation powers. But the question is not whether the ABCC has satisfactorily handled its powers but what is the system that ought to be put into place, in new legislation, to govern the exercise of extraordinary powers by a new body.
- 6.5 It must also be remembered that perceptions are important. Williams/McGarrity made that point, in referring to the ABCC:

The ABC Commissioner is appointed by the Minister for Employment and Workplace Relations. The minister also has the power to issue written directions to the ABC Commissioner specifying the manner in which he or she must exercise the powers set out in the BCII Act. While the ABCC is ostensibly an independent body, the ability of the executive to influence the exercise of the ABC Commissioner's investigatory and coercive powers gave rise to criticisms during the term of the Howard Government that the ABCC is a political instrument. The problem is compounded by the breadth of the ABC Commissioner's discretion in exercising his or her investigatory powers and the selectiveness, as for example criticised by Spender ACJ of the Federal Court,¹⁴⁶ in deciding when to initiate an investigation and who to prosecute.¹⁴⁷

Possible safeguard areas

- 6.6 It is desirable to consider four possible areas of safeguard: the choice of the person or persons who will make the decision to summons a person for interrogation; the criteria for that decision (the "threshold test"); the choice of the person to preside over the interrogation; and the need, if any, for external review of the conduct of the interrogation. I will discuss these matters in turn.

Who should issue the summons?

- 6.7 Amongst those who commented on this question, there was general agreement that it would be desirable that the decision to issue a summons for coercive interrogation be made by a person independent of the Specialist Division or, at least, not subordinate to its Director; or, alternatively, that there should be a method of challenging that decision.
- 6.8 This reflects the view, mentioned in the Discussion Paper, "that the person in charge of an investigation is not necessarily the person best placed to weigh its potential burden on others; an independent 'second look' is a useful safeguard."¹⁴⁸
- 6.9 There are numerous precedents for requiring an independent assessment of the appropriateness, in the particular case, of a regulatory body exercising invasive statutory powers. Police have to go to a magistrate or nominated court officer for search warrants. Only judges or nominated members of the Administrative Appeals Tribunal ("AAT") may issue warrants to intercept telecommunications. Under the Victorian *Major Crime (Investigative Powers) Act 2004 (Vic)*, it is necessary for a Supreme Court judge to make a coercive powers order before a person may be subjected to interrogation before the Chief Examiner. Even when there is a concern about national security, ASIO has to obtain a warrant from a federal

146 *Lovewell v O'Carroll*, (unreported, QUD 427/2007, transcript, 8 October 2008) at pages 88-89 per Spender ACJ.

147 Williams, G & McGarrity, N, *The Investigatory powers of the Australian Building & Construction Commission* (2008) 21 Australian Journal of Labour Law; Submission 3, November 2008, page 264.

148 Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, para 120.

magistrate or judge, after first obtaining the consent of the Attorney-General, for coercive questioning relating to terrorism matters.

6.10 In the Discussion Paper I canvassed the possibility that the Divisional Manager might share responsibility for the Division with a supervisory board. I said that, if there is to be such a board, "it might be advisable to give that board the task of reviewing any decision by the Divisional Manager to undertake a particular investigation and/or compulsorily to interrogate a particular person. It would be important to avoid making the decision-making procedure too cumbersome or slow; however, in the age of telephone conferencing and email, that need not be a problem."¹⁴⁹

6.11 There was little enthusiasm, amongst those who made submissions, for a supervisory board. The reasons given by JHG were typical:

John Holland submits that there should not be a divisional supervisory board for the Specialist Division as any such board would affect the independence of the Specialist Division. John Holland submits that for the Specialist Division to be effective it will need to maintain complete independence from participants in the building and construction industry such as employers or unions who may be appointed to the Specialist Division board (notably if non-industry participants were appointed to the board then they would not be able to make any significant or useful contribution).

*Further, a supervisory board would create an additional level of bureaucracy which would affect the Specialist Division's ability to immediately investigate potential breaches. Any additional level of bureaucracy would dramatically affect the Specialist Division's ability to perform its functions which often demand a quick investigation and at times, court proceedings.*¹⁵⁰

6.12 The only submission that explicitly supported the notion of a supervisory board sharing responsibility for the initial decision was that of Victoria. The Victorian Government thought the supervisory board could be given a review or concurrence role in respect of decisions to initiate an investigation and/or compulsorily interrogate a particular person.¹⁵¹

6.13 BHP came close to accepting the idea of a supervisory board. BHP said:

*The ABCC would come under the supervision of a three or five member Building and Construction Industry Investigations Review Panel. The Panel members would be appointed by the Minister. They would be drawn from different parts of Australia and have a range of relevant experience. The Chairperson would be an eminent lawyer such as a retired judge. The Panel's functions would involve review of procedures to be applied generally. The Panel members would meet periodically and give guidance on issues which have arisen so as to assist in the future. The Panel would work towards best practice procedures.*¹⁵²

6.14 BHP envisaged that a person could ask the Chairperson of the Panel to review a decision by the Director to issue a notice to attend an interrogation. The application would be determined on the papers within three days. The Chairperson's decision would not be reviewable.

¹⁴⁹ *ibid* para 99.

¹⁵⁰ John Holland Group Pty Ltd, *Proposed Specialist Division of Fair Work Australia*, Submission 9, December 2008, page 30-31.

¹⁵¹ Victorian Government, *Victorian Government response to the Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, Submission 44, January 2009, para 39.

¹⁵² BHP Billiton Pty Ltd, *Submission of BHP Billiton: Proposed Building & Construction Division of Fair Work Australia*, Submission 10, December 2008, para 57(a).

- 6.15 CCF argued that, to empower a supervisory board to decide whether to institute investigations and/or summons people for interrogation:
- (i) *Raises serious potential for conflict of interest;*
 - (ii) *It is impractical given the need for urgent decisions to be made in relation to enforcement;*
 - (iii) *It is in effect "outsourcing" enforcement of Commonwealth laws; we note that there is no other precedent in operation in any other Australian regulator that we are aware of;*
 - (iv) *It causes confusion and a lack of clarity in the accountability of the Building and Construction Inspectorate Manager as an employee of the office of Fair Work Ombudsman with concurrent accountabilities to the Supervisory Board; and*
 - (v) *It raises legal issues in relation to review rights of persons the subject matter of enforcement or regulatory action.*¹⁵³
- 6.16 I am not persuaded about point (ii) and I do not think point (iii) is correct. There are other Commonwealth regulators with part-time members. However, there is substance in the remaining three points. And those points apply equally to the panel proposed by BHP. Taking those points into account, I have decided not to recommend the creation of a supervisory board, or other body having executive powers, to share executive responsibility for the BCD.
- 6.17 As I indicated at paragraph 1.12 above, I nonetheless favour creation of an *advisory* board for the BCD. That board should not exercise executive authority. Its task should be the development of general policies and programs, not the making or approving of decisions about particular investigatory action. Upon reflection and having regard to the submissions, I have decided to recommend that, within the BCD itself, decisions about the initiation of an investigation and/or the summoning of a person for compulsory interrogation should be made by only one person: the Director (or any Acting Director) of the Division.
- 6.18 This does not mean the Director should have the final say about notices to attend for interrogation. Having regard to the invasive nature of a notice, there is a strong case for giving that task to an independent person.
- 6.19 Williams/McGarrity noted that one of the amendments proposed (but rejected by the then Government) to the Bill for the *Codifying Contempt Act 2004* would have required the approval of a Federal Court judge before BIT could exercise its investigatory and coercive powers. They commented:
- Some similar form of approval should be required for the exercise of the ABC Commissioner's investigatory and coercive powers. This would introduce an independent, apolitical element into the investigatory process. Not only would it assist in dispelling community fears about the politicisation of the ABCC, it is also appropriate given the serious consequences of the use of these powers, including the imposition of a mandatory jail term for failure to comply with a notice issued by the ABC Commissioner and the abrogation of the right to silence and the privilege against self-incrimination in examinations before the ABCC. It would be problematic if such a broad, unchecked discretion were conferred on a minister. It is even worse to confer it on an unelected person, such as the ABC Commissioner, who does not require approval for the use of the power and is not accountable to either parliament or the people.*¹⁵⁴

¹⁵³ Civil Contractors Federation, *Civil Contractors Federation Submission to Discussion Paper: Proposed Building & Construction Division of Fair Work Australia*, Submission 12, December 2008, page 28.

¹⁵⁴ Williams, G & McGarrity, N, *The Investigatory powers of the Australian Building & Construction Commission* (2008) 21 Australian Journal of Labour Law; Submission 3, November 2008, pages 264-265.

- 6.20 I agree with the sentiments expressed in this comment. However, I do not think the Director of the BCD should be required to obtain external approval of a mere decision to initiate an investigation. Such a decision would not, at that stage, affect any particular individual. Under the BCII Act, the individual impact occurs only when the ABCC decides to issue a notice under section 52. If the new legislation is to provide for similar decisions, that is the stage at which there should be a requirement of external approval.
- 6.21 I do not recommend the function of issuing attendance notices be given to members of the Federal Court or Federal Magistrates Court. A decision about issuing such a notice would be an administrative, not judicial, decision. The function could not be conferred on a federal judge or magistrate, acting in that capacity; but only on an individual judge or magistrate, acting in a personal capacity, but designated because of the fact that he or she holds judicial office.
- 6.22 In recent years, the Federal Court judges have become increasingly uneasy about accepting designation to issue warrants and make administrative orders, for fear of compromising their ability to hear challenges to actions taken in reliance upon those warrants and orders. As a result, today, most applications for telephone interception warrants are handled by nominated members of the AAT.
- 6.23 The President and Deputy Presidents of the AAT are all experienced lawyers and accustomed to balancing considerations of public and private interest. They deal regularly, often at short notice, with applications for warrants and orders. There are presidential members resident in every State.
- 6.24 A requirement that an attendance notice be issued by a presidential member of the AAT would not impose significant cost or delay. As is the position with warrants, the application would usually proceed *ex parte*; that is, without the affected person being present. It could be expected to be heard within a day or so of request, and take less than an hour. It would certainly be more expeditious and satisfactory than the BHP proposal for review, by a panel chairperson, of the Director's decision.
- 6.25 If this suggestion is adopted, it would, of course, be necessary for the Director to provide to the presidential member a written account of the known relevant facts, to enable him or her to be satisfied about the threshold requirements. However, this would not be an unreasonable burden. It would be good practice, in any event, for the Director, at the stage of considering the issue of an attendance notice, to prepare a written summary of the known facts. Ordinarily at least, one would expect the presidential member to be prepared to receive information on the basis of information and belief; that is, sourced hearsay.
- 6.26 The ABCC Annual Report for 2007-08 reveals that, in that year, the ABCC conducted 54 examinations pursuant to notices issued under section 52 of the BCII Act. Even if notices continued to be issued at this rate under the new regime, notwithstanding a tighter statutory threshold, the additional function would have little impact on the AAT workload. Once per week on average, a presidential member, somewhere in Australia, would be required to devote upwards of an hour to this new task.
- 6.27 It should be provided, in the new legislation, that any notice requiring a person to attend for interrogation before a BCD officer be issued by a presidential member of the AAT.

- 6.28 In their submission, Williams/McGarritty made some observations about the absence of judicial review of a decision, under section 52 of the BCII Act, to issue a notice to attend for interrogation. They said:

There is no mechanism in the BCII Act for either internal or external review of the merits of a decision by the ABC Commissioner to exercise his or her investigatory powers. There is also only limited scope for judicial review of the legality of such a decision. Because parliament has excluded judicial review under the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act), it is not possible to challenge a decision by the ABC Commissioner to exercise his or her investigatory powers on the grounds set out in ss 5 and 6 of that Act. These grounds include: breach of the rules of natural justice; failure to observe procedures required by law; the making of the decision was an improper exercise of power; fraud; the power was exercised in bad faith; and abuse of power. Review of the legality of a decision by the ABC Commissioner to exercise his or her investigatory powers will still be available under the constitutional writs in s 75(v) of the Constitution. However, as members of the High Court have noted, review under the ADJR Act is likely to be wider than review under s 75(v) as the latter is restricted to challenges based on a 'jurisdictional error'.

The importance of judicial review has been accepted by a number of independent bodies. The Cole Royal Commission recognised in its final report the importance of judicial review being available under both the ADJR Act and s 75(v) of the Commonwealth Constitution. It stated that 'the [ADJR Act] ought to apply to the ABCC, according to its terms'. Similarly, the Committee on Freedom of Association of the International Labour Organisation in 2004 noted the potentially dangerous consequences of giving too large an unreviewable discretion to the ABC Commissioner. The committee considered that the 'expansive powers of the ABCC, without clearly defined limits or judicial control, could give rise to serious interference in the internal affairs of trade unions'.¹⁵⁵

- 6.29 Because of the terms of section 75(v) of the Constitution, a recipient of an attendance notice would have a constitutionally-guaranteed right to challenge the decision to issue the notice, and this right can be exercised in the Federal Court; see section 39B (1) of the Judiciary Act 1903. However, usually, this would not be useful; the Court would be able to intervene only if the applicant is able to show jurisdictional error.
- 6.30 As a general rule, I am in favour of subjecting administrative decisions to the ADJR Act. However, I do not recommend that a decision of a presidential member of the AAT to issue a notice to attend for interrogation should be made reviewable under that Act. There is a danger that applications for review would routinely be made, either to procure delay or for other tactical reasons. This happened, in the mid-80s, in respect of committal proceedings concerning federal offences that were being heard by magistrates.
- 6.31 If an application for judicial review of a decision to issue an attendance notice was made, inevitably it would delay the interrogation and, perhaps, the whole investigation. The delay would increase if either party chose to appeal the first-instance decision.
- 6.32 The possibility of delay is not the only problem. Judicial review would be inherently unsatisfactory. The primary respondent would be the AAT member who issued the attendance notice, but he or she might enter a submitting appearance, thereby depriving the court of any information about the reasons for issuing the notice. The Director might be joined as a respondent, and then put in a dilemma. In order to rebut grounds such as improper exercise of power, bad faith, and unreasonableness, the Director might feel forced to place before the court all the information so far obtained in the investigation in respect of

¹⁵⁵ *ibid* page 266.

the matter under investigation and to indicate the nature of the questions intended to be directed towards the person summoned for interrogation. The person would learn what other people have said about the matter and be forewarned about the questions likely to be directed to himself/herself, thereby reducing the utility of the interrogation. Alternatively, the Director might decide to withhold this information from the reviewing court, thereby running the risk of a defensible decision being struck down.

- 6.33 A decision made *ex parte* on an application to issue an attendance notice may sometimes be one that would not have been made if the decision-maker had first heard the intended recipient of the notice. But the effect of such a decision is only to require the recipient to attend for interrogation. Particularly if my recommendations for greater supervision of the interrogation process are adopted, the occasional case in which the notice might not have been issued may seem a lesser evil than the prospect of frequent litigation about the justification for the notice.

The threshold test

- 6.34 Section 52 of the BCII Act empowers the ABC Commissioner or a Deputy ABC Commissioner¹⁵⁶ to issue to any person a notice to attend for interrogation if he/she “believes on reasonable grounds” that the person “has information or documents relevant to an investigation” or “is capable of giving evidence that is relevant to an investigation.” The investigation must, no doubt, be of the type mentioned in section 10(b) of the Act; that is an investigation into a suspected contravention, by one or more building industry participants, of the BCII Act, the WR Act, an award or certified agreement or an order of the Australian Industrial Relations Commission. However, as I said in the Discussion Paper: “the issuing officer is not required to make a judgment as to the need to make that investigation, having regard to the nature and seriousness of the suspected contravention, nor the importance to the investigation of having evidence from the particular person.”¹⁵⁷

- 6.35 In October 2005, very early in its life, the ABCC published guidelines that explained its approach in considering whether or not to issue a summons to someone to attend for interrogation. The guidelines provide:

Obtaining information voluntarily or by use of pre-existing information gathering powers given to ABC inspectors under the BCII Act are the preferred methods of obtaining information. Accordingly, the decision to exercise the compliance powers will not be taken lightly.

*The ABCC shall not use the powers to conduct a ‘fishing expedition’ for information. A notice can only be issued if the ABC Commissioner or Deputy ABC Commissioner has the requisite ‘belief on reasonable grounds’ in relation to the matter. A mere assertion that the relevant matter constitutes or may constitute a contravention of a designated building law will not constitute ‘reasonable grounds’.*¹⁵⁸

- 6.36 Although it is obviously desirable that the ABCC first consider whether the information may be obtained voluntarily, it will be noted that the guidelines do not include considerations like those mentioned in the Discussion Paper. In any event, administrative guidelines are no substitute for enforceable statutory rules.

¹⁵⁶ See section 13(2) BCII Act.

¹⁵⁷ Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, para 119.

¹⁵⁸ Office of the Australian Building & Construction Commissioner, *Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry*, October 2005, paras 3-4.

- 6.37 The threshold test received little attention in the submissions. This was probably because, with the exception of those made on behalf of South Australia and Victoria, the submissions were polarised in relation to coercive interrogation. The employer submissions all favoured continuation of the current coercive interrogation regime, most with no discussion of the finer points raised by the Discussion Paper. Most of the submissions opposing coercive interrogation powers treated the present issue as one that, for them, did not arise.
- 6.38 However, Williams/McGarrity commented that the powers in section 52 of the BCII Act “are conferred in overbroad terms, with limitations on their scope too often left to the discretion of the ABC Commissioner rather than being set out in the BCII Act.”¹⁵⁹
- 6.39 Although the New South Wales Government opposed conferring coercive interrogation powers on the new Specialist Division, it did refer to the need for safeguards, if that power was conferred; in particular, that the agency “be required to consider alternative means of gaining the information and weigh up the probable importance of the information with the cost to the person of providing it”.¹⁶⁰
- 6.40 Victoria also dealt with safeguards:
- Further, the Victorian Government submits that if these powers are retained, adequate safeguards should be instituted in order to ensure that such powers are exercised appropriately and that the rights of affected employees and others are not unreasonably compromised in the exercise of such powers. In addition, . . . the Victorian Government is concerned that the power to compel a person to provide information or documents or to attend before the Commissioner amounts to a low investigatory threshold.*
- Where such a power to compel attendance or to require the provision of documents or information (whether verbal or oral) is retained, the Victorian Government submits that more stringent criteria must be satisfied before a notice can be issued pursuant to section 52(1). In this regard, the Victorian Government supports and commends His Honour’s suggestion regarding preconditions for the exercise of that power, namely that an obligation should be placed upon any person empowered to issue a summons, to compel a person to provide information or documents or to attend before the Commissioner to answer questions, to take into account the nature and seriousness of the suspected contravention and the importance of the evidence from a particular person to the investigation.*¹⁶¹
- 6.41 The threshold test was referred to at some forums. There was no opposition to the idea of a more demanding threshold, along the lines floated in the Discussion Paper. However, on reflection, I think a reference should be made to the position of the person to be summoned, so far as that is known.
- 6.42 I recommend that the AAT presidential member charged with the duty of determining whether a person should be required to attend for interrogation should need to be satisfied by written material, which may include “information and belief” evidence, that:

159 Williams, G & McGarrity, N, *The Investigatory powers of the Australian Building & Construction Commission* (2008) 21 Australian Journal of Labour Law; Submission 3, November 2008 page 256.

160 New South Wales Government, *Submission to the Wilcox Inquiry on the proposed Building and Construction Division of Fair Work Australia*, Submission 37, December 2008, page 85.

161 Victorian Government, *Victorian Government response to the Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, Submission 44, January 2009, para 36-37.

- (i) the BCD has commenced an investigation into a particular suspected contravention, by one or more building industry participants, of the Fair Work Act, an “industrial law”, as defined by that Act, or an industrial instrument made under that Act;
- (ii) there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation, or is capable of giving evidence that is relevant to that investigation;
- (iii) it is likely to be important to the progress of the investigation that this information or evidence, or those documents, be obtained; and
- (iv) having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact upon the person of being required to do so, insofar as this is known, it is reasonable to require that person to attend before the Director or a Deputy Director and answer questions relevant to the investigation.

The person to preside over the interrogation

- 6.43 Section 52 of the BCII Act speaks about the attendance pursuant to a notice under that section being “before the ABC Commissioner, or an assistant”. The term “assistant” is defined by subsection (8) as including a Deputy ABC Commissioner, an ABC Inspector or any member of the staff of, or any consultant to, the ABCC. The range of people authorised to conduct compulsory interrogations is extremely wide; in my opinion, unacceptably so.
- 6.44 Mr Ross Dalglish (Deputy Commissioner Legal of the ABCC) told me that, in fact, almost all ABCC interrogations to date have been conducted by the ABC Commissioner himself or one of the two Deputy ABC Commissioners. On a few recent occasions, an Assistant ABC Commissioner has presided.
- 6.45 Mr Dalglish said the ABCC always briefs counsel to be the primary questioner at an interrogation. This allows the presiding officer to adopt a less active, and less obviously partisan, role. Of course, as everyone present would realise, the presiding officer always has an interest in ascertaining the facts of the case and, in practice, often puts some questions.
- 6.46 I have considered whether it ought to be the rule that an independent person preside over compulsory interrogations. No doubt it would be possible to assemble an Australia-wide panel of lawyers, practising or retired, who are experienced in the conduct of litigation and/or inquiries, and who would be prepared to serve, as needed, as presiding officers at compulsory interrogations. This might be more expensive than the present practice, but expense is not the major reason why I have decided not to recommend such a rule. This would, after all, be an investigation, not a trial, and one where there is statutory protection against self-incrimination; so it seems desirable that the interrogation be controlled by a person who understands its purpose, the relationship between this witness’ evidence and that of others and the nature of the suspected contravention.
- 6.47 Having said that, I think it important that the new legislation require the presiding person to be a senior officer of the Specialist Division. The ABCC’s practice, in relation to choice of the presiding officer, cannot be criticised; but it is not satisfactory to leave this matter to the discretion of the Director of the day. In my opinion, the legislation ought to require the interrogation to be conducted by the Director, or a Deputy Director, of the Division.

External monitoring of the interrogation

(i) The Discussion Paper

- 6.48 In the Discussion Paper I discussed external monitoring of the manner of exercise of compulsory interrogation powers:

*If the proposed Specialist Division of FWA is to be granted coercive powers, such as those now enjoyed by the ABCC, it seems essential to subject it to external monitoring. A requirement of prior concurrence would be a useful safeguard against inappropriate invocation of the power, but it would still remain important to have the power's actual use monitored by a high status independent person.*¹⁶²

- 6.49 I also described the legislation governing the monitoring, by the Special Investigations Monitor ("SIM"), of the manner of exercise of the powers of the Victorian Office of Police Integrity ("OPI").¹⁶³

(ii) Submissions about the need for external monitoring

- 6.50 Williams/McGarrrity noted that Commissioner Cole had envisaged "two methods of oversight": a requirement that the ABCC submit an annual report to the Minister and "scrutiny by the Commonwealth Ombudsman".¹⁶⁴ In addition, Commissioner Cole recommended that the legislation establishing the ABCC make its operations, including its conduct of interrogations, subject to judicial review under the ADJR Act. However, the BCII Act does not do this.¹⁶⁵

- 6.51 Williams/McGarrrity went on:

*The two methods of oversight referred to by the Royal Commission are inadequate by themselves. The requirement that the ABC Commissioner provide the Minister for Employment and Workplace Relations with an annual report on the ABCC's operations, including the number of investigations and prosecutions, does not compensate for the absence of review by an independent body into specific uses of the ABCC's investigatory powers, nor does the fact that the ABCC falls within the general jurisdiction of the Commonwealth Ombudsman. The ABCC is treated by the Ombudsman in exactly the same manner as other Commonwealth government agencies. That is, complaints may be made to the Ombudsman by individuals or organisations affected by a decision of the ABC Commissioner and the Ombudsman may investigate these complaints, or the Ombudsman may initiate an ad hoc investigation on its own motion. Given the extraordinary nature and scope of the ABC Commissioner's investigatory powers, there should be a mandatory annual review by the Ombudsman of the use of these powers.*¹⁶⁶

- 6.52 No doubt it would be possible to subject the BCD's interrogations to judicial review, but this is unlikely to prove satisfactory. As is apparent from the grounds of review set out in sections 5 and 6 of the ADJR Act, judicial review under that Act focuses on the making of a particular decision: not its merits, but whether it is vitiated by absence of power, fraud, improper purpose or the like. It is difficult to apply that focus to the type of complaint likely to arise out of an interrogation.

¹⁶² Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, para 129

¹⁶³ *ibid* page 32.

¹⁶⁴ Williams, G & McGarrrity, N, *The Investigatory powers of the Australian Building & Construction Commission* (2008) 21 *Australian Journal of Labour Law*; Submission 3, November 2008 pages 267-268.

¹⁶⁵ *ibid*.

¹⁶⁶ *ibid* page 268.

- 6.53 That type of complaint is illustrated by some interviews included in the CFMEU video-documentary, *Constructing Fear*,¹⁶⁷ and the submission of Mr Gareth Davies.¹⁶⁸ Those communications allege treatment at an ABCC interrogation that the complainant found intimidating. Complainants mentioned such matters as the intrusive nature, manner and tone of the questioning, even the hearing room seating arrangements.
- 6.54 I have not investigated these complaints or attempted to reach any conclusion about their accuracy; that is not my assigned task. I mention the complaints merely to make the point that complaints like these could not satisfactorily be resolved by review under the ADJR Act. None of the grounds available under that Act would enable them to be adequately addressed. However, such complaints could satisfactorily be resolved by an independent person reviewing a videotaped record of the interrogation.
- 6.55 Most employer submissions argued there would be no need for external monitoring of interrogations undertaken by the proposed Specialist Division. Some asserted that the ABCC had never abused its interrogation power and supported the assertion by remarking that there had not yet been a case in which the Commonwealth Ombudsman had upheld a complaint against the ABCC.
- 6.56 Many employer interests referred to the ability of the Commonwealth Ombudsman to investigate, and comment upon, any complaint made by an interrogee concerning his/her treatment before and during the interrogation. All these people regarded this as sufficient. No employer actively supported the idea of proactive external monitoring along the lines of that undertaken in Victoria by the SIM.
- 6.57 Most of the submissions that reflected an employee or union perspective said little or nothing about external monitoring. For them, there ought to be no compulsory interrogation, so the issue of external monitoring did not arise. The Queensland Government adopted the same position.
- 6.58 Other submissions, while opposing compulsory interrogation, put a fall-back argument supporting some form of external monitoring.¹⁶⁹ New South Wales said:
- [I]f coercive powers are to be granted to the Specialist Division, it is the view of the New South Wales Government that they should be strictly limited and subject to legislative safeguards including external monitoring arrangements. This is essential to ensure the Specialist Division's activities are subject to scrutiny by an independent source. The Victorian OPI model is attractive as it provides for several levels of scrutiny and would ensure that the extraordinary powers are kept in check.*¹⁷⁰
- 6.59 Surprisingly, the ACTU opposed external monitoring on the ground that the conduct of building industry employees, that would be under investigation, could not be compared with the type of conduct that is examined in Victoria by agencies (the OPI and Chief Examiner) whose interrogations are monitored by the SIM. The submission misses the point. The external monitoring regime is not directed to the conduct of the person under investigation but to the conduct of the investigator.

167 Construction, Forestry, Mining and Energy Union, *Australia's Secret Industrial Inquisition - Constructing Fear*, August 2007, www.constructingfear.com.au.

168 Davies, G. *Submission re "proposed building and construction division of fair work Australia"*, Submission 7, December 2008.

169 See The Police Association of Victoria, *Response to the Proposed Building & Construction Division of Fair Work Australia Discussion Paper*, Submission 11, December 2008, para. 14; Gwandalan Summerland Point Branch of the Australian Labor Party, *Submission to the Hon Murray Wilcox*, Submission 15, December 2008, para 14; and the New South Wales Government, Queensland Government, *Wilcox Consultation Process on the Proposed Building and Construction Division of Fair Work Australia*, December 2008 pages 18 and 20.

170 New South Wales Government, *New South Wales Government submission to the Wilcox Inquiry into the proposed Building and Construction Division of Fair Work Australia*, Submission 37, December 2008, page 86.

6.60 SafeWork SA suggested the creation of an independent supervisory board, to monitor the manner in which the Specialist Division exercised its coercive powers. The board would be constituted by individuals experienced in law and industrial relations, preferably as pertaining to the building and construction industry, with a “judicial or quasi-judicial member”, presumably as chairperson. SafeWork SA said:

*Such a body would have jurisdiction to conduct reviews into specific uses of the specialist division’s investigatory or other powers where they differ in any manner from the powers available to the Fair Work Inspectorate in general. The Board should be required to report to the Minister who would be obliged to table such reports in the Commonwealth Parliament. The Board could also be empowered to make recommendations on these matters and submit proposals to the Minister as necessary.*¹⁷¹

6.61 The Victorian Government also felt there was a need for external monitoring of any coercive interrogation power. It endorsed the comment I made at paragraph 129 of the Discussion Paper, refer to paragraph 6.48 above, and went on:

*The Victorian Government agrees that the Victorian Office of Police Integrity (OPI) is the most rigorous current Australian monitoring regime. In this respect, it is a useful framework to consider in developing an effective external monitoring system for the proposed specialist division.*¹⁷²

(iii) The Commonwealth Ombudsman

6.62 Professor John McMillan, the Commonwealth Ombudsman (“CO”), made a submission in which he drew attention to the possibility of using his office in a monitoring role, thereby obviating the expense of setting up a special agency like Victoria’s SIM. The submission pointed out that the CO, who is also the Australian Capital Territory Ombudsman, already has the duty of:

...inspecting records or providing oversight in areas such as:

- *telecommunications interception by Commonwealth law enforcement agencies*
- *access to stored communications by Commonwealth, State and Northern Territory enforcement agencies*
- *use of surveillance devices by Commonwealth law enforcement agencies*
- *controlled operations by Commonwealth law enforcement agencies*
- *immigration detention that extends for more than two years*
- *access to the ACT Sex Offender Register.*¹⁷³

6.63 Professor McMillan likened these inspection functions to that “performed in State systems by the statutory inspector or public interest monitor.”¹⁷⁴ He mentioned the annual briefing provided by his Office to a joint Parliamentary committee in respect of the controlled operation powers of the Australian Commission for Law Enforcement Integrity.

6.64 Professor McMillan set out a number of advantages possessed by his Office:

- *expertise and a solid sense of its own role and the issues that arise in investigation and oversight functions, and in administration more generally*

171 Safework South Australia, *Safework SA’s Submission in response to the Discussion paper on the proposed Building and Construction Division of Fair Work Australia*, Submission 32, December 2008, page 3.

172 Victorian Government, *Victorian Government response to the Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, Submission 44, January 2009, para 41.

173 Commonwealth Ombudsman, *Submission by the Commonwealth Ombudsman*, Submission 23, December 2008, page 3.

174 *ibid.*

- *experience in a wide range of work including, for example, staff who specialize in the performance of oversight work rather than complaint investigation*
- *sufficient size and scalability to enable staff to be applied to specialist functions as demand varies*
- *a sound and considerable public profile and a reputation for discretion and balance within the public sector.*¹⁷⁵

6.65 The submission concluded:

*The Discussion Paper proposes that the Specialist Division would exercise significant intrusive powers. Given the sensitivity that surrounds such a function, there is a need for oversight that goes beyond reacting to complaints. In summary, the Ombudsman already has functions similar to those suggested by the OPI model and has the powers to carry out those functions. The Ombudsman has considerable experience in the oversight of intrusive and contentious agency activity, including covert or discreet activity of which the individual subject to it is not be (sic) aware.*¹⁷⁶

(iv) Conclusions about need

6.66 In considering whether it is necessary to require external monitoring of the compulsory interrogations to be conducted by the Specialist Division, it is instructive to note the standards of accountability set by the Victorian Parliament.

6.67 In the Discussion Paper, I mentioned the role of the SIM in monitoring OPI interrogations concerning the conduct of police officers. I did not refer to the *Major Crime (Investigative Powers) Act 2004 (Vic)* (the MCIP Act). That Act provides for interrogation in relation to suspected organised crime. An organised crime offence is one punishable by imprisonment for ten years or more that involves multiple offenders, substantial planning and organisation, forms part of systemic and continuing criminal activity and has a purpose of obtaining profit, gain, power or influence: in other words, very serious crime. The power of compulsory interrogation may be exercised only after a Supreme Court judge has made a coercive powers order. The interrogation must be conducted by the Chief Examiner or an Examiner, in either case an experienced lawyer. Notwithstanding all this, the Victorian Parliament has thought it necessary to have the SIM monitor the interrogations. As with the OPI, by section 53 of the MCIP Act, the Chief Examiner is obliged to inform the SIM about the issue of a witness summons and to provide a written report, after the examination, setting out:

- the reasons for the examination and the place and time of the examination; and
- the name of the witness and of any other person who was present during the examination; and
- the relevance of the examination to the organised crime offence in relation to which the coercive powers order was made; and
- any other prescribed matters.

6.68 This report must include a copy of the video-recording of the interrogation that section 45 of the MCIP Act requires to be made.

6.69 The power to compel people to attend for interrogation and answer questions, under threat of imprisonment, is, by Australian standards, an extraordinarily intrusive power. Until the enactment of the BCII Act, it was reserved for cases where a legislature considered it necessary for a government agency to

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid* page 5.

investigate conduct much more serious than a breach of industrial law. Even then, the Victorian Parliament has thought it necessary to require external monitoring of interrogations conducted not only by the OPI, involving police conduct, but by the Chief Examiner in regard to major organised crime.

- 6.70 If it is necessary to monitor the conduct, by an experienced lawyer, of an interrogation about serious criminal activities, it must be even more necessary to monitor the conduct of an interrogation, into a mere breach of industrial law, by a person who is not necessarily a lawyer, and is a senior officer of the investigating body.
- 6.71 It is not to the point that no formal complaint has yet been made to the CO in respect of the ABCC's exercise of its compulsory interrogation powers. As is apparent from the comments I have mentioned, that does not mean there is no unhappiness. Many people would lack the confidence and/or knowledge necessary to make an official complaint against a powerful government agency. Moreover, the question is not whether the ABCC has given rise to justifiable complaint. We are talking, not about the ABCC's conduct, but about the desirable content of new legislation governing the operations of a new investigatory organisation. Sadly, history shows that any unmonitored power will eventually be abused. I adhere to the opinion, expressed in the Discussion Paper, that, if the new Specialist Division is to be given coercive powers, like those now enjoyed by the ABCC, it is essential to subject it to external monitoring.

(v) A new role for the Commonwealth Ombudsman?

- 6.72 I met with Professor McMillan in order to discuss the possibility of his office being the external monitor. The notion has obvious appeal. The CO's Office is well-respected in the community. It is readily accessible, with a call-centre and offices in every State and Territory. It is staffed by people who are experienced in monitoring the performance of sensitive duties by public officials. My only reservation was whether there would be any difficulty in the Office making the logistic adjustments necessary to fulfil this new role. It seemed to me that, if CO monitoring was to operate well, the work would need to be done by a small unit in the Office; perhaps comprising only two or three people, but senior people with experience in the conduct of inquiries. Given the wonders of modern communications technology, including that enabling the transmission of video material, the members of the unit could be located anywhere in Australia, but it would be important that one of them was available at any time. Of course, the new monitoring role would not occupy all the time of any of them; they would be free to perform other duties as well.
- 6.73 In my opinion, it would be desirable to model new legislation providing for CO monitoring of compulsory interrogations upon the Victorian statutes subjecting the OPI and Chief Examiner to monitoring by the SIM. If that model were followed, the Director of the BCD would be required to notify the CO, promptly after a decision by a presidential member of the AAT to issue an attendance notice, of that fact and the relevant circumstances and reasons. Probably the most convenient course would be to require the BCD to provide a copy of the documents put before the presidential member. The Director would be required to ensure that the interrogation was video-recorded and to forward a copy of that video, promptly after the interrogation, to the CO, along with any transcript of the hearing and a report containing information analogous to that listed in section 53 of the MCIP Act. The CO would be required to report to Parliament annually, and at any other time the CO thought necessary, about the exercise of the interrogation power.
- 6.74 Professor McMillan indicated he saw no difficulty in his Office being able to fit into this concept, if that were the wish of the Parliament. I recommend that course. Giving the monitoring role to the CO avoids both the duplication of resources and the delay that inevitably attends the establishment of a new agency.

Witnesses' expenses

- 6.75 The BCII Act provides for legal representation of persons summoned for interrogation, but it makes no provision for payment of the reasonable cost of that representation. A person served with a notice is thus forced to choose between three unpalatable alternatives:
- (i) to attend the hearing unrepresented, thereby foregoing his/her right to legal representation, and effective protection against irrelevant, or unnecessarily intrusive, questions, or other objectionable conduct of counsel or the presiding officer;
 - (ii) to pay the cost of representation himself/herself, thereby being out of pocket in relation to a matter where the person is a mere witness; or
 - (iii) to seek financial assistance from somebody else, such as the person's union (if any). This course may be distasteful to the person. Moreover, it may compromise, or be thought to compromise, the evidence the witness will then give.
- 6.76 This surprising omission from the BCII Act is compounded by the failure of the Act to make any provision for the payment of a witness' travelling (and any accommodation) expenses and loss of wages. This failure is extraordinary. For many years, it has been the rule that a person who serves a subpoena on a person, requiring his or her attendance at a court, is bound to offer conduct money covering travelling expenses. Moreover, the party issuing the subpoena is responsible, at least in the first instance, for the person's other reasonable expenses, including loss of wages. It is unconscionable to put people in the position of being required, under threat of imprisonment, to attend a hearing, as a witness, at their own expense.
- 6.77 I was informed by Mr Dalglish that the ABCC has long recognised the unfairness of this situation. However, the ABCC has not sought to cure the unfairness by requesting an amendment of the BCII Act. The ABCC has occasionally made a voluntary payment to a witness, but it does not favour this course because of concern that it may expose the witness to questioning, at any resultant trial, as to whether his/her evidence was thereby tainted.
- 6.78 I recommend it be made clear in the new legislation that the BCD is to bear the reasonable expenses incurred by summoned persons, including reasonable legal expenses.

Client legal privilege and public interest immunity

- 6.79 I have previously noted that subsection (7) of section 52 of the BCII Act makes the operation of that section "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." The Act does not define "law".
- 6.80 Client legal privilege is a concept developed, over many years, by judges concerned to ensure that people can obtain legal advice and assistance without fear of thereby compromising their position. Public interest immunity is designed to enable the courts to avoid the disclosure of sensitive information, such as national security and police intelligence, that ought not be disclosed. Both privileges apply in courts and are regarded as being of fundamental importance.
- 6.81 There is a question whether subsection (7) of section 52 precludes a person relying on either of these privileges. The negative argument would emphasise the word "enacted" and say the legislature was referring only to secrecy provisions imposed by statute. On the other hand, "enacted" appears only in the

parenthesis; it may not affect the interpretation of the major clause in the sentence. Moreover, paragraphs (a) and (c) of section 53(1) preclude an excuse based on contravention of another law or the public interest.

- 6.82 It is not clear whether those responsible for the wording of the BCII Act gave any thought to the desirability of retaining these privileges. Whether or not they did, the question ought now be considered. Given the fundamental importance of the two privileges, they ought to be recognised and made available by the new provisions concerning coercive interrogation.

Conclusion

- 6.83 Many people will be disappointed that I have felt it necessary to recommend that the new legislation provide for compulsory interrogation. As a person who puts a high value on civil liberties, I too am disappointed about that. However, I am confident the safeguards I have recommended, if implemented, will minimise the unnecessary use, and potential for misuse, of the power; without impeding, or significantly delaying, investigations of suspected contraventions of federal industrial law by building participants.

Recommendation 4:

The use of compulsory interrogation be subject to the following safeguards:

- (i) a notice to a person compulsorily to attend for interrogation be issued only by a presidential member of the Administrative Appeals Tribunal who is satisfied by written material, which may include evidence on the basis of "information and belief", that:**
 - (a) the Building and Construction Division has commenced an investigation into a particular suspected contravention, by one or more building industry participants, of the *Fair Work Act*, an "industrial law", as defined by that Act, or an industrial instrument made under that Act;**
 - (b) there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation, or is capable of giving evidence that is relevant to that investigation;**
 - (c) it is likely to be important to the progress of the investigation that this information or evidence, or those documents, be obtained; and**
 - (d) having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact upon the person of being required to do so, insofar as this is known, it is reasonable to require that person to attend before the Director or a Deputy Director and answer questions and/or produce documents relevant to the investigation;**
- (ii) the Director or a Deputy Director of the Building and Construction Division preside at all compulsory interrogations;**

- (iii) the Commonwealth Ombudsman monitor proceedings at all compulsory interrogations and for that purpose the Director:**
 - (a) promptly notify the Commonwealth Ombudsman of the issue of all notices to attend for interrogation; and**
 - (b) promptly after the interrogation, supply to the Commonwealth Ombudsman a report, a video recording of the interrogation and a copy of any written transcript; and**
- (iv) the Commonwealth Ombudsman report to Parliament annually, and otherwise as required, concerning the exercise of the power of compulsory interrogation.**

Recommendation 5:

The legislation authorising compulsory interrogation provide for:

- (i) payment to persons summoned for interrogation of their reasonable expenses (travelling, accommodation and legal, as may be) and any loss of wages or other income; and**
- (ii) recognition and availability of client legal privilege and public interest immunity.**

CHAPTER SEVEN—THE CODE AND GUIDELINES

The issue

7.1 The fourth topic discussed at the forums was;

“Having regard to the terms of the Fair Work Bill, and the considerations raised by the above questions, what future useful purpose will be served by the Implementation Guidelines? If they are to be retained, should they be amended in any way?”

The National Code of Practice for the Construction Industry

7.2 This document, commonly called “the Code”, was issued by the Commonwealth, with the agreement of all States and Territories, to state principles that would apply to future construction business with governments. The idea was to use the purchasing power of governments as a means of imposing more discipline on building industry participants. The Code commenced operation on 22 September 1997.

7.3 In the Discussion Paper, I summarised the topics covered by the Code.¹⁷⁷ I noted that, in my first-round meetings, nobody had suggested the Code caused them problems. This remains the situation. Although some submissions contain criticisms of the Guidelines, nobody has voiced a complaint about the Code itself.

7.4 I see no reason for the Government to take any action in regard to the Code.

The Implementation Guidelines for the National Code of Practice

(i) Nature of the Guidelines

7.5 The Guidelines were first issued by the Commonwealth Government, in February 1998. At that stage, its application was limited to Commonwealth Government projects. The Guidelines have since been amended on several occasions. As now framed, the Guidelines extend well beyond Commonwealth projects. They also apply to projects indirectly funded by the Commonwealth, above minimum amounts, and the privately-funded work of entities that wish to be considered for Commonwealth Government contracts.

7.6 In the Discussion Paper, I summarised the terms of the Guidelines, as they currently stand.¹⁷⁸ I will not repeat that summary. I mentioned there was a question whether the content of the Guidelines fell within my Terms of Reference.¹⁷⁹ However, I indicated I was prepared to receive, and pass on to you as Minister, any submissions that people cared to make on that subject.

7.7 I noted the informal status of the Guidelines:

The current Guidelines have no statutory force. They are amendable at the whim of the Minister of the day, without the necessity (legally, at least) for consideration by Cabinet or the Parliament. The current Guidelines are not a disallowable instrument, meaning that neither House of Parliament has power to set them aside. Thus there is no Parliamentary supervision of the content of a body of rules whose application may have a profound effect upon a building participant’s business. And it is doubtful there would be any way in which a court could intervene effectively to protect a person against a perverse interpretation or application of the Guidelines. There would appear to be a strong

¹⁷⁷ Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, page 12.

¹⁷⁸ *ibid* paras 36-47.

¹⁷⁹ *ibid* paras 51-52.

case, if the Guidelines are to be retained, for putting them on a more formal basis, at least to the extent of providing for them to be a disallowable instrument and providing effective recourse to the courts in respect of any legal dispute—for example about their interpretation or application—and the AAT for review of the merits of particular decisions.¹⁸⁰

(ii) The employers' attitude to the Guidelines

7.8 The submissions revealed strong employer support for the Guidelines, sometimes mislabeled "the Code". NECA expressed the reason in this way:

The importance to NECA of the Guidelines (and Code) has been the overlap between legislation, policy and practical 'on-the-ground' implementation. Whilst not directly covered by the BCII Act, the obligations (and reach) of the Guidelines, has ensured that self compliance and self-assessment in relation to proper industrial practices and the rule of law (including the BCII Act) are now a commercial and financial imperative for all participants in the industry. In this regard, the Guidelines have had a marked effect in the industry upon:

- *prohibited content in registered and unregistered industrial agreements;*
- *union right of entry;*
- *the selection and use of subcontractors;*
- *project agreements and 'jump-up' clauses (including in respect of site allowances and redundancy fund payments);*
- *the use of union-nominated labour, shop stewards and/or OH&S representatives;*
- *pattern bargaining;*
- *dispute resolution procedures; and*
- *OH&S.*¹⁸¹

7.9 Under the heading "The Importance of the Code", the HIA said:

In addition, there is the problem that the proposed Fair Work Bill makes no provision for a Code of Practice or an accreditation scheme similar to the established under Chapter 3 and Part 2 of Chapter 4 of the Building and Construction Industry Improvement Act 2005.

The ABCC cannot be viewed separate from the Code. Each reinforces the other. One enforces industrial laws. The other gives employers every reason to think long term and not to acquiesce in order to buy short term industrial peace. It is a licensing regime for commercial building projects funded by the Commonwealth.

In the HIA's experience the Code, although an administrative burden for some members, has been equally – if not more – responsible for the cultural improvements in the industry.

*Whatever the powers of the new Inspectorate, they should include the ability to maintain and enforce a Code of Practice and accreditation for federal government work.*¹⁸²

¹⁸⁰ *ibid* para 85.

¹⁸¹ National Electrical and Communications Association, *Submission re: proposed Building and Construction Division of Fair work Australia*, Submission 18, December 2008, para 43.

¹⁸² Housing Industry Association Ltd, *Wilcox Inquiry Into The Creation of Building & Construction Industry Specialist Division Within the Inspectorate of Fair Work Australia*, Submission 20, December 2008, page 7.

7.10 The CCIWA submitted:

The Guidelines were introduced as a set of procedures to operate administratively in conjunction with the WR Act and later the BCII Act. They have acted as the third part of the compliance and monitoring system intended to assist Australian Government agencies and Commonwealth Authorities and Companies Act 1997 ("the CAC Act") bodies interpret and implement aspects of the Code in relation to construction projects.

Since their alteration in September 2005 following the Cole Royal Commission's recommendations for improvements to the effectiveness of the Code and Guidelines they have been regarded in the industry as effective.¹⁸³

- 7.11 In discussions, some employer representatives said the importance of the Guidelines was that they raised the stakes. Even if the Guidelines covered much the same ground as the BCII Act and WR Act, it was one thing to risk a penalty for a contravention of the legislation; it was another to shut oneself out of all Commonwealth funded work. The employer representatives generally added that the unions knew it was imperative for the employer to remain "code-compliant" (actually Guidelines compliant); this helped the employer resist any union pressure to break the rules.

7.12 The MPMSAA pointed out the Guidelines also protect employers from other employers:

In many cases the Code and Guidelines duplicate provisions of the Workplace Relations Act 1996. They operate, however, not to prevent workers or unions applying pressure for particular benefits, but to prevent employers putting pressure on other employers to do so. The sanction for breaching the Code and Guidelines is to be prevented from tendering on Commonwealth funded projects for periods of time.

It is submitted that the Code and Guidelines provide a powerful incentive, in particular, for principal contractors not to make sweetheart arrangements with unions for short term gain in the full knowledge that such arrangements will not be an additional cost to them, but will be borne by the specialist contractors which employ almost all of the labour on such sites.¹⁸⁴

- 7.13 Amongst employer representatives there was, however, a widely held view that the Guidelines ought to be put on a more formal basis than at present. AIG/ACA said:

Despite some initial difficulties transitioning to these arrangements, the use of procurement policy by Commonwealth departments and agencies has been an important element in the success of the reform of the construction industry. The use of the Code and Guidelines now enjoy significant industry support.

However, it has always been Ai Group and ACA's view that given the largely regulatory role proposed for the Building Code, the existing Code and Guidelines and the proposed Building Code should have been given effect as a regulation of the Commonwealth pursuant to the Building and Construction Industry Improvement Act 2005.

It remains our view that in order to protect the rights of building contractors and other building industry participants, there should be an appropriate degree of Parliamentary and judicial scrutiny of the Code and any amendments made to it.

183 Chamber of Commerce and Industry of Western Australia, *Proposed Building and Construction Division of Fair Work Australia*, Submission 24, December 2008, page 34.

184 Master Plumbers and Mechanical Services Association of Australia, *Proposed Building & Construction Division of Fair Work Australia*, Submission 13, December 2008, para 3.2.3-3.2.4.

Ai Group and ACA support the right of the Commonwealth, as a client of the industry, and as a financier of infrastructure (through various Commonwealth - State deeds of arrangement) to use its purchasing power to influence the behaviour of those who provide commercial services.

Equally, we support the right of Governments to enact laws and regulations to regulate the industry. But those laws and regulations must be passed by the Parliament, and they should not deny individuals and organisations the right to seek appropriate review of administrative decisions that affect their businesses.

In summary, Ai Group and ACA support the use of purchasing policy to assist with the reform of the construction industry. However, we do recommend:

- The regulations establishing the Code and Guidelines must be subject to Parliamentary scrutiny;*
- The standards by which compliance is assessed must be clear and unambiguous;*
- The process of assessment must be transparent, independent and rigorous;*
- There must a proper process of appeal or review when administrative decisions made behind closed doors can have deleterious commercial consequences for companies.¹⁸⁵*

7.14 The MBA submitted:

Commonwealth insistence that those wishing to tender for major projects must have Code and Guidelines compliant workplace relations arrangements in place has been a principal mechanism in achieving the cultural change that has occurred in the industry to date. Their effectiveness is indicated by their effect in eliminating from agreements the right to require non-working union delegates to be employed. The Code and Guidelines have had a proactive effect in that workplace agreements have had to be modified so as to comply with their stipulations. This pro-activity has accelerated cultural change which would otherwise have to rely upon reactive circumstances such as penalising bad behaviour. Obviously, the latter process is not as expeditious in stimulating cultural change.

Under the Guidelines, reform is also extended to industrial instruments that are not registered under the WRA. Unregistered agreements must comply with the Code and Guidelines and this rule has been a boon for workplace reform. Unregistered agreements, including side deals and common law contracts, may not contain matters that would, if they were included in a workplace agreement, be prohibited content (as specified in the Workplace Relations Regulations 2006). The effect has been to restrict perks such as bargaining agents' fees from spreading via unregistered instruments. Master Builders' policy, largely embodied in the Government's election policy Forward with Fairness, is for there to be constraints on bargaining where the public interest is affected, such as with pattern bargaining, union bargaining fees or non-pertaining matters. Accordingly, this translates to fairly extensive content constraints, a matter entrenched in the current industry arrangements by the Code and Guidelines.

Master Builders is aware that the Government's policy is not to have extensive constraints on bargaining. However, the Government's policy for industrial relations also made clear that:

The principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue, as will a specialist inspectorate for the building and construction industry.

¹⁸⁵ Australian Industry Group and the Australian Constructors Association, *Joint submission to the Hon Murray Wilcox*, Submission 27, December 2008, page 13.

It would be extremely difficult for the principles of the current framework to be applied without retaining the Code and Guidelines.

Master Builders policy is for the Guidelines to take the form of delegated legislation because of their success in requiring builders to enter into workplace agreements that reflect flexibility and because they have become a catalyst for breaking the old mould of agreement making conduct. . . Since February 2006 Master Builders has called for the Code and Guidelines to be issued as the statutory Building Code for the purposes of section 27(1) BCII Act.¹⁸⁶

- 7.15 BHP was the only employer interest to oppose putting the Guidelines on a more formal basis. BHP described the Code and Guidelines as “important elements in the recent reforms of the building and construction industry”¹⁸⁷ but went on:

One of the factors upon which comment is made is that the Code and Guidelines operate under the executive power of the Commonwealth and have not been given legislative form. BHP Billiton submits that this is unexceptionable and should be retained. First, the sanction for non-compliance with the Code or Guidelines is a purely economic one imposed by the Commonwealth through its market position. No offence is created. Secondly, use of executive rather than legislative power adds to the utility of the Code and Guidelines since they must be flexible in order to deal with practical situations as they develop. Use of the Commonwealth’s executive power rather than its legislative power is ideally suited for this purpose. It would be a retrograde step, playing into the hands of persons who wish to re-establish the former ungovernable industrial relations in the building and construction industry, if the flexibility and speed of response now available was compromised by resort instead to a legislative regime.¹⁸⁸

- 7.16 JHG expressed strong support for the Code and Guidelines but had a suggestion:

The Code and Guidelines form an integrated and essential part of the regulatory framework and should be retained. The strength and effectiveness of the Code and Guidelines come largely from the fact that they are given effect by virtue of the Commonwealth Government - a major client of the building and construction industry - however the Code has not been properly implemented and there are currently inadequate formal compliance mechanisms in place. The Specialist Division should be responsible for all Code matters relating to interpretation and the assessment of contractors’ performance against the Code.¹⁸⁹

- 7.17 Elaborating, JHG said:

The Code has been a critical component of the reform process. In practical terms it applies only to the major contractors – those companies who are large enough to have a significant proportion of their businesses reliant upon Commonwealth funded projects. Generally, subcontractors will only seek to comply with the Code through their relationships with major contractors. Because the Commonwealth is the provider of such a significant proportion of the industry’s revenue, major contractors have no commercial option but to ensure that their own operations and those of their sub-contractors and suppliers comply with the Code.

¹⁸⁶ Master Builders Australia Inc, *Submission to the Hon Murray Wilcox on Proposed Building and Construction Division of Fair Work Australia*, Submission 16, December 2008, paras 12.5-12.8.

¹⁸⁷ BHP Billiton Pty Ltd, *Submission of BHP Billiton: Proposed Building & Construction Division of Fair Work Australia*, Submission 10, December 2008, para 52.

¹⁸⁸ Ibid.

¹⁸⁹ John Holland Group Pty Ltd, *Proposed Specialist Division of Fair Work Australia*, Submission 9, December 2008, page 7.

The view that the Code is in some way anti-competitive is flawed. The Code expressly prohibits attempts by head contractors to force sub-contractors to adopt pattern and/or project agreements as a condition of securing work on a project. Prior to the reform process, major contractors would require sub-contractors to be party to pattern agreements – a standard form of agreement with the relevant union(s). This meant that if a sub-contractor wanted to participate in major projects, he had no option but become party to either the pattern agreement, a project agreement, or both. In other words, a condition of doing business with a major contractor was that the sub-contractor had to become party to an agreement that may not suit the needs of his enterprise or his employees, and which would increase costs and reduce productivity. This practice, analogous to third line forcing was indeed anti-competitive.

By contrast, the Code encourages all sub-contractors to develop their own employment arrangements and prohibits any form of discrimination on the basis of those employment arrangements. This encourages competition in its broadest sense – that is sub-contractors can come to the market and compete on any aspect of their business, including in the employment arrangements and labour productivity. This ability offers the industry and its clients significant further upside if the Code and associated sanctions are left in place. Since the reinvigoration of the Code and Guidelines following the Cole Royal Commission, there has been confusion as to who is responsible for its interpretation and for the assessment of contractors' performance against the Code. Many contractors have abdicated responsibility for Code compliance to DEEWR or its predecessor DEWR. DEEWR is not, in our assessment, capable of effectively managing Code interpretation or enforcement. In our experience, this has led to a dilution of the effect of the Code. Attachment C to this Submission is a copy of correspondence from John Holland to DEWR/DEEWR which clearly demonstrates that the Code matters are not effectively managed by DEWR/DEEWR. We would recommend that the proposed Specialist Division be allocated responsibility for Code interpretation and the assessment of contractors' performance under the Code.¹⁹⁰

- 7.18 The Electrical and Communications Association of Queensland ("ECA") supported the Code and Guidelines but thought decisions under them ought to be reviewable by the AAT, after an internal review whose findings had been supplied to the parties.

(iii) The States and local government

- 7.19 All five States that made submissions expressed concern about the Guidelines. They were joined by the Local Government Association of NSW and Shires Association of NSW.¹⁹¹ South Australia and New South Wales called for the Guidelines to be totally rescinded.
- 7.20 The major State and local government complaint was that the Guidelines made many entities, that operate under State awards, non-compliant and ineligible to undertake work funded by the Commonwealth. This was because those awards contained provisions that were inconsistent with prohibitions in the Guidelines. The problem was particularly acute for State-owned entities that were bound, under State law, to operate under a State award. I was told the result was sometimes to preclude a State-owned entity doing the work it was established to do. This caused particular difficulties in rural and remote areas, where there was often no readily-available alternative contractor. With recent increases in the level of federal funding for State and local government projects, this presented a growing problem.

¹⁹⁰ *ibid* pages 27-28.

¹⁹¹ Workplace Solutions Local Government Association of NSW and Shires Association of NSW, *Submission to the Hon Murray Wilcox*, Submission 19, December 2008.

- 7.21 However, it seems that problem has now been resolved. On 10 February 2009, you, as Minister, wrote to all the State and Territory Workplace Relations Ministers attaching a document that stated, amongst other things, that "...entities operating under state and territory industrial relations jurisdictions that are complying with their legal obligations set out in relevant legislation; applicable court and tribunal orders, directions and decisions; or industrial instruments; will be considered to be in compliance with the Code and Guidelines."¹⁹²
- 7.22 Victoria and New South Wales were also concerned about ambiguities in the Guidelines. Victoria referred to uncertainty over the application of the Guidelines to particular events and people, and to problems arising out of their extension to material suppliers.¹⁹³ Victoria said:
- The Guidelines are vague and open to broad interpretation to the extent that their application under certain circumstances may in practice fail to achieve the intended purpose. As put by one commentator:*
- To put it bluntly, in some respects the Code and Guidelines mean what DEWR says they mean, and what DEWR says they mean can differ from time to time.*
- This problem is exacerbated because DEWR's interpretation or application of the Guidelines is not subject to judicial review.*¹⁹⁴
- 7.23 Victoria submitted that, if the Guidelines are retained, they should be:
- re-written in plain English with less ambiguity and less scope for differing interpretation; and*
- in accordance with proper public administration, ... put on a more formal basis, with provision for disallowance by Parliament and/or access to judicial review.*¹⁹⁵
- 7.24 New South Wales gave examples of ambiguities and inconsistent interpretations. The submission adopted a comment by the authors of a textbook, *Workplace Relations in the Building and Construction Industry*, that such relations are "subject to an extraordinary level of bureaucratic discretion and decision-making."¹⁹⁶
- 7.25 The New South Wales Government was also concerned about the contents of the Guidelines. It argued the Guidelines were "onerous, prescriptive and costly".¹⁹⁷ It said:
- The New South Wales Government is concerned about the level of red tape that currently exists for building industry participants. The workplace relations requirements contained within section 8 of the Guidelines are both onerous and prescriptive, particularly in relation to union activity. Furthermore, the Guidelines provide for additional unnecessary interference in parties' arrangements regardless of what may best suit the parties.*

¹⁹² Letter from the Hon Julia Gillard, Deputy Prime Minister, to the State and Territory Workplace Relations Ministers, 10 February 2009.

¹⁹³ Victorian Government, *Victorian Government response to the Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, Submission 44, January 2009, paras 43-44.

¹⁹⁴ *ibid* paras 48-49.

¹⁹⁵ *ibid* para 50.

¹⁹⁶ Forsyth, A, Gostercnick, V, Ross I & Sharad, T, *Workplace Relations in the Building and Construction Industry*, Lexis Nexis Butterworths, 2007, page 6 as cited in New South Wales Government, *New South Wales Government submission to the Wilcox Inquiry into the proposed Building and Construction Division of Fair Work Australia*, Submission 37, December 2008, page 37.

¹⁹⁷ *ibid* pages 34-35.

*The effect of the Guidelines is to micro-manage projects and impose a raft of unnecessary red-tape and regulatory obligations that are complex, prescriptive, restrictive, inefficient, costly and adversarial.*¹⁹⁸

Examples were provided.

7.26 New South Wales also thought the scope of the Guidelines was too broad. It said:

Originally the Guidelines were intended to inform federal government agencies about federal procurement policy requirements. The application of the Guidelines to projects without federal government funding and the requirement to pass on prescriptive compliance obligations to entities in the contracting chain are effectively 'tentacles' which capture the activities of most building participants on most large infrastructure projects, including State and local government agencies, even where federal funding is nominal or non-existent.

As the discussion paper notes on page 13, entities do not need to ensure that subcontractors contracted to perform work on privately funded projects are Guidelines compliant (as they are required to do on federally funded works, (2.5.5)). However, in practice, most contractors prefer to receive confirmation from sub-contractors that they are in fact compliant before they will engage them (usually in the form of a letter from DEEWR).

Furthermore, the definition of the industry is extremely broad. Along similar lines to the BCII Act (Cth), the Guidelines apply to all construction activities and include activities such as building fit out, installation of internal systems and in addition, certain material suppliers to infrastructure projects as defined (s2.1.4). Such a broad definition creates uncertainty or captures participants whose primary business is not in the construction industry.

*These examples highlight the indiscriminate extension of the Guidelines to every organisation marginally associated with building and construction work and the impractical requirements for compliance. It was never the original intention of the Code to capture such entities and activities.*¹⁹⁹

(iv) The unions' position

7.27 The ACTU submission said:

The unions accept that the government has the right to set internal guidelines for government procurement. Indeed, we see merit in the government using those guidelines to promote good industrial practices, by preferring suppliers who pay decent wages and conditions, and who respect their workers' rights. Many State and foreign governments have taken this approach in relation to their own procurement codes.

However, the present Code and Guidelines do not achieve these progressive objectives; on the contrary, they appear to reward employers who have engaged in poor industrial practices, such as strategies to defeat collective bargaining (for example, by refusing to negotiate collective agreements, and insisting on the use of individual agreements). They seek to use the Commonwealth's purchasing power to control industry outcomes, in areas that are far beyond the reach of the Commonwealth's constitutional power, and in ways which the government could never convince the Parliament to endorse.

¹⁹⁸ ibid page 34.

¹⁹⁹ ibid pages 36-37.

Moreover, by burdening employers with an additional layer of prohibitions and regulations of their dealings with unions and employees, beyond that provided for in the WRA, the Code has discouraged many clients, employers and unions from entering into otherwise lawful arrangements that would have led to harmonious workplace relations.²⁰⁰

Examples were cited.

7.28 ACTU concluded:

In summary, the unions are not opposed to the government having a procurement code, but submit that the code should:

- *be consistent with the government's industrial relations legislation and policies;*
- *be consistent with our international obligations (including the obligation to promote collective bargaining); and*
- *facilitate positive, progressive, modern industrial relations practices.*

In particular, we think that the following reforms need to be made:

- *The **scope** of the Code should be clarified so that it only covers the 'construction industry' (ie excludes off-site construction, mining, etc).*
- *The **application** of the Code should be narrowed so that it only applies:*
 - *to tenderers for government work, and not their related entities;*
 - *to work that is substantially funded by the Commonwealth;*
 - *from the time that the construction contract is entered into, not from the time the tender is submitted.*
- *The **requirements** of the Code should be amended, so that:*
 - *successful tenderers need only comply with general industrial law (ie as set out in the Fair Work Bill) and need not comply with any additional industrial rules;*
 - *preference is given to tenders that promote important social objectives such as occupational health and safety, training and skill development, use of Australian labour and materials, respect for the environment, participation of women and Indigenous people in the workforce, and security of employee entitlements;*
 - *engaging in participating collusive tendering practices disqualify the tenderer.*
- *The task of **monitoring** of the Code should be given to the Department, and not to the ABCC or any other compliance agency; and*
- *The **enforcement** of the Code should be improved, by allowing both merits review and judicial review of decisions taken under the Code. We express no opinion on the question of whether the Code should be subject to disallowance by the Senate.²⁰¹*

7.29 CCU supported the retention of the Code and Guidelines, but subject to major changes in content. It said:

The content of the Guidelines should also be amended in at least the following respects:

- The **scope** of the Guidelines should be amended to cover the 'on-site' construction industry only.*
- The **application** of the Guidelines should be narrowed so that it only applies:*

200 Australian Council of Trade Unions, *Submission to the Wilcox Consultations on behalf of the ACTU and State and Territory Labor Councils*, Submission 25, December 2008, pages 22-23.

201 *ibid* pages 24-25.

- to tenderers for government work, not their related entities;
- to work that is substantially funded by the Commonwealth;
- from the time that the construction contract is entered into, not from the time the tender is submitted.

(iii) The **requirements** of the Guidelines should be amended, so that:

- rights conferred by general industrial law not be diminished through application of the Guidelines;
- preference is given to tenders that promote important social objectives such as occupational health and safety, training and skill development, respect for the environment, participation of women and Indigenous people in the workforce, and security of employee entitlements;
- engaging in collusive tendering practices or other unlawful behaviour can disqualify the tenderer.

(iv) The task of **monitoring** of the Guidelines should be given to the Department, and not to the ABCC and that industry participants (unions and employer bodies) have a role in decisions made in respect of compliance and the practical application of the Guidelines.

*A revised version of the Guidelines is attached for the consideration of the Inquiry.*²⁰²

7.30 The attachment, which is too lengthy to reproduce here, sets out many objectives that would command widespread community support.

7.31 CCU went on to deal with accountability and review. After pointing out that unions and employees have an interest in code-related decisions, CCU said:

What is needed is a practical review mechanism that has particular regard to the different interests that can be affected by these decisions. This must take account of the position occupied by unions and employees. Since the most contentious aspects of the Code/Guidelines have always been the industrial relations provisions and since the majority of decisions relate to federal industrial instruments, one option might be to introduce such a mechanism into the Workplace Relations Act.

*In any event, any future Code/Guidelines should at a minimum be constituted as a disallowable instrument allowing Parliament to set them aside in the event that they are found to be operating unsatisfactorily.*²⁰³

(v) My comments

7.32 Consistently with what I stated in the Discussion Paper, my role is to pass on the views about the Guidelines that have been expressed to me. However, perhaps I may be allowed some comments.

- (a) There is strong support for the Code and Guidelines amongst building and construction industry employers. The employers believe these instruments, especially the Guidelines, have made a major contribution to the improvement in industry behaviour which is accepted, on all sides, to have occurred in recent years. The argument that the Guidelines have the effect of “raising the stakes” makes sense. **It seems desirable to retain the Code and Guidelines as an adjunct to the statutory provisions governing conduct in the industry.**

202 Combined Construction Unions, *Joint Submission on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Australian Workers Union, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Construction, Forestry, Mining and Energy Union*, Submission 36, December 2008, pages 67-68.

203 *ibid* pages 69-70.

- (b) There is a question about the reach of the Guidelines. Although it is very much a policy decision for the Government, I do not see why the Guidelines should apply only to projects “substantially” funded by the Commonwealth, as ACTU and CCU argue. The Commonwealth Government has an interest in the efficient delivery of all projects in which it invests money, whether directly or indirectly and whether this investment is a major or minor proportion of the overall cost. The extension of the Guidelines to the privately funded projects of entities that wish to tender for Commonwealth Government work is, perhaps, more questionable. However, this is probably not a big issue. If an entity makes, and keeps, itself “code-compliant”, for Commonwealth Government project purposes, it will automatically satisfy the requirement that it be code-compliant in respect of its privately funded work.
- (c) The rationale of the Guidelines is that they conduce to a more harmonious building site. So it is difficult to see the justification for extending them to material suppliers and people who work off-site. If the extension caused no practical problems, perhaps this would not matter. But it is apparent it does. In order to avoid ludicrous results, the drafter of the Guidelines has had to resort to words such as “*integral* to the project” and “*principal* activity or purpose”: see clause 2.1.4. Language like this is problematic because it requires the making of value judgments, about which people may reasonably differ. **I think it would be preferable to limit the application of the Guidelines to on-site work.**
- (d) Although the Guidelines play a valuable role in indicating what must *not* happen on a building site, there is scope, as ACTU and CCU have pointed out, for using them also in a *positive* way, to assist fulfilment of wider policy objectives of the Government. Just as there is merit in the Government using its financial muscle to improve employment relationships in the industry, so there is merit in using that muscle to attain other goals; for example, employment of more apprentices, women and Indigenous people and achievement of environmental goals, such as energy and water efficiency, materials recycling and so on. This is not the time to be definitive; the possible additional provisions would need first to be discussed within the industry. **However, I make the suggestion that the Government review the content of the Guidelines, in consultation with industry participants, including the unions and the States and Territories, both to remove existing ambiguities and to include desirable positives. It would be good to have the revised Guidelines take effect when the new regime commences on 1 February 2010.**
- (e) As I suggested in the Discussion Paper, and many people have agreed, the Guidelines need to be put on a more formal basis. Section 27 of the BCII Act allows for the Minister to issue a Building Code constituting a code of practice for participants in the building and construction industry. Such a Code would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and, therefore, disallowable by either House of the Parliament. Given the type of provisions that would be included in any Building Code, and their commercial significance to building employers, this is as it should be. Parliamentary oversight of delegated legislation is a fundamental element in our system of government. **If the Guidelines are to be retained, either in their present or an amended form, they ought to be made a disallowable instrument, using either the present section 27 or a similar provision in the new Act.**
- (f) One advantage of using section 27, or its successor provision, is that this would extend the reach of the Guidelines, now known as “the Building Code”, to all building contractors that are constitutional corporations or are undertaking work in a Territory or Commonwealth place. The reach of the Building Code would not be limited to entities interested in doing work that is funded (directly or indirectly) by the Commonwealth, and their related entities. If the idea is to improve practices in relation to building work that falls within the definition in section 5 of the

BCII Act, that objective would more fully be achieved. Of course, to retain the “raising the stakes” element, **it would be necessary for the Commonwealth to continue to make contracts conditional on code-compliance. To demonstrate code-compliance, the entity would need to show that its industrial instruments comply with the Guidelines and, I suggest, that neither it nor any related entity has been found to have contravened the legislation, or an industrial instrument, within (say) the previous two years.**

- (g) This raises the question of the identity of the agency that should determine whether an entity is code-compliant. As mentioned, JHG argues this should not be DEEWR but the Specialist Division. JHG’s preference seems to arise out of unhappiness at some rulings issued by DEEWR concerning the proper interpretation of the Guidelines and/or one or more industrial instruments. Of course, the best way to minimise interpretation disputes is to minimise ambiguity. Otherwise there is likely to be dispute, regardless of the identity of the agency. Nonetheless, whatever its genesis, I think there is merit in JHG’s view. The present system seems to me cumbersome, and wasteful of resources.
- (h) As I understand the position, an assessment team within DEEWR determines whether an entity’s industrial instruments comply with the Guidelines and, if they do, issues a letter to that effect. Reports and complaints about an entity’s behaviour are considered by a multi-Departmental committee, the Code Monitoring Group (“CMG”), which can issue formal warnings to entities thought to have breached the Guidelines or, in more serious cases, recommend sanctions to the Minister. A multi-Departmental committee may be an excellent vehicle for addressing whole-of-government policy and discretionary decisions, but it seems a strange body to make a factual judgment as to an entity’s behaviour. It is not clear to me how CMG would determine a dispute about the facts of the case or why this determination would need the involvement of officers from several different departments. **If the BCD is to have an investigative role in relation to contraventions, it makes sense for it to be responsible for determining whether an entity is code-compliant.** This will require it to make decisions, from time to time, about both the facts of cases and the proper interpretation of the Guidelines, but it should be able to do this as well as anyone else.
- (i) JHG’s submission points up a serious present omission: the absence of any facility for review of DEEWR and CMG decisions. An adverse decision by either of these bodies may have devastating consequences for an entity’s business, yet the entity has no avenue for effective review, either judicial review on any of the grounds set out in the ADJR Act, or merits review by the AAT. Put bluntly, this is outrageous. The entity would be able to invoke the right conferred by section 75(v) of the Constitution, but it would rarely be possible to show jurisdictional error. Section 75(v) would be of no assistance in the case of a dispute as to the facts of the case or the proper interpretation of the Guidelines. **Whether the Guidelines are to be retained in their present form or amended, it is my opinion that decisions taken under them should be made judicially reviewable under the ADJR Act and administratively reviewable by the AAT.**

CHAPTER EIGHT—THE BUILDING AND CONSTRUCTION DIVISION

Jurisdiction of the BCD

- 8.1 As I indicated in chapter 3 above, I recommend the BCD be a semi-autonomous unit of the OFWO. A question arises as to the extent of its jurisdiction.

(i) **The residential sector?**

- 8.2 The HIA suggested the new Specialist Division should regulate, not just that portion of the building and construction industry that is covered by the BCII Act but the whole industry. It will be recalled that the definition of “building work” in section 5(1)(g) of the BCII Act, excludes:

any work that is part of a project for:

- (i) the construction, repair or restoration of a single-dwelling house; or*
- (ii) the construction, repair or restoration of any building, structure or work associated with a single-dwelling house; or*
- (iii) the alteration or extension of a single-dwelling house, if it remains a single-dwelling house after the alteration or extension.*

- 8.3 The HIA submitted:

The ABCC does not cover most residential housing. There is an urgent need to protect the entire industry. The residential construction industry is the dominant sector in the building construction industry. According to the ABS, residential construction is worth more than double the value of the commercial construction sector and a third larger than the civil construction sector. The value of home renovations alone is equivalent to the entire commercial construction industry.

Within the residential construction industry, close to 84 percent of the activity involves new detached dwellings and renovations. Only about 3 percent of activity is due to multi-unit high rise development. The remaining estimated 13 percent of activity is comprised of multi-unit developments other than high rise, being principally townhouse and unit styles developments under three storeys.

Further, the perception that residential construction has no employees is erroneous. In fact, the sector is a larger employer than the commercial construction sector. According to the ABS, the residential construction industry employs nearly 380,000 people, compared to 235,000 in commercial construction and 108,000 in civil.

The employment exists at two levels. Residential builders engage employees in the form of administrative staff, apprentices, draftsmen, project managers and tradespeople. Trade contractors also engage employees in the form of apprentices, labourers, and assistant trades people. In fact, the larger employers tend to be trade contractors, not builders, who can engage gangs of similar trades for larger scale residential developments.

While the residential sector is not a source of industrial disputation it has suffered illegal industrial disputes. This happens at the interface between onsite work and the delivery of manufactured products. They involve the same union and major industry players as the commercial sector. They can exhibit the same disregard for laws and institutions as found by Cole.

The second way the residential construction industry is impacted is in relation to contractors who move between residential and commercial sectors. These contractors may be 'asked' to sign workplace agreements as a condition of working on the commercial site. While this agreement may be limited to the site, it can contain obligations that bind an employer even in their residential activities.²⁰⁴

8.4 The HIA quoted ABS figures that showed the value of work in 2007-08 to be;

Residential (including alterations and additions):	\$66.27 billion
Non-residential building:	\$31.38 billion
Civil engineering:	\$40.99 billion

8.5 Detached houses accounted for two-thirds of the value of new residential construction in that year.

8.6 HIA also quoted the ABS workforce break-up, but this time as at 2005-06:

Residential	379,029 employees
Commercial	235,349 employees
Civil engineering	108,836 employees

8.7 These figures demonstrate the extent of investment and employment in the residential sector of the industry. There is no doubt about the economic (and social) importance of the residential sector. However, they also demonstrate that it would be a major step to extend special controls to the residential sector. The BCD's task of keeping in contact with industry participants would be hugely increased. Many residential builders operate on a small scale, perhaps working alone and using specialist sub-contractors as required, perhaps having one or two employees, with whom they share the physical work and have a close personal relationship. In the absence of evidence of significant problems in the residential sector, I would not feel justified in recommending such a dramatic extension of BCD's jurisdiction.

(ii) Off-site prefabrication

8.8 In its submission, the CCU drew attention to the width of the definition of "building work" in section 5(1) of the BCII Act.²⁰⁵ Paragraphs (a), (b) and (c) catch a wide range of on-site activities. Paragraph (d) then says:

- (d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c), for example:*
- (i) site clearance, earth-moving, excavation, tunnelling and boring;*
 - (ii) the laying of foundations;*
 - (iii) the erection, maintenance or dismantling of scaffolding;*
 - (iv) the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site;*
 - (v) site restoration, landscaping and the provision of roadways and other access works.*

²⁰⁴ Housing Industry Association Ltd, *Wilcox Inquiry Into The Creation of Building & Construction Industry Specialist Division Within the Inspectorate of Fair Work Australia*, Submission 20, December 2008, para 2.

²⁰⁵ Combined Construction Unions, *Joint Submission on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Australian Workers Union, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Construction, Forestry, Mining and Energy Union*, Submission 36, December 2008, page 34.

8.9 The CCU commented:

Given the width of s 5(1)(a), (b) and (c) the reach of subsection (d) is potentially very wide. For example it may include engineering or architectural work. It may cover the final cleaning of a building before it is handed over.

The 'prefabrication of made-to-order components' is included in the definition even though the Cole Commission did not examine such work to any real extent. The extension of the Act into this area has arguably embraced off site joinery, glazing, brick/block, tile manufacturing, pre cast concrete products and the manufacture of other construction materials and components. None of these were looked at in any detail by the Royal Commission. The Royal Commission's terms of reference did not define the industry that was to be considered, it merely excluded one sector, housing, from consideration. No justification can therefore be drawn from Cole for the application of the laws into these areas.

Other problems include the following:

The formulation 'prefabrication of made-to-order components to form part of any building...etc' is imprecise and problematic. It would be susceptible to a range of interpretations by the courts. It may also include the manufacture of such components for use in the housing sector.²⁰⁶

- 8.10 In drawing attention to this matter, the CCU was arguing that, because of the demarcation problem, there should not be special legislation for the building and construction industry. That view is not open to me, given my Terms of Reference. However, the submission raises a valid concern about the width of the definition to be used in the new legislation. Just as I felt there was no justification for the Guidelines extending to off-site work, so I believe the BCD's jurisdiction and powers should not extend off-site. Otherwise, I recommend, the BCD should cover the same portion of the total building and construction industry as the ABCC does now.

Structure and role of the BCD

- 8.11 The BCD should be headed by a Director, appointed by the Minister, who would be responsible to the FWO in relation to administrative, financial and personnel matters, but not in relation to operations. The Minister would be empowered to give directions to the Director concerning operational matters, although not about a particular case. The relevant section of the new Act would be modelled on section 11 of the BCII Act. Subject to any such direction, and available resources, it should be for the Director to decide what operational activities, including investigatory and prosecutorial activities, the BCD will undertake.
- 8.12 For the reasons set out at paragraph 6.16 above, I do not recommend the creation of a supervisory board for the BCD. However, I do favour an advisory board comprising the Director, the FWO and up to five part-time members appointed by the Minister and holding office for (say) three years. I envisage the part-time appointees would be people knowledgeable about the industry, with a balance between people having an employer background and those from the employees' side.
- 8.13 The MPMSAA, which supported the idea of an advisory board, suggested that members could also include "clients, community representatives, occupational health and safety experts and educationalists and representatives of training organisations".²⁰⁷ There is plenty of room for choice, but it would be important to ensure a geographical spread so as to ensure the advisory board had first-hand information about

²⁰⁶ *ibid.*

²⁰⁷ Master Plumbers and Mechanical Services Association of Australia, *Proposed Building & Construction Division of Fair Work Australia*, Submission 13, December 2008, para. 3.8.2.

conditions in different States and Territories. The advisory board might meet face-to-face two or three times a year and in telephone or video conference as required.

- 8.14 My reason for favouring an advisory board is that I think it important that the BCD do more than investigate and prosecute suspected contraventions of the relevant legislation and industrial instruments.
- 8.15 Many people have spoken to me about the need to change the culture within the building and construction industry. The best way of changing any culture is through education, so educational programs ought to be a major BCD activity. Suitable programs are best devised with input from people steeped in the industry and conversant with its characteristics, Australia wide. I envisage that educational programs would go beyond telling people their legal rights and obligations, though this would be most important, and include such things as skills upgrading and health and safety courses.
- 8.16 In the Discussion Paper I asked whether the Specialist Division should carry out OHS inspections and prosecutions.²⁰⁸ There was no support, in the submissions, for that idea. Amongst those who dealt with the subject, there was a unanimous view that the State OHS inspectorates worked well; any Specialist Division role would lead only to confusing fragmentation or duplication. I accept that view and abandon the idea of the BCD itself carrying out OHS inspections and prosecutions. Nonetheless, and despite recent improvements in the industry's injury rate, there are still too many accidents, especially fatal accidents. It may be appropriate for the BCD, as an organisation specialising in this industry, to work with organisations such as Safe Work Australia, and the Office of the Federal Safety Commissioner ("OFSC") in encouraging research about the pattern and causes of accidents in the building and construction industry, and the best methods of minimising them.
- 8.17 Another recurrent problem in the industry, although of a very different type, is the phenomenon called "phoenixing"; where a company goes into liquidation, leaving employees unpaid, but its owners promptly create, or acquire, another company and resume trading, often under an almost identical name. The unpaid employees have no recourse against the new company. The phenomenon is not confined to the building industry but is common within it. It would seem to me useful, and in the interests of both employees and the large majority of employers (who do the right thing but have to compete against those who do not) for a specialist body such as the BCD to investigate phoenixing and devise ways of combating it; if necessary, by proposing legislative action.
- 8.18 A further issue, raised with me by MPMSAA, is the adequacy of the current security for payments statutory provisions. MPMSAA put a specific suggestion to me.²⁰⁹ The merit of that suggestion is beyond the scope of my inquiry. However, it is apparent that this is an important issue that ought to be addressed in the interests of all subcontractors, and also those head contractors who honour their obligations but find themselves competing with some who do not.
- 8.19 These thoughts are not intended to be exhaustive. They are simply examples of the types of issues that the advisory board may wish to address. No doubt the members of the advisory board will have many other ideas about improving industry operations and the working life of those employed within it.
- 8.20 The advisory board should be responsible for determining the policies, programs and priorities of the BCD. It should not have an executive role, either in relation to the selected programs or the Division's investigative and prosecutorial functions.

208 Wilcox, M, *Proposed Building and Construction Division of Fair Work Australia-Discussion Paper*, October 2008, para. 101

209 Master Plumbers and Mechanical Services Association of Australia, *Proposed Building & Construction Division of Fair Work Australia*, Submission 13, December 2008, para.3.9.1 to 3.9.4

BCD's investigative and prosecutorial functions

- 8.21 I envisage that the BCD would take over many of the ABCC's staff and would conduct its investigative and prosecutorial functions in much the same way as the ABCC does now, but with two important differences.
- 8.22 First, the BCD's power of compulsory interrogation would be subject to the safeguards set out in chapter four above: notices to attend for interrogation to be issued by a presidential member of the AAT, rather than an officer of the BCD itself; tighter criteria for the issue of notices; interrogations to be conducted by the Director or a Deputy Director; and external monitoring by the CO.
- 8.23 Second, it would be important for the BCD itself to pursue complaints made by employees, and their unions, against employers for failure to pay employees' entitlements and other contraventions of industrial instruments or legislation. The ABCC has never done this. Its practice has been to refer matters like this to the WO, on the basis that the WO has staff trained to this role. I understand the reasoning, but the ABCC's practice has had the unfortunate effect of compounding the belief, of many on the employee side, that the ABCC is a politically-inspired worker-bashing agency. Although it may be preferable to use different individuals for the task, I think it will be critically important for the BCD to actively investigate and prosecute employees' claims and be seen to do so.

BCD's general powers and responsibilities

- 8.24 Subject to the special considerations arising out the BCD's power of compulsory interrogation, I recommend the Director of the BCD have all the functions, powers and responsibilities, in relation to the building and construction industry, that FWO has in respect of every other industry. Various views have been expressed to me about some powers; for example, the circumstances under which information may be passed to another agency and the power to commence, or intervene in, legal proceedings. However, I believe it to be a sound principle that the general rules laid down by the Fair Work Bill should apply to the building and construction industry, and the BCD, unless there is good reason to provide otherwise. In my opinion, no good reason has been established in relation to any matter except compulsory interrogation.
- 8.25 I suggest an additional Division, Division 4, be added to Part 5-2 of the Fair Work Bill. This Division should establish the BCD, provide for its compulsory interrogation power, and give to the Director and the BCD Inspectors, without repetition or specification, all the functions, powers and duties, in relation to building industry participants, that are conferred and imposed by Division 2 of Part 5-2 on the FWO and Fair Work Inspectors in respect of other employers, employees and industrial associations. The functions that would thereby be conferred on the Director are:
- (a) to promote:
 - (i) harmonious and cooperative workplace relations; and
 - (ii) compliance with this Act and fair work instruments; including by providing education, assistance and advice to employees, employers and organisations;
 - (b) to monitor compliance with this Act and fair work instruments;
 - (c) to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;
 - (d) to commence proceedings in a court, or to make applications to FWA, to enforce this Act, fair work instruments and safety net contractual entitlements;
 - (e) to refer matters to relevant authorities; and

- (f) to represent employees who are, or may become, a party to proceedings in a court, or a party to a matter before FWA, under this Act or a fair work instrument, if (the Director of the Building and Construction Division) considers that representing the employees will promote compliance with this Act or the fair work instrument.
- 8.26 The powers would include the power of the FWO (Director) to give directions to inspectors (clauses 704 and 705 of the Fair Work Bill) and all the powers listed in sections 708 to 716, subject to the qualifications set out in Division 3. The proposed Division 4 should also pick up the disclosure of information rules contained in clause 718 of the Fair Work Bill.
- 8.27 The entitlement of inspectors to initiate legal proceedings is dealt with in Chapter 4 of the Fair Work Bill. However, it is important to remember that the word “inspector” is defined in clause 12 as meaning “a Fair Work Inspector”; that is, a person appointed by the FWO under clause 700 of the Bill. If the BCD is to be operationally autonomous, it would not be appropriate for its inspectors to be appointed by the FWO. The best course might be to extend the clause 12 definition so as to include inspectors appointed by the Director under the new Division 4.

Supervision and monitoring of the BCD

- 8.28 I envisage the BCD will be subject to supervision and monitoring in four different ways:
- (i) The Director will be answerable to the FWO in respect of his or her administrative, financial and personnel management, but not operational matters;
 - (ii) The Director will be answerable to the Minister in respect of operational matters, but not in relation to a particular case. The new Division 4 of Part 5-2 should contain provisions, referring to the Director, that are similar to clauses 684, 685 and 686 of the Fair Work Bill;
 - (iii) The BCD’s exercise of its compulsory interrogation power will be routinely monitored by the CO, even in the absence of any complaint; and
 - (iv) The BCD will be subject to the general oversight of the CO, which is usually complaint-driven, in the same way as any other Commonwealth agency.

Staffing and resources

- 8.29 It is important that the BCD be, and be seen to be, focussed on the building and construction industry. I received a firm message, from almost all those who addressed the point, that the BCD should have its own dedicated staff who already have, or will quickly acquire, specialised knowledge of the industry. I agree. Except perhaps in rural and remote areas, where there might be insufficient work to fully occupy a specialist inspector, the BCD inspectors should not be asked to take on general OFWO duties.
- 8.30 If the BCD is to match the response time and other standards of efficiency achieved by the ABCC, it will need (initially, at least) staff and other resources at least equivalent to those currently provided to the ABCC. Indeed, if (as I recommend and unlike the ABCC) it carries out its own employer compliance work, instead of referring that work to the FWO, the BCD will probably need more staff (investigators and legal) than the ABCC has now.
- 8.31 I expect the majority of the BCD’s staff will be people who transfer from the ABCC and find themselves carrying out much the same work as before. They may need to be supplemented by some people with

expertise in recovery of employees' entitlements, perhaps recruited from the Office of the Workplace Ombudsman or from outside the Public Service.

Interaction with other agencies

- 8.32 My Terms of Reference require me to report on "the interaction of the Specialist Division with other federal enforcement agencies such as the Australian Securities and Investments Commission, the Australian Taxation Office, the Australian Competition and Consumer Commission and with relevant state enforcement agencies;"
- 8.33 One of the counsel who assisted the Cole Royal Commission, Mr Timothy Ginnane SC, made a submission to me in which he suggested the proposed Specialist Division could "act as a clearing house of information that relates to illegal activity affecting the revenue and relating to corporate illegal activity in the building and construction sector." He argued for legislation "to allow the Specialist Division to share information with appropriate Commonwealth and State agencies."
- 8.34 Mr Ginnane went on:
- The Specialist Division can facilitate a whole of government approach to illegal corporate activity in the building and construction sector to ensure that information of possible illegality is referred to the appropriate agencies for further investigation particularly in respect of revenue issues and corporate illegality.*
- The Specialist Division can be a facilitator of the establishment of appropriate links between such agencies. It is not in the public interest to have the Specialist Division aware of and "sitting on" information of possible illegal activities in the building and construction sector and not having the legislative mandate to provide that information to relevant authorities.*
- There is no reason why police, crime and corruption commissions should not receive the information provided the information relates to matters within their mandates. They are all acting in the public interest to ensure that laws are observed. One of the problems of law enforcement is that the left hand does not know what the right hand knows. The need for appropriate connections to be established between public agencies and authorities is an abiding challenge.*²¹⁰
- 8.35 Mr Ginnane recognised the need to prevent the Specialist Division becoming a "warrantless information-gatherer", but thought this could be prevented by ensuring the Specialist Division only collected information that was relevant to the exercise of its own powers.
- 8.36 I have reservations about the BCD setting itself up as a "clearing house" of information. Information sharing should never become an end in itself. The BCD should only gather information that is relevant to an investigation into a suspected contravention of industrial law. However, if it does have information, legitimately obtained, that is relevant to the work of, and might be valuable to, another government agency then, I agree, it should not "sit on" that information.
- 8.37 I think Mr Ginnane's point is covered by clause 718 of the Fair Work Bill, which ought to be picked up in the proposed Division 4. That clause applies only to information obtained in the exercise of specified powers. Subclause (2)(b) permits the FWO to disclose the information where "the disclosure is likely to assist in the

210 Ginnane, T, *Use of Information and Interaction with Other Agencies*, Submission 35, December 2008, paras 4-6.

administration or enforcement of a law of the Commonwealth, a State or a Territory.” If this clause were picked up for the BCD, it would be necessary to add a reference to information obtained at a compulsory interrogation. Of course, the use/derivative use indemnity, as in section 53(2) of the BCII Act, would continue to apply.

Transition issues

- 8.38 The last three items in my Terms of Reference require me to report on ways of ensuring the BCD’s resources are efficiently and effectively allocated, high quality staff are recruited to, and trained by, the BCD and there is an orderly transition from the ABCC to the BCD.
- 8.39 I included questions about these matters in the Discussion Paper. Perhaps understandably, there was little response. However, the MBA made two recommendations.
- 8.40 First, the MBA urged “retention of all the current personnel and agency resources that are provided to the ABCC so that transmission is made as seamless as possible and so that the cultural change that we emphasise throughout this submission may be continued”.²¹¹
- 8.41 I agree with the thrust of this submission. Of course, some ABCC personnel might not wish to transfer to the BCD. However, it would assist transition if there were a substantial migration from the ABCC to the BCD.
- 8.42 Secondly, the MBA drew attention to the need to provide contractual certainty to builders in the event of a change to the Guidelines. In order to be eligible to tender for government contracts, entities have to agree to provide access to, amongst others, the ABCC for the purpose of policing compliance with the Guidelines. The MBA’s proposition is that the transitional provisions should ensure the builder’s obligation is not changed, during the life of a contract, by a change to the Guidelines. I agree, and would add that the legislation should put the BCD in the place of the ABCC.

Recommendation 6:

- (i) **A new Division 4 be added to Part 5-2 of the Fair Work Bill relating to the “building and construction industry”, as therein defined.**
- (ii) **The definition of “building and construction industry” follow the definition of “building work” in the *Building and Construction Industry Improvement Act 2005*, but excluding off-site work.**

Recommendation 7:

The Director of the Building and Construction Division have all the functions, powers and responsibilities, in relation to the “building and construction industry”, as defined in the new legislation, that the Fair Work Ombudsman has in respect of other industries; including, in particular, investigation of suspected unlawful behaviour by any building industry participant (whether employer, employee or industrial association) and the prosecution of penalty and other legal proceedings.

Recommendation 8:

Except perhaps in rural and remote areas, the Building and Construction Division have its own dedicated operational staff, including inspectors.

²¹¹ Master Builders Australia Inc, *Submission to the Hon Murray Wilcox on Proposed Building and Construction Division of Fair Work Australia*, Submission 16, December 2008, para 19.1.

CHAPTER NINE—WHAT OF THE BCII ACT?

- 9.1 It is necessary to consider what then should be done with the BCII Act. There are two alternatives: extensive amendments or repeal, with re-enactment in the new Division 4 of Part 5-2 of the Fair Work Bill those provisions that are still required. I favour the latter course. It would be easier for readers if all the relevant legislation were in a single statute.
- 9.2 Sections 1, 2 and 3 of the BCII Act would not be required. Part 5-2 of the Fair Work Bill has its own objects clause.
- 9.3 Many of the definitions in sections 4, 5 and 6 of the BCII Act would certainly be required. It will be necessary to mark out the BCD's territory. This can probably best be done by picking up the concept of "building work" and, from that, "building employee", "building employer" and "building industry participant". These definitions seem not to have caused any problem, in proceedings under the BCII Act. However, consideration should be given to omitting off-site work.
- 9.4 Sections 7 and 8 of the BCII Act are covered by general Fair Work Bill provisions.
- 9.5 Chapter 2 of the BCII Act relates to the ABCC. That chapter would be repealed and not re-enacted in the new Division 4 of Part 5-2, although provisions comparable to sections 11, 12, 13 and 14 of the BCII Act should be enacted in relation to the Director's autonomous operational activities. There will also need to be provisions in respect of the appointment of the Director: compare sections 15-25 of the BCII Act.
- 9.6 I have already indicated that I think the Guidelines, or an amended version of them, should become a disallowable legislative instrument. So it would be desirable for the new legislation to include equivalents of sections 27 and 28 of the BCII Act.
- 9.7 The matters addressed in Chapter 4 of the BCII Act have not been issues in my inquiry. As I understand the position, the Government's intention is that the OFSC should continue to exist, with the Commissioner's existing functions. Presumably, chapter 4 should be re-enacted, either in the Fair Work Bill or elsewhere; also sections 60 to 63 relating to the powers of Federal Safety Officers.
- 9.8 Consistently with my recommendation about the first forum question, neither chapter 5 nor chapter 6 of the BCII Act would be re-enacted.
- 9.9 Chapter 7 Part 1 (sections 48 to 51) relates to enforcement. However, the Fair Work Bill has its own enforcement provisions. If, as I recommend, the penalties applicable to building participants are to be the same as those applicable to persons in other industries, none of these provisions will be required in the new legislation.
- 9.10 Chapter 7 Part 2 Division 1 (sections 52 to 56) of the BCII Act concerns the power of compulsory interrogation. If my recommendations are accepted, a provision like section 52 will be needed, but taking in both the requirement for a notice to attend for questioning being issued by a presidential AAT member and the suggested criteria, the threshold test. Equivalents of sections 53-56 would also be appropriate.
- 9.11 Chapter 7 Part 2 Division 2 (sections 57 to 59) of the BCII Act is covered by the Fair Work Bill.
- 9.12 Chapter 8 of the BCII Act contains miscellaneous provisions. Sections 64 and 65 of the BCII Act are covered by the Fair Work Bill. If there are to be equivalents of section 12 or section 14, as I recommend, section 66 of the BCII Act will be needed.

- 9.13 Section 67 of the BCII Act is an unusual and contentious provision. It enables the ABC Commissioner to publicise a non-compliance with the Building Code, the BCII Act or the WR Act. No consequence is made to follow from the publication, though publication may be damaging to the reputation of the alleged non-complier, especially if that person is interested in obtaining Commonwealth building work. Especially because of that fact, it is disconcerting that the BCII Act provides no requirement for the person to be alerted to the possibility of a publication, with an opportunity to respond to the allegation. I see no advantage in retaining this provision.
- 9.14 Section 68 of the BCII Act (delegation by the Minister) is similar to clause 792 of the Fair Work Bill. Clause 793 of the Fair Work Bill, dealing with corporate liability and state of mind, does not go as far as sections 69 and 70 of the BCII Act. However, that clause addresses the same topics and must be taken as Parliament's current view about those subjects, in a workplace relations context. I see no basis for suggesting that a different rule should apply in the building and construction industry. In the result, I do not recommend that any of sections 68, 69 and 70 of the BCII Act be re-enacted.
- 9.15 Sections 71 and 72 of the BCII Act permit the ABCC to intervene in proceedings, respectively, before a court or the AIRC. The Fair Work Bill contains a provision (clause 569) permitting the Minister to intervene in court proceedings but there appears to be no reference to intervention by the FWO. Perhaps this was thought unnecessary; the FWO could always apply to the court for leave to intervene. That may be correct, but it might be useful for the new legislation to authorise the Director to apply for leave to intervene in a matter before a court or FWA arising under the Fair Work Act and involving a building industry participant or building work. I would not favour a statutory *right* to intervene. In order to guard against the case being hijacked, it is better to give the court or FWA discretion to allow intervention. In that way, terms may be imposed.
- 9.16 Sections 73, 75 and 78 of the BCII Act are already covered by the Fair Work Bill. Sections 74, 76 and 77 of the BCII Act are not. They deal, respectively, with the Industrial Registrar notifying the ABCC about AIRC applications involving a building industry participant or building work, a court not requiring an undertaking as to damages and the ABCC not being liable for conduct in good faith. These appear all to be useful provisions. Unless there was a policy reason for omitting them from the Fair Work Bill, I would favour their inclusion in the new Division 4 of Part 5-2.

Attachment 1

Transition to Fair Work Australia for the Building and Construction Industry: Terms of Reference

The Australian Government has asked the Honourable Murray Wilcox QC to consult and report on matters related to the creation of the Specialist Division including, but not limited to:

- The operational structure of the Specialist Division and its relationship with other parts of Fair Work Australia;
- The independence and accountability of the Specialist Division;
- The need, if any, for external monitoring, review or oversight of the Specialist Division;
- The scope of investigations and compliance activities to be undertaken by the Specialist Division;
- The powers required by the Specialist Division and its inspectors for the purpose of conducting investigations and compliance activities;
- The rights of persons who are subject to the investigations and compliance activities of the Specialist Division;
- The responsibilities of the officers of the Specialist Division;
- The reporting requirements of the Specialist Division;
- The resolution of disputes and complaints about the activities of the Specialist Division;
- The use of information collected by the Specialist Division in its investigations;
- The commencement of proceedings by the Specialist Division;
- The interaction of the Specialist Division with other federal enforcement agencies such as the Australian Securities and Investments Commission, the Australian Taxation Office, the Australian Competition and Consumer Commission and with relevant State enforcement agencies;
- The likely resources to be required by the Specialist Division and the ways of ensuring those resources are efficiently and effectively allocated;
- The best ways of ensuring high quality personnel are recruited to and retained by the Specialist Division and are properly trained and supervised; and
- The best manner of ensuring an orderly transition between the ABCC and the Specialist Division

His Honour's consultations relate solely to the Specialist Division and are separate to the existing consultative processes established by the Government to inform the broader workplace relations framework and the establishment of Fair Work Australia. The Government intends legislation creating a new workplace relations system will be introduced into the Parliament in the second half of 2008.

The Government has asked His Honour to provide his report by the end of March 2009. His Honour's report will assist to inform Government consideration of the creation and ongoing operation of the Specialist Division.

Attachment 2

Consultations

ACTU and Federal representatives of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Australian Workers Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and Construction, Forestry, Mining and Energy Union

Air-conditioning & Mechanical Contractors Association

Australian Chamber of Commerce and Industry

Australian Constructors Association: Chief Executive Officers and other senior officers of major contractors

Australian Financial Review, Workplace Relations Conference 2008 *Building a Competitive Australia*

Australian Industry Group

Australian Industry Group, National Personnel and Industrial Relations (PIR) Conference 2008

Australian Mines and Metals Association

BHP Billiton

Builders Alliance Group

Chamber of Commerce and Industry Western Australia

Commonwealth Ombudsman

Debate forum – University of Melbourne

Debate forum – University of Sydney

Debate forum – University of Western Australia

Department of Premier and Cabinet – SafeWork South Australia

Electrical Communications Association of Queensland

Grocon Pty Ltd

Housing Industry Association

Institute of Public Affairs and a group of subcontractors

Master Builders Association of NSW

Master Builders Association of Queensland

Master Builders Association of South Australia

Master Builders Association of Victoria

Master Builders Association of Western Australia

Master Builders Australia Inc

Master Plumbers and Mechanical Services Association of Australia

McConnell Dowell

National Electrical and Communications Association of Australia

NSW Department of Commerce – Office of Industrial Relations

Office of the Australian Building and Construction Commissioner

President of the Administrative Appeals Tribunal

President of the Australian Industrial Relations Commission

Probuild Construction

Queensland Department of Industrial Relations

Site visit – BlueWater Desalination Project site – Kurnell – John Holland Group and other entities involved in the project

South Australian Unions and SA State representatives of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and Construction, Forestry, Mining and Energy Union

Unions NSW and NSW State representatives of Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Australian Workers Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and Construction, Forestry, Mining and Energy Union

Unions Western Australia and WA State representatives of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Australian Workers Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and Construction, Forestry, Mining and Energy Union

Victoria Police, Inaugural Australasian Human Rights and Policing Conference 2008

Victorian Department of Innovation, Industry and Regional Development

Victorian Special Investigations Monitor

Victorian Trades Hall Council

Western Australian Department of Consumer and Employment Protection – Labour Relations

Workplace Ombudsman

Attachment 3

List of Submissions received in relation to the Discussion paper released 9 October 2008.

1. Carpenter, GW, *ABCC-Discussion Paper Submission*, November 2008.
2. Shumack, P, *Submission to the Hon Murray Wilcox*, October 2008.
3. Williams, G & McGarrity, N, *The Investigatory powers of the Australian Building & Construction Commission*, Australian Journal of Labour Law, Edition 21, 2008.
4. Clancey, K, *Submission to the Hon Murray Wilcox*, November 2008.
5. Air-conditioning & Mechanical Contractors Association, *Written submission by the Air-conditioning & Mechanical Contractors Association to the Consultation being conducted by the Hon Murray Wilcox*, November 2008.
6. Geelong West Branch ALP, *Submission to the discussion paper: Proposed Building and Construction Division of Fair Work Australia*, November 2008.
7. Davies, G, *Submission re "proposed building and construction division of fair work Australia"*, November 2008.
8. Thomson, K MP, *Building and Construction Industry Improvement Act 2005 and the ABCC: A Political Exercise Not Genuine Reform*, December 2008.
9. John Holland Group Pty Ltd, *Proposed Specialist Division of Fair Work Australia*, December 2008.
10. BHP Billiton Pty Ltd, *Submission of BHP Billiton: Proposed Building & Construction Division of Fair Work Australia*, December 2008.
11. The Police Association of Victoria, *Response to the Proposed Building & Construction Division of Fair Work Australia Discussion Paper*, December 2008.
12. Civil Contractors Federation, *Civil Contractors Federation Submission to Discussion Paper: Proposed Building & Construction Division of Fair Work Australia*, December 2008.
13. Master Plumbers and Mechanical Services Association of Australia, *Proposed Building & Construction Division of Fair Work Australia*, December 2008.
14. Australian Chamber of Commerce and Industry, *Proposed Building & Construction Division of Fair Work Australia*, December 2008.
15. Gwandalan Summerland Point Branch of the ALP, *Submission to the Hon Murray Wilcox*, December 2008.
16. Master Builders Australia Inc, *Submission to the Hon Murray Wilcox on Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, December 2008.
17. Electrical and Communications Association, *Submission to the Hon Murray Wilcox*, December 2008.
18. National Electrical and Communications Association, *NECA Submission re: Proposed Building and Construction Division of Fair Work Australia*, December 2008.

19. Workplace Solutions Local Government Association of NSW and Shires Association of NSW, *Submission to the Hon Murray Wilcox*, December 2008.
20. Housing Industry Association Ltd, *Wilcox Inquiry Into The Creation of Building & Construction Industry Specialist Division Within the Inspectorate of Fair Work Australia*, December 2008.
21. Institute of Public Affairs, *Submission to Wilcox review of the Australian construction industry reforms*, December 2008.
22. Grocon Pty Ltd, *Submission to the Hon Murray Wilcox*, December 2008.
23. Commonwealth Ombudsman, *Submission by the Commonwealth Ombudsman - Discussion Paper: Proposed Building and Construction Division of Fair Work Australia*, December 2008.
24. Chamber of Commerce and Industry of Western Australia, *Proposed Building and Construction Division of Fair Work Australia*, December 2008.
25. Australian Council of Trade Unions, *Submission to the Wilcox Consultations on behalf of the ACTU and State and Territory Labor Councils*, December 2008.
26. Master Builders Association of NSW, *Submission to Hon Murray Wilcox on the Proposed Building and Construction Division of Fair Work Australia*, December 2008.
27. Australian Industry Group and the Australian Constructors Association, *Joint Submission to the Hon Murray Wilcox*, December 2008.
28. Peetz, D, *Submission to the Wilcox Consultations on the creation of the Specialist Division for the building and construction industry within the inspectorate of Fair Work Australia*, December 2008.
29. Australian Mines and Metals Association, *Submission to the Wilcox Review of the transition of the Australian Building and Construction Commission to Specialist Division of Fair Work Australia*, December 2008.
30. BGC Contracting Pty Ltd, *Proposed Specialist Division of Fair Work Australia*, December 2008.
31. Property Council of Australia, *Proposed Building and Construction Division of Fair Work Australia*, December 2008.
32. Safework South Australia, *Safework SA's Submission in response to the Discussion paper on the proposed Building and Construction Division of Fair Work Australia*, December 2008.
33. Western Australian Government, *Submission of the Western Australian Government*, December 2008.
34. Queensland Government, *Wilcox Consultation Process on the Proposed Building and Construction Division of Fair Work Australia*, December 2008.
35. Ginnane, G, *Use of Information and Interaction with Other Agencies*, December 2008.
36. Combined Construction Unions, *Joint Submission on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Australian Workers Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; and Construction, Forestry, Mining and Energy Union*, December 2008.

37. New South Wales Government, *New South Wales Government submission to the Wilcox Inquiry into the proposed Building and Construction Division of Fair Work Australia*, December 2008.
38. IRIQ, *IRIQ Submission to the Honourable Murray Wilcox on The proposed Building and Construction Division of Fair Work Australia*, January 2009.
39. Australian Industry Group, *Supplementary submission to the Hon Murray Wilcox*, January 2009.
40. Lloyd-Smith, G, *Commonwealth ABCC - Victorian OPI - ASIC etc - Coercive Powers?*, January 2009.
41. Master Builders Australia Inc, *Reply Submission to the Hon Murray Wilcox on Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, January 2009.
42. Peetz, D, *Supplementary Submission-in-Reply to the Wilcox Consultations on the creation of the Specialist Division for the building and construction industry within the inspectorate of Fair Work Australia*, January 2009.
43. John Holland Group Pty Ltd, *Preliminary Assessment of the Economic Benefits of Industrial Relations Reform in the Construction Industry*, Supplementary Submission, January 2009.
44. Victorian Government, *Submission by the Victorian Government in response to Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, January 2009.
45. Master Builders Australia Inc, *Submission to the Hon Murray Wilcox on Issues arising from the Law School Debates*, March 2009.
46. Construction, Forestry, Mining and Energy Union, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Supplementary Submission, March 2009.
47. Australian Industry Group, *Supplementary Submission to the Hon Murray Wilcox*, March 2009.
48. Econtech Pty Ltd, *Report on Building and Construction Productivity*, March 2009.

Attachment 4

Law School Forums

University of Western Australia – Wednesday, 18 February 2009

Co-Chairs

Professor William Ford, Dean of the Faculty of Law,
University of Western Australia

Dr Trish Todd, Director (Undergraduate Programs)
Faculty of Business at UWA Business School

Lead Speakers

- Tom Roberts, Construction Forestry, Mining and Energy Union;
- Joel Fetter, Australian Council of Trade Unions; and
- Kim Richardson, Master Builders Association of Western Australia.

University of Melbourne – Thursday, 26 February 2009

Co-Chairs

Associate Professor John Howe,
The Faculty of Law, The University of Melbourne

Associate Professor Anthony Forsyth,
Department of Business Law and Taxation, Monash University

Dr Joo-Cheong Tham,
The Faculty of Law, The University of Melbourne

Lead Speakers

- Peter Nolan, Australian Industry Group;
- Joel Fetter, Australian Council of Trade Unions;
- Professor George Williams, University of New South Wales;
- Herman Borenstein SC, Victorian Bar;
- Craig Dowling, Victorian Bar;
- Ken Phillips, Institute of Public Affairs; and
- Jacqueline Parker, Corrs Chambers Westgarth.

Co-Chairs

Professor Ron McCallum AO, Professor of Industrial Law,
The University of Sydney

Professor Joellen Riley, Professor of Labour Law,
The University of Sydney

Lead Speakers

- Richard Calver, Master Builders Australia Inc;
- Tom Roberts, Construction, Forestry, Mining and Energy Union;
- Associate Professor Peter Sheldon, Australian School of Business,
University of New South Wales;
- Nicola McGarrity, Gilbert and Tobin Centre of Public Law,
University of New South Wales;
- Brian Seidler, Master Builders Association of New South Wales; and
- David Burnie, New South Wales Council of Civil Liberties.

Attachment 5

Glossary Items

AAT	Administrative Appeals Tribunal
ABCC	Australian Building and Construction Commissioner
ABS	Australian Bureau of Statistics
ACA	Australian Constructors Association
ACCI	Australian Chamber of Commerce and Industry
ACCC	Australian Competition and Consumer Commission
ACTU	Australian Council of Trade Unions
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AIG	Australian Industry Group
AIRC	Australian Industrial Relations Commission
Allen	Allen Consulting Group
AMMA	Australian Mines and Metals Association
ARC	Administrative Review Council
ASIO	Australian Security Intelligence Organisation
AWA	Australian Workplace Agreement
BCII Act	<i>Building and Construction Industry Improvement Act 2005</i>
BCD	Building and Construction Division
BHP	BHP Billiton Limited
BIT	Building Industry Taskforce
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CCF	Civil Contractors Federation
CCIWA	Chamber of Commerce and Industry of Western Australia
CCU	Combined Construction Unions
CLA	Chant Link and Associates
CMG	Code Monitoring Group
CO	Commonwealth Ombudsman
Code	National Code of Practice for the Construction Industry 1997
DEEWR	Department of Education, Employment and Workplace Relations
DEIR	Queensland Department of Employment and Industrial Relations
ECA	Electrical and Communications Association of Queensland
FID	Financial Investment Decision

FWA	Fair Work Australia
FWO	Fair Work Ombudsman
Grocon	Grocon Pty Ltd
Guidelines	Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry
HEIC	Help and Early Intervention Centre
HIA	Housing Industry Association
Implementation Guidelines	Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry
IPA	Institute of Public Affairs
JHG	John Holland Group Pty Ltd
JWM	Jackson Wells Morris Pty Ltd
MBA	Master Builders Australia Inc
MCIP Act	<i>The Major Crime (Investigative Powers) Act 2004 (Vic)</i>
MPMSAA	Master Plumbers and Mechanical Services Association of Australia
NECA	National Electric and Communications Association
OFSC	The Office of the Federal Safety Commissioner
OFWO	The Office of the Fair Work Ombudsman
OHS	Occupational Health and Safety
OHSW	Occupational Health, Safety and Welfare
OPI	The Victorian Office of Police Integrity
Rawlinson's	Rawlinson's Australian Construction Handbook
RFSU	Ready for start-up
SIM	Special Investigations Monitor
TPA	<i>Trade Practices Act 1974</i>
Williams/McGarrrity	Professor George Williams and Ms Nicola McGarrrity,
WO	Workplace Ombudsman
WorkChioces	<i>Workplace Relations Amendment Act 2006</i>
WR Act	<i>Workplace Relations Act 1996</i>

Proposed Building and Construction Division of Fair Work Australia

Discussion Paper

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BACKGROUND

(1) The Cole Report

1. On 29 August 2001, the then (Coalition) Government appointed the Honourable TRH Cole RDF, QC, a former judge of the Supreme Court of New South Wales, to conduct a Royal Commission into certain matters relating to the Australian building and construction industry. The Commission took evidence in all states and the Northern Territory. Public hearings were conducted on 171 days and private hearings on parts of 22 days.³
2. On 24 February 2003, the Royal Commissioner delivered a 23 volume report in which he made numerous findings and recommendations. He suggested four areas of structural reform: ⁴
 - (a) changes to ensure bargaining only at enterprise level, eliminating “pattern bargaining”;
 - (b) mechanisms to “ensure that any participant in the industry causing loss to other participants as a result of unlawful industrial action is held responsible for that loss”;
 - (c) mechanisms to ensure that disputes are settled in accordance with legislated or agreed dispute resolution procedures “rather than by the application of industrial and commercial pressure”; and
 - (d) creation of an independent body that will ensure “that participants comply with industrial, civil and criminal laws applicable to all Australians....as well as industry specific laws applicable to this industry only.”
3. The Royal Commissioner also called for cultural change, in four respects: ⁵
 - (a) recognition by all participants that “the rule of law applies within the industry”;
 - (b) “recognition, principally by the unions but also by the major contractors and subcontractors, that in Australia there exists freedom of choice to either join or not join an association of employees”;
 - (c) “an attitudinal change of participants regarding management of building and construction projects”; that is, control should be exercised by head contractors and major subcontractors, not by unions; and
 - (d) an attitudinal change to safety by all participants: “governments, clients, contractors, subcontractors, unions and workers.”
4. The Royal Commissioner identified 25 practices which he regarded as unlawful or inappropriate, leading him to brand the industry as one “which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy.” He said: “They mark the industry as singular. They indicate an urgent need for structural and cultural reform.” He went on to itemise many “types of inappropriate conduct” revealed by the evidence before him. He thought this stemmed from “a clash between the short-term project profitability focus of the providers of capital, clients, head contractors and subcontractors on the one hand, and the long-term aspirations of the union movement, especially the Construction Forestry Mining and Energy Union, to dominate, control and regulate the industry for its benefit, and what it perceives to be the benefit of its members, on the other hand.” ⁶
5. The Royal Commissioner thought this clash usually resulted “in those with the short-term focus surrendering to those with the longer-term objective.” He said:

*quick fix solutions driven by commercial expediency supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies. Those with longer-term objectives know that those with a short-term focus are vulnerable to delay and cost. There is thus an inequality of bargaining power, when conflict occurs.*⁷

CHRONOLOGY

31 December 1996	Commencement of workplace relations legislation - <i>Workplace Relations Act 1996</i> ("the WR Act").
22 September 1997	Commencement of Commonwealth-State-Territory <i>National Code of Practice for the Construction Industry</i> ("the Code").
February 1998	Commencement of the <i>Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry</i> ("the Guidelines"). Application limited to Commonwealth projects.
29 August 2001	Establishment of Cole Royal Commission.
1 October 2002	Establishment of Building Industry Taskforce ("BIT").
24 February 2003	Commissioner Cole delivers Royal Commission report.
6 November 2003	Building and Construction Industry Improvement Bill ("the 2003 Bill") introduced into the House of Representatives.
December 2003	The Guidelines are revised so as to transfer enforcement responsibility to BIT and extend their operation to projects funded (directly or indirectly) by the Commonwealth.
21 June 2004	Senate committee tables its report recommending rejection of the 2003 Bill. (The Bill subsequently lapsed on the prorogation of Parliament for the 2004 election.)
13 July 2004	Commencement of the <i>Workplace Relations Amendment (Codifying Contempt Offences) Act 2004</i> which provided coercive information gathering powers to BIT.
9 October 2004	Federal election at which Coalition Government gains control of the Senate, as from 1 July 2005.
9 March 2005	New Building and Construction Industry Improvement Bill ("the 2005 Bill") introduced into House of Representatives.
12 September 2005	The 2005 Bill becomes law as the <i>Building and Construction Industry Improvement Act 2005</i> ("the BCII Act").
1 October 2005	The Office of the Australian Building and Construction Commissioner ("the ABCC") commences operation.
1 November 2005	Further amendment of the Guidelines (released September 2005) so as to extend their application to private projects of contractors interested in undertaking Australian Government work took effect.
27 March 2006	<i>Workplace Relations Amendment Act 2006 (Work Choices)</i> took effect.
1 June 2006	Amendment of Guidelines to adopt WorkChoices reforms.
30 April 2007	ALP workplace relations policy announced, including plan to establish Fair Work Australia ("FWA") with a specialist building and construction division.
24 November 2007	Australian Labor Government elected.
22 May 2008	Deputy Prime Minister explains proposed consultation process regarding Specialist Division and issues draft Terms of Reference.
21 July 2008	Consultation Terms of Reference finalised. ⁸

6. The Royal Commissioner identified factors that he thought made the industry unique, justifying special legislation: ⁹

The unwillingness and incapacity of head contractors to respond to unlawful industrial conduct causing them loss is due, principally, to two structural factors. The first relates to their desire to be long-term participants in the industry. To be so, having regard to the competitive nature of the industry and the low profit outcomes, requires them not only to address the short-term focus on profitability of a given project, but to consider the long-term relationship with union participants. They know that unless there is significant acceptance of union demands, there will be continuous industrial disruption on other current and future projects. Clients, including governments, who are major participants in the industry, will not select contractors who are unable to deliver projects on time and within budget. The prospect of industrial disruption is a disqualifying feature for the obtaining of future work, and thus being a long time participant in the industry. This is well understood both by the contractors, and by the unions. It places enormous power in the hands of unions. It encourages unions to use that power to obtain otherwise unattainable outcomes. The threat of the use of power is as effective as its exercise. Each of the unions and the contractors know this and factors this circumstance into their relationships.

The second structural factor is the weakness in the mechanisms for enforcing laws of general application, including the criminal law, the industrial law, especially the Workplace Relations Act 2006, and the civil law for recovery of loss caused by unlawful action. The industrial tribunals and court mechanisms are too cumbersome, too uncertain and too expensive. This results in the mechanisms being underutilised. Further, there is no entity whose function it is to ensure that the industry operates within the law.

Financiers and clients, be they government or private sector, do not wish to accept risks of delayed construction. They usually require that risk to be accepted by the head contractor. Head contractors are thus liable for heavy liquidated damages for delayed completion. In addition, delays result in additional standing and overhead charges being incurred. Accordingly, head contractors seek to avoid a delayed construction process. They know, as does the union, what the costs of those delays are. Head contractors seek to assign the risk of delay to subcontractors. Subcontractors normally provide 90 per cent to 95 per cent of the labour to do the construction work. Head contractors provide little labour, but manage the construction process. The assignment of risk to subcontractors means that they also are vulnerable to liquidated damages for delay in their subcontract work.

7. Commissioner Cole recommended the enactment of special legislation to govern the building and construction industry. This would include the creation of a statutory Commission, comprising about six members, which would be "responsible for monitoring conduct in the industry, and prosecuting unlawful industrial action, breaches of freedom of association laws, and addressing all complaints of unlawfulness in the industry." The Commission's functions would include monitoring of compliance with the Code and Guidelines.
8. The Cole Royal Commission is, and always has been, controversial. In a detailed appraisal, the Senate Committee majority that recommended opposition to the 2003 Bill was critical both of the conduct of the Royal Commission and its findings.¹⁰ These criticisms reflected a widespread view in the union movement that the establishment of the Commission was unnecessary and politically-motivated and that the Royal Commission was conducted in an unsatisfactory way. Critics claim the Royal Commissioner, and counsel assisting, focussed their attention on the supposed sins of unions and employees, ignoring those of employers (tax avoidance, occupational health and safety irregularities and failures to meet legal obligations to employees), that unions were unduly restricted in their cross-examination of witnesses and introduction of evidence and that the report grossly exaggerated union and employee lawlessness. In a submission to the

INDUSTRY OVERVIEW

In both economic and social terms, building and construction is one of Australia's most important industries.

The Cole Commission reported that in 2001-02, the industry's total production amounted to \$59.7 billion. The industry contributed 5.5 per cent of Australia's gross domestic product and provided 7.5 per cent of Australian jobs.¹¹

Unsurprisingly, given the "resources boom", more recent estimates contain much higher figures. The Australian Bureau of Statistics ("ABS") estimated the total value of construction work in 2006-07 to be \$71.2 billion.¹²

In August 2007, the Reserve Bank estimated that the industry then accounted for about 7.5 percent of gross domestic product and provided about 940,000 jobs.¹³

This present inquiry is not concerned with all that activity. The mandate of the ABCC extends only to about two-thirds of the total industry: "commercial" building, including multi-unit residential accommodation, but not including projects involving less than five dwellings.¹⁴ Nonetheless, if the Specialist Division of FWA is to cover the same segment of the industry as does the ABCC, that Division will be charged with responsibilities in respect of construction work currently running at something like \$50 billion each year; that is, about two-thirds of about \$75 billion total construction work.

Of course, the building and construction industry is not only economically important. The industry underpins our standard of living and lifestyle, which rely heavily upon the use, and therefore maintenance and supplementation, of physical infrastructure. It is essential to maintain, and further improve, the productivity of the industry.

International Labour Organisation ("ILO") dated 14 September 2007, the Australian Council of Trade Unions ("ACTU") commented that, although the Royal Commission identified what it claimed to be "392 instances of unlawful conduct", the Commonwealth Attorney-General made only 98 referrals to prosecution authorities, in relation to 92 of the 392 instances. Only 26 of the 92 instances were said to be breaches of the criminal law. As at February 2006, three years after the Cole Report, 95 of the 98 referrals had been finalised without legal action. The fate of the remaining three matters had not been disclosed. No prosecution action has yet flowed from the Cole Report.¹⁵

9. It is not my function to review either the conduct or the findings of the Cole Royal Commission. Nor do I have the time or resources to do this. So I express no opinion about most of the controversial matters. However, there can be no doubt that the Royal Commissioner was correct in pointing to a culture of lawlessness, by some union officers and employees, and supineness by some employers, during the years immediately preceding his report. The evidence summarised in the report is too powerful to permit any other view.
10. This does not necessarily mean I agree with all the recommendations of the Royal Commissioner or the enactment of the *Building and Construction Industry Improvement Act 2005* (the BCII Act). It is not necessary for me to form opinions about those matters; my task is not to consider what ought to have been done in 2003, but what should be the position in 2010.
11. I have set out Commissioner Cole's views, not because I adopt them, but because his views were the catalyst for the enactment of the BCII Act. This did not happen immediately. As the Chronology (page 5) shows, there was an earlier Bill, the 2003 Bill, but it failed to pass the Senate.

THE BCII ACT AND THE ILO

The ILO is the oldest existing international body, having been formed in 1919. It presently comprises 182 member States, each of which is represented on the Governing Body by three representatives, one nominated by the relevant national government, one appointed by employer interests and one appointed by the unions in that country. Australia was a founding member of the ILO.

The ACTU complained to the ILO that the BCII Act, read with the WorkChoices provisions of the WR Act, breaches two ILO Conventions that Australia has ratified. The former Coalition government disputed this claim. If the ACTU's argument is correct, it may provide a powerful reason for recommending against inclusion, in the new legislation, of similar provisions. As a general principle, it seems to me, Australia should honour obligations it has voluntarily incurred in the international arena.

The *Freedom of Association and Protection of the Right to Organise Convention, 1948* (ILO 87) includes Articles 2 and 3, as follows:

- Article 2. *Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.*
- Article 3. (1) *Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*
- (2) *The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

Article 8 requires that, in exercising rights under the Convention, workers and employers, and their respective organisations, "shall respect the law of the land." However, that law "shall not be such as to impair, nor shall it be applied as to impair, the guarantees provided for in this Convention."

Article 11 requires each ILO member to "take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."

Article 1 of the *Right to Organise and Collective Bargaining Convention, 1949* (ILO 98) requires workers to be given "adequate protection against acts of anti-union discrimination in respect of their employment." By Article 2, workers' and employers' organisations are to enjoy protection against interference, by each other or their agents, in their establishment, functioning or administration.

Article 4 requires measures to be taken, presumably by ratifying countries, "to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

After considering submissions from both the ACTU and the former government, the ILO Committee on Freedom of Association ("the CFA"), in November 2005, published a report about the BCII Act, and the earlier 2003 Bill, in which it expressed concern that many WR Act provisions breached these Conventions. Their concern was heightened by sections 37 and 38 of the BCII Act:

Whereas the concept of "protected action" under the WRA implies that trade unions might be divested of immunity and incur liability in tort in case of industrial action taken in contravention of the conditions

specified in the WRA, the concept of “unlawful action” in the 2005 Act implies not simply liability vis-a-vis the employer, but a wider responsibility towards third parties and an outright prohibition.

The CFA also said it:

observes with concern that, in addition to the restrictions on collective bargaining and industrial action imposed as a result of the 2005 Act, this Act also gives considerable investigatory powers to the ABCC without sufficient safeguards against interference in trade union activities. The Committee notes that the ABCC has the power to enter premises, take possession of documents “for as long as necessary”, keep copies, and interview any person for “compliance purposes”, that is to say, in the absence of any suspected breach of the law. Moreover, there is no reference in the 2005 Act to the possibility of lodging an appeal before the courts against the ABCC’s notices. The Committee further notes that there is no consideration in the 2005 Act for the need to ensure that penalties are proportional to the offence committed, given that serious sanctions can be incurred in case of failure to comply with a notice by the ABCC to give information or to produce documents.

The CFA made several recommendations to the ILO Governing Body, including that it should request the Australian Government to:

- modify sections 36, 37 and 38 of the BCII Act “so as to ensure that any reference to unlawful industrial action in the building and construction industry is in conformity with freedom of association principles” and adjust sections 39, 40 and 48-50 “so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry”;
- revise section 64 of the BCII Act “to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law,” or the decision, or case law, of the administrative labour authority;
- take steps to promote collective bargaining, as provided by ILO 98. “In particular, the Committee requests the Government to review... the provisions of the Building Code and the Guidelines so as to ensure that they are in accordance with freedom of association principles.”
- “introduce sufficient safeguards into the BCII Act so as to ensure that the functioning of the ABC Commissioner and inspectors does not lead to interference in the internal affairs of trade unions and, in particular, ... introduce provisions on the possibility of lodging an appeal before the courts against the ABCC’s notices prior to the handing over of documents.”

The Governing Body adopted these recommendations in November 2005. However, Australia did not comply with any of the ILO requests.

After considering further submissions, from both the Australian Government and the ACTU, the CFA re-affirmed its position in each of the following two years, again with the support of the Governing Body.

The problem perceived by the CFA is that ILO 87 and 98 are both concerned with the right of workers to organise themselves into a collective body that can negotiate on their behalf. Although neither Convention talks about strike action, the CFA regarded the right to strike as an essential concomitant to the right to negotiate collectively. The Committee was concerned about those sections of the BCII Act that imposed pecuniary penalties on strikers for unlawful industrial action. It thought the investigatory provisions of the BCII Act increased the weight of those sections. It may follow that the question whether the new legislation affecting building workers will breach either of the ILO Conventions will depend as much upon the rules concerning strike action in the industry as upon the nature of the relevant investigatory powers. Nonetheless, the CFA’s comments about the need for review of the exercise of the powers given to the ABCC may warrant attention in the design of the Specialist Division.

(2) THE BCII ACT

12. The BCII Act closely followed the recommendations of Commissioner Cole. The only significant exception seems to be in relation to the structure of the ABCC. Whereas Mr Cole envisaged a statutory Commission, constituted by several Commissioners, section 9 of the BCII Act provides for a more hierarchical structure: a Commissioner and one or more Deputy Commissioners, all appointed by the Minister. All others, including the Assistant Commissioners, are to be public servants engaged by the Commissioner: see section 25.
13. In reading the BCII Act, it is important to bear in mind the definition of “building work” contained in section 5. The definition excludes work related to a single dwelling-house, unless it is part of a project involving at least five single dwelling-houses. Only persons engaged in “building work” are “building industry participants” and, therefore, of interest to the ABCC. The ABCC is not concerned with the many projects that comprise the erection, renovation and/or extension of single dwelling houses.
14. The functions of the ABCC are set out in section 10 of the BCII Act; principally:
 - (a) “monitoring and promoting appropriate standards of conduct by building industry participants”, including compliance with the BCII Act itself, the WR Act and a Building Code envisaged to be issued by the Minister under section 27 of the BCII Act;
 - (b) investigating suspected contraventions, by building industry participants, of the BCII Act, the WR Act, an industrial instrument or the proposed Building Code;
 - (c) instituting, or intervening in, legal proceedings; and
 - (d) providing assistance, advice, information and representation to building industry participants.
15. The functions of the ABCC are not confined to the conduct of employees and unions. They cover the conduct of building industry employers and contraventions by them of the BCII Act, the WR Act or an industrial instrument such as an award or certified agreement. It is open to the ABCC itself to investigate and prosecute alleged employer misconduct, such as short-payment of wages or denial of award entitlements; rather than, as is its practice, simply to hand these cases on to the Workplace Ombudsman.
16. No section 27 Building Code has yet been issued.
17. The statutory functions of the ABCC do not extend to monitoring compliance with the 1997 National Code of Practice or the Guidelines; although in practice the ABCC does this, apparently pursuant to contractual provisions imposed on parties by clause 4.2.4 of the current Guidelines.
18. The ABCC is subject to Ministerial direction in some respects, but not in relation to a particular case (section 11), and must report annually to Parliament (section 14).
19. Chapter 5 of the BCII Act is unusual, if not unique, in that it imposes substantial monetary penalties upon people in a particular industry who engage in *any* particular industrial action. Chapter 5 imposed that burden retrospectively, to the date when the 2005 Bill was introduced into Parliament.
20. The critical provision in Chapter 5 is section 38. It says: “A person must not engage in unlawful industrial action”. Section 37 explains that “unlawful industrial action” is “building industrial action” which is “industrially-motivated”, “constitutionally-connected” and not “excluded action.”
21. Each of these terms is defined in section 36. Put simply, the section provides that the offence will be committed if, amongst other things, a person takes action in the building industry that adversely affects a corporation, or relates to work that is regulated by an award or certified agreement, and is not:
 - (a) “protected action” under the WR Act: that is, action in a notified bargaining period in support of a new certified agreement; (by section 40, particular industrial action loses its protection if it involves “extraneous participants” such as an officer or employee of a union that is not itself a “negotiating party” to the relevant proposed agreement); or

- (b) action taken by an employee out of his/her “reasonable concern . . . about an imminent risk” to his/her own health or safety and the employee did not unreasonably fail to comply with a direction to work elsewhere; (by section 36(2), the employee has the burden of proving these facts).
22. A contravention of section 38 attracts a “civil penalty” (fine) up to \$110,000 for a corporation, including a union, and \$22,000 for an individual. It may also result in an order to pay compensation to any person who suffered damage as a result of the contravention: see section 49. Also, by section 39, various courts are empowered to make an injunction restraining the industrial action, breach of which would be punishable as a contempt of court.
 23. Section 52 is a particularly contentious feature of the BCII Act. This section allows the ABC Commissioner, or a Deputy Commissioner,¹⁶ if he or she “believes on reasonable grounds” that a person has “information or documents relevant to an investigation”, or is capable of giving relevant evidence, to give a notice to that person requiring him or her to give information, or produce a document, to the ABCC or 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.” The term “assistant” includes any assisting ABCC staff member: see section 52(8). The section makes no provision for payment of a witness’ expenses or lost wages.
 24. By section 52(3), a summonsed person is entitled to be legally represented at the hearing, although the person conducting the hearing may refuse to allow a particular lawyer to appear (*Bonan v Hadgkiss* (2006) FCA 1334; (2007) FCAFC 113). There is no provision requiring the ABCC to meet the person’s legal expenses.
 25. It is an offence, punishable by up to six months’ imprisonment, for a notified person to fail to comply with the notice, to fail to take an oath or make an affirmation, when required to do so, or to fail to answer questions relevant to the investigation. However, neither the information, answers and documents given or produced by the person, nor “any information, document or thing obtained as a direct or indirect consequence of giving the information or answer or producing the document” may be used in evidence against that person, other than in a prosecution for false swearing: see section 53(2).
 26. Wide powers of entry are conferred on ABC inspectors (sections 57-59) and Federal Safety Officers (sections 60-63).
 27. Three further provisions of the BCII Act warrant mention. First, section 64 makes unenforceable, to the extent that it relates to building employees, any uncertified agreement that applies to employees of more than one employer; that is, any project agreement. Second, section 67 provides that, if the ABC Commissioner thinks it is in the public interest to do so, he/she may publish details (including the names of alleged offenders) of non-compliance with the section 27 Building Code, the BCII Act or the WR Act. The BCII Act contains no requirements for prior notice to an affected person or for ensuring that person has the opportunity to present a defence. Third, section 69 extends, beyond the common law rules, the liability of an association of building employees (a union) for the actions of its members.

(3) The Code and the Guidelines

The Code

28. The Code has no legislative force. It was issued in 1997 by the Commonwealth, with the agreement of the states and territories, to state principles that would apply to future construction business with governments. It defines the "construction industry" in wide terms, so as to include "all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering."
29. The Code covers eight subjects: the client's rights and responsibilities; business relationships; competitive behaviour; continuous improvement and best practice; workplace reform; occupational health, safety and rehabilitation; industrial relations; and security of payment.
30. The industrial relations section provides for the following:
 - (a) compliance with awards and approved agreements;
 - (b) no pressure or coercion in respect of the making, variation or termination of workplace arrangements;
 - (c) overaward payments to be determined by the individual employer, free from coercion or pressure;
 - (d) permissibility of project agreements, incorporating site-wide payments, conditions or benefits, but only for "major projects", that are authorised by the principal, maintain the integrity of individual enterprise agreements and do not "flow on" to other projects;
 - (e) application of freedom of association principles;
 - (f) dispute settlement at enterprise level, in accordance with agreed procedures; and
 - (g) no strike pay unless legally required or authorised by an industrial tribunal.
31. In my first-round meetings, nobody suggested the Code caused them problems.

The Guidelines

(a) Application

32. In early 1998, the Commonwealth Government issued separate Commonwealth Industry Guidelines and Commonwealth Implementation Guidelines.
33. The Implementation Guidelines were subsequently revised and reissued on three occasions, each time by extending their application or tightening their requirements. The latest version, revised in September 2005 and reissued in June 2006, abolished the previous division between Industry and Implementation Guidelines, with one set of Guidelines ("the Guidelines") being now used by Government agencies, tenderers, contractors and other building and construction industry participants.
34. Many aspects of the Guidelines are uncontentious. However, during the first-round meetings, numerous people expressed concern about some provisions, these being directly relevant to their operations.
35. As now framed, the Guidelines have an extremely wide application: see section 2.1.
36. First, they pick up the wide definition of "construction work" used in the Code, but add to it:
"building refurbishment or fit out, installation of building security systems, fire protection systems, air-conditioning systems, computer and communication cabling, building and construction of landscapes."
37. Second, the Guidelines apply to some work that is performed well away from any construction site. They cover "material supply contracts where the supplied material is integral to the construction of the project or to the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on site or off site."

38. Third, the Guidelines extend beyond Commonwealth projects. They not only apply to all construction projects indirectly funded by the Commonwealth, above minimum amounts, but also require “parties interested in undertaking Australian Government construction work” to comply with the Code and Guidelines on all their privately-funded, Australian-based construction projects commenced after 1 November 2005. This latter extension applies even to consultants and material suppliers and the “related entities” of interested parties.
39. Section 3.2 of the Guidelines requires that, from 1 November 2005, “all entities tendering for or expressing interest in construction projects directly or indirectly funded by the Australian Government must be compliant with the Code and Guidelines at the time they lodge an expression of interest or tender” and comply with the Code and Guidelines on their privately-funded projects.

(b) Workplace relations provisions

40. It is not necessary to refer to the administrative provisions contained in sections 4 to 7 of the Guidelines. However, it is desirable to note aspects of section 8.
41. Section 8.1 requires tenderers to comply with unregistered industrial agreements, but prohibits unregistered agreements that provide for a site allowance or contain matters that would be “prohibited content” under the WR Act.
42. Section 8.2 picks up the Code’s reference to “workplace arrangements”, but adds a requirement that parties “ensure that implementation of the Code supports a direct relationship between employees and employers and contractors/subcontractors, with a reduced role for third party intervention in workplace arrangements.”
43. Section 8.4 deals with project agreements. It does not ban them, but significantly restricts the circumstances in which they may be used. Additional administrative requirements are imposed, including notification to the funding agency’s Minister. Section 8.4.3 states: “Mirror pattern agreements and agreements that seek to apply common terms and conditions across a site are inconsistent with the Code and Guidelines.”
44. The freedom of association provision (section 8.5) sets out some, probably uncontentious, general principles. However, it goes on to prohibit certain particular practices. Some of these prohibitions, or their interpretation by the ABCC, have evoked criticism. They include prohibitions on:
 - (a) employers providing to unions the names of new staff, job applicants, contractors or subcontractors;
 - (b) signs or notices “that imply that union membership is anything other than a matter for individual choice”;
 - (c) “show card” days;
 - (d) employers encouraging or discouraging employees to join a union;
 - (e) any requirement for an employer to hire an individual nominated by a union as a non-working shop steward or job delegate;
 - (f) pressuring subcontractors to join employer associations;
 - (g) using induction forms to require employees to reveal their union status;
 - (h) using forms requiring employers or contractors to identify the union status of their employees or subcontractors;
 - (i) requirements for employers to apply union logos, mottos or other indicia to company-supplied property, including clothing;
 - (j) any requirement for an employee to be exclusively represented by a union in a dispute settlement procedure; and
 - (k) any requirement in an industrial instrument for a person to pay a fee to an organisation of which he or she is not a member, e.g. a “bargaining fee”.

45. Section 8.6 requires “strict compliance” with the WR Act’s limitations on union right of entry and prohibits attempts to avoid those requirements “by allowing delegates or shop stewards to perform a similar function”. It also bans an industrial instrument allowing “a person or entity that is not a party to the instrument to monitor its operation.” This means that, if a union is not itself a party to an industrial agreement, it cannot monitor its implementation, even at the request of union members who are parties.
46. Section 8.7 requires dispute settlement “to be dealt with at the workplace between the appropriate level of management, employees and where applicable, union representatives.” This provision may result in inconsistency with state industrial laws and Notional Agreements Preserving State Awards; mandatory union encouragement clauses are often required in certain state agreements or awards. Section 8.7 seems to have precluded some unincorporated potential tenderers bound by non-compliant instruments from tendering for projects caught by the Guidelines. If this effect is widespread, it may seriously be affecting competition in the construction industry, including amongst material suppliers.
47. Section 8.10, relating to “Workplace reform”, makes industrial instruments containing a variety of provisions non-compliant with the Guidelines. Concern has been expressed about the prohibition of restrictions on an employer’s choice of labour categories, on the ground that it bars any attempt by employees or their union to ensure employers take on a reasonable number of apprentices. However, in practice, the impact of this provision relates more closely to “casual conversion” clauses, with apprenticeship ratios considered compliant with the current Guidelines on the basis that ratios of apprentices to workers on site is an occupational health and safety and training issue, rather than a restriction on labour.
48. More generally, in its response to the ACTU complaint about the BCII Act, the ILO CFA (see page 8 box) made this comment regarding section 8.10:

...the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers’ and employers’ organisations should have the right to organize their activities and to formulate their programmes.

(c) Enforcement

49. Section 9 of the Guidelines details processes for monitoring and reporting on compliance with the Code and Guidelines, and for determining whether a sanction should be imposed on a party for a breach. The section envisages that a Code Monitoring Group (the “CMG”), which is supported by a Working Group and Secretariat, will deal with Code related issues including alleged breaches. In practice, if a question of non-compliance arises, the CMG notifies the affected person and considers whatever submission that person might make in relation to the alleged breach. If the CMG is not satisfied with the explanation, it may deliver a formal warning to the alleged offender or recommend to the Minister that the person be precluded from tendering for Australian Government work for a particular time and within a particular geographical area.
50. Section 9.5 of the Guidelines provides for review of a CMG decision by the Secretary of the Department of Employment and Workplace Relations (now Department of Education, Employment and Workplace Relations). It also recognises the availability of the jurisdictional writs provided by section 75(v) of the Commonwealth Constitution. However, those writs would not usually allow a court to resolve a dispute as to the interpretation of the Guidelines or their application to the particular case, and certainly not a dispute as to the facts of the case. The clause specifically excludes judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and merits review by the Administrative Review Tribunal (“AAT”).

(d) Submissions invited

51. There is a question whether the content of the Guidelines falls within my Terms of Reference. The Terms of Reference do not explicitly refer to the Guidelines. However, they do require me to report “on matters related to the creation of the Specialist Division.” These matters are “not limited to” the subjects listed in the dot points. Some have argued that, given that the Specialist Division will replace the ABCC, which spends much of its time policing Guideline compliance, the content of the Guidelines is related to the creation of the Specialist Division.
52. I see no point in a semantic debate about this matter. I am prepared to receive, and pass on to the Minister, any submissions that people wish to make about the Guidelines. It will be for the Minister to determine what course she should take in relation to them. Accordingly, I invite you to consider, and indicate to me:
- (a) whether or not you favour the retention of the Guidelines, in addition to the 1997 Code;
 - (b) if the Guidelines are to be retained, how they may be improved; either by adding desirable provisions or amending or removing undesirable provisions;
 - (c) why you have that opinion; and
 - (d) what factual information supports your view.

BUILDING INDUSTRY PRODUCTIVITY

During each of the last two years, the ABCC has commissioned Econtech Pty Ltd, an economics researcher, to report on productivity changes in that part of the construction industry that lies in the ABCC's domain, the "commercial" sector. For each report, Econtech decided to measure the changes by examining the differential between the cost incurred by "commercial" builders, on the one hand, and single dwelling builders, on the other, for eight selected building items. Apparently, it is usual for the cost of an item provided to dwelling house builders to be lower than the cost of the same item supplied to "commercial" builders. Costs were obtained from the relevant year's edition of *Rawlinsons Australian Construction Handbook*. An edition is published each January, reflecting costs as at the end of the preceding year.

In 2007, Econtech calculated the differential, in respect of the sum of the eight items, for each of the years 1994 to 2007 in each mainland state; also the five-state ("Australian") average. Purportedly on this basis, Econtech said the Australian 1994-2003 average differential was 10.7 per cent, that it was 17.2 per cent in 2004, 14.3 per cent in 2005 and 11.4 per cent in 2006, and fell to 1.7 per cent in 2007. Using those figures, Econtech went on to calculate the boost to the Australian economy that had been achieved by reform of the "commercial" building sector.¹⁷

This result was widely publicised. However, some people doubted the 1.7 per cent figure. It would mean the differential had dropped by 85 per cent in one year. It seems 1.7 per cent was, indeed, incorrect. The figure was not the average of the five states' 2007 figures that were set out in the relevant Table; nor was its provenance otherwise explained in the report.

In the 2008 report, which was limited to the years 2004-08 and used adjusted *Rawlinsons* data, 2004 is still the spike year, but the reduction from 2004 to 2008 is less steep. Comparison between costs in January 2006 (three months after the start of the BCII Act and the establishment of the ABCC) and January 2008 reveals a differential drop of only 6.75 per cent, over the two years (16.3 per cent to 15.2 per cent).¹⁸

Because of Econtech's adjustments to *Rawlinsons*' figures, it is difficult to be sure, but the 2008 differential (15.2 per cent) seems to be higher than for the 1994-2003 average and for all but one of those 10 years.

The lack-lustre result reported by Econtech in 2008 is perplexing. Over the period 1996-2007, there was a significant reduction in time lost in the construction industry due to industrial disputes. If only for this reason, one would expect significant productivity gains to show up in any study. Perhaps the explanation of their non-appearance in the 2008 report is that, contrary to Econtech's assumption, the suppliers of the eight selected items did not pass on all their productivity gains in lower prices.

In August 2007, the Allen Consulting Group ("Allen") provided a report to the Australian Constructors Association concerning the economic impacts of a ten percent decrease in multi-factor productivity in the non-residential construction industry. In the Executive Summary of the report, Allen said:¹⁹

With the exception of a fall in 2001, which was most likely associated with the introduction of the GST, construction industry labour productivity has consistently exceeded labour productivity of the economy as a whole. Multi-factor productivity in the non-residential construction industry has displayed similar trends to those of labour productivity. The multi-factor productivity index measures industry gross value added per unit of capital and labour input. Multi-factor productivity increased strongly throughout the 1990s and peaked just prior to the introduction of the GST. Following a short but sharp fall in productivity following the introduction of the GST, multi-factor productivity rebounded quickly and has been increasing since 2001.

ABS statistics for 1996 to 2007 inclusive reveal that time lost in the construction industry—that is, the whole industry, not just the “commercial” sector—was as follows (thousands of working days lost): 1996, 334.7; 1997, 107.8; 1998, 210.9; 1999, 165.4; 2000, 108.8; 2001, 120.7; 2002, 101.6; 2003, 123.3; 2004, 120.1; 2005, 89.4; 2006, 15.2; and 2007, 6.8.²⁰ This is a dramatic fall. However, two comments seem appropriate.

First, the 1996-2007 reduction is not necessarily attributable to the BCII Act and the ABCC; or not all of it anyway. ABS statistics²¹ also show substantial reductions in lost time in other industries. For example, the figures in the relevant 12 years for the coal mining industry were: 160.8; 95.7; 60.4; 26.0; 37.4; 19.3; 6.9; 7.8; 5.6; 12.4; 2.9; and 3.4. The figures for all manufacturing were 103.3; 145.6; 95.4; 184.5; 146.3; 195.4; 87.9; 116.8; 47.7; 55.0; 45.8; and 15.1. The decline is even steeper in the All Industries table: 928.7; 534.2; 526.4; 650.7; 469.1; 393.1; 259.1; 439.5; 379.8; 228.2; 132.7; and 49.7. Community-wide factors may be responsible for most, if not all, of the reduction, over these 12 years, of lost time in the construction industry.

Second, the Allen report shows that 1996 was an abnormal year. In the five years preceding 1996, lost time in the construction industry was less than in the period 2001-2007. In paragraph 2.6 of its report, Allen summarised the position thus:

The number of industrial disputes in the construction industry has been very low since 2000, and particularly low in the past year. . . . The late 1980s were characterised by a significant number of disputes. There were comparatively few disputes through the first half of the 1990s. With the exception of a couple of significant spikes in the number of days lost in the mid-1990s, the long term trend has been towards a declining number of industrial disputes in the industry.

The only possible justification of having specially restrictive rules for the building and construction industry must be that this is necessary to provide industrial peace and an acceptable level of productivity. Many people assert that the industry’s present happy position, in these respects, is attributable to the BCII Act and the activities of the ABCC. Is there any hard evidence that supports that assertion?

(4) The ABCC in operation

53. Two ABCC annual reports have, so far, been tabled in Parliament (2005-06 and 2006-07). During both those years, there were, in addition to the Commissioner, two Deputy Commissioners and three Assistant Commissioners. All these people have individual areas of responsibility, but they also meet fortnightly with the Commissioner to determine the ABCC's operational, legal and corporate strategies.²²
54. According to the two annual reports, in its 21 months operation to 30 June 2007, the ABCC finalised 111 investigations. At 30 June 2007, another 112 were ongoing.
55. In the 21 months to 30 June 2007, the ABCC issued 49 notices under section 52 of the BCII Act. The 2005-06 report does not break up the recipients of notices issued in the nine months covered by that report but the 2006-07 report states that, of the 20 notices issued during that year, 15 went to employees, four to union officials or delegates and one to management. The 2006-07 report says:

The compliance powers have continued to be a particularly effective method of obtaining information from reluctant witnesses. The use of these powers has assisted investigations which would otherwise have stalled. It enables the ABCC to make fully informed decisions as to whether or not the evidence warrants prosecution for a civil penalty.

56. The 2006-07 report reveals the subjects of investigation in each of the two financial years: trade unions, 61 per cent and 73 per cent respectively; employees 16 per cent and 11 per cent; head contractors 13 per cent and 7 per cent; subcontractors 4 per cent and 4 per cent; employers and employer associations 3 per cent and 3 per cent; others 5 per cent and 3 per cent.
57. The main matters investigated were: unlawful/unprotected industrial action 27 per cent and 25 per cent; coercion 17 per cent and 18 per cent, freedom of association/discrimination 9 per cent and 11 per cent; breach of permit/right of entry rules 6 per cent and 18 per cent; agreement/dispute resolution 13 per cent and 8 per cent; strike pay 7 per cent and 5 per cent; and compliance with AIRC orders 5 per cent and 3 per cent. Alleged criminal activity accounted for only 1 per cent and 3 per cent, respectively, in the two years.
58. It appears that the ABCC makes many site visits, mainly for educative purposes. However, in the 21 month period, there were also 21 "site inspections" and 33 "audits". The 2006-07 report explains what the ABCC means by these terms:

Site inspections focus on practical on-site behaviours which may contravene the principles of the Code. The aim of these inspections is to assist the site in becoming Code compliant and also enable the ABCC to identify if there is a need for a more detailed audit.

Audits are more in-depth examinations of business systems and practices to ensure they are consistent with the Code and Guidelines. They include on-site visits, detailed review of documents and formal interviews.²³

59. The reports list the legal proceedings taken during each of the financial years. In 2005-06, the ABCC had 26 penalty proceedings before the courts, 19 of which were inherited from the BIT. They included strike pay (34 per cent), coercion (31 per cent), unlawful industrial action (11 per cent), right of entry (11 per cent) and freedom of association (8 per cent). Nine new proceedings were instituted in 2006-07.
60. The ABCC has power, under section 72 of the BCII Act, to intervene in proceedings before the Australian Industrial Relations Commission ("the AIRC") that arise under the WR Act and involve a building industry participant or building work. The annual reports reveal that the ABCC exercised this power 21 times in 2005-06 and 34 times in 2006-07. The later report states that the "vast majority of cases were resolved quickly and on a satisfactory basis."
61. The 2006-07 report also says: "Anecdotal evidence from building industry participants suggests that the ABCC's power to intervene has been a positive force in this regard." However, no hard evidence of the utility of intervention is offered.

(5) Occupational health and safety

62. No aspect of the building and construction industry is more important than occupational health and safety ("OHS"). On this aspect, the interests of employers and employees (and governments) converge.
63. During the first-round discussions, some (inconsistent) assertions were made about the effect on OHS of the WR and BCII Acts. On the one hand, it was said by some employers, and their representative organisations, that the greater employer control these statutes provide has meant that management now takes a more proactive role in maintaining high standards of OHS on building sites. It was asserted this has meant a reduction in work-related deaths and injuries. On the other hand, some union leaders claimed the WR Act's tight restrictions on union officials right of entry, coupled with the ABCC's zealous enforcement of those restrictions, has prevented union officials from carrying out their historic role of detecting potential site dangers and influencing management to take remedial action before an accident occurs.
64. The building and construction industry should not be regarded as homogeneous. No doubt there are responsible employers and irresponsible employers, conscientious and reasonable union officers and some who are not. So it is possible that both assertions are correct, depending upon which building or construction site is being considered. Nevertheless, I have thought it useful to look at such relevant statistics as are available. Unfortunately, they are not very recent.
65. In June 2008, the Australian Safety and Compensation Council ("ASCC") published *Compendium of Workers' Compensation Statistics Australia 2005-2006*. This reveals that, in 2005-06, Australia-wide and covering all industries, there were 15.6 serious workers' compensation claims per 1000 employees. That figure was down from 20.8 in 1997-98 and 16.8 in 2004-05, itself a drop of 19.2 per cent over the eight year period. During the same period, the frequency rate (serious claims per million worked hours) fell from 12.2 to 10.1 (17.2 per cent).²⁴
66. In terms of number of serious claims, construction has ranked third or fourth in each of the eight years 1997-98 to 2004-05, the number of claims being higher in the last two of these years than in the first. However, in terms of both the incidence rate and the frequency rate, there was a steady improvement. The incidence rate figures are 37.2; 33.2; 30.9; 33.1; 30.2; 29.9; 29.2 and 27.1; a drop of 27.15 per cent over the eight years. The frequency rates figures show a similar pattern: 18.4; 16.5; 15.3; 16.8; 15.6; 15.2; 14.9 and 13.9, an overall drop of 24.45 per cent.²⁵
67. When self-employed workers are excluded, the construction sector improvement is less pleasing. There are no frequency rate figures that exclude self-employed workers. However, the incidence rate improvement is 19.29 per cent and 17.40 per cent, for employed building construction workers and non-building construction workers respectively. These figures are much the same as those for all employees in all industries.²⁶
68. My first reaction to the ASCC statistics is that they do not give much support to either side's argument concerning the effect on safety of the WR and BCII Acts. However, I invite submissions about that matter, and also any other statistical material that may be instructive.

(6) The Workplace Ombudsman

69. On 27 March 2006, the Coalition Government established the Office of Workplace Services ("OWS") as an executive agency. OWS was replaced, on 28 June 2007, by a statutory authority, the Workplace Ombudsman ("WO"). The task of the WO, like the OWS before it, was described in the WO's Annual Report 2006-07 as being to "protect the workplace rights of employers, employees and their representatives". The report claims this has been achieved "through a strong mix of targeted compliance and education activities; the use of voluntary compliance activities and, where the circumstances warrant, through in-depth investigations and prosecutions."²⁷
70. To facilitate investigations and prosecutions, the WR Act confers certain powers. By section 167 of that Act, the WO may appoint workplace inspectors who are invested (by section 169) with special powers. These powers are to be exercised for the purpose of determining observance of workplace agreements, awards, minimum legal standards and the WR Act. The powers are to enter, without force, any premises in which the inspector has cause to believe relevant work is being performed or there are relevant records; to inspect any work, material, machinery, appliance, article or facility; to take samples of goods or substances; to interview any person and to require the production of any relevant document. By section 819 of the WR Act, it is an offence, punishable by up to six months' imprisonment, for a person to contravene a requirement to produce a document. However, there appears to be no penalty for failure, in other ways, to cooperate with an inspector. In particular, there is no mechanism for compulsory interrogation, as under section 52 of the BCII Act.
71. Notwithstanding the lack of a compulsory interrogation power, OWS and WO have, in a short time, notched up an impressive record. In the 2006-07 financial year, they recovered from employers, on behalf of over 9,600 employees, entitlements worth \$13.5 million. 99.3 per cent of this money was recovered without resort to litigation, but 41 underpayment court proceedings were brought. Court determinations were made in 19 matters, with the courts ordering defendant employers to pay \$86,447 in underpaid wages and \$409,155 in penalties.²⁸
72. For present purposes, what is the significance of this success?
73. Under the new workplace legislation, the WO will be folded into FWA.²⁹ FWA will have an Inspectorate, whose inspectors will apparently have functions and powers like those of WO inspectors. Some may think, in that case, there is no need to give a specialist building and construction division any additional investigation or enforcement functions or powers; the WO already may investigate and, if appropriate, prosecute any breaches of workplace law. Others may argue that, even if the Specialist Division is to be given investigative and enforcement responsibilities in the building and construction industry, the WO's success shows there is no need for powers of compulsory interrogation, such as those conferred by section 52 of the BCII Act. Still other people may argue that the WO's success is irrelevant; recovery of unpaid entitlements, with the benefit (presumably) of willing evidence from the short-paid employee and access to the employer's documents, says nothing about the need to compel disclosure of information about substantially undocumented events on or near building sites.
74. Comment on this question is invited.

DIFFERENT RULES

The basis for the complaint by the building unions about section 38 of the BCII Act is that it treats industrial action by building workers much more harshly than industrial action by other workers. This includes the circumstances under which industrial action attracts penalties, the size of penalties, the BCII Act provision of statutory remedies against employees and unions and the reverse onus of proof concerning an imminent threat to safety.

Penalties under the WR Act for unprotected action are limited to specific circumstances, most notably where there is an agreement (collective or individual) in place that has not passed its nominal expiry date. Outside of these circumstances, and some other limited circumstances (e.g. where the unprotected action is taken for a reason that would breach the freedom of association provisions or the coercion in relation to agreement making provisions), unprotected industrial action is not automatically subject to any civil penalties. So generally speaking, if there was no agreement in place, or any agreement had passed its nominal expiry date, then there would be no penalty under the WR Act for unprotected action. This contrasts with the BCII Act, where such action would be unlawful (providing it satisfied the other requirements to be unlawful action in section 37) and subject to the range of sanctions under that Act.

The penalty provided for breach of section 38 of the BCII Act, for an individual, is up to 200 penalty units (\$22,000), while the penalty for an individual under section 494 of WR Act is up to 60 penalty units (\$6,600).

Unlawful action taken by individuals in the building industry exposes them to statutory remedies for compensation for damage resulting from the unlawful industrial action, as well as civil penalties. Damages are not available under the WR Act provisions, although it would be open for an affected party to seek damages through an action in tort.

Under the BCII Act, if an individual is concerned about a safety matter, the onus of proof rests on the individual to prove there was an imminent threat to safety. There is no similar onus under the WR Act.

CONTENT OF THE LAW ENFORCED BY THE SPECIALIST DIVISION

(1) The purposes of the BCII Act

75. Before turning to the detailed matters mentioned in my Terms of Reference, it is desirable to say something about the possible content of the law that the Specialist Division will be expected to enforce.
76. The Government has apparently not yet decided whether, assuming there are elements of the BCII Act which it would wish to retain, it should keep that Act in existence, with appropriate amendments, or place the desired elements in a different Act. Perhaps this does not much matter. The more important question is: what elements of the BCII Act should continue to exist? In addressing that question, it is helpful to keep in mind the two main purposes of the BCII Act. They are entirely separate. It is possible, theoretically at least, to retain either of these purposes without the other; or, of course, both or neither of them.

(2) Penalisation of unprotected industrial action

77. The first main purpose of the BCII Act is to impose on participants in the building industry penalties in respect of unprotected industrial action. This purpose is achieved by Chapter 5 of the Act, in particular by section 38. It will be recalled that this section imposes a substantial monetary penalty upon any person in the building industry who engages in "unlawful industrial action"; in practical terms, any industrial action other than "protected action" or action based on a reasonable concern for the employee's health or safety.
78. The building unions argue that Chapter 5 is discriminatory. They are correct, in the sense that the Chapter imposes rules on participants in the building industry that do not apply to participants in other industries: see (the box on page 21).
79. Many employers accept that Chapter 5 is discriminatory, in the sense mentioned above. However, they argue the discrimination is justified. They assert the building and construction industry has a deplorable track record, one that cannot be compared with that of any other industry, and that a provision like section 38 of the BCII Act is essential to ensure an acceptable level of industrial harmony and productivity. An example of this approach is to be found in a paper recently published by the Australian Mines and Metals Association ("AMMA").³⁰ That paper asserts there has been insufficient cultural change in the building and construction industry to justify abandoning section 38 (and the present powers of the ABCC). In particular, at pages 30-32, the paper lists seven court or AIRC decisions that unlawful industrial action had occurred, or was likely to occur. On its face, the list makes a strong case against any abandonment, at this stage, of Chapter 5. However, is the AMMA list correct? Is the incidence of unlawful industrial action in the building and construction industry higher than in other heavy industries? If there is a case for continuing Chapter 5, should this be on an interim basis or indefinitely? AMMA suggests a review of the situation after five years. Is this an appropriate time? I would like to have comments about all these matters, from people on both sides of the debate. In particular, I am interested to receive comment from those who would abolish section 38 about the seven cases mentioned by AMMA.
80. In considering the desirability of continuing Chapter 5, it is necessary to bear in mind the general provisions of the new legislation that will apply to building employees in company with all other employees.
81. On 17 September 2008, the Deputy Prime Minister released further information about the proposed new general legislation.³¹ She confirmed that the Government will retain the concept of "protected action", this being industrial action undertaken only within a collective bargaining period and, even then, only after a secret ballot of affected employees and three days notice to the employer. Presumably, there will be a health and safety exception, but the criteria are tight. Ms Gillard said that "unprotected industrial action will not be tolerated under any circumstances", that the FWA will be empowered to order a resumption of work, and,

perhaps more importantly, it will be unlawful for an employee to demand, or an employer to pay, strike pay for a period of unprotected action. Presumably, any breach of the strike pay prohibitions will attract a significant penalty. There will be a mandatory loss of four hours pay, even if the unprotected action ends in less time than that.

82. Under these circumstances, some people may argue, there is no need to retain special provisions, unique to the building industry, in respect of unprotected action. Unprotected action will already attract the automatic penalty of loss of wages for the duration of the action, with a minimum four hours' lost wages. Why double up the penalty, especially in a discriminatory way? Is this argument correct?
83. Are there other ways of tackling the problem of unlawful industrial action? For example, would it be possible to penalise a union which is involved in unlawful industrial action by withdrawing that union's right of entry to the site for a period of time; or even its right to represent workers on that site? If so, would a combination of that penalty and the automatic loss of wages by employees be sufficient to discourage unlawful industrial action?

(3) The ABCC

84. The second main purpose of the BCII Act is to create and empower a special building and construction investigatory and enforcement body, the ABCC. The relevant parts of the Act are summarised in paragraphs 12 to 27 above. The question whether it is appropriate to take similar provisions into the new legislation is discussed below.

(4) The Guidelines

85. In considering the future desirability of provisions like those now contained in the BCII Act, it is desirable to think about the enforcement role that might be played by revamped Guidelines. The current Guidelines have no statutory force. They are amendable at the whim of the Minister of the day, without the necessity (legally, at least) for consideration by Cabinet or the Parliament. The current Guidelines are not a disallowable instrument, meaning that neither House of Parliament has power to set them aside. Thus there is no Parliamentary supervision of the content of a body of rules whose application may have a profound effect upon a building participant's business. And it is doubtful there would be any way in which a court could intervene effectively to protect a person against a perverse interpretation or application of the Guidelines. There would appear to be a strong case, if the Guidelines are to be retained, for putting them on a more formal basis, at least to the extent of providing for them to be a disallowable instrument and providing effective recourse to the courts in respect of any legal dispute—for example about their interpretation or application—and the AAT for review of the merits of particular decisions.
86. A number of the people with whom I have consulted have criticised the wording of the current Guidelines. They say they are unnecessarily wordy and contain too many ambiguities. If there is force in these criticisms, it would seem desirable for them to be revised before they are converted into a disallowable instrument.
87. If the Guidelines are to be retained, there is an opportunity to expand their area of application. Although the current Guidelines cast a wide net, they do not catch employers who have no interest in carrying out federally-funded work. Yet, if the Guidelines set out rules that are necessary in order to maximise harmony and productivity in the building and construction industry, why stop there? Legally, it would be possible to extend the application of the Guidelines (whatever they might then be called) to all corporate employers, thus catching all but the smallest employers. Of course, in order to do this, it would be necessary to give the Guidelines a statutory underpinning, but that is desirable in any case. In order to provide a worthwhile sanction against employers who are not interested in federally-funded work, it would also be necessary to provide for a civil or criminal penalty.

88. I am not presently suggesting the Government should take the course mentioned in the preceding paragraph. I merely throw it out as an option for consideration. Some people might see stronger Guidelines as an opportunity to ensure employers will not yield to inappropriate employee demands. They might argue that, once it is known that employers cannot yield, inappropriate demands will cease. Would there be any merit in such an argument?

STRUCTURE, ACCOUNTABILITY AND INDEPENDENCE

89. It is convenient to discuss together the first two items in my Terms of Reference:

- (a) The operational structure of the Specialist Division and its relationship with other parts of Fair Work Australia; and
- (b) The independence and accountability of the Specialist Division.

I will confine discussion in this section to accountability within FWA, as distinct from external monitoring, which is mentioned in the third term of reference.

90. On 17 September 2008, the Deputy Prime Minister stated ³² that FWA will consist of a President, Senior Members and Members. There will be a Chief Executive Officer and administrative staff. Ms Gillard also confirmed that the new FWA will be a "one-stop shop", subsuming a number of federal authorities: the AIRC, the Australian Industrial Registry, the Australian Fair Pay Commission and Secretariat, the Workplace Authority and the Workplace Ombudsman, as well as the ABCC. It will be a large organisation.
91. No doubt the President will be the public face of FWA. It is not yet clear to what extent (if any) he/she will have overall responsibility for the organisation; but it is obviously not intended that the President will make or control all its decisions and actions. Nor would this be practicable. The Senior Members and Members will each have responsibility for their own decisions and the Chief Executive Officer will presumably have overall administrative responsibility, possibly subject to any direction of the President.
92. The Deputy Prime Minister made clear there will be an Inspectorate within FWA. This will be an investigation and prosecution unit, headed by a Director who will appoint Fair Work Inspectors.
93. The Terms of Reference indicate the Specialist Division will be a division of the Inspectorate. The Specialist Division will not exercise rights-making functions, as the AIRC traditionally has done. Its duties will be limited to investigation and enforcement. But of what laws? That is the issue just discussed.
94. As FWA is to be a single entity, it will be necessary for the Chief Executive Officer to be administratively responsible for the Inspectorate. Similarly, as the Specialist Division is to be part of the Inspectorate, the Director will have a degree of responsibility for the Specialist Division. However, there is a question as to the extent to which the Specialist Division should be under the direction of the Director.
95. No doubt it will be essential for the Director, and even the Chief Executive Officer, to be involved in financial, personnel and other administrative decisions concerning the Specialist Division. It does not follow that either of these people should be made responsible for each discretionary decision taken on behalf of the Specialist Division; for example, whether to undertake a particular investigation or whether to exercise a particular power. Subject to any requirement for concurrence, it might be best to allow such decisions to be made at a divisional level. An analogy is to be found in the court system. Each of the Australian federal courts has a one-line budget appropriation that is administered by the Chief Justice of the court, with the aid of a Registrar/Chief Executive Officer. The judges of each court play a role in its administration, but ultimate responsibility is vested in the Chief Justice alone. However, the Chief Justice has no role in other judges' judicial decisions. Determination of the outcome of a particular case is the independent, personal responsibility of the judge or judges assigned to the case. It is reviewable only on appeal to any available higher court.

96. Judges in the federal courts exercise the judicial power of the Commonwealth, whereas the specialist building and construction division would exercise administrative power. This does not undermine the analogy; members of the AIRC exercise Commonwealth administrative power but nonetheless have independence, and personal responsibility, for their decisions, which are reviewable only on appeal. Presumably, it is intended that Senior Members and Members of FWA will be in a like position.
97. I see no difficulty in fitting a specialist building and construction division into the Inspectorate. That division would need a leader, whom I will call "the Divisional Manager", who would presumably report to the Director. However, there might be a case for the Divisional Manager to share responsibility with a divisional supervisory board. Much will depend upon the functions and powers given to the Specialised Division. It might be argued that, the more significant its functions and draconian its powers, the greater the need for a divisional supervisory board, not just an executive head. This seems to have been the thinking of Commissioner Cole, in recommending a statutory Commission on which there would be room, at any one time, for a variety of people, drawn from most, if not all, the states and territories.
98. I envisage that any divisional supervisory board would comprise some five to seven people, drawn from a variety of backgrounds and based in various states and territories. These people might be appointed, on a part-time basis, for a term of years: thereby obtaining a measure of independence from the government of the day. The divisional board would be responsible for determining the Specialist Division's policies and programs, leaving day-to-day implementation of them to the Divisional Manager.
99. If there is to be a divisional supervisory board, it might be advisable to give that board the task of reviewing any decision by the Divisional Manager to undertake a particular investigation and/or compulsorily interrogate a particular person. It would be important to avoid making the decision-making procedure too cumbersome or slow; however, in the age of email and telephone conferencing, that need not be a problem. Is a supervisory board a good idea or not? If so, what ought to be its role?
100. There is a question whether inspectors should work only within the Specialist Division or assist in other divisions as well. A pragmatic approach might be best. In a place where there is considerable building and construction activity, it might be advantageous to deploy an inspector only on that work; but to allow overlap with other industries where there is insufficient building and construction activity to keep the inspector fully occupied. I would welcome comment on this point.
101. There is also a question about the role of the Specialist Division. Should it follow the lead of the ABCC and confine itself to alleged transgressions by unions and employees, concerning itself with employers only to the extent that they are alleged to be involved in those transgressions; or should it investigate other alleged breaches by employers; for example non-payment of employee entitlements? And should the Specialist Division carry out educative activities and/or OHS inspections and prosecutions?
102. A further issue is the extent to which the Specialist Division will be independent of government. To some extent that might depend on the independence of FWA generally. However there may be a particular concern about independence if the Specialist Division is granted coercive interrogation powers. It will be recalled that section 11 of the BCII Act allows the Minister to direct the ABC Commissioner regarding the exercise of the ABCC's powers and functions under the Act, but not in relation to a particular case. Does this provision strike the right balance for the Specialist Division? Or does it give the Minister too much, or too little, control?

THE SCOPE OF INVESTIGATION AND COMPLIANCE ACTIVITIES

103. The fourth dot point in the Terms of Reference requires me to consider what should be the scope of the Specialist Division's investigation and compliance activities.
104. The ABCC's functions are stated at paragraph 14 above. It would be possible to give the new Specialist Division exactly the same functions as those of the ABCC. Bearing in mind that those functions include the investigation and prosecution of employer breaches, such as non-compliance with awards and certified agreements, is there need for anything more?

PROFESSOR WILLIAMS' VIEW ON POWERS

At a forum in Canberra on 25 August 2008, ³³ Professor George Williams criticised the ABCC's coercive and investigatory powers, which he described as "exceptional and unwarranted".

He said the power conferred on the ABCC by section 52 of the BCII Act 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 meetings 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 wrong doing.*
- *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).*

Professor Williams explained he was not saying 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."

The professor said section 52(7) of the BCII Act "is remarkable in further overriding secrecy provisions in other laws. 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."

Professor Williams went on to speak of the "low threshold for the use of the ABCC's powers." After citing some of the BCII Act's definitions, he said:

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'.

After referring to the penalties provided by the BCII Act, the professor noted the lack of safeguards against abuse of the powers conferred on the ABCC:

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.

Professor Williams conceded that similar powers were to be found in other statutes. But he thought the context was important:

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 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.

Finally, the professor asked whether "the law could be fixed by greater oversight?"

He thought not:

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.

POWERS AND RESPONSIBILITIES OF OFFICERS OF THE SPECIALIST DIVISION AND THE RIGHTS OF AFFECTED PERSONS

(1) Powers to enter, inspect and copy

105. The fifth, sixth and seventh dot points in my Terms of Reference concern the powers and responsibilities of officers of the Specialist Division and the rights of persons who are subject to the investigation and compliance activities of the division. These matters should be considered together.
106. The Deputy Prime Minister has already indicated that the FWA Inspectorate will be given "strong and effective investigative powers, including the power to inspect and copy documents and records on an employer's premises."³⁴ Unless there is a specific contrary provision, these powers will be available to inspectors within the Specialist Division. Presumably the powers will be similar to those conferred on ABCC inspectors by section 59 of the BCII Act. Is there any problem about Specialist Division inspectors having those powers?

(2) Power to summons for interrogation

107. In discussions with me, all union leaders strongly opposed the idea of conferring on the new Specialist Division power to summons a witness for compulsory interrogation. With a few exceptions, employer representatives expressed the opposite view, usually equally strongly. The state government officers expressed mixed views.
108. As I have indicated, some people see this as a human rights issue. They say it amounts to discrimination against workers (more correctly, participants) in the building industry.
109. It is true that similar powers are not available against most other workers. There are exceptions, notably police officers in those states where police integrity or general public corruption commissions have been established, and public servants generally in the latter. There are also statutory bodies, at both federal and state level, that investigate criminal or other illegal behaviour and which have the power to compel people to attend to give evidence.
110. Well-known Commonwealth examples include the Australian Taxation Office ("ATO"), the Australian Competition and Consumer Commission ("ACCC"), the Australian Securities and Investments Commission ("ASIC"), the Australian Crime Commission ("ACC") and the Inspector-General of Intelligence and Security ("IGIS"). Each of these agencies has power, not only to require production of documents, but also to compel people to submit to interrogation, refusal being a criminal offence.³⁵
111. There are currently three state corruption-investigation Commissions: the Independent Commission Against Corruption (NSW) ("ICAC"), the Crime and Misconduct Commission (Qld) and the Corruption and Crime Commission of Western Australia. All three organisations have power to compel the attendance of witnesses, failure to attend or to give evidence being a criminal offence.³⁶ The same statement is true of the two police commissions, the (New South Wales) Police Integrity Commission ("PIC")³⁷ and the (Victorian) Office of Police Integrity ("OPI").³⁸
112. On another level, inspectors employed by WorkSafe Victoria have power to enter premises believed to be a workplace, at any time during business hours, for inspection purposes. Inspectors have the right to demand the production of documents and answers to questions, it being a punishable offence to refuse or fail to comply with their demand.³⁹ Similar powers are available to OHS inspectors in other states.

113. Leaving aside these administrative bodies, it is commonplace for unwilling witnesses to be subpoenaed to give evidence in, or produce documents to a court. The power to issue a subpoena is fundamental to the operation of courts. To my knowledge, it has never been considered to raise a human rights issue.
114. Power to compel attendance may actually assist a witness. Some people, who are not unwilling to give evidence, ask to be served with a subpoena in order to avert criticism, even ostracism, by others.
115. Notwithstanding all the above, it understandably causes resentment amongst building workers that they, but not workers in almost any other industry, can be summoned to give evidence about work-related events, with a view to building up a case against their co-workers and/or their union. Unlike most of those summoned by the statutory bodies to which I have referred, the people who are interrogated by the ABCC are usually not people under suspicion of misconduct: they are ordinarily mere witnesses, summonsed in order to enable the ABCC to determine whether there is a case against someone else and, if so, to provide the evidence the ABCC hopes will lead to a conviction. Unlike persons subpoenaed to give evidence in court, court action has not yet been commenced; it may never be commenced.
116. As I have indicated, some employers, and employer associations, acknowledge what the unions call “discrimination” against building workers. But they argue the present powers are essential, if the building and construction industry is not to slip back into the “lawlessness” detected by Commissioner Cole. Those people tend to ascribe the current level of industrial harmony and productivity on building sites to the existence of those powers. Are they correct? If so, that may justify maintenance of the special powers. What is the evidence of a causal connection between the existence of these powers and increased productivity?
117. If the compulsory interrogation power is to be retained, a question arises as to the safeguards that ought to be built into the legislation to reduce the possibility of inappropriate exercise of those powers. Safeguards are of prime importance. However desirable it may be for the new legislation to include the compulsory interrogation power, in the interests of industrial peace and productivity, exercise of the power will usually cast a burden on the recipient of the summons. It must normally be distressing for a person to receive a summons requiring him or her to attend a formal interrogation, upon pain of a gaol sentence for failure to attend or answer questions, about events at work that involve one’s workmates. No doubt this is particularly the case if the recipient is not a confident personality and/or is inexperienced in the ways of the law and the bureaucracy. Moreover, at least so far as the Act is concerned, the recipient is left to bear any lost wages and the expense of obtaining legal assistance.
118. Monitoring, and subsequent review, of the exercise of the power can be a useful safeguard; but it is even more important to reduce the likelihood of any inappropriate exercise of the power before it occurs.
119. The precondition for the exercise of power under section 52 of the BCII Act, including the issue of a summons to attend for interrogation, is that the ABC Commissioner, or a Deputy Commissioner, “believes on reasonable grounds” that the relevant person “has information or documents relevant to an investigation” or “is capable of giving evidence that is relevant to an investigation”. No doubt, it is necessary for the investigation to fall within the description in section 10 (b) of the Act; that is, it must relate to a suspected contravention, by a building industry participant, of the BCII Act, the WR Act, an award or certified agreement or an order of the AIRC. However, the issuing officer is not required to make a judgment as to the need to make that investigation, having regard to the nature and seriousness of the suspected contravention, nor the importance to the investigation of having evidence from this particular person.

120. I assume the ABC Commissioner, and any Deputy who is called upon to consider exercising the power, always considers these matters; nonetheless, it might be desirable for the legislation relating to the FWA Specialist Division to impose an express obligation to that effect upon any person empowered to issue a summons on behalf of the division. If the statute sets out the obligation, these matters are less likely to be overlooked. It might also be desirable to require another person, not being a subordinate of the person who is to issue the summons, to concur in its issue. The law has long required police to obtain a search warrant from a magistrate before entering and searching private property; the decision to take that step is not left to the investigating police. Similarly, telephone tap warrants must be issued by an independent judicial or AAT officer. The rationale of these requirements is that the person in charge of an investigation is not necessarily the person best placed to weigh its potential burden on others; an independent "second look" is a useful safeguard.
121. If there is to be a Specialist Division supervisory board, it could be the rule that the person called upon to consider the issue of a summons must obtain the concurrence of that board. If there is not to be a supervisory board, it might be appropriate to require concurrence by the FWA President, or his/her deputy.

(3) Admissibility of documents

122. I mentioned in paragraph 25 above that section 53 of the BCII Act makes inadmissible in proceedings against a person any document or thing produced by that person pursuant to a notice given under section 52 of that Act. Moreover, any information, document or thing that is obtained as an indirect result of giving the information, document or thing is also inadmissible. Does this go too far? What may be widespread distaste about the idea of penalising a person on the basis of statements made by him or her under compulsion to answer may be less applicable to production of documents. There may not be the same infringement of human dignity.
123. Also, it seems anomalous to make a different rule about documents produced by people pursuant to a section 52 notice and documents inspected and copied by an inspector exercising the right of entry conferred by section 59 of the Act. In each case, the affected person is an involuntary player in an exercise of a statutory power. Why should it make any difference which power is used?

THE OPI MODEL

Legislation governing the Victorian OPI provides a possible model in respect of the proposed Specialist Division.

The function of OPI is to investigate concerns about the conduct of members of Victoria Police. The Director of OPI has power, for that purpose, to summon any person to attend, and give evidence at, a hearing (public or private, as the Director decides) or to produce documents. Similar to the position under section 52 of the BCII Act, it is an offence to fail to attend the hearing or to refuse to take the oath or make an affirmation.

(Unlike the section 52 situation, it is also an offence, subject to specified exceptions, for a summonsed person to disclose to another person the fact or terms of the summons.)

Unlike the BCII Act, the Victorian police legislation provides for an external monitor of the OPI's exercise of power, the Special Investigations Monitor ("the SIM"). The current SIM is a former judge. He is not limited to investigation of complaints; the SIM has the continuous role of assessing the questioning of persons attending hearings, and the Director's requirements for production of documents, in relation to both relevance and appropriateness.

In order to enable the SIM to do this, the Director is obliged:

- (a) within three days of the issue of a summons or warrant, to make a written report about it to the SIM, giving reasons; and
- (b) as soon as possible after a person attends to give evidence, to report the reasons for the attendance, the names of the persons present at that time, the relevance of the attendance to the investigation, and information about any certificate protecting the person from self-incrimination. The report must include a video recording of the hearing and a copy of any written transcript.

A person who has attended to give evidence has the right to complain to the SIM that he or she "was not afforded adequate opportunity to convey his or her appreciation of the relevant facts to the Director." Witnesses are informed of this right before leaving the hearing room. Unless the SIM considers the subject-matter of a complaint to be trivial, or the complaint vexatious or lacking in good faith, the SIM is obliged to investigate it.

Even if there is no complaint, the SIM may, at any time, make recommendations to the Director as to any action the SIM thinks should be taken. The recommendation may be for steps to prevent particular conduct occurring in the future or to remedy harm or loss that has already arisen.

The SIM has extensive investigatory powers. He/she is obliged to submit an annual report to Parliament dealing with the manner in which the Director's powers have been exercised in the preceding year and may make a special report at any time.

The Director is not obliged to adopt a recommendation of the SIM. However, the SIM may require the Director to make a written response, giving the SIM the opportunity, if appropriate, to report the disagreement to the Parliament.

The primary advantage of the SIM procedure is immediacy. Investigations conducted by OPI are subject to very prompt scrutiny, whether or not there is a complaint. Although totally independent of the Director and OPI staff, the SIM knows the purpose and nature of the investigation and the relevance of the witness' evidence and sees everything that happened at the hearing. The SIM looks over OPI's shoulder throughout. This imposes a powerful discipline on OPI's exercise of its considerable powers.

EXTERNAL MONITORING

124. The topics mentioned in the third, eighth and ninth dot points in my Terms of Reference raise questions about external supervision of the conduct of the proposed Specialist Division. There is no significant external supervision of the ABCC.
125. A person who is unhappy about the way in which he/she has been treated by the ABCC can complain to the Commonwealth Ombudsman. However, the complaint will be just one of the thousands of complaints, involving the full range of Commonwealth agencies, that the Ombudsman receives each year. If the complaint is upheld, the Ombudsman can discuss it with the ABCC and/or mention it in the Ombudsman's annual report; but these would be actions after the event, designed to prevent repetition, rather than to relieve the position of the complainant.
126. Where a person is in dispute with the ABCC in respect of a legal issue, it might be useful, if expensive, for the person to take the matter to the Federal Court. This course was taken in *Bonan v Hadgkiss*, where it was determined that the ABCC had a discretion to refuse to allow the appearance of a lawyer who had previously represented another person summoned for interrogation in respect of the same incident.
127. However, the limits of useful court action are demonstrated by another Federal Court case, *Washington v Hadgkiss (2008) FCA 28*. That was a challenge to a proposed investigation by an ABCC Deputy Commissioner, Mr Nigel Hadgkiss, allegedly in relation to a suspected breach of section 816 of the WR Act. Counsel for the applicants contended this was not the true purpose of the investigation, as was demonstrated by changes in the wording of the initiating notices and other surrounding circumstances. Mr Hadgkiss did not give evidence; nonetheless the challenge failed. Marshall J applied High Court authority in holding that impropriety of purpose "will not lightly be inferred and, by application of a principle of regularity, will only be inferred if the evidence cannot be reconciled with the proper exercise of the power." Marshall J followed established law. However, his decision illustrates the unsatisfactory nature of that law. The principle of regularity (really a presumption) was developed, many years ago, to cover situations where satisfactory evidence of the circumstances surrounding the official act was unavailable or difficult to obtain; for example, because of the effluxion of time or geographical remoteness. In cases where direct evidence about the circumstances is readily available, but withheld from the court, the presumption serves only to save the official act from proper judicial scrutiny.
128. In a report dated 1 May 2008, *The Coercive Information-Gathering Powers of Government Agencies*, the Administrative Review Council, offered 20 principles "as a guide to government agencies, to ensure fair, efficient, and effective use of coercive information-gathering powers." The principles contained no reference to external review, possibly because, so it seems, no Commonwealth agency that exercises coercive information-gathering powers is currently subject to any more effective external scrutiny than the ABCC. However, some state agencies are subject to external review, to a greater or lesser extent. The ICAC legislation provides for appointment of an Inspector of the Independent Commission Against Corruption,⁴⁰ who is empowered to audit the Commission's operations and deal with complaints about its conduct. The Inspector may act on his/her own initiative but there is no requirement that the Commissioner automatically supply information to the Inspector. The PIC position seems to be similar.
129. If the proposed Specialist Division of FWA is to be granted coercive powers, such as those now enjoyed by the ABCC, it seems essential to subject it to external monitoring. A requirement of prior concurrence would be a useful safeguard against inappropriate invocation of the power, but it would still remain important to have the power's actual use monitored by a high status independent person.

130. The most rigorous current Australian monitoring regime is that which applies to the Victorian OPI. This regime involves the appointment, as a monitor, of somebody who holds the office for a specific term. Having regard to the number of compulsory interrogations that have been conducted by the ABCC, it would seem sufficient to have a part-time appointee. With contemporary communication facilities, the monitor could be located anywhere in Australia. The cost would be modest.
131. I throw out, for comment, the suggestion that a monitoring system like that of the Victorian OPI should be part of any new legislation that retains compulsory interrogation.

LITIGATION BY THE SPECIALIST DIVISION

132. The ABCC has power both to initiate certain litigation in its own name (section 73 of BCII Act) and to intervene, as of right, in any matter before the AIRC that arises under the WR Act and involves a building industry participant or building work (section 72). Presumably, the proposed Specialist Division should have similar powers. However, it may be thought undesirable, as a matter of general principle, that parties who come to court to resolve a particular issue should find their case “hijacked” by an intervenor who wishes, perhaps, to resolve a point that is of little concern to them but whose resolution will cause them additional costs and delay. Should intervention be by leave, in order to allow the court to control the extent and terms of the intervention?

USE OF INFORMATION AND INTERACTION WITH OTHER AGENCIES

133. Section 65 of the BCII Act imposes criminal sanctions on the misuse of information gathered by an ABCC officer in the course of his/her employment. Given the invasive nature of the ABCC’s powers and the likely sensitivity of much of the material it collects, this seems correct, and appropriate to be reproduced in the new legislation governing the Specialist Division. However, some people may think section 65 goes too far, or not far enough. Submissions on the point are invited.
134. Perhaps one permissible use of gathered information might be transmission to other government agencies, being agencies concerned with the investigation of unlawful conduct of the type that appears to be indicated by the transmitted material. The relevant agency might be one of the Commonwealth agencies mentioned in the twelfth dot point in the Terms of Reference (ASIC, ATO and ACCC). But what about another Commonwealth agency? What about state agencies, such as police, crime or corruption commissions, etc? Is there a legitimate concern that to permit the transmission of information to these agencies would be to go too far, that the Specialist Division would end up being a warrantless information-gatherer for agencies that would ordinarily require warrants to obtain the information for themselves? As is so often the case, there may be a need to choose between administrative efficiency, on the one hand, and private rights on the other.

RESOURCES, PERSONNEL AND TRANSMISSION

135. The last three dot points in my Terms of Reference concern logistic matters, in setting up the proposed Specialist Division. They are all important matters, but probably not contentious at this time. However, if anybody wishes to say anything about any of those matters this would be welcome.

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