MASTER BUILDERS AUSTRALIA

Submission to

Senate Education, Employment and Workplace Relations Committee

on

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009

July 2009

Master Builders Australia Inc ABN 70 134 221 001

EXECUTIVE SUMMARY

The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the Bill) is a significant and potentially disastrous watering down of the current powers exercised by the Australian Building and Construction Commission (ABCC). Although the Deputy Prime Minister has given repeated assurances that "a strong cop on the beat" was needed in the building and construction industry and would be retained in order to combat industrial lawlessness, the result effectively is a toothless tiger and therefore Master Builders opposes the passage of the Bill.

There are no separate building and construction laws for the new inspectorate to administer that would give effect to the Government's assurances of having a strong cop on the beat.

The powers of the new inspectorate will be considerably less than those wielded by the ABCC. The most significant of these reductions are:

- The maximum level of fines that may be imposed for proven breaches has been cut by two thirds.
- The range of circumstances in which industrial action is unlawful and attracts penalties has been narrowed.
- Parties are no longer forbidden to apply "undue pressure" to make, vary or terminate an agreement.
- The definition of building work has been narrowed to exclude work performed off-site, thus limiting the ambit of the inspectorate's authority.
- The inspectorate is no longer required to publish reports of non-compliance incidents in situations where breaches did not go to court.
- The right to intervene in industrial relations cases has been abolished.

The power to compel witnesses to give evidence has been retained, but this is now hedged about with so many safeguards, including the ever-present threat of being "switched off", that its effectiveness as a tool of information gathering is likely to be substantially reduced. On top of this, the confidentiality requirements have

been watered down, making it less likely that witnesses will have the confidence to come forward.

The fundamental problem with the apparatus established by the Bill is that the specialist inspectorate lacks the independence it needs to be effective. It is smothered in layers of costly bureaucracy and strangled by yards of red tape. There are so many safeguards against the possible abuse of its powers that there remains little scope for the proper exercise of such powers that it retains. To achieve optimal productivity and efficiency Australia's building and construction industry requires an industrial relations culture underpinned by a foundation of law and order. Because the proposed Bill provides inadequate enforcement mechanisms, it will undermine this foundation and will inevitably result in deterioration in lawful industrial relations and other practices on construction sites around the country. From a public interest perspective alone, this scenario is unacceptable.

Master Builders asks the Government to reconsider the fundamental aspects of the Bill and not proceed with its passage.

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1 INTRODUCTION

1.1 This submission is made by Master Builders Australia Inc (Master Builders).

1.2 Master Builders represents the interest of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 30,000 members.

2 PURPOSE OF SUBMISSION

2.1 The Government introduced the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the Bill) into Parliament on 17 June 2009. This submission addresses the Bill in detail.

2.2 Prior to the 2007 election, the Labor Party promised that it would retain the Office of the Australian Building and Construction Commissioner (ABCC) until 31 January 2010, when it would be replaced by a specialist Fair Work inspectorate. The Bill gives effect to that election promise. However, on a number of occasions the Deputy Prime Minister, the Hon Julia Gillard, has indicated that the Government will retain "a tough cop on the beat", including in her Second Reading speech on the Bill.[1] In Master Builders' view the inspectorate established by the Bill fails to realise this intention.

2.3 This submission outlines why Master Builders has taken that view, highlighting that the proposed Building Industry Inspectorate will have no separate underlying provisions to enforce but will be enforcing provisions of the new *Fair Work Act 2009 (Cth)* (FW Act) in the capacity of Inspector. This submission emphasises why this arrangement falls short of the "tough cop" promised. Master Builders strongly recommends that the Bill should not be passed.

2.4 The Government undertook to consult with industry stakeholders about the replacement legislation. In June 2008 the Deputy Prime Minister appointed the Hon Justice Murray Wilcox QC, a retired Federal Court judge, to report on matters related to the creation of the specialist Fair Work Inspectorate. Master Builders provided a comprehensive submission to this inquiry, as well as a reply submission and a further submission directed to specific queries Mr Wilcox raised at a debate on the issues before him aired at the Sydney University Law School.

[1] Available at http://www.deewr.gov.au/Ministers/Gillard/Media/Speeches/Pages/Article_090617_112100.aspx

2.5 Mr Wilcox submitted his report at the end of March 2009: *Transition to Fair Work Australia for the Building and Construction Industry* (the Report).[2] A number of the provisions in the Bill are based upon the Report but there are elements of the Bill which do not follow his recommendations, particularly the "switching off" mechanism. This submission recommends (as an absolute minimum) that this element of the Bill be abandoned.

2.6 This submission sets out a case for maintaining separate building and construction industry laws and then provides a detailed analysis of the Bill.

3 BACKGROUND

3.1 Following the recommendations of the Cole Royal Commission, the then federal Government introduced legislation tailored to the needs of the industry, the *Building and Construction Industry Improvement Act 2005 (Cth)* (BCII Act) and established the ABCC. The ABCC's role is to monitor, promote, investigate and enforce appropriate conduct by those engaged in building work, as defined in the BCII Act. Its jurisdiction includes compliance with industrial instruments, the *Workplace Relations Act 1996* (from 1 July 2009, the *Fair Work Act 2009* (FW Act)) and the *Independent Contractors' Act* 2006 (called "designated building laws") and, in principle, a statutory "building code" issued under the BCII Act. No statutory "building code" has ever been declared under the BCII Act, although the Minister[3] has that power. Instead, under contract conditions attached to federal government funded projects, the ABCC has extensive powers to ensure that building industry participants adhere to Government procurement conditions set out in a Code and related Implementation Guidelines.

3.2 The BCII Act provides for high penalties for breaches of its terms, including breaches of designated building laws.[4] Breaches of the Code and Guidelines are dealt with by a Government committee called the Code Monitoring Group. Sanctions include excluding the offender from tendering for a period of time although this has been exercised only when there has been a substantial breach of the law, with this sanction being applied to three contractors who were convicted of breaching the *Trade Practices Act*.

[2] http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/
[3] The ABCC treats the *Code* and the *Guidelines* as the building code for its purposes and applies it to employers undertaking building work which are constitutional corporations or in a "Commonwealth place"
[4] The BCII Act, WR Act, a federal industrial instrument and the *Independent Contractors Act 2006*

3.3 The ABCC has strong but not unique investigation powers, and similar powers are held by comparable agencies such as the Australian Competition and Consumer Commission and the Australian Prudential Regulatory Authority. Persons required to provide information or answers cannot refuse on the basis of potential self-incrimination, public interest or potential breach of another law, but the material cannot be used against them in civil or criminal proceedings (unless they have lied). ABCC officers may require and administer oaths. As stated, these powers are not unique to the ABCC but are held by several other specialist agencies: see Attachment 1. Attachment 1 also details the powers of the ABCC and sets out the reasons for their retention.

3.4 The extent of the ABCC's information gathering powers has been highly controversial. The Wilcox Report recommends that there be "safeguards" attached to the exercise of the powers. In this submission Master Builders argues that the separate laws administered by the ABCC should be retained and that the so called safeguards, when considered with the "switching off" mechanism, have gone too far. They will not deliver a "tough cop on the beat" and will prevent the successor to the ABCC from operating effectively.

4 RETENTION OF SEPARATE SUBSTANTIVE PROVISIONS FOR THE BUILDING AND CONSTRUCTION INDUSTRY

4.1 In the Report, Mr Wilcox has accepted that there are features of the industry which merit a specialist regulator, and that the ABCC had improved relations among industry participants. He openly admitted that there is "more work to be done" in changing the industry. The Report makes it clear that:

> *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.*[5]

4.2 Regrettably, the sentiment reflected in that statement was not manifest in practical recommendations that would ensure the work of the ABCC continues. That is the major contradiction in the Wilcox Report. Mr Wilcox examined the differences between the BCII Act and the FW Act and set out the following key findings:

4.2.1 Under the FW Act there are civil penalties for organising or engaging in industrial action prior to the nominal expiry of an agreement. Under the BCII

[5] Supra note 2 at para 3.23

Act there are civil penalties for engaging in unprotected industrial action (action prior to the nominal expiry date gives rise to unprotected industrial action, but there are other causes as well).

4.2.2 The difference in penalties flows into access to damages. Where there is a civil penalty (industrial action prior to nominal expiry per the FW Act; unprotected industrial action per the BCII Act) the court can also award damages. Under the FW Act it would still be possible to bring a civil action for damages arising from unprotected industrial action because industrial action needs to be protected so as to have immunity from civil action.

4.2.3 Maximum penalties under the FW Act ($33,000 for a corporation; $6,600 for an individual) are less than a third of those under the BCII Act ($110,000 for a corporation; $22,000 for an individual).

4.2.4 Differences in the language of the FW Act and BCII Act may mean there are technical changes to aspects of the BCII Act if it is replaced by the FW Act. Mr Wilcox dismissed these as largely "semantic" but Master Builders disagrees and believes that they are substantive and fundamental to the separate building and construction industry regime.

4.2.5 At paragraph 4.32 of the Report Mr Wilcox states:

> *Although there is clearly a technical difference between 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 find it difficult to find a scenario under which this would make a practical difference …*

4.3 Master Builders considers that this ignores the harsh reality of industrial action in the building and construction industry. The distinction between action prior to the nominal expiry date; and action that is not 'protected' industrial action is substantial. For example, in Victoria, building industry participants routinely operate under agreements that have passed their nominal expiry date while awaiting negotiations to be finalised for a template industry agreement. It would unleash industrial mayhem if industrial action that was taken to demonstrate "industrial muscle" around the relevant period became lawful or, as is evident from the terms of the FW Act, did not attract a civil penalty.

4.4 These negotiations often take several months to finalise. In Victoria, The "standard" industry CFMEU pro forma enterprise bargaining agreement 2005-2008 had a nominal

expiry date of 31 March 2008 yet a replacement agreement was not available until towards the end of that year. There are many companies still in the process of finalising the replacement agreements in place now (some 12 months after the nominal expiry date) or considering alternatives. For a number of industry segments with 31 March 2008 nominal expiry dates replacement agreements were not finalised until February–March 2009. In recognition of the traditional delay between the nominal expiry of the agreement and the availability of a union endorsed replacement, the 2005-2008 pro forma provided for a pay increase on 1 March 2008 with no further increase to be sought until 1 March 2009. Similarly, under CFMEU EBA 2008-2011 a pay increase is provided for on 1 March 2011 even though the Agreement has a nominal expiry date of 31 March 2011. Civil penalties for engaging in unprotected action with access to damages should be retained as a feature of building and construction industrial relations laws.

4.5 Mr Wilcox's findings regarding penalties are especially disappointing. Master Builders strongly opposes any weakening of the penalty provisions for breaches of industrial laws by building industry participants. The Report fails to recognise that the turbulent history of the building and construction industry provides a valid case for the retention of significantly higher penalties than would otherwise apply. This is despite the fact that the Report acknowledges the existence of continuing unacceptable conduct. The Report's recommendation is related to the following finding by Mr Wilcox at para 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.*

4.6 This finding ignores the evidence of the Royal Commission that there is a special case for building and construction industry laws particular to the industry, backed by appropriate penalties as means to restore and then enforce the rule of law.

4.7 Section 38 of the BCII Act stipulates that a person must not engage in unlawful industrial action, with a maximum penalty of $110,000 for breaches. The rationale for this provision is based on the additional severe consequences of industrial action in the building and construction industry compared with other industries. By undertaking industrial action, building workers have the potential to inflict heavy financial penalties upon builders and even cause projects to be abandoned and firms to go out of business.

4.8 The first issue is that liquidated damages could be payable if a project is delayed by unlawful industrial action. Those liquidated damages can easily wipe out a contractor's profit and lead to insolvency. The second issue relates to the cost of the consequent necessity to speed up the work program for the building or structure, especially where industrial action has been taken during sensitive operations such as a concrete pour. The hardened concrete must be expensively removed before work can continue. Accordingly, overtime could be earned by the workers thus increasing their rewards for taking unlawful industrial action during a sensitive period. The third major cost issue is the financial effect on others in the building and construction industry chain. Because of the interrelated manner in which construction activity is carried out by subcontractors which follow one another in a building schedule, the adverse consequences of industrial action flow on to the "following" trades. These costs are unacceptable and belie the real reason for such industrial bastardary which is to instill fear as a weapon of exerting industrial control.

4.9 Costs of prosecuting matters under general workplace laws are met by each party. Cost rules for matters taken under the BCII Act are able to be claimed by the successful party. Denying this right will mean that unions are less accountable, as the threat of prosecution will be less potent because they will not need to meet crippling legal costs. The relevant costs rule is set out at section 570 FW Act.

4.10 Master Builders believes that the penalties for taking unlawful industrial action in particular are appropriate considering the harsh consequences for all parties when unlawful industrial action occurs. Administering the special rules for the industry has been part of the ABCC's success. It has been necessary for the ABCC to act in the way it has because of the continuing culture of lawlessness in the building and construction industry, epitomised in the CFMEU's continued refusal to abide by the law on building sites as illustrated by its recent conviction for contempt of court.[6] (Attachment 3 to this submission is a summary of the facts surrounding the case). The conviction followed on from actions by CFMEU officials and members who on 19 February 2009 and again on 23 February 2009 obstructed and interfered with the passage of vehicles seeking to enter the New Royal Children's Hospital Site in Melbourne, in breach of a court order made by Marshall J. on 19 February 2009. The ABCC intervened in these proceedings. Tracey J. found that: "The CFMEU was

[6] *Bovis Lend Lease Pty Ltd v Construction Forestry Mining and Energy Union* (No 2) [2009] FCA 650 (19 June 2009) http://www.austlii.edu.au/au/cases/cth/FCA/2009/650.html accessed 3 July 2009

determined not to obey the Order and did not make a reasonable attempt to comply with the Order."[7]

4.11 The CFMEU was required to pay a fine of $75,000 and also ordered to pay the applicant's costs of the penalty hearing on an indemnity basis. This case shows that the substantive provisions of the BCII Act that would be omitted from the law if the Bill proceeds are needed. It also demonstrates the truth of Mr Wilcox's finding that the work of the ABCC is not yet done. It shows that the intransigent attitude of the building industry unions towards the law that was identified in the Cole Royal Commission Report remains in place.

4.12 Attachment 4 is a newspaper article about the Westgate Bridge saga. The industrial relations of the industry were at a low point on this project and, yet again, the item shows the need for tough laws. The unlawful and inappropriate behaviour on this project was also referred to by the Deputy Prime Minister, the Hon Julia Gillard, in her speech to the ACTU congress this year, where she said in her discussion on the building and construction industry the following (although not specifically mentioning the project):

> *Like me, I am sure you were appalled to read of dangerous car chases across Melbourne City involving carloads of balaclava wearing people, criminal damage to vehicles resulting in arrests, threats of physical violence and intimidation of individuals, including damage to a private residence….*
>
> *Balaclavas, violence and intimidation must be unreservedly condemned as wrong by every unionist, every ALP member, every decent Australian.*[8]

4.13 The differences in the substantive law are not merely matters of semantics. This point is illustrated extensively in the legislative comparison at Attachment 2 and in Attachment 5 which is a copy of the judgment in *John Holland P/L v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*[9]. This case shows the need for the retention of the prohibition on the application of "undue pressure" set out in the BCII Act, explained in Attachment 2.

4.14 The point that Master Builders wishes to emphasise is not merely technical. It is the fact that the work of the ABCC cannot continue in the manner indicated by Mr Wilcox in the Report without dedicated and tailored laws. The abandonment of those laws

[7] Id at para 15

[8] The Hon. Julia Gillard MP, 'Address to ACTU Congress', 3 June 2009, *Minister's Media Centre*, http://www.deewr.gov.au/Ministers/Gillard/Media/Speeches/Pages/Article_090603_131653.aspx

[9] [2009] FCA 235

jeopardises major infrastructure projects, like the Westgate Strengthening Project. Industrial action at that site occurred between early February 2009 to May 2009, with all of the attendant delays, expenses and frustrations for the citizens of Melbourne that are involved when major roadways are delayed in their construction. Industry specific laws are directed at behaviour of the level seen at the Westgate site as a matter of importance to the entire community. This point is brought out further in the analysis of the Bill (including discussion of the replacement coercive powers) especially in section 5 of this submission.

5 PROVISIONS OF THE BILL

5.1 General

5.1.1 **Schedule 1** of the Bill is structured so that it amends the BCII Act insofar as that Act is affected by the *Fair Work (State Referral and Consequential and Other Amendments Act 2009)* which was not passed by Parliament at the time of introduction of the Bill. The new legislation will become known as the *Fair Work (Building Industry) Act 2009.*

5.2 Objects

5.2.1 The objects of the Bill differ from those set out in the BCII Act. It is clear that the passage of the Bill will mean a stronger focus on enforcement of the National Employment Standards, the terms of enterprise agreements and other safety net contractual entitlements (see the definition at Item 43 of Schedule 1) against employers, with a new emphasis on this function in the Bill. This is especially evident in view of the deletion of a central current object in section 3(2)(d) BCII Act namely "ensuring that building industry participants are accountable for their unlawful conduct".

5.2.2 This objective was a central aim of the legislation, arising from recommendations of the Cole Royal Commission and an integral part of the separate building and construction industry laws. It will be difficult for the new agency to be "a tough cop on the beat" if its job does not include making building industry participants accountable for their unlawful actions. Making building industry participants accountable for their unlawful conduct must be a continuing object of the legislation. The Bill removes this as the principal focus of the agency and its provisions are therefore built on a foundation that will mean the work of the ABCC cannot be done in the future.

5.3 Definition of Building Work

5.3.1 Item 48 of Schedule 1 has the effect of repealing the definition of building work in section 5 BCII Act by repealing the subparagraph which extends the term to the prefabrication of made-to-order components to form part of any building structure or works whether or not that prefabrication is carried out on site or off site. The change made by the Bill will substitute coverage for on site prefabrication only. This will cause much confusion as to the dividing line between when the Bill's provisions will or will not apply, since many businesses have staff engaged in both on-site and off-site fabrication.

5.3.2 There are several examples where both on-site and off-site work regularly occurs, particularly the making of tilt-up concrete panels, joinery businesses and glazing and glass cutting activities. These businesses often operate so that there is both on site and off site work undertaken, depending on the building project. These activities should be covered by the legislation. It is especially necessary for companies which may employ dedicated on site or off site teams where inconsistent obligations could arise across their workforce.

5.4 Functions of Director

5.4.1 Item 49 of Schedule 1 of the Bill would repeal Chapter 2 of the BCII Act and substitute a new Chapter 2. The proposed section 10, which forms part of Chapter 2, sets out the functions of the Director of the Fair Work Building Industry Inspectorate. These functions are additional to the Director's status as an Inspector per proposed section 59A. The functions of the Director are now largely tailored to the expanded role for the Inspectorate of ensuring compliance with safety net contractual entitlements. This will obviously divert resources from policing the obligation to act lawfully, especially regarding unlawful industrial action. The work of the ABCC has been focussed on restoring the rule of law in the industry and that process should not be undermined by the diversion of resources to new functions. The work of the ABCC has, in large part, been activated by complaints; resources should not be directed away from this vital role.

5.4.2 In the proposed section 10(a)(ii), 10(c), and 10(g), the Director is given a number of functions relating to the Building Code. The Government has not

yet announced whether the National Code and related Implementation Guidelines (Code and Guidelines), as modified on 9 July 2009,[10] will form the statutory Building Code under the Bill. We urge that outcome. As indicated at paragraphs 3.1 and 3.2 of this submission, they were not so declared under section 27 BCII Act. Master Builders' policy is for documents of the nature of the Code and Guidelines to be declared under the statute so that they clearly form part of the work of the specialist agency with all the accountability measures that are linked to statutory instruments.

5.4.3 One of the key effects of the Code and Guidelines has been the penetration of their discipline to all parties involved in the contractual process. The principal contractor has the fundamental job of overseeing the behaviour of all the numerous parties in a building project, and reform has had a cascading effect along the chain of contractors.

5.4.4 In addition, the leverage introduced by the exercise of the Commonwealth's spending power has meant that the commercial consequences of not being Code and Guidelines compliant have been so great as to neutralise the commercial considerations identified by the Cole Royal Commission as forcing contractors to capitulate to union demands. ABCC supervision of the application of the Code and Guidelines at site level has been a vital component in the success of the reform and is therefore a significant factor in determining the functions of any successor agency. Accordingly, Master Builders' policy is for the Code and Guidelines to take the form of delegated legislation because they have become a catalyst for breaking the old mould of unacceptable conduct, especially around the process of agreement making.

5.5 Minister's Directions

5.5.1 The proposed section 11 gives greater powers to the Minister than provided in the BCII Act. The proposed section 11(1)(a) states that the Minister may give directions to the Director about "the policies, programs and priorities of the Director." This level of Ministerial power could mean that the Director was, for example, guided by the proposed Advisory Board to meet a particular priority but then required by a Ministerial direction to place resources in a different

[10] http://www.workplace.gov.au/workplace/Organisation/Industry/BuildingConstruction/NationalCodeandImplementationGuidelines.htm

area. Master Builders considers this to be a retrograde step because the independence of the ABCC has been of great benefit to the industry. That independence, shaped by the broad requirements of the BCII Act and activated by complaints, has enabled the ABCC to operate so that its principal purpose of restoring the rule of law to the industry is not lost from sight. Under the Bill, the Minister would have the power to neutralise the function of the successor body in relation to the enforcement of the law relating to industrial action by, for example, requiring the Inspectorate to devote an express percentage of its resources to the enforcement of safety net contractual entitlements. Master Builders recommends that the extension of the power of Ministerial Direction be removed from the Bill.

5.5.2 Master Builders supports the retention of the requirement that the Minister not be permitted to provide directions about particular cases.

5.6 Reports and Delegation

Section 12 reflects the wording of the current provision regarding the Minister seeking reports from the Director and is supported. Master Builders has no concerns with the proposed provisions about delegation.

5.7 Annual Report

5.7.1 Proposed section 14 is inadequate and would not provide the public with valuable information, such as about whether the Inspectorate was operating to enforce the sort of behaviour recently encountered on the Royal Children's Hospital project mentioned earlier. The proposed section would only require the annual report to include:

(a) details of directions given by the Minister during the financial year under section 11 or 12; and

(b) details of delegations by the Director under section 13 during the financial year; and

(c) details of recommendations made to the Director by the Advisory Board during the financial year.

5.7.2 The Bill deletes the current BCII Act's requirements in section 14(2) as follows:

(a) details of the number, and type, of matters that were investigated by the ABC Commissioner during the financial year;

(b) details of financial assistance provided during the financial year to building employees and building contractors in connection with the recovery of unpaid entitlements; and

(c) details of the extent to which the Building Code was complied with during the financial year.

These provisions should be retained as they provide transparency to the functioning of the agency and alert the community to the work undertaken via investigation.

5.7.3 Master Builders recommends that other operational details and statistics about the activities of the Inspectorate also be included: for example, any actions taken to enforce civil penalty provisions in particular those relating to industrial action per section 417(1) and 421(1) FW Act (the provisions of which are set out in paragraph 5.11.3 of this submission). These sorts of statistics show how much of the Inspectorate's resources are devoted to the ongoing task of maintaining the rule of law and how much were devoted to other tasks.

5.8 Appointment, Acting Appointments, Remuneration, Leave of Absences, Engaging in Other Paid Employment, Disclosure of Interests, Resignation and Termination

5.8.1 Master Builders does not have any concerns with proposed sections 15 to 22 of the Bill.

5.9 Fair Work Building Industry Inspectorate Advisory Board

5.9.1 Proposed sections 23 to 26H deal with the Advisory Board proposed to be established to make recommendations to the Director. Master Builders believes that the Advisory Board is unnecessary, will prove to be ineffective, cause unnecessary delays and may lead to conflict. As indicated earlier in this submission, the Minister has the right to direct the Director as to policies, programs and priorities. The proposed section 24 says that the role of the Advisory Board is to make recommendations to the Director about the same matters. In addition, the Advisory Board is to make recommendations about any matter that the Minister makes a request of the Advisory Board to consider. The potential for managerial confusion and conflict over policies is obvious.

5.9.2 The history of workplace conflict in the building and construction industry led to the establishment of the ABCC under the BCII Act. This was a result not only of the Cole Royal Commission findings, which comprehensively documented

the need for the rule of law to be applied in the building and construction industry, but of earlier inquiries which came to the same conclusion, notably the Gyles Royal Commission in New South Wales.[11] None of these detailed examinations of the industry proposed the establishment of an Advisory Board along the lines now set out in the Bill but all have recommended specialist task forces to tackle the industry's workplace relations problems. As the Wilcox Report demonstrates, these problems have not gone away.

5.9.3 In addition to the difficulty that the Board's functions seem remote from the day to day activities of the Inspectorate, especially when it is considered that only two meetings per year would be required (see proposed section 26G(b)), the Director could be faced with a conflict of interest if the Advisory Board's priorities and recommended programs turned out to be different from those of the Minister who would in any event have the power to overrule the Board's recommendations by Directions.

5.9.4 Master Builders is also concerned at the potential lack of balance in the proposed Advisory Board. The proposed section 25(e) states that the Advisory Board will have 3 other non-staff members in addition to a union and an employer representative. Although Master Builders understands that a member must have the qualifications set out in the proposed section 26(2), the appointees to the Board will influence its recommendations about priorities and programs. We believe that, if the Advisory Board proceeds, it is not necessary to have the three additional members.

5.10 Building Industry Participants to Report on Compliance Code

5.10.1 It is noted that Item 50 of Schedule 1 would have the effect of repealing current section 28 of the BCII Act. Section 27 relating to the capacity of the Minister to issue a Building Code would remain.

5.10.2 Without a Government decision as to whether the Code and Guidelines become the declared Building Code, it is difficult to comment on the utility of the repeal of section 28. However, it seems that the power of Inspectors under section 712 FW Act will be sufficient to make up for the repeal of section 28 in that by that provision inspectors are empowered to require persons to produce records or documents.

[11] *Final Report of Royal Commission into Productivity in the Building Industry in New South Wales*, Sydney 1992

5.11 Chapters 5 and 6

5.11.1 Item 51 of Schedule 1 repeals chapters 5 and 6 of the BCII Act. Chapter 5 relates to industrial action and the like. Chapter 6 relates to discrimination, coercion and unfair contracts. The table in Attachment 2 of this submission shows that the laws to be administered by the specialist division will not be sufficient to enable it to carry on the work of the ABCC. The Wilcox inquiry acknowledged that this work of transforming the industrial relations culture of the industry must continue, yet curiously Mr Wilcox did not recommend the continuation of a specialist legal regime. This contradiction has become manifest in the Bill, a principal reason Master Builders urges that it not proceed. In this context, it is evident that Chapters 5 and 6 are the heart and soul of the reforms.

5.11.2 Without dedicated laws to deal with the subject matter of chapters 5 and 6 and the related penalties for their breach, the work of the ABCC cannot be continued. Content is not only important; it is fundamental to the proper functioning of the successor body. As the ABCC Commissioner, Mr John Lloyd, pointed out in a letter dated 27 April 2009 to the Deputy Prime Minister (tabled in Parliament on 25 June 2009) when commenting on the Report, the content of the substantive rules is vital. In this context, the following is what Mr Lloyd says in paragraphs 8-10 of the letter:

The industry has a record that sets it apart from other industries. It has over the years recorded excessive levels of unlawful industrial action, coercion and discrimination. The majority of the cases initiated by the ABCC involve these types of contraventions.

Penalty provisions are designed to deter unlawful conduct. The report at ***Pn4.61*** *observes that a court will always take into account a person's previous record in selecting a penalty. The courts are generally awarding higher penalties as time goes on. A number have exceeded the maximum levels in the Fair Work Act. Also, some organisations and persons are repeat offenders. Maximum penalties at the levels proposed will considerably reduce the court's discretion in determining penalties. The deterrence of the penalty regime will be markedly reduced.*

The industry has particular characteristics that make it especially vulnerable to unlawful industrial action, coercion and discrimination. A number of these characteristics are outlined in Chapter 4 of the report. It is our experience that the following factors are particularly compelling:

a) the apportioning of most risk to contractors;

b) the sequencing of work and interlocking tasks on projects;

c) high liquidated damages for not completing a project on time;

d) the large number of sub-contractors on a project;

e) most workers employed by sub-contractors and not the head contractor;

f) a union culture supporting direct action; and

g) a willingness of some contractors to adopt a short term perspective and ignore unlawful conduct.

5.11.3 Master Builders emphasises that the industry specific laws and the design of the BCII Act are based on the findings of a Royal Commission established to make recommendations on how the rule of law could be restored to the industry. Mr Wilcox subsequently found that the work of the ABCC was not complete. Without the specialist laws that underpin its work, there is no capacity to continue to improve the industry's workplace culture. Under the FW Act, Inspectors will have the power to bring civil penalty proceedings in relation to industrial action in only two circumstances: per section 417(1) and 421(1) and with penalty levels far below the current BCII Act levels. In order to demonstrate the deficiency inherent in relying only on these two provisions instead of on Chapter 5 as it currently stands, the FW Act provisions are now set out:

417 – Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement, etc

(1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:

(a) an enterprise agreement is approved by FWA until its nominal expiry date has passed; or

(b) a workplace determination comes into operation until its nominal expiry date has passed; whether or not the industrial action relates to a matter dealt with in the agreement or determination.

***Note:** This subsection is a civil remedy provision (see Part 4-1).*

421 – Contravening an order, etc

(1) A person to whom an order under section 418, 419 or 420 applies must not contravene a term of the order.

***Note:** This subsection is a civil remedy provision (see Part 4-1).*

Master Builders would urge Senators to recommend the retention of industry specific laws and related penalties and that Chapters 5 and 6 are not repealed.

5.12 Enforcement

Item 52 of Schedule 1 of the Bill would repeal Chapter 7 of the BCII Act. Part 1 of Chapter 7 deals with the contravention of civil remedy provisions, and should be

retained for the same reasons as Chapters 5 and 6 should be retained. Master Builders opposes the repeal of the existing civil remedy provisions of the BCII Act and supports the retention of the higher penalties, as previously discussed.

5.13 Powers to Obtain Information

The Part that is introduced by Item 52 of Schedule 1 contains proposed sections 36 to 58. These provisions relate to the powers to obtain information and would replace Part 2 of current Chapter 7. We now comment on each proposed section in turn.

5.14 Section 36 - Definitions

5.14.1 This provision sets out two definitions to be used in the relevant Part of Chapter 7. The first relates to the definition of a building project, which is defined widely as a project that consists of or includes "building work," as defined earlier in the Bill.

5.14.2 The term "interested person" is also defined. This concept is critical to the operation of other provisions in new Chapter 7, particularly as it is "interested persons" who will be able to apply to "switch off" the power to obtain information under compulsion. It is highly unsatisfactory that the definition only clarifies that the Minister is an interested person but the other components of this vital definition are left to the Regulations. Since the draft Regulations are not yet available, the breadth of this definition can only be a matter of speculation. At a meeting of the Committee on Industrial Legislation (COIL) held on 15 July 2009, the Government released some material concerning potential policy underpinnings of the Regulations. However, until Regulations are at least received in draft form, that material, whilst helpful, falls short of providing answers to a number of the questions raised in this submission.

5.14.3 Master Builders recommends that persons given the power to bring an application be narrowly defined. One such test would be that "interested persons" are limited to those who have a financial or commercial interest in the building project. This would then be capable of extending to employees who have a financial interest: it could be specified that they hold this interest in the sense that their wages and related employment payments would provide the relevant financial connection. The concept would obviously apply to the developers, investors and contractors involved in the project. This limited definition would guard against abuse of the ability to make application to have

the information gathering powers "switched off". The Government may decide that representative rights should be extended under the Bill to parties such as unions or employer associations who could be vested with a right to represent employers or employees who, as stated, have a financial interest in the project. What must not be permitted is for persons who have an interest "at large" in building and construction industry matters to qualify as interested persons or for those who wished to exercise a political point. Parties who have been repeat offenders under the BCII Act or who have shown contempt for the law should also be excluded from representation.

5.14.4 Master Builders has fundamental concerns about the entire process of "switching off" the powers and the gateway to the triggering of that process must be narrow in order to avoid abuse.

5.15 Section 36A – Application

5.15.1 This provision narrows the basis on which the Director may carry out an investigation, the subject of the relevant Part of Chapter 7. Currently section 52 of the BCII Act enables the ABC Commissioner to obtain information and documents or require persons to attend in order to answer questions where the ABC Commissioner believes on reasonable grounds that a person has "information or documents relevant to an investigation or is capable of giving evidence that is relevant to the investigation".

5.15.2 The new provision would limit the information gathering powers to an investigation of a "suspected contravention" by a building industry participant of a designated building law or a safety net contractual entitlement. This limitation flies in the face of the very cogent reasons for retaining the current provisions set out in the letter sent to the Deputy Prime Minister by the ABC Commissioner mentioned earlier in this submission. The following paragraphs are instructive and consistent with Master Builders' experience of the subject:

At Pn5.2 the Report states:

"There is no requirement for the Commissioner or Deputy Commissioner to consider either the conduct under investigation or the possibility of procuring the information or documents in another way."

The report, to be totally accurate, should have stated that no such specific requirements are contained in the BCII Act. The thrust of the relevant sections of the Act and the requirements to exercise the power judiciously mean the ABCC is very cautious in its approach to using the compulsory interrogation power.

The requirement in BCII Act that there is a belief on reasonable grounds that a person had information relevant to an investigation is treated very seriously. The decision to conduct an examination is supported by a formal statement-in-support submitted to a Deputy Commissioner and noted by the Commissioner. The power is only invoked after all avenues of gathering information on a voluntary basis have been exhausted. The person examined is given a transcript of the examination. Counsel is engaged to assist the ABCC and examinees have the right to legal representation. Guidelines on the use of compulsory examination power and other relevant material are published on our website.

We have always been mindful that persons subject to the exercise of the power have recourse to the courts if they are treated improperly or unlawfully. Also, we have liaised extensively with other agencies exercising similar powers to ensure we adopted best practice procedures.

In practice the Commissioner and Deputy Commissioner have authorised examinations only when serious conduct was involved and only as a last resort to ensure that a thorough investigation was undertaken. The only two court challenges to the exercise of the power have failed.

Master Builders completely endorses these remarks. That endorsement is carried over in some of the commentary that follows.

5.15.3 Section 36A(2) of the Bill provides for an additional safeguard in respect of suspected contraventions of a safety net contractual entitlement. The relevant powers may be exercised only if the Director reasonably believes that the building industry participant contravened a provision or a term of the NES or instruments set out in section 706(2) of the FW Act. Master Builders is concerned that the use of powers in this manner brings the industry into uncharted waters. It raises a number of issues that will need to be made clear in practice but have not surfaced in the Bill: for example, as the Director and inspectors under the Bill per proposed section 59C(5) will not be required to follow the directions of Fair Work Ombudsman given to Fair Work Inspectors, what mechanisms will there be to ensure consistency in operational matters? This level of practical detail is absent from the Bill and should be available to building industry participants well before the Bill is implemented, if it proceeds.

5.16 Sections 36B – 37G Independent Assessor

5.16.1 These provisions cover the establishment and appointment of a statutory office holder, the Independent Assessor (IA). This position was not recommended by the Wilcox Report but is a new and unrehearsed concept. The question should be asked as to whether this is an impermissible delegation of power from Parliament: Master Builders questions that it is appropriate and that it is a

provision that properly encapsulates the rule of law. The IA is vested with the power to determine that the provisions of proposed section 45 do not apply to a specific building project. The proposed section 45 sets out when and how the Director may apply for an examination notice that would enable him or her to use the compulsory interview powers.

5.16.2 Master Builders opposes the establishment of the IA as unnecessary and unwarranted and which threatens the very rule of law that the Inspectorate should uphold. The IA is permitted to vary a law that Parliament has passed, thus flying in the face of the entire mechanism of accountability built into the Parliamentary process.

5.16.3 Although it creates a new bureaucratic structure that must incur establishment costs and have running costs, these are not reflected in the cost assumptions that are set out in the Financial Impact Statement for the Bill. The Statement says that the Bill is budget neutral. Assuming that the IA will need staff in order to carry out its functions, it is difficult to see how Budget neutrality will be achieved without affecting the operational capacity of the Inspectorate, especially its duty to constrain unlawful industrial activity.

5.16.4 The appointment of the IA is based upon the misconceived notion that information gathering powers are so offensive to the trade unions that they need to be "switched off" on certain building projects. This idea defies logic: if there is to be lawful behaviour and ready compliance with the law on a building site, then proposed section 45 is unlikely to be utilised.

5.16.5 If there are industrial relations problems on a site or a union wishes to take a militant stance, pressure will be placed on a contractor to support an "interested person" application to have the provisions turned off by means of, for example, a term in an enterprise agreement covering the relevant building project. That will, in turn, provoke arguments as to whether the matter pertains to the relationship of the employer and the union under section 172(1)(b) FW Act. In addition, the entire idea of "turning off" a law that Mr Wilcox considered important enough to retain and then be reviewed after five years, contradicts the structure of the legislation which is, in any case, already top heavy with so called safeguards.

5.17 Section 38

Section 38 provides that a determination under section 39 cannot be made in relation to a building project if building work had already begun before the commencement date of the Bill. Master Builders supports a provision that clearly isolates the powers of the IA to projects which will commence when the new legislation comes into effect, presumably, from 1 February 2010. All pre-existing projects must be excluded even where work has not commenced but where tenders have been let; otherwise uncertainty will be created. Provision should be made in the Bill to introduce this criterion as a means to distinguish which projects are or are not covered by the legislation.

5.18 Section 39

5.18.1 Section 39 vests the IA with the power to make a written determination that section 45 does not apply to one or more "building projects", a concept that is not defined in the Bill. The manner in which this term is defined is critical but is missing. The provision stipulates that the IA may make a determination only on application by an interested person in relation to the building project. This point heightens Master Builders' concern that the scope of the definition of an interested person is not yet available because the Regulations have not yet been issued.

5.18.2 The basis upon which the IA must make a determination compounds the difficulty caused by the absence of the Regulations. Proposed section 39(3) states that the IA must be satisfied that it would be appropriate to make a determination that section 45 does not apply having regard to the objects of the Bill and any matters prescribed by the Regulations. Master Builders is unable to comment on the applicable criteria because the Regulations are not available. This is a matter of some importance. What is the basis on which the IA may determine that the power to compel people to provide information is not available? We oppose the use of this power and the potential dislocation of projects that could occur, especially if the IA's discretion is broad.

5.19 Section 40

5.19.1 Section 40 provides that an interested person may apply for the relevant determination. It also sets out what the application must contain. We reiterate

our concern here that stakeholders are being kept in the dark as to the significance of these provisions because the Regulations are not yet available. Section 40 states that the relevant application may be in a form prescribed by the Regulations and include the information prescribed by the Regulations. We strongly recommend that the Regulations be exposed as soon as possible and well before the Bill is enacted.

5.19.2 Proposed section 40(5) states that an interested person has the capacity to make a further application in relation to the same building project when the interested person "becomes aware of new information in relation to the building project". This is far too loose a criterion. While the provision is intended to prevent an interested person from making repeat applications in relation to the same building project on the same grounds in the absence of new information, a better approach would be to permit an application to be made only once. This is because building sites are constantly changing as each following trade conducts its particular work, making available "new information" as a matter of course.

5.19.3 In other words, "new information" will be generated constantly as the building project changes and reaches its various stages of completion. As just set out, it would be better if only one application could be brought. However, instead, the proposed provision could be better drafted by making it clear that the new information had to relate to one of the criteria to be determined for the purposes of section 39 and that any application should not amount to an abuse of process. The new information must clearly relate to a matter about which the IA is required to be satisfied. There should be a link between the information on which a new application is founded and a specific factor upon which the IA has reached a decision. A more meaningful discussion of these issues will be possible when the Regulations are available and the matters brought into debate at the recent COIL given more substance.

5.20 Section 41

Section 41 sets out rules by which the IA must consider an application for determination, including the obligation to provide a copy to the Director of the Inspectorate. The Director must be given a reasonable opportunity to make submissions in relation to the application. The provision also permits the IA to make a decision about the operation of section 45 through a determination. The IA must give written notice of the decision to the applicant and the Director. The provision is silent

as to whether or not reasons must be provided for reaching the decision. It might be assumed as a matter of natural justice that reasons would be given but Master Builders does not believe that it should be possible as a matter of law to make decisions without giving reasons, and this should be made plain in the Bill. That would also help to determine whether the "new information" discussed in the context of section 40 relates to a factor that led the IA to make the relevant determination.

5.21 Section 42

The terms of section 42 reinforce the concerns expressed in the previous paragraph. Section 42 requires the IA to give a copy of any determination made to the Director and to the applicant and to publish it in the Gazette. The IA must take these actions as soon as practicable after making a determination. The determination takes effect on the day when it was published in the Gazette. There is no provision for when the determination will expire. This should be clarified and the Bill amended so that a date of expiration is required to be published. In this context, we reiterate our call to require the IA to produce reasons for its decisions.

5.22 Section 43

Section 43 makes provision for the Director to request the IA to reconsider a determination made under section 39(1). The Director may make the request if underlying circumstances relating to the building project have changed so that the criteria that were satisfied at the time the IA's original decision to make a determination are no longer satisfied. The provision gives the IA the capacity to confirm or revoke the decision or vary it. If the structure adopted in the Bill is to be enacted, a provision of this kind is supported.

5.23 Section 44

This provisions deals with the process for AAT Presidential members to be nominated in order to issue examination notices. Given the structure of the Bill, the section is foundational, although opposed by Master Builders.

5.24 Section 45

5.24.1 Section 45 sets out when and how the Director may apply for an examination notice that may be served on the person who is required to give information. The form and content of the notice is set out in section 48 discussed below. It should be noted that section 45(3) enables Regulations to prescribe both a

form for the application and additional information that may be required beyond information set out in section 45(5) that would constitute the basis of its issue. Once again, meaningful consideration of this provision is inhibited by the unavailability of the Regulations. However, there should be few constraints placed in the way of the Director and all matters that are required to be supplied should be able to be expressed objectively.

5.24.2 Section 45(5) sets out the terms which must be included in an affidavit made by the Director which must be provided with an application to the AAT Presidential member as a precursor to the issue of an examination notice. Part of that affidavit is a requirement to specify "other methods used to attempt to obtain information, documents or evidence". This requirement fails to take into account the fact that many witnesses shelter behind the current section 52 powers in order that their evidence may be given under compulsion and in confidence. There is evidence that many witnesses welcome the element of compulsion because they fear reprisals if it could be claimed that they provided the information voluntarily.

5.24.3 The following is an extract from an item in *The Australian* which reports on the ABC Commissioner's letter to the Deputy Prime Minister and highlights the fact that some people require confidentiality as a precondition of giving evidence:

> *Lloyd's most chilling claim was that not all compulsory interrogations were of hostile witnesses. About one-third of its examinations were of people who asked to give information under compulsory interrogation.*
>
> *"They take this approach because they fear reprisals if seen to be cooperating with the ABCC", Lloyd wrote. "We consider such a fear to be a genuine concern for many people.*
>
> *"This protection from retribution has proved to be a most effective means of assisting investigations uncover the facts."*[12]

5.24.4 For the reasons set out in this quotation, Master Builders does not believe that the constraints implied in section 45(5) and discussed further below in the context of section 47 are warranted. The work of the Inspectorate in curbing unlawful industrial action should not be stifled through the over-elaborate precautions that this process would introduce. The entire structure for the issue of examination notices should not be based on the idea that witnesses

[12] Don't Muzzle the Dog, *The Australian*, 30 June 2009, http://blogs.theaustralian.news.com.au/currentaccount/index.php.theaustralian/comment, accessed 30 June 2009

always give evidence reluctantly. What is needed is an overriding criterion that should automatically lead to the issue of an examination notice: that the person concerned seeks anonymity. This is a matter of great concern; the future work of the Inspectorate will be severely curtailed if building industry participants are fearful of the consequences of giving evidence. It will lead to a situation where complaints are not made or are withdrawn before they are dealt with and will play into the union hands in exercising their culture of fear and intimidation.

5.24.4 This concern is reinforced from experience. In its previous form as the Building Industry Taskforce, the ABCC did not possess extensive information gathering powers, particularly the power to compel persons with information or documents about a building industry investigation to provide that material. The result was that the majority of complaints were not taken further. As the Taskforce reported:

A survey conducted on a number of clients who withdrew their complaint found that 52 per cent had done so for fear of the ramifications they may face should they pursue the matter.[13]

5.24.5 As can be seen from this documented problem, the Bill should take into account the fact that those with information about a building industry investigation (or a contravention under the Bill) may need to be protected and to remain anonymous so that the information can be collected and used to assist with the restoration of the rule of law in the industry. There is thus another foundational issue established by the Bill which is based upon a premise that has no validity when considering the industry's circumstances.

5.25 Section 46

Instead of the legislation containing the automatic sunset provision as expressed in section 46, Master Builders recommends that a review be scheduled twelve months before the period five years from the date of commencement of the legislation and that Parliamentary processes then be used to determine whether or not the building and construction industry should continue to have a separate inspectorate which possesses the relevant information gathering powers. We note that the Explanatory Memorandum states that it is intended the Government will undertake a review before the end of the five year period, to consider "whether the compulsory examination

[13]Cth of Australia, Building Industry Taskforce, *Upholding the Law – Findings of the Building Industry Taskforce,* September 2005 p 11

powers continue to be required". With this statement in the Explanatory Memorandum, it seems unnecessary to have a specific sunset provision.

5.26 Section 47

5.26.1 This section sets out the factors that the AAT Presidential member must consider when determining an application. Some of the factors align with the information that is required to be in the affidavit of the Director. In particular, section 47(1)(d) suffers from the same problem that we have mentioned in connection with the requirement of the affidavit to contain sworn evidence about other methods of gathering the required information. That provision requires the AAT Presidential member to be satisfied that "any other methods of obtaining the information, documents or evidence has been attempted and has not been successful or is not appropriate". Section 47 offers a potential means to take into account the interests of those who wish to shelter under the power to require persons to give evidence in order to maintain anonymity in that it could be regarded as not "appropriate" to obtain the information in another way.

5.26.2 Master Builders submits that it would be preferable if there was an explicit provision in the new legislation to allow information to be given anonymously and under compulsion without the need to exhaust other avenues first. As Mr Lloyd's letter pointed out, some witnesses have been glad to be "forced" to give evidence because this gives them some protection from reprisals. These considerations reinforce the point that the confidentiality of the affidavit and the details of the AAT process should be set out in the legislation.

5.27 Section 48

As indicated earlier, this section sets out the form and content of an examination notice. A number of matters about its form and content will be left to the Regulations. Since these are not yet available, we reiterate our call for their early release.

5.28 Section 49

5.28.1 This section effects the Report's recommendations that the Ombudsman monitor the use of the examination powers. This provision sets out the requirements of formal notification to the Ombudsman of matters connected with the examination, including a copy of the notice and the affidavit that accompanied the application for an examination notice and any other information that was given to the AAT Presidential member who issued the notice. Master Builders view is that installing both a "front end" and a "back

end" safeguard is going too far; there is no evidence of abuse of the information gathering powers by the ABCC and there is no reason other than the unfounded lobbying of the union movement, for the cumbersome layers of bureaucracy that the Bill piles up.

5.28.2 There is no evidence that the ABCC has misused or abused its compulsory powers in the past. Master Builders contends that the monitoring by the Commonwealth Ombudsman as proposed will be a sufficient safeguard to ensure that the Inspectorate exercises its compulsory powers appropriately and efficiently.

5.28.3 The Inspectorate should operate in the same way as other agencies with similar powers. In this context the similar provisions of the *Trade Practices Act 1974* (Cth) (TPA) are relevant (see Attachment 1). Section 155 of the TPA permits the same type of compulsory powers to be exercised by the Chairman and Deputy Chairman of the Australian Consumer and Competition Commission without the need for prior judicial or other oversight as contemplated in the Report and expressed in the Bill. Master Builders therefore recommends that the Ombudsman's oversight should be the only safeguard adopted in the Bill. This is the external monitoring that Mr Wilcox believed to be an "essential" part of the exercise of the relevant powers. It appears sufficient to allay any (we believe unfounded) concerns held by Mr Wilcox.

5.29 Section 50

5.29.1 Section 50 is about the way in which the Director must give the relevant person the examination notice issued by the AAT Presidential member. The Director has the discretion not to provide the person with the notice. If the Director does not give the notice within three months of it being issued, the notice ceases to have effect. Within the structure of the current Bill, this provision is not opposed.

5.29.2 The drafting of proposed section 50(3) is confusing but the provision appears to mean that the Director may give a notice to a person and vary the time and the date so that the person must have at least fourteen days notice of the examination time and date. This is substantiated at paragraph 140 of the Explanatory Memorandum which is as follows:

This power is necessary to ensure that the person is given at least fourteen days notice of their requirement to attend as well as providing flexibility to set an alternate time or date such as where it is desirable to accommodate the wishes of the person subject to the notice.

Master Builders recommends that proposed section 50 (sub-section 3, 4 and 5) be drafted to make that intent clearer.

5.30 Section 51

5.30.1 Section 51 sets out the rules covering situations when a person is required to attend before the Director and answer questions, called an examination. The Director is required to conduct the examination even though he or she has an agency to run.

5.30.2 The section states that a person is entitled to be represented at the examination by a lawyer of their choice. The Explanatory Memorandum states that the intent of this provision is to expressly override *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner).*[14] In this case Deputy ABC Commissioner Hadgkiss excluded a particular legal representative because she had appeared for another witness. Mr Hadgkiss ruled that her appearance for a second witness may have prejudiced the investigation. The Federal Court upheld this ruling. In Master Builders' understanding, currently in the unusual circumstance where a particular legal representative is excluded, the witness is given time by the ABCC to arrange for alternative legal representation of their choosing. This seems a better approach to the law and we recommend the Bill be altered to reflect this current and equitable practice rather than have a practice instead of enshrining a practice that courts have found has the potential to be prejudicial.

5.30.3 Master Builders strongly opposes section 51(6). This could have disastrous consequences for an investigation into, say, widespread unlawful action where the content of the questions and confidential material was put to an examinee. The provision says that the Director is unable to require a person to give an undertaking not to disclose information or answers given at the examination or to discuss matters relating to the examination with another person. Such a provision departs from normal practices of not sharing such information because that creates scope for witnesses to co-ordinate their responses. The

[14] [2006] FCA1334

integrity of examinations of this kind rests upon the preservation of confidentiality ensuring that the investigation is not prejudiced or questions that might be asked of others are not "rehearsed" to the prejudice of the truth. Under the BCII Act, the content of the examination is confidential and may not be disclosed by the witness, legal counsel or the ABCC until the investigation is completed. The ABCC notifies witnesses as to when the investigation is complete and when they may disclose the evidence given in their examination. This procedure maintains the integrity of the examination process, a matter threatened by proposed section 51(6).

5.31 Section 52

5.31.1 Item 55 of Schedule 1 of the Bill repeals current section 52 and replaces it with a provision that creates the offence of failing to comply with an examination notice. As indicated at paragraph 151 of the Explanatory Memorandum, the proposed section 52(1) effectively replicates the existing subsection 52(6). This makes it an offence to fail to comply with the terms of an examination notice, with a maximum penalty of imprisonment for six months.

5.31.2 Proposed section 52(2) provides an exemption from the requirement to provide information or answer questions if the person would be required to disclose information that is subject to legal professional privilege or would be protected by public interest immunity. Master Builders' notes the terms of section 155(7B) of the *Trade Practices Act* as follows:

This section does not require a person to produce a document that would disclose information that is the subject of legal professional privilege.

Accordingly, we do not oppose the similar provision in proposed section 52(2).

5.31.3 Master Builders does, however, oppose the extension of public interest immunity as an exemption from providing information. This is because the boundaries of this exemption would be too wide and could be highly prejudicial to an investigation under the Bill. There is no justification for its inclusion offered in the Report.

5.31.4 Halsbury's *Laws of Australia* describes the immunity or privilege as follows:

The court will not compel or permit the disclosure of information that would be injurious to an identified public interest. The categories of public interest immunity are not closed and are not limited to issues involving central

organs of government. Public interest immunity claims are characterised as either:

- *class claims, where the documents belong to an identifiable class and where disclosure, regardless of the contents, would be injurious to the public interest; and*
- *contents claims, where the risk of injury is based on the particular contents of the documents.*

The court may limit the availability of the sensitive material. Non-disclosure is limited to secondary evidence of the document, not necessarily to secondary evidence of the matters referred to in the documents.[15]

5.31.5 A paper by Laughton[16] indicates that the interests of the State are broad and that there is a very real conflict between the application of the immunity and the idea of open democracy. Given the uncertain boundaries of the immunity and the many arguments that could be developed around its terms where Government infrastructure projects might be at jeopardy (eg the need or otherwise to disclose documents created by Government departments) if the Inspectorate was not able to exercise its powers, Master Builders opposes the extension of this exemption. A large amount of evidence that would otherwise be required to be produced during an examination would have the potential to be excluded.

5.31.6 The criterion is very broad and is likely to spark litigation and divert resources away from the principal purposes of the Inspectorate. In addition, we question for whose benefit is the immunity to be invoked in the current context. It is not an issue that impinges on civil liberties; the immunity protects disclosure of the interests of the State. This excuse should not be available to those who violate industrial relations laws.

5.32 Sections 53 and 54

5.32.1 There are a number of consequential amendments to the current sections 53 and 54 of the BCII Act made by Items 56 to 60 of Schedule 1 of the Bill. The protections regarding the liability in section 54 are retained. The unavailability of excuses against providing information, producing a document or answering a question, pursuant to an examination notice for the purposes of the Bill, have been changed. The provision which would not permit a person to use the public interest as an excuse not to provide the information etc required by an

[15] On line service at para 195-7250 (footnotes omitted)
[16] G Laughton SC, *Public Interest Immunity,* 25 May 2007 http://74.125.155.132/search?q=cache:k4gnBuE5BNsJ:www.hicksons.com.au/media/documents/Public%2520Interest%2520Immunity%2520Seminar%2520Paper%2520for%2520NSW%2520Police%2520Force%252025May2007.pdf+public+interest+immunity&cd=1&hl=en&ct=clnk&gl=au accessed 8 July 2009

examination notice has been removed. Hence, we reiterate our concerns that the public interest criterion is far too broad and will undoubtedly be the subject of time consuming litigation to no useful end.

5.32.2 It should be emphasised that there are worthwhile protections conferred by the existing sections 53 and 54. Under section 53(2) where a person provides information, documents or answers under a section 52 notice, these are only admissible in proceedings for an offence under section 52 and the offences under the criminal code mentioned in section 52. Section 54 provides that persons who in good faith provide documents or answer questions where section 52 applies are protected from liability if they have contravened another law and they are protected from civil liability where loss or damage has been suffered by another person. These are significant protections that should not be ignored when examining the safeguards that apply in the context of the compulsory examination powers. Their existence makes the proliferation of additional protections in the Bill both illogical and redundant. This is a further ground on which Master Builders supports only the monitoring role to be undertaken by the Commonwealth Ombudsman.

5.33 Section 54A

5.33.1 Proposed section 54A deals with requirements relating to the oversight of examinations that will be undertaken by the Commonwealth Ombudsman. This provision epitomises the unreasonable and cumbersome multi-layered bureaucratic procedures that the Bill will impose on the Director. When the examination is completed, the Director must provide the Ombudsman with a report about the examination, a video recording of the examination, and a transcript of the examination. It does seem to be a case of gilding the lily to require a video as well as a transcript. It is not as though the examination notice permitted torture of the examinee.

5.33.2 Proposed section 54A(2) sets out the content of the report which must include a copy of the examination notice, the time and place of the examination was conducted and the name of each person present. What other detail will be required remains a mystery as the Regulations will prescribe the other information.

5.33.3 The Ombudsman is required to review the exercise of the Director's powers and of any person assisting the Director.

5.33.4 In addition, at the end of each financial year the Ombudsman must prepare and present to the Parliament a report about examinations conducted during the year. The report must include the results of all reviews conducted by the Ombudsman during the year. Master Builders believes that the legislation should require that all such communications omit details that could reveal the identity of witnesses along the lines of current section 66 BCII Act. There should be a specific statutory provision that the identity of witnesses must not be disclosed.

5.33.5 It is interesting to compare the constraints placed on the Director compared with the capacity of the Ombudsman to obtain information, documents or records relevant to an Ombudsman's investigation under the *Ombudsman Act 1976 (Cth)*. This power of the Ombudsman includes the right to require a person to attend to answer questions relevant to the Ombudsman's investigation along the lines of the current powers vested in the ABCC. It is noted, however, that section 9(3) of the *Ombudsman Act* does contain a number of constraints on disclosure but it is very specific as to what is or is not in the public interest. In accordance with section 9(4)(b) of the *Ombudsman Act*, the general public interest excuse is not available to prevent a person from producing a document or other record or answering a question when required to do so under the *Ombudsman Act*. This comparison reinforces Master Builders' earlier points about the fact that the public interest is too broad a consideration when seeking provision of information relevant to a suspected contravention under the Bill.

5.34 Section 55-56

Items 62-67 of Schedule 1 make consequential changes to section 55 and 56 of the BCII Act. These are not opposed.

5.35 Section 57

Section 57 states that the Director's power to obtain information is not limited by a secrecy provision in another law unless the power to obtain information is expressly excluded. Master Builders supports this provision.

5.36 Section 58

5.36.1 This provision deals with payment for a person's expenses incurred in attending an examination. Reasonable expenses will be paid to cover matters

such as travel, accommodation but also, as recommended in the Report, includes legal expenses.

5.36.2 In Master Builders' view this involves a burden on the taxpayer that has no good policy justification. Master Builders supports the proposition that persons who attend to provide information etc should have their reasonable expenses paid. However, we do not support the extension of reimbursement to legal costs. The Inspectorate is not a court nor should its investigative processes be regarded as akin to a costs jurisdiction. Compensation for legal expenses incurred as a result of being compelled to assist the investigatory process is out-of-step with the rules and regulations which govern similar agencies. In circumstances where the cost of legal representation is reimbursed, it should be payable only for evidence given in court or for participation as a party to proceedings where the party has been successful. Legal expenses should not be reimbursed merely because a person has provided evidence at an investigatory level.

5.36.3 At the very least, if the provisions of the Bill proceed, the requirement about recovering legal costs should be subject to a means test and not made available to those above a certain income, not prescribed as an absolute right.

5.36.4 We note that the form and information required to make an application to be paid expenses under proposed section 58(3) is to be set out in the Regulations. This again reinforces the notion that the Regulations should be released as soon as possible so that more of the detail of the Bill is known before its enactment.

5.37 Fair Work Building Inspectors

The appointment of inspectors, including appointment to that role of the Director, is covered in proposed sections 59-59A. These provisions are not opposed. Section 59B requires that identity cards are to be issued to Inspectors and be in a form approved by the Director, with a recent photograph of the Inspector. Master Builders has no concerns with the provision about identity cards.

5.38 Powers of Inspectors and the Director

5.38.1 Under proposed section 59C, an Inspector will have the same functions and powers as possessed by a Fair Work Inspector. An Inspector appointed under the Bill may perform those functions and exercise the relevant powers only in

relation to "building matters" and subject to any restrictions that are contained in the Inspector's instrument of appointment. Building matter is defined in proposed section 59C(3) as a matter that relates to a building industry participant. The definition of this latter term is set out in sub-section 4(1) of the Bill.

5.38.2 Master Builders' only concern with the definition is that it encompasses a person who has entered into a contract with a building contractor under which the building contractor agrees to carry out building work or to arrange for building work to be carried out, and thus excludes off-site work. Master Builders reiterates its concern that off-site work should be covered, for the reasons set out earlier in this submission.

5.38.3 Proposed section 59C(5) would not permit the Fair Work Ombudsman to issue directions to Inspectors appointed under the Bill. As indicated earlier, how the Inspectorate will then operate to delimit its work and have consistent policy with regard to, for example, the making of applications for orders in relation to contraventions is unclear. The manner in which applications for orders about contraventions of the civil remedy provisions contained in the FW Act (which deal with inter alia the two provisions concerning industrial action discussed earlier) should be clarified prior to the passage of the Bill. It would be better if the Inspectorate administered industry specific laws; but if the Inspectorate is to administer the FW Act, consistency in approach is vital.

5.38.4 Section 59D provides the Director with the same power to accept written undertakings as is vested in the Fair Work Ombudsman under section 715 FW Act.

5.38.5 Section 59E requires Inspectors to monitor compliance with any Building Code issued under the Bill. Questions that arose earlier about whether the Code and Guidelines would be declared as the Building Code are again raised in the context of this power. When an Inspector monitors any Building Code they have the same powers they would have if the Building Code were a Fair Work instrument. Master Builders supports this principle but points out that Commonwealth contracts could vest Inspectors with greater powers than those set out in the statute. Whether that will occur will be made clear when the status of the Code and Guidelines is announced by the Government. As stated earlier, we recommend that the Code and Guidelines become the statutory Building Code.

5.38.6 Section 59F provides that the Director may give written directions to Inspectors relating to the performance of their functions or the exercise of their powers as inspectors. These directions are of a general nature. Master Builders does not oppose this power but submits that the directions should be, so far as possible, aligned with directions given by the Fair Work Ombudsman to Inspectors appointed under the FW Act.

5.38.7 Section 59G gives the Director power to issue a direction to a particular Inspector about the exercise of that Inspector's functions or powers. Paragraph 200 of the Explanatory Memorandum provides an example of such a direction. It states that:

The Director could direct an Inspector to prepare an internal report about a particular matter or to pursue or discontinue litigation. An Inspector must comply with these directions.

The arming of the Director with such a power means that the appointment of the Director and their particular administration of the Inspectorate will be a very significant influence on its culture and outcomes.

6 OCCUPATIONAL HEALTH AND SAFETY IN THE BUILDING AND CONSTRUCTION INDUSTRY AND THE BILL

6.1 The Cole Royal Commission placed a heavy emphasis on occupational health and safety (OH&S). The Royal Commissioner stated that the Commission examined no subject more important than OH&S. The Federal Safety Commissioner (FSC) was established in 2005 as a direct result of the recommendations of the Cole Royal Commission and that appointment was formalised in the BCII Act. Master Builders supported the creation of this role and continues to support the work of the FSC as an important contribution to improving OH&S outcomes in the building and construction industry. The Australian Government Building and Construction OH&S Accreditation Scheme has resulted in improvements in the OH&S performance of accredited companies. The Federal Safety Commissioner's 2006-07 progress report identified a reduction in the median Lost Time Injury Frequency Rate (LTIFR) of 41.52 per cent (from 11.97 to 7.00); and a fall in the median Medical Treatment Injury Frequency Rate (MTIFR) of 31.82 per cent (from 28.78 to 19.62) between 2005-06 and 2006-07.[17]

[17] Federal Safety Commissioner, *Federal Safety Commissioner's 2006-07 Progress Report,* December 2007, p 12

6.2 Master Builders supports the continuation of provisions governing the FSC in the Bill. There are over 100 building and construction companies accredited by the FSC. The majority of companies participating in the Scheme have indicated that it has led to improvements in their OH&S management systems and has engendered a culture change in their approach to safety. Their focus on and commitment to safety will help achieve broader performance improvement in the industry.

6.3 Master Builders is committed to improving OH&S performance in the building and construction industry. Master Builders OH&S policy is set out in *Building a Safer Future: Occupational Health and Safety Policy Blueprint 2008-2015*.

6.4 The focus for the building and construction industry is to maintain the current trend of reductions in injury and fatality incidence rates. The industry is committed to its part in achieving the goals of the National OH&S Strategy.[18] The National OH&S Strategy is centred on the achievement of the following targets:

6.4.1 sustaining a significant, continual reduction in the incidence of work-related fatalities with a reduction of at least 20 per cent by 30 June 2012 (and with a reduction of 10 per cent being achieved by 30 June 2007); and

6.4.2 reducing the incidence of workplace injury by at least 40 per cent by 30 June 2012 (with a reduction of 20 per cent being achieved by 30 June 20417).

6.5 The industry's commitment is reflected in the signing of the Leadership Charter at the Federal Safety Commissioner's CEO Forum in August 2008 by the CEOs of leading building companies. The Leadership Charter provides a public commitment to improving the health and safety of all those working on building and construction sites in Australia. Master Builders supports the National OH&S Strategy and has endorsed the Leadership Charter. Master Builders was motivated to make these commitments by its determination to reduce fatalities and serious injuries in the industry and to become part of the improvement process.

6.6 OH&S is too important an issue to abuse. The Royal Commission detailed the misuse of safety issues for industrial purposes, including numerous instances where safety concerns were manipulated for non-safety related purposes. These have continued. The Commissioner rightly stated that such behaviour trivialises safety, deflects attention away from the resolution of safety problems on sites and inhibits the capacity of unions to effect constructive change. The Commissioner concluded that the

[18] *National OHS Strategy 2002-2012*, National OHS Commission, Commonwealth of Australia 2002

cumulative effect of the abuse of OH&S right of entry on the safety culture of the building and construction industry was significant.[19]

6.7 The ABCC's role and the extent of its powers to gather information do not impinge upon OH&S. The notion that a breach of the law will make building sites safer is a logical non sequitur and displays ignorance as to the role of the ABCC. This is a theme frequently found in union communications. In that regard, we set out the ABC Commissioner's response to an allegation by the ACTU that the ABCC has contributed to a downturn in the industry's health and safety record:

> In response to Ms Burrow's comments yesterday linking the industry's poor occupational health and safety record with the existence of the ABCC, the ABC Commissioner John Lloyd said:
>
> *Ms Burrow's suggestion that the ABCC has contributed to an increase in the number of deaths in the construction industry ignores the facts. The ABCC Act provides specific protection for employees stopping work for occupational health and safety reasons.*
>
> The comments indicate that the ACTU is misinformed about the facts concerning occupational health and safety regulation in the building and construction industry. "The ABCC is not given responsibility for occupational health and safety regulation in the building and construction industry. This rests with State occupational health and safety agencies, Comcare and the Federal Safety Commissioner.
>
> The *Building and Construction Industry Improvement Act 2005* provides that a worker is legally entitled to cease work if they have a reasonable concern about an imminent risk to their health and safety. The ABCC refers any occupational health and safety matter it discovers in the course of an investigation to the relevant occupational health and safety agency.
>
> *"The ABCC is committed to do all it can to improve the industry's poor occupational health and safety record and to support those specifically charged with this task," states Commissioner Lloyd.*[20]

Master Builders supports the statement made by the ABCC.

[19] Final Report of the Royal Commission into the Building and Construction Industry, *Reform – Occupational Health and Safety*, Vol 6, p 102

[20] ABCC Media statement *Commissioner Rejects ACTU Allegation as Misinformed,* 28 April 2009

6.8 The Bill makes few changes to the FSC or the Federal Safety Officer (FSO) provisions in the BCII Act. However, sections 62(14) and 63(14) are repealed by Item 73 of Schedule 1. These provisions relate to refusing or unduly delaying entry to premises by a FSO exercising powers under section 62 and 63. The Explanatory Memorandum at paragraph 204 says that the repeal is because such refusal and undue delay "would fall within the scope of section 149.1 of the *Criminal Code* which deals with obstruction of Commonwealth public officials". Master Builders urges that there be a statutory note in the Bill that highlights the criminal law consequences as set out in the Explanatory Memorandum.

6.9 For radical elements in the building unions, safety is just another means to gain illegitimate control of construction sites, and they have sought the abolition or the emasculation of the ABCC precisely because it has had great success in thwarting their ambitions No case has been made out that the ABCC has an adverse effect on safety. Breaking the law does not assist the aims of advancing safety outcomes. Indeed, the union movement has been accused of using safety as only a tool of industrial leverage. Reputably, the unions use safety as a means to gain control and, at the same time, gain public sympathy. The following supports this point. The President of the ACTU said:

> *I need a mum or dad of someone who's been seriously injured or killed. That would be fantastic.*[21]

6.10 Further Michael Stutchbury, the *Australian's* economics editor warns:

> *True to form, Victorian officials from the Construction Forestry Mining and Energy Union have vowed to make safety the key to their battle against the ABCC's powers. The CFMEU would show that the unions were "in control" of workplace safety.*[22]

7 PROJECT AGREEMENTS

7.1 Item 74 of Schedule 1 repeals current section 64 BCII Act. This provision is aimed at what were common adverse practices in the building and construction industry prior to the passage of the BCII Act – that is allowing unregistered agreements to operate as de facto project agreement arrangements. These agreements secured site wide terms and conditions of employment and involved instances where unions sought to impose, for example, site allowances that were to be paid in proportion to the

[21] ABC Lateline, 10 August 2005

[22] Supra note 9, http://blogs.theaustralian.news.com.au/currentaccount/index.php/theaustralian

monetary value of the project. These payments were unrelated to productivity and added unnecessary costs to projects. These unregistered agreements are made unenforceable by reason of current section 64 BCII Act.

7.2 A further means by which common site terms and conditions were rolled out was by including a "jump up" provision in an unregistered agreement. If an agreement contained provisions that were less than the agreed "industry" site terms and conditions then the more favourable provisions would displace the less favourable. The combined effect of section 64 and the provisions of the Guidelines that require a site allowance to be specified in an agreement have effectively eliminated "jump up" provisions to the advancement of productivity. Collective bargaining has the capacity to increase productivity; but it does not where artificial provisions are put in place which prevents genuine bargaining by substituting industry wide conditions.

7.3 Master Builders supports the retention of a provision that continues to make unregistered project agreements unenforceable so that the disconnection between productivity and payments in relation to project agreements does not again become a burden on the industry.

8 DISCLOSURE OF INFORMATION

8.1 Item 74 of Schedule 1 substitutes a new section 64 for the repealed section 64 discussed in Section 7 of this submission. Proposed section 64 permits disclosure of information, other than protected information under section 65. The Director may disclose or authorise the disclosure of information acquired by him or her and staff during the course of performing the Inspectorate's work.

8.2 The provision is intended to achieve consistency with the approach to disclosure of information set out in section 718 FW Act, relating to the functions of the Fair Work Ombudsman.

8.3 Master Builders disagrees and recommends that there be a general prohibition on the disclosure of personal information. Section 65 is limited to protecting disclosure of material gathered at an examination or via the issue of an examination notice. Building and construction industry participants will be reluctant to come forward if they face the possibility that details of their complaint or personal information will become public. This danger is currently recognised in section 66 BCII Act.

8.4 Master Builders recommends that there be an extension of the protections in section 66 so that its terms are not limited to the reports to be given under section 12 or 14 but should be extended to any disclosures made under section 64. Without a provision that restricts disclosure of personal details, it is likely that many people who would otherwise come forward to make complaints will be deterred. As indicated earlier in this submission, over half the complainants who made a complaint to the Building Industry Taskforce withdrew their complaint for fear of the consequences. The new regime should eliminate this possibility and ensure the security of witnesses.

8.5 Section 64A permits the Federal Safety Commissioner to make disclosures like those that can be made by the Director. We would anticipate that building and construction industry participants should also get similar protection from the disclosure of their affairs by the Federal Safety Commissioner as we have recommended apply in respect to disclosures made under proposed section 64.

8.6 As indicated earlier, the Bill amends current 65 of the BCII Act to limit the application of the section only to information that was disclosed or obtained under an examination notice or at an examination. Master Builders believes that this is inadequate protection and reiterates the fact that the policy position envisaged by section 66 should not be altered and that individuals should have the protection envisaged in relation to the section 12 or section 14 reports extended to disclosure under the section 64 power.

8.7 Item 82 of the Bill repeals section 67 BCII Act. The Explanatory Memorandum at paragraph 221 states that section 67 is unnecessary in light of the proposed new disclosure provisions in section 64. Section 67, now repealed, provides the ABC Commissioner with the capacity to publish details of non-compliance with the Building Code, including the names of the persons who have failed to comply, and non-compliance by a building industry participant with the BCII Act, including the names of those participants who failed to comply. Section 67 recognised that there was a public interest imperative that justified an exception to the general rule of non-disclosure of an individual's affairs. This would protect those who wish to come forward to make complaints. The proposed new disclosure provision permits disclosure of information in a much wider range of circumstances and is therefore more likely to prejudice the position of complainants who may be reluctant to come forward with information.

9 OTHER MATTERS

9.1 Item 83 of Schedule 1 repeals current section 68 about delegation with a new provision about the same subject. The proposed section would allow the Minister to delegate all of the powers under Chapter 3 about the Building Code to the Director or the FSC. Master Builders does not oppose this consequential change.

9.2 Item 84 of Schedule 1 repeals current sections 69 and 70 BCII Act. The Explanatory Memorandum states that the repeal of these sections is consequential to other amendments but, in particular, the repeal of chapters 5 and 6 which, earlier in this submission, Master Builders has submitted should be retained. Accordingly, in Master Builders view, provisions similar to sections 69 and 70 should be retained.

9.3 Section 69 provides that for the purposes of the BCII Act, conduct of the committee of management of a building association or of an officer or agent of a building association acting in that capacity is taken to be the conduct of the building association. The provision sets out the circumstances the conduct of a member or group of members is also taken to be conduct of the building association. This provision is necessary in order to ensure that responsibility is taken by a building association where the conduct of the member or group of members is authorised by the rules or the committee of management of the association or a properly authorised officer or agent.

9.4 Section 70 is pivotal in applying a provision of the BCII Act (and should for building industry participants be applied in relation to coercion provisions under the FW Act) that refers to coercing, encouraging, advising or inciting a person to do something. Essentially, the provision states that whether or not the person is able, willing or eligible to do the particular thing about which pressure was applied should not be a relevant consideration when determining whether an offence against the legislation has occurred. This means that the conduct, coercion, encouragement, etc., can be established even if the person being coerced, etc. is not able, willing or eligible to do the thing he or she is being coerced to undertake. This is very important in focusing only on the behaviour of the building industry participant who illegitimately seeks to apply pressure amounting to coercion.

9.5 Items 85 and 86 replace references to the ABC Commissioner with references to the Director in the current provisions of the BCII Act. Master Builders supports retention of the power of the Director to intervene in court proceedings. Master Builders notes that in respect of section 72 the changes to the legislation consequential on the

passage of the Fair Work legislation package has meant that the ABC Commissioner and subsequently the Director may no longer intervene in Fair Work Australia proceedings but has now only the right to make submissions in a matter before Fair Work Australia.

9.6 Item 87 repeals sections 73 and 73A of the BCII Act. These provisions permit the ABC Commissioner or an ABC Inspector to institute proceedings under the FW Act or the *Independent Contractors Act 2006*. Given that Inspectors under the Bill will now have the power to institute proceedings pursuant to proposed section 59C, the Explanatory Memorandum states that section 73 and section 73A are no longer necessary. Master Builders reiterates that there should be separate and tailored laws which relate to the building and construction industry but that if the structure of the Bill proceeds, the repeal of sections 73 and section 73A is inevitable.

9.7 Changes effected by items 88-95 of Schedule 1 are not opposed as that they are in large part consequential to other amendments, given the structure of the Bill.

10 SCHEDULE 2: TRANSITIONAL AND CONSEQUENTIAL PROVISIONS

10.1 Schedule 2 foreshadows that Regulations may deal with transitional and consequential amendments, including the legislation. This again reinforces Master Builders' view that regulations which affect substantive changes should be made available well prior to the enactment of the Bill.

11 CONCLUSION

11.1 The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 represents a significant watering down of the powers formerly exercised by the Australian Building and Construction Commission. Although the Deputy Prime Minister has given repeated assurances that "a strong cop on the beat" was needed and would be retained in order to combat industrial lawlessness, the result is a toothless tiger.

11.2 The Government has made it obvious that the proposed Building Industry Inspectorate will have significantly less clout than the ABCC. It will have also less independence because it will no longer be a separate commission based on its own statute, but a division of a larger industrial relations body. It will be subject to a cumbersome process of direction from:

- an advisory board;
- the Minister;
- the "Independent Assessor", who will have the superfluous yet daunting power of "switching off" the inspectorate's coercive interrogation power on any building project where he or she considers this warranted.

11.3 The powers of the new inspectorate will also be considerably less than those wielded by the ABCC. To name the most significant of these:

- The maximum level of fines that may be imposed for proven breaches has been cut by two thirds.
- The range of circumstances in which industrial action is unlawful and attracts penalties has been narrowed.
- Parties are no longer forbidden to apply "undue pressure" to make, vary or terminate an agreement.
- The definition of building work has been narrowed to exclude work performed off-site, thus limiting the ambit of the inspectorate's authority.
- The inspectorate is no longer required to publish reports of non-compliance incidents in situations where breaches did not go to court.
- The right to intervene in industrial relations cases has been abolished.

11.4 The power to compel witnesses to give evidence has been retained, but this is now hedged about with so many safeguards, including the ever-present threat of being "switched off", that its effectiveness as a tool of information gathering is likely to be substantially reduced. On top of this, the confidentiality requirements have been watered down, making it less likely that witnesses will have the confidence and courage to come forward.

11.5 The fundamental problem with the apparatus established by the Bill is that the specialist inspectorate lacks the independence it needs to be effective. It is smothered in layers of costly bureaucracy and strangled by yards of red tape. There are so many safeguards against the abuse of its powers that there remains little scope for the proper exercise of such powers as it retains. The ABCC was effective because it had the independence and the authority to exercise its powers without these burdensome constraints. Hamstrung as it is by an excessive weight of safeguards, and subject to

directions from both an advisory board and the Minister, the new body has little prospect of achieving its stated aims.

11.6 The Bill reflects the resentment of the building unions that under the BCII Act they were singled out for special treatment and that this amounted to unjustified coercion and discrimination. Whilst the Hon Justice Wilcox agreed that it was unfair not to accord the building unions equal treatment under the law he did find that problem with behaviour remained and warranted the retention of an industry watch dog. Justice Cole's words, "a singular industry" in which the rule of law did not apply still resonate. The normal processes of the law are fine for parties who agree to abide by the rules of the game, but for those who consistently reject and flout those rules, something stronger is needed. The only reason the ABCC was directed against a specific industry sector and armed with unusual powers is that the unions in the sector have for decades consistently refused to play by the rules of the game. Exceptional behaviour requires an exceptional response. The unions have, by their own behaviour, attracted a response.

11.7 The building unions have stood out among the labour movement in their contempt for the law and the industrial tribunals, and have been notorious for the enthusiasm with which they resorted to violence, intimidation and thuggery in pursuit of their aims, not merely against employers, but just as often against other unions. Among the union movement the building unions, and especially the old Builders Labourers Federation, were regarded as mavericks and feared as thugs, and it is a sad fact that some of this destructive and contrary spirit has been inherited by their contemporary successors. It was the uniquely lawless culture of the building and construction industry that created the need for a specialist body to supervise, investigate and recommend prosecution. If this is discrimination, it was made necessary by the building unions' own behaviour. If they are not prepared to play by the normal rules it is hypocritical on their part to complain that the normal rules are not being applied to them.

11.8 The establishment of the ABCC has led to a period of remarkable harmony in the building and construction industry, characterised by rising take-home pay, fewer days lost to industrial action, a declining accident rate, a substantial increase in productivity and a record level of construction projects completed on or ahead of schedule and within budget. These achievements were all the more remarkable in that they occurred during a period of booming investment in the industry and substantial labour and material shortages. None of this was at the expense of worker well-being: on the contrary, take-home pay actually increased, and industrial accidents have declined,

during the period in which the ABCC has regulated the industry, an outcome that has benefited workers more than employers, and which does not suggest that, as alleged by some the ABCC acts as "a tool of the bosses."

11.9 In his Report on the future of the ABCC, Mr Wilcox recognised the existence of the old culture of violence that disfigures the building and construction industry and acknowledged the success of the ABCC in curbing lawlessness and transforming the culture of the industry. But he concluded that "the ABCC's work is not yet done", and continued: "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."[23] Master Builders on behalf of the industry, the economy and community wholeheartedly agrees with that finding. This Bill if passed will see Justice Wilcox's prophecy about a reversal of progress come true.

11.10 Unfortunately, the provisions of the Bill, bowing so far to union resentment of the ABCC's powers, are likely to have precisely this result: to undo the progress that has been made and threaten to return us to the "bad old days" when the law of the jungle prevailed.

[23] Supra note 2 at para 3.23

Attachment 1

Powers of the Australian Building and Construction Commissioner

Sections of the BCII	What is the power	How and when used	Why	Reason to be retained
Australian Building and Construction Inspectors (ABC Inspectors)				
59(3)	**may, without force, enter premises**	To inspect building sites and obtain information that is relevant to an investigation. Before entering premises, an ABC Inspector must announce that they are authorised to enter and produce their identity card to the occupier for inspection.	For compliance purposes That is, ascertaining whether: ▪ the BCII ▪ the WRA; ▪ the *Independent Contractors Act 2006* (Cth); ▪ an order of the Australian Industrial Relations Commission; or ▪ a Commonwealth industrial instrument; has or is being complied with, by a building industry participant.	Powers are equivalent to those given to 'workplace inspectors' under section 169 of WRA. Without these powers, ABC inspectors would be unable to attend sites unless invited on, and would have virtually no evidence gathering capability.
59(9)	may, without force, enter business premises			
59(5)(a)	may inspect, any work, material, machinery, appliance, article or facility			
59(5)(b)	may take samples of goods or substances			
59(5)(c) & 59(11)	**may interview any person (voluntarily)**			
59(5)(d)	may inspect, and make copies of, any document on the premises			
59(5)(e)	may require that documents be produced			

Sections of the BCII	What is the power	How and when used	Why	Reason to be retained
59(6)	**may, by written notice, require that documents be produced**			

Sections of the BCII	What is the power	How and when used	Why	Reason to be retained
ABCC or Deputy ABCC ONLY				
52(1)(c)	Require a person by written notice to give the information	To obtain information when unable to do so using the powers available under section 59.	If the ABCC believes on reasonable grounds that a person: ▪ has information; ▪ has documents; or ▪ is capable of giving evidence; that is relevant to an investigation.	Without section 52 there is no way of compelling information or evidence (see also ABCC Examinations report). Same powers as: ▪ Australian Competition and Consumer Commission (Section 155 *Trade Practices Act 1974* (Cth)); ▪ Australian Taxation Office (Section 353 *Taxation Administration Act 1953* (Cth)); and ▪ Australian Securities and Investment Commission (Section 19 *Australian Securities and*
52(1)(d)	Require a person by written notice to produce the documents			
52(1)(e)	**Require a person by written notice to attend and answer questions**			

Sections of the BCII	What is the power	How and when used	Why	Reason to be retained
				Investment Commission Act 2001 (Cth)).
ABCC ONLY				
67	The ABCC may publish details of non-compliance with the: ▪ BCII; ▪ WR; or ▪ *Independent Contractors Act*.	If the ABCC considers that it is in the public interest to do so he/she may publish details of non-compliance, including the names of participants who have failed to comply.	The ABCC must apply the public interest test having regard to his/her functions and the purposes set out in the BCII.	This is an important option. It enables the ABC Commissioner to use alternative methods (to court proceedings) to address non-compliance, when it is in the public interest to do so.

Comparison of unlawful industrial action under the *Building and Construction Industry Improvement Act 2005* and the *Workplace Relations Act 1996* with similar provisions contained in the *Fair Work Act 2009*	
BCII Act **Section 38 Unlawful industrial action prohibited** A person must not engage in unlawful industrial action. **Penalty:** Grade A civil penalty 'Unlawful industrial action' is defined in section 37. **Section 37 Definition of *unlawful industrial action*** Building industrial action is ***unlawful industrial action*** if: a) the action is industrially-motivated; and b) the action is constitutionally-connected action; and c) the action is not excluded action. 'Excluded action' is defined in section 36 as 'building industrial action that is protected action for the purposes of the Workplace Relations Act'.	There are no direct equivalent provisions for s.37 or 38 of the *BCII Act* in the *Fair Work Bill*.
BCII Act, s 36 **"building industrial action"** Not include action authorised or agreed to "in advance and in writing" S 36(2) : burden of proving OHS imminent risk is on person seeking to rely on it **Workplace Relations Act** **Section 420 Meaning of industrial action** For the purposes of this Act, **industrial action** means any action of the following kinds:	**Fair Work Act** **Section 19 Meaning of *industrial action*** (1) ***Industrial action*** means action of any of the following kinds: • A failure or refusal to work at all • Bans • Performance of work in a manner different to custom • Lock out of employees from their work by the employer (2) However, ***industrial action*** does not

• A failure or refusal to work at all • Bans • Performance of work in a manner different to custom • Lock out of employees from their work by the employer but does not include the following: • Employee action that is authorised or agreed to by the employer • Employer action that is authorised or agreed to by the employees • Employee action if the action was based on a reasonable OH&S concern about an imminent risk and the employee did not unreasonably fail to comply with the employer's direction to perform other work (1)(g)(i). ***Lock out*** is defined as being when an employer prevents employees from performing work under their contracts of employment without terminating those contracts. ***Burden of proof*** – whenever a person seeks to rely on subparagraph (1)(g)(i) [OH&S concern], that person has the burden of proving it applies.	include the following: • Employee action that is authorised or agreed to by the employer • Employer action that is authorised or agreed to by the employees • Employee action if the action was based on a reasonable OH&S concern about an imminent risk and the employee did not unreasonably fail to comply with the employer's direction to perform other available safe and appropriate work at the same or another workplace. ***Lock out*** is defined as being when an employer prevents employees from performing work under their contracts of employment without terminating those contracts.
Workplace Relations Act **Section 435 Protected action** (1) **General** Action by a person is **protected action if:** a) the action is protected action under subsection (2) or (3); and b) no provision of Subdivision B excludes the action from being protected action; and c) subsection 434(3) does not exclude the action from being	**Fair Work Act** **Section 408 Protected industrial action** Industrial action is ***protected industrial action*** for a proposed enterprise agreement if it is one of the following: • employee claim action for the agreement (s.409) • employee response action for the agreement (s.410) • employer response action for the agreement (s.411)

protected action. There are two types of protected action: • Employee and employee organisation actions (s.435(2)) • Employer actions (s.435(3))	**Section 409 Employee claim action** **Section 410 Employee response action** **Section 411 Employer response action**
Workplace Relations Act **Section 440 Exclusion – industrial action must not be taken until after nominal expiry date of workplace agreements or workplace determinations** Engaging in or organising industrial action in contravention of section 494 or 495 is not protected action. **Section 494 Industrial action etc must not be taken before nominal expiry date of collective agreement or workplace determinations** **Section 495 Industrial action must not be taken before nominal expiry date of AWA**	**Fair Work Act** **Section 417 – Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement, etc.** *No industrial action* (1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which: (a) an enterprise agreement is approved by FWA until its nominal expiry date has passed; or (b) a workplace determination comes into operation until its nominal expiry date has passed; Whether or not the industrial action relates to a matter dealt with in the agreement or determination. (2) The persons are: (a) an employer, employee, or employee organisation, to whom the agreement or determination applies; or (b) an officer of an employee organisation to which the agreement or determination applies, acting in that capacity.

COMMENT:

- Under the BCII Act there is no need for an enterprise agreement or a workplace determination for there to be unlawful industrial action; it need only be constitutionally-connected and industrially- motivated. This is broader than the WRA and the FWA.
- Under the WRA and FWA, industrial action need not be industrially-motivated in order to be unlawful.
- Under the *FWA* the burden of proof to prove there was an OH&S concern about an imminent risk to health and safety lies on the applicant. This is different to the *WRA s 420(4) and BCIIA s 36(2)* where the burden of proof lies on the person seeking to rely on the claim.

Comparison of civil penalty provisions of Chapter 6 of the *Building and Construction Industry Improvement Act 2005* with similar provisions contained in the *Fair Work Act 2009*

Section 43 of the BCII Act **Section 43 Coercion in relation to engagement etc. of building employees and building contractors**	The equivalent is section 355 of the *Fair Work Act* which provides: **Section 355 Coercion—allocation of duties etc. to particular person**
(1) A person (the ***first person***) must not organise or take action, or threaten to organise or take action, with intent to coerce another person (the ***second person***):	A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:
(a) to employ, or not employ, a person as a building employee; or	(a) employ, or not employ, a particular person; or
(b) to engage, or not engage, a person as a building contractor; or	(b) engage, or not engage, a particular independent contractor; or
(c) to allocate, or not allocate, particular responsibilities to a building employee or building contractor; or	(c) allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or
(d) to designate a building employee or building contractor as having, or not having, particular duties or responsibilities.	(d) designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

The Explanatory Memorandum to the Bill

1443. Clause 355 is intended to prevent persons from being coerced to make certain employment or management related decisions. It prohibits a person from organising or taking, or threatening to organise or take, any action against another person with intent to coerce that person or a third person to:

- employ, or not employ, a particular person;
- engage, or not engage, a particular independent contractor;
- allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or
- designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

1444. For example, clause 355 prohibits an industrial association from organising industrial action against a head contractor with intent to coerce the head contractor to engage a specific employee as a site delegate or safety officer.

COMMENT:

These provisions appear to be equivalent in their operation.

<u>Section 44 of the BCII Act</u> (incorporating amendments made by the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*

Coercion of persons to make, vary, terminate etc. collective agreements etc.

(1) A person must not:

take or threaten to take any action; or

(b) refrain or threaten to refrain from taking any action;

with intent to coerce another person, or with intent to apply undue pressure to another person, to agree, or not to agree:

(c) to make, vary or terminate, or extend the nominal expiry date of, a building enterprise agreement; or

(d) to approve any of the things mentioned in paragraph (c).

Note: Grade A civil penalty.

(2) Subsection (1) does not apply to action that is protected industrial action (as affected by Part 3 of Chapter 5 of this Act).

(3) An employer must not coerce, or attempt to coerce, an employee of the employer in relation to who is to be, or is not to be, the employee's bargaining representative:

Note: Grade A civil penalty.

(4) An employer must not apply, or attempt to apply, undue pressure to an employee of the employer in relation to who is to be, or is not to be, the employee's bargaining representative:

Note: Grade A civil penalty.

(5) To the extent that section 343 of the FW Act relates to:

(a) the making, varying or terminating of an enterprise agreement; or

(b) the appointment, or termination of appointment, of a bargaining representative for an enterprise agreement; that section does not apply if the agreement is a building enterprise agreement.

The equivalent of section 44 is provided for at sections 343 and 344 of the Act– Clause 343 -Coercion

343 (1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

(a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or

(b) exercise, or propose to exercise, a workplace right in a particular way.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply to protected industrial action.

Section 344 of the Act - Undue influence or pressure

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:

(a) make, or not make, an agreement or arrangement under the National Employment Standards; or

(b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or

(c) agree to, or terminate, an individual flexibility arrangement; or

(d) accept a guarantee of annual earnings; or

(e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

Note: This section is a civil remedy provision (see Part 4-1).

The Explanatory Memorandum

1390. Subclause 343(1) prohibits a person from organising or taking, or threatening to organise or take, any action against another person with intent to coerce that person or a third person to:

- exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
- exercise or not exercise, a workplace right in a particular way.

1391. This clause is intended to prohibit any action (i.e., not limited to adverse action) taken with intent to coerce another person, or a third person, in relation to the exercise (or not) of their workplace rights. The prohibition applies irrespective of whether the action taken to coerce the other person is effective or not.

1392. Subclause 343(1) is intended to cover section 400 of the WR Act which broadly dealt with coercion in agreement-making. However, the protection in subclause 343(1) is broader because it protects all workplace rights.

Clause 344 – The Explanatory Memorandum

1394. Clause 344 prohibits an employer from exerting undue influence or undue pressure on an employee in relation to a decision by the employee to:

- make or not make an arrangement under the NES;
- make or not make an agreement or arrangement under a term of a modern award or enterprise agreement permitted to be included in the award or agreement by subclause 55(2);
- agree to or terminate an individual flexibility arrangement;
- accept a guarantee of annual earnings; and
- agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

1395. The prohibition applies in circumstances where an employer makes an agreement with an individual employee (not employees acting collectively) and where the employer should be expected to take care not to exert significant and inappropriate pressure on an employee to make the agreement.

1396. Under influence or pressure is a lower threshold than coercion. This is deliberate as it recognises there should be higher obligations on an employer when they are entering into arrangements with employees that effectively modify or alter their conditions under the safety net.

COMMENT:

Section 44 of the BCII Act has the element of “undue pressure” as applied by any person. The Act does not, as undue pressure is only in clause 344, which is about an employer applying pressure on an employee and not a third party applying undue pressure.

Section 45 Discrimination against employer in relation to industrial instruments (incorporating amendments made by the *Fair Work (State Referral and Consequential and Other Amendments) Act, 2009*

(1) A person (the ***first person***) must not discriminate against another person (the ***second person***) on the ground that:

(a) the employment of the second person's building employees is covered, or is not covered, by:

(i) a particular kind of industrial instrument; or

(ii) an industrial instrument made with a particular person; or

(iii) a particular preserved Australian Pay and Classification Scale; or

(iv) the Australian Fair Pay and Conditions Standard; or

(v) the National Employment Standards; or

(b) it is proposed that the employment of the second person's building employees be covered, or not be covered, by:

(i) a particular kind of industrial instrument; or

(ii) an industrial instrument made with a particular person; or

(iii) a particular preserved Australian Pay and Classification Scale; or

(iv) the Australian Fair Pay and Conditions Standard.

(v) the National Employment Standards

Note: Grade A civil penalty.

(2) Subsection (1) does not apply to

Section 354 Coverage by particular instruments

(1) A person must not discriminate against an employer because:

(a) employees of the employer are covered, or not covered, by:

(i) provisions of the National Employment Standards; or

(ii) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or

(iii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation; or

(b) it is proposed that employees of the employer be covered, or not be covered, by:

(i) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or

(ii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply to protected industrial action.

conduct that is protected industrial action (as affected by Part 3 of Chapter 5 of this Act). (3) Subsection (1) does not apply to conduct by the first person if: (a) the conduct occurs in relation to: (i) a proposed agreement between the first person and the second person under which the second person would carry out building work or arrange for building work to be carried out; or (ii) a proposed variation of an agreement between the first person and the second person under which the second person carries out building work or arranges for building work to be carried out; and (b) the conduct is engaged in solely for the purpose of encouraging the second person to have particular eligible conditions in an industrial instrument that covers employees of the second person. (4) Subsection (1) does not apply unless: (a) the industrial instrument referred to in that section is an award, transitional award, workplace agreement, pre-reform certified agreement or pre-reform AWA; or Fair Work Instrument; or (b) the first person is an organisation or a constitutional corporation; or (c) the second person is a constitutional corporation; or (d) the conduct occurs in a Territory or Commonwealth place.	
Clause 354 – The Explanatory Memorandum 1437. Clause 354 prohibits a person from discriminating against an employer on the basis that employees of the employer are or are not covered by provisions of the NES or are or are not	

covered or proposed to be covered by:

- a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or
- an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation.

1438. It is intended to be broadly equivalent to section 804 of the WR Act.

1439. The clause only applies to discrimination on the basis of the particular type of workplace instrument, rather than anything contained in that instrument.

1440. The reference to a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument) is intended to ensure that the clause deals with both:

- particular types of workplace instruments, such as modern awards and enterprise agreements; and
- subsets of those particular types of workplace instruments, such as single-enterprise agreements and multi-enterprise agreements.

1441. For example, subclause 354(1) prohibits:

A head contractor refusing to engage a subcontractor because the subcontractor's employees are not covered by an enterprise agreement, but instead a modern award applies to determine their entitlements and obligations. In this example, the person is discriminating against an employer because a particular type of workplace instrument does not cover the employer's employees.

A head contractor refusing to engage a subcontractor because the subcontractor's employees are covered by a multi-enterprise agreement rather than a single-enterprise agreement. In this example, the person is discriminating against the employer because a particular type of enterprise agreement covers the employer's employees.

1442. Subclause 354(2) makes clear that the provision does not apply to protected industrial action. This means that protected industrial action does not amount to discrimination.

Section 46 of the BCII Act - Coercion in relation to superannuation

There is nothing in the Fair Work Act that deals with superannuation in this way.

Section 64 BCII Act Project agreements not enforceable
There is not an equivalent provision in the Fair Work Act.

Attachment 3

NEW ROYAL CHILDREN'S HOSPITAL DISPUTE

1. Background

Previously Bovis Lend Lease (BLL) introduced a safety swipe card entry system on its projects that was opposed by some unions. This led to disputation and was broadly labelled the "Blue Glue Dispute." This dispute was aired in the Australian Industrial Relations Commission (AIRC) and the Federal Courts, culminating in the execution of a Deed to facilitate the implementation and ongoing operation of the system. This was reluctantly agreed to by the relevant unions. The introduction of the system was perceived by them as being "anti-union."

This dispute was followed by an election from the floor of a site delegate and, as the delegate was new to the role, a number of "teething" issues needed to be addressed. In addressing these issues, the dispute discussed below developed.

2. Details of dispute leading to contempt proceedings

Around December 2008, a subcontractor (engaged by BLL to undertake work at the New Royal Children's Hospital (RCH) site), encountered difficulty with a delegate-elect. The delegate-elect was understood to be refusing the direction of his supervisor and taking leave from the work site to attend union meetings off site, without prior notice being given to his supervisor. Just before the Christmas 2008 site shutdown, the employer subcontractor issued a request for the employee to report for work at the employer's yard the following day. It is believed that this request was issued so the employee could have discussions with his employer to remedy the problems being experienced on site. The employee refused this direction and turned up for work at the RCH site the following morning. In summary, the refusal of the employee to follow the directions of his employer, led to his dismissal.

This event led to intervention by the Construction, Forestry, Mining and Energy Union (CFMEU) which demanded the employee's reinstatement. A tentative agreement was made between the employer and the CFMEU relating to the employee being sent on annual leave and, on his return, the potential for the employee to be reinstated and to continue employment. However, it was stipulated that this occur on another project and that the employee would not be reinstated on the RCH project. This agreement was not formalised.

In February 2009, the employee who had been dismissed (believed to be unemployed) returned to the RCH project in company with CFMEU organisers. A demand was made that

the employer reinstate employment of the individual and that he continue as a delegate. The former employer refused to reinstate the employee on the RCH project. However, employment was again offered on an alternative site. The CFMEU refused to entertain this offer and demanded that he be reinstated at RCH or employed directly by BLL. However, refusal was again confirmed by both the former employer and BLL. The CFMEU demanded a further meeting with BLL at this time; however this request was refused on the ground that the issue was between the employer and their former employee, and not a matter for BLL. In response, that afternoon, a blockade formed at the entry gates of the RCH project.

CFMEU officials and parties unknown to BLL gathered at the entry gates. CFMEU cars were parked across the entry gates, blocking entry or exit of any vehicles to the site. The union and other parties were requested to remove themselves from the entry to the site; however, the response was that the blockade would remain until such time as the delegate was reinstated by the employer or employed by BLL. At this time, discussions were held with a senior official of the CFMEU advising that if the blockade was not removed, there would be no alternative other than to take legal action. This discussion once again led to a demand for the delegate to be reinstated on the project. Correspondence was also issued to the CFMEU demanding the removal of the illegal blockade. BLL then sought to obtain an order from the Federal Court for its removal.

On application, an interim order was granted by the Federal Court. This order was served on the CFMEU officials at the entry gates. However, once again union officers and other parties refused to leave. At this time, the blockade had been in place for nearly a week, and materials and essential services were not reaching the project; thus productivity was severely reduced and subcontractors were directing labour to other projects. BLL endeavoured to have vehicles enter the site to deliver materials, only to have the union parties at the entry gate turn them away, refusing their entry. The CFMEU and its officers showed disregard for orders issued by the Court. At this stage, utilising police to have the order strictly enforced would have led to potential violence, so the police were reluctant to proceed. BLL did not request their intervention.

The CFMEU continued to refuse to comply with the interim order issued by the Federal Court, which led to BLL making application to the Federal Court for contempt of court proceedings. During the Federal Court contempt proceedings, the blockade continued.

BLL was told by CFMEU officers to employ the delegate and then all issues would be resolved. BLL's position was that if the CFMEU wished for union representation on the project a democratic vote by the workforce would be required. The CFMEU refused to undertake this

course of action on the basis a delegate had already been elected and was “required” to be reinstated.

The blockade was disbanded on 4 March 2009 and normal deliveries were able to enter the site. The blockade lasted for 22 calendar days. Ironically, following further discussions and undertakings by the CFMEU, the delegate was offered employment on the RCH project under stringent terms and conditions.

A BRIDGE TOO FAR

PICTURE: JASON SOUTH (DIGITALLY ALTERED)

An industrial stoush on a West Gate Bridge project may have turned the tide against construction unions and fortified a rift with the Rudd Government. **Ben Schneiders** reports.

WHEN Julia Gillard addressed the ACTU congress earlier this month in Brisbane, she was met by a sea of unionists wearing yellow T-shirts adorned with the slogan "one law for all".

The stunt was part of a concerted union campaign to push the Labor Government to scrap the coercive powers of the Australian Building and Construction Commission, which ACTU secretary Jeff Lawrence, the day before, had said was the No. 1 industrial issue for unions.

The message Gillard delivered back to the more than 500 delegates was equally blunt. Not on my watch, she effectively told them in a stiff rebuke to the industrial wing of the labour movement. She linked the behaviour on the West Gate Bridge industrial dispute earlier this year to all that was wrong with building unions and the need to keep discriminatory laws.

"Like me, I am sure you were appalled to read of dangerous car chases across Melbourne city involving carloads of balaclava-wearing people, criminal damage to vehicles resulting in arrests, threats of physical violence and intimidation," Gillard said. "The last time I read of balaclavas in an industrial dispute, they were being worn by security thugs at the Melbourne waterfront when the MUA fought its history-making battle against Patricks and the Liberal Party. Balaclavas, violence and intimidation must be unreservedly condemned . . . and the Rudd Labor Government will do everything necessary to ensure that we do not see this appalling conduct again."

The comments caused uproar and cries of "bullshit" and "shame" and dark talk from unionists that they had been sold out by Labor.

Remarkably, Gillard's reference to violence came despite the allegations having yet to be tested in court and lawyers and unionists pointing out that those wearing balaclavas during the dispute were the "scabs", not those on the union side.

The focus on West Gate, on one level, was also surprising as it started off as such a small dispute and seemingly over so little. The industrial relations news service *Workplace Express* in February reported the dispute — correctly as the court transcripts show — as a dispute between rival unions over coverage on a project that would eventually employ hundreds.

On one side was the right-wing Australian Workers Union, which had been negotiating with John Holland, and on the other side were two left-wing unions — the Australian Manufacturing Workers Union and the often aggressive Construction, Forestry, Mining and Energy Union.

The issue really flared in early March when about 30 workers employed by a labour hire firm used by John Holland lost their jobs. That labour hire firm, Civil Pacific, had struck a deal with the CFMEU and AMWU on wages and conditions that John Holland could not cop, which resulted in Civil Pacific withdrawing from the project, bringing it to a halt with the jobs also lost.

It was barely news at a time when Australia's economic downturn appeared at its worst, with Pacific Brands a little more than a week earlier laying off 1850 staff and other employers in industries such as automotive shedding workers in their hundreds almost daily.

But that single event sparked a confrontation involving allegations of death threats, numerous injunctions, violence, car chases, a huge police presence and what some describe as one of the most remarkable industrial deals ever signed in Australia. At least 10 people have also been charged for a range of offences.

Yesterday, just two weeks after Gillard's "balaclava" speech, laws were rushed into Parliament by Labor that will move to enshrine a new building regulator that keeps the coercive powers but with more checks and balances.

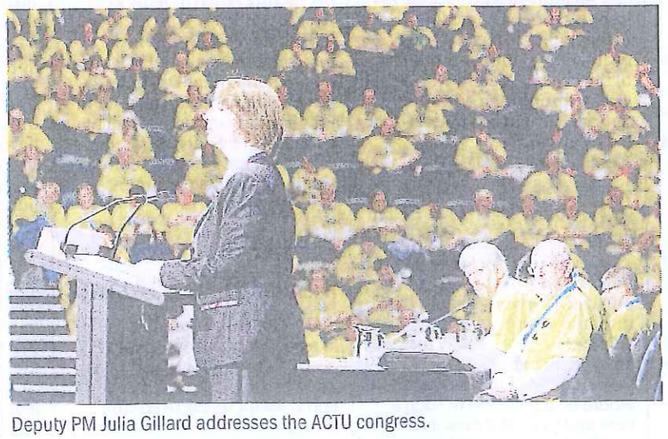
Under the present regime, introduced by the Howard government after a royal commission earlier this decade, workers can be jailed for up to six months for not co-operating with an investigation. A South Australian construction worker, Ark Tribe, faces that prospect. It also sees unions tied up in litigation for taking unlawful industrial action and other prohibited activity.

An analysis of court judgements by the Master Builders Association of Victoria showed there had been about $1.7 million in fines since the regulator's inception, with the CFMEU's Victoria branch fined nearly $400,000. The legal costs to unions would be far higher still.

But the West Gate dispute has done little for the union case for getting rid of the commission and the reputation that has developed about thuggish behaviour and violence.

The dispute saw John Holland take the unions to the Federal Court. In a ruling in mid-March, Judge Christopher Jessup outlined an exchange between an organiser from the AMWU and a security guard for John Holland:

"Smile you c--t your whole f---ing family is going to be on this f---ing camera . . . and I will get every one of you. You think you're funny now you f---ing copper wannabe c--t . . . you're f---ed and you don't know how f---ed you are," organiser Tony Mavromatis allegedly said. Later he allegedly told the guard he was "gone" and "your f---ing family's gone". And on it went. (Mavromatis denied in an affidavit these and other exchanges quoted in the Jessup judgement.)



Deputy PM Julia Gillard addresses the ACTU congress.

For the best part of two months from early March, the project was beset by protests to stop John Holland bussing up labour to work on the bridge. Hundreds of police became involved with claims of crazed car chases across Melbourne and death threats.

JOHN Holland in turn took the AMWU and CFMEU and a variety of people to the Federal Court to stop the protests and get the project going again. The construction giant — which many unions loathe for what they see as its anti-union agenda and poor safety record — also pursued the parties for tens of millions of dollars in damages. And this time they meant it. While a damages claim can be used as a tactic by employers to reach a settlement, John Holland felt it had enough on the unions to not only get a settlement but to re-write the industrial landscape.

In return for the damages claim being dropped and the dispute settled, the unions have agreed to pay a combined $650,000 every time they breach the deal on any John Holland project in Victoria for at least the next 2½ years. The CFMEU will donate $250,000 to charity for each breach and the AMWU $400,000, reflecting other unresolved disputes it had with John Holland.

Copies of the agreement, obtained by *The Age*, make it clear that the unions "will not threaten, organise, encourage, procure or engage in any industrial action" including picketing and protests or any moves to discourage people from working on John Holland projects. It does not cover any industry-wide protests that are not directed at John Holland, or isolated and minor breaches. But if John Holland is targeted by unlawful action, the fines are invoked.

An independent expert on workplace law, who asked not to be named, described the agreement as "one of the most extraordinary things I've seen" with the unions agreeing to limits on a key weapon — their ability to take industrial action.

The suggestion that he had signed away key rights provoked a furious reaction from CFMEU state secretary Bill Oliver, who denied the agreement included a no-strike clause. AMWU state secretary Steve Dargavel has also denied the claim.

The legal expert who spoke to *The Age* queried how the deal would stand up if challenged in court, but others say that from the way it is structured, as long as John Holland is prepared to re-activate the damages claim, it has significant leverage over the two unions.

John Holland human resources executive Stephen Sasse declined to comment on the dispute because it had been settled but pointed to the company's "unsurpassed" ability to deliver projects.

Clearly John Holland sees the deal as a way to extract a peace dividend from an industry often beset by confrontation and use it as an advantage to win other projects. John Holland is part of one of the two remaining consortiums bidding for the desalination plant in Wonthaggi — an important project for the State Government — which has seen unions jostle for coverage.

For the unions seeking coverage — which include the CFMEU and AMWU — they not only face operating under the "bad behaviour" agreement with John Holland but ongoing separate action over the West Gate dispute from the Australian Building and Construction Commission that could see them liable for huge fines. That case is expected to be heard in the Federal Court in March 2010 and could include a fresh series of allegations.

Also outstanding is any formal agreement on which unions will cover the West Gate project.

AWU state secretary Cesar Melhem yesterday said there had been a number of meetings between the unions over the issue, but there was still no settlement. He said the overwhelming majority of the 100 workers on the project were AWU members and the other unions won't be part of it until there is an agreement.

Remarkably after all the turmoil, little has changed from early February, with the AWU still in the dominant position despite the cost to the other unions and the damage to the campaign to change the laws.

Melhem — whose union is seen as far more pragmatic or even accused by some on the left as being too employer-friendly — was sharply critical of the Government's use of West Gate as a way to justify keeping the coercive powers.

"I think it's just ridiculous," he says. "There's other laws in place, criminal laws to deal with this sort of behaviour."

While that may be true, it is also the case that the timing of the West Gate dispute, the nature of the allegations and the imagery it stirred gave the perfect opening for Labor to ride over deeply held concerns within the union movement about the need for "one law for all".

Ben Schneiders is workplace reporter.

John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (corrigendum) [2009] FCA 235 (17 March 2009)

Last Updated: 23 March 2009

FEDERAL COURT OF AUSTRALIA

John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2009] FCA 235

CORRIGENDUM

JOHN HOLLAND PTY LTD v AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION, CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, MICK POWELL, TONY MAVROMATIS and MICK BULL
VID 89 of 2009

JESSUP J
17 MARCH 2009(CORRIGENDUM 19 MARCH 2009)
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 89 of 2009**

BETWEEN:	**JOHN HOLLAND PTY LTD** **Applicant**
AND:	**AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION** **First Respondent**
	CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION **Second Respondent**
	MICK POWELL **Third Respondent**

TONY MAVROMATIS
Fourth Respondent

MICK BULL
Fifth Respondent

JUDGE: **JESSUP J**
DATE OF ORDER: **17 MARCH 2009 (CORRIGENDUM 19 MARCH 2009)**
WHERE MADE: **MELBOURNE**

CORRIGENDUM

1. In the third sentence of paragraph 65, "the BCII Act" should be substituted for "the WR Act".

I certify that the preceding one (1) numbered paragraph is a true copy of the Corrigendum to Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:
Dated: 19 March 2009

FEDERAL COURT OF AUSTRALIA

John Holland Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2009] FCA 235

INDUSTRIAL LAW – Union protest outside head office for major construction project – Intent of protestors to influence contractor to make industrial agreement with unions not presently having members working on the project – Whether intent was for agreement to be made under *Workplace Relations Act 1996* (Cth) – Whether intent of protestors also to secure employment of workers previously laid off by subcontractor – Whether intent to secure that employment in absence of claimed industrial agreement.

INDUSTRIAL LAW – Union protest outside head office for major construction project – Methods used by protestors – Whether illegitimate – Whether negated choice of contractor – Whether amounted to coercion or application of undue pressure.

STATUTES – Words and phrases – "Undue pressure".

Building and Construction Industry Improvement Act 2005 (Cth) ss 43, 44, 49
Workplace Relations Act 1996 (Cth) Part 8

Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2000] FCA 1188; (2000) 100 FCR 530
Seven Network (Operations) Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2001] FCA 456; (2001) 109 FCR 378

JOHN HOLLAND PTY LTD v AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION, CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, MICK POWELL, TONY MAVROMATIS and MICK BULL
VID 89 of 2009

JESSUP J
17 MARCH 2009
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 89 of 2009**

BETWEEN: **JOHN HOLLAND PTY LTD**
Applicant

AND: **AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION**
First Respondent

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
Second Respondent

MICK POWELL
Third Respondent

TONY MAVROMATIS

Fourth Respondent

MICK BULL
Fifth Respondent

JUDGE: **JESSUP J**
DATE OF ORDER: **17 MARCH 2009**
WHERE MADE: **MELBOURNE**

Upon the applicant by its counsel undertaking:

(a) to submit to such order (if any) as the Court may consider to be just for the payment of compensation, to be assessed by the Court or as it may direct, to any person, whether or not a party, adversely affected by the operation of the interim order below; and

(b) to pay the compensation referred to in (a) above to the person there referred to.

THE COURT ORDERS THAT:

1. Pending the hearing and determination of this proceeding or further order, the first, second, third and fourth respondents be restrained, whether by themselves, their servants or agents, from –

(a) preventing, hindering or impeding the access or approach of any person or vehicle to, or the egress or departure of any person or vehicle from, the applicant's head office for the West Gate Bridge Strengthening Alliance Project at 275 Williamstown Road, Port Melbourne ("the project office");

(b) counselling, persuading or requesting any person not to attend a job interview or employment induction session at the project office or not to cross a picket line for the purpose of attending any such interview or session;

(c) damaging any part of the project office or of the applicant's property in the vicinity of the project office;

(d) striking, kicking or interfering with any door or window at the project office;

(e) save for the purpose of entry or exit otherwise authorised by law, standing, sitting, lying or otherwise being present at or on the approach to any door, gate or entrance of or to the project office;

(f) urinating in public within 200 metres of the project office;

(g) threatening or abusing any person at, within, or in the vicinity of the project office or any person entering, approaching, leaving or departing from the project office; and

(h) organising or procuring any person to do any of the things set out in (a) – (g).

2. The parties have liberty to apply in accordance with previous orders made herein.
3. Costs be reserved.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
The text of entered orders can be located using eSearch on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 89 of 2009**

BETWEEN: **JOHN HOLLAND PTY LTD**
Applicant

AND: **AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES UNION**
First Respondent

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION
Second Respondent

MICK POWELL
Third Respondent

TONY MAVROMATIS
Fourth Respondent

MICK BULL
Fifth Respondent

JUDGE: **JESSUP J**
DATE: **17 MARCH 2009**
PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1. By Notice of Motion filed on 6 March 2009, the applicant, John Holland Pty Ltd, seeks interim injunctions to restrain the first, second, third and fourth respondents from continuing to engage in conduct alleged to be in contravention of ss 43 and 44 of the *Building and Construction Industry*

Improvement Act 2005 (Cth) ("the BCII Act"). The background to the motion is set out in two previous interlocutory judgments which I delivered in relation to what is broadly the same dispute: see *Williams v Automotive, Food, Metals, Engineering, Printing Kindred Industries Union* [2009] FCA 86, and *Williams v Automotive, Food, Metals, Engineering, Printing Kindred Industries Union (No. 2)* [2009] FCA 103. I shall assume that the reader of these reasons is familiar with that background, and with the terminology used in my previous reasons.

2. The applicant, John Holland Pty Ltd, is a building construction company involved in a major project of works on the West Gate Bridge ("the project"). The first respondent, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union ("the AMWU") and the second respondent, the Construction, Forestry, Mining and Energy Union ("the CFMEU") are organisations registered under the *Workplace Relations Act 1996* (Cth) ("the WR Act"). The third respondent, Mick Powell, is an organiser in the employ of the CFMEU, and the fourth respondent, Tony Mavromatis, is an organiser in the employ of the AMWU. The fifth respondent, Mick Bull, is not the subject of the present motion. The Australian Building and Construction Commissioner has intervened in the public interest pursuant to s 71 of the BCII Act. I shall refer to him as the intervener.

3. I heard argument on the motion on 10 March 2009, and subsequently received short written submissions from the parties. On 11 March 2009, I imposed a limited restraint upon the respondents, operative only for the period during which I reserved judgment on the applicant's motion.

4. In the second of my previous interlocutory judgments, I referred to the circumstance that, on 8 February 2009 or thereabouts, Civil Pacific Services (Vic) Pty Ltd ("Civil Pacific") made an agreement with the AMWU and the CFMEU, applicable to work on the project, which would, it seems, have obliged Civil Pacific to pay higher wages than had previously been paid by that company on the project. I referred also to Civil Pacific's request to the applicant for a consequential adjustment to the contract pursuant to which it was then providing labour for the project. Evidence now before the court establishes that the applicant did not agree to that request, and that Civil Pacific withdrew from the project on 2 March 2009. It seems that, there being no further need for the services of the workers who had been engaged on the project, the employment of those workers was then terminated by Civil Pacific.

5. Since 3 March 2009, the respondents and others with whom they are associated in their dispute with the applicant have maintained a presence outside the applicant's office at 275 Williamstown Road, Port Melbourne, which is the head office for the project ("the project office"). The applicant describes this presence as a picket line, while the respondents describe it as a protest. The applicant says that the respondents' purpose is to prevent or hinder those working in the project office, and others having lawful reasons to attend there (particularly workers applying for employment on the project), from entering the building. The respondents say that their purpose is to protest against the involvement of the applicant in the dismissal of the Civil Pacific workers, and to advance their claim that the applicant should enter into a site agreement for the project with the AMWU and the CFMEU.

6. I shall commence by referring to the evidence as contained in the affidavits filed in support of, and in opposition to, the applicant's motion. To the extent that I make findings of fact, they are, of course, provisional and intended to be used only for the purpose of deciding first whether the applicant has a prima facie case in the sense explained in *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46; (2006) 227 CLR 57 (and if so what is the apparent strength of that case) and secondly where the balance of convenience lies.

7. On the morning of 3 March 2009, Mr Marshall, the applicant's General Superintendent for the Southern Region, was informed that there was a picket line outside the project office. At about 7.30 am that day, he arrived at the office, and saw a number of men standing around one of the pedestrian entrances thereto. Most of them had either AMWU or CFMEU logos or badges on their clothing. One of them approached Mr Marshall and said: "What are you going to do about our jobs?". Another asked him: "What are you going to do with us?". Mr Marshall asked if he could speak to a spokesman or representative of the group. He was advised to speak to Mr Powell. Mr Marshall walked to the front entrance of the office, and was approached by Mr Powell and Mr Gareth Stephenson (an organiser of the CFMEU). According to Mr Marshall, Mr Mavromatis was also present, but, according to the affidavit of the respondents' solicitor, Mr Trevor Clarke, Mr Mavromatis was not present. Mr Marshall indicated to these men that he would like to have a discussion with them. In his affidavit sworn on 6 March 2009, Mr Marshall said that he told them that he would like to have a meeting to discuss the picket line that was then occurring. Mr Clarke was informed by Messrs Powell and Stephenson, however, that Mr Marshall merely asked whether they wanted "to catch up and have a chat". Messrs Powell and Stephenson (and, according to Mr Marshall, Mr Mavromatis) indicated that they were happy to have a meeting.

8. After that conversation, Mr Marshall continued towards the front entrance of the project office. At the entrance, according to him, Mr Marshall encountered eight or ten persons lying or sitting on the steps, blocking his way. He recognised some of them as former Civil Pacific employees. They were wearing clothing with AMWU or CFMEU badges or insignia. As Mr Marshall approached the entrance, these individuals moved slightly, but made some remarks towards him, including, "Gary, nice to see that you have got a fucking job". According to Mr Clarke, neither Mr Powell nor Mr Stephenson observed any persons lying on the steps, and Mr Powell observed Mr Marshall entering the entrance to the project office without any impediment.

9. Mr Marshall did arrange a meeting as discussed between himself and Messrs Powell and Stephenson (and, according to him, Mr Mavromatis). It was held at 9.00 am on 3 March 2009 at the applicant's office in Abbottsford. The meeting was attended by Messrs Marshall, Powell, Stephenson and Mavromatis, and by some other staff of the applicant, including Mr Bradd Hamersley, the applicant's Regional HR/IR Manager for the Southern Region. The meeting was chaired by Mr Hamersley. Although there is a dispute as to the words he used, it is common ground that, at about the start of the meeting, Mr Hamersley inquired of the union representatives what was the purpose of their presence at the project office. According to Mr Hamersley, Mr Stephenson asked what the applicant was going to do with the former Civil

Pacific employees, and asked whether it was going to give them jobs. That led into a discussion about the terms and conditions under which those persons would be employed on the project, if they were so employed directly by the applicant. Mr Hamersley said that the applicant intended to engage direct employees under an existing agreement between itself and the Australian Workers Union ("the AWU") called the John Holland Southern Region Agreement ("the Southern Region Agreement"). That agreement was made under Part 8 of the WR Act. That led to a debate about whether the Southern Region Agreement appropriately covered all the categories of employees that were likely to be working on the project, particularly boilermakers. The union representatives contended that it did not, while the applicant's representatives contended that it did.

10. The parties at the meeting then discussed the general nature of the relationship between the applicant, on the one hand, and the AMWU and the CFMEU, on the other hand, in relation to the project. At some point, Mr Mavromatis said that the reason for the action being taken by the respondents at the project office was the termination of the employment of the former Civil Pacific employees. There was reference to what the union representatives described as "freedom of association", in the sense that, according to them, the applicant was proposing to force direct employees, including any that may have previously been employed by Civil Pacific, to work under the Southern Region Agreement. According to the affidavit material filed on the present motion, from this point the nature of the discussion became somewhat more robust, and ultimately the union representatives left the meeting, clearly dissatisfied with progress. Before they did so, Mr Mavromatis made it clear that there had to be an agreement for the project between the CFMEU, the AMWU and the applicant. I shall go no further in my provisional findings about what was said at this meeting, both because of the nature of the differences between the relevant evidence proffered by the parties (which, at least in the way those differences were described by Mr Clarke, appears to be concerned substantially with whether the union representatives used the expression "picket line", or the expression "industrial action", and with the extent to which the various representatives accompanied their contributions to the conversation with coarse expletives) and because further elaboration does not appear to be necessary for the limited purposes of the motion presently before the court.

11. After the meeting at Abbottsford, Mr Marshall returned to the project office. Upon arriving, he saw about 30 people standing on Williamstown Road itself, on the median strip and on the kerb outside the front entrance to the office. He saw large CFMEU flags and one large AMWU flag. As he entered the office, he noticed that Messrs Mavromatis, Powell and Stephenson were conducting a meeting with those present. Mr Stephenson was speaking through a megaphone, and Mr Marshall heard the expressions "stick it out" and "workers' rights". After the meeting, those present remained where they were and waved flags at passing traffic. They dispersed at around 12.30 pm.

12. At 2.00 pm on 3 March 2009, Mr Marshall held a meeting with the staff then working at the project office. According to him, some of the female staff members were visibly anxious and upset, and were concerned about what would happen when they left the office for lunch. Two of them told Mr Marshall that they felt intimidated as they entered the office. One of them

referred to a comment made to her as she was entering, in the following terms: "Why are you lucky enough to have a job and I haven't?".

13. Mr Marshall exhibited to his affidavit a file note made by Mr Alan Foster, an IR/HR Manager employed by the applicant. In that file note, Mr Foster refers to his arrival at the project office on 3 March 2009, when he encountered two groups of persons protesting outside the project office. He was approached by Mr Powell. Mr Powell asked: "When are John Holland going to get the blokes a job?". Thinking that Mr Powell was referring to the former Civil Pacific employees, Mr Foster said that he understood that a number of them had lodged their CVs online the previous night, and that he (Foster) intended to commence processing their applications that day. Mr Powell questioned why the applicant would not simply employ all the former Civil Pacific employees immediately. Mr Foster responded that it was necessary to follow what he described as "due diligence processes". Mr Powell asked when they were going to talk about an agreement. Mr Foster responded that he would pass on this question to Mr Marshall, to which Mr Powell said that he (Foster) should let Mr Marshall know that he (Powell) had asked.

14. On 4 March 2009, Mr Marshall arrived at the project office at about 8.00 am. He saw about 40 persons gathered standing outside the front entrance. He did not recognise many former Civil Pacific employees. He did recognise "a lot more union officials" than had previously been present. Messrs Mavromatis, Powell and Stephenson were present. Mr Marshall also saw what he described as "a CFMEU camper/barbeque trailer", and two marquees, set up on the front garden of the project office. Mr Marshall says that he saw some of the persons present urinating on the project office building and on the front garden. According to Mr Clarke, Messrs Mavromatis, Powell and Stephenson deny that anyone so urinated, and say that they had no knowledge of such behaviour being alleged until reading about it in Mr Marshall's affidavit. Messrs Powell and Stephenson did inform Mr Clarke, however, that the police had told them that they had received complaints that persons were urinating on trees in the park across the road. Mr Powell suggested to the police that these persons might have been from another site that was nearby. He told the police that those attending the protest outside the applicant's office would use the public toilets in the park, along with those in "an auction business nearby" which they had permission to use. He assured the police that he would ensure that persons attending the protest did not urinate in the park.

15. Mr Marshall also noticed a CFMEU flag being raised on one of the flagpoles on the project office. According to Mr Marshall, the lock and cover had been removed from the access point for the working mechanism for the flagpole, but Mr Powell told Mr Clarke that there was "never a lock or a cover on the flagpole" on which the CFMEU flag was raised.

16. Mr Marshall said that it was not possible to enter the project office through the front entrance, as there were about 12 people sitting on the steps. According to Mr Clarke, he was instructed by Messrs Mavromatis, Powell and Stephenson that, while there were persons sitting on the steps, they moved aside whenever any person approached to enter, or to leave, the building. They told Mr Clarke that no-one was stopped or hindered from entering or leaving.

They did not, however, suggest that Mr Marshall had in fact entered the building through the front entrance on the occasion referred to in his affidavit.

17. As a result of being unable (according to him) to enter the project office through the front entrance, Mr Marshall called the police. He asked the police to request the picketers to move the camper trailer and marquees to the other side of the road, and to hire "a portaloo". According to Mr Marshall, the police spoke to the persons on the protest, and then left. There was no change in the behaviour of those outside the project office. Mr Marshall later saw Mr Powell drive his vehicle onto the footpath, connect the camper trailer, and drive about 40 metres along the footpath before departing.

18. According to Mr Marshall, the withdrawal of Civil Pacific from the project has had the result that little meaningful work is now being undertaken there, and the recommencement of work is an urgent priority. The applicant is considering both the employment of workers directly, and the engagement of a labour hire company. Some interviews with prospective employees and labour hire companies were arranged for 4 March 2009. These were to occur at the project office. Two workers who had applied for direct employment did not attend their interviews at the appointed time. Each was telephoned by a staff member of the applicant. Each spoke to Mr Marshall. The first worker told him that, as he was approaching the project office to attend his interview, he was spoken to by two of the persons gathered outside. They discussed their issues with the worker, and told him (according to Mr Marshall) "not to cross the picket line". The worker told Mr Marshall that he decided not to attend for the interview, as he did not want to be labelled a "scab". The second worker was also approached by two of the persons gathered outside the project office. According to Mr Marshall, they asked him if he was going to attend a job interview, and they communicated to him their concerns in relation to the applicant. They told him that, while they could not tell him what to do, "it would not be a good idea to cross the picket line". For that reason, according to the worker, he did not attend the job interview.

19. Of the three persons who provided Mr Clarke with information, only Mr Stephenson said anything which might bear upon Mr Marshall's evidence regarding the workers who failed to attend for their job interviews. Mr Stephenson spoke to one worker who had attended at the project office for the purposes of a job interview. He told the worker that those on the protest had been sacked, and that there was a dispute about the pay and conditions on the Westgate project. The worker told Mr Stephenson that he had not been informed that there was a dispute on the job when they asked him for an interview, and that he would not go into the project office. Mr Stephenson said that the worker remained at the protest for some time, and shook hands with other persons then present. Mr Stephenson said that this worker was not told by him, or by any other person, that there was a picket line, he was not told not to cross the picket line, and he was not told that it would not be a good idea for him to cross the picket line.

20. On 5 March 2009, Mr Marshall arrived at the project office at about 8.00 am. He saw about 40 persons (whom he described as "picketers") outside the front entrance of the project office. The campervan/barbeque and the two marquees were again set up on the front garden. The CFMEU flag was on the flagpole. Messrs Mavromatis, Powell and Stephenson, and a small number of former Civil Pacific employees, were amongst those present. Mr Marshall saw

a number of them urinating in public across the road from the front entrance to the project office. Mr Marshall was told by a member of the applicant's staff that he (the staff member) had been abused by those present, and a security guard told Mr Marshall of an obscenity which had been directed to him by one of those present. In his affidavit, Mr Clarke does not refer to any instructions which would deny the content of these allegations.

21. The security guard told Mr Marshall that those present at the protest had kicked the front door of the project office off its tracks, such that the door would not open. The guard said that he had had to repair the door. Mr Marshall observed where this damage had been done. According to Mr Clarke, Messrs Stephenson and Powell informed him that they did not see any person kicking the door, and that such behaviour would have been "entirely inconsistent with the tone of the protest".

22. Mr Marshall telephoned the police, as he was becoming increasingly concerned about the behaviour of those present outside the project office. When the police arrived, those persons left the front entrance of the project office. However, as soon as the police left, they reoccupied the front entrance steps, so that, according to Mr Marshall, it was not possible to enter. According to Mr Clarke, Mr Powell instructed him that the protesters (as he described them) remained at the front entrance after the police arrived "but moved aside on the steps to allow them to enter and exit the premises".

23. Generally with respect to the behaviour of the respondents and their supporters on 3, 4 and 5 March 2009, Mr Stephenson told Mr Clarke that it was intended that the protest be "highly visible" and that, for that reason, they concentrated themselves at the front entrance to the project office. Mr Stephenson said that the complaint that the protesters were communicating at the project office was "that there was a dispute because John Holland were trying to drive down rates of pay and that this had led to 38 workers being sacked". He said that the protesters did attempt to speak to persons who approached the front entrance, some of whom spoke to the protesters, and others of whom did not. Mr Stephenson said that the protesters did not "obstruct or inhibit" anyone wishing to enter or to leave the office, and did not persist in attempting to speak to persons who did not wish to speak to them. Messrs Stephenson, Mavromatis and Powell informed Mr Clarke that it was possible to enter, and to leave, the project office through the front and rear entrances, and that numerous persons did this on 3, 4 and 5 March 2009. Mr Mavromatis told him that, on those days, trucks and couriers at various times entered and left the premises.

24. What I have described above broadly represents the state of the affidavit evidence filed in relation to the applicant's motion as at 10.00 am on 6 March 2009. I had indicated that I would hear the motion at 10.15 am on 10 March 2009, conditionally upon the applicant having served its affidavit evidence by 10.00 am on 6 March 2009. When the matter came on before me on 10 March, the applicant and the intervener sought, and were granted, leave to read further affidavits containing evidence of the respondents' conduct since 10.00 am on 6 March 2009. I also received a further affidavit from Mr Clarke, in response to that evidence.

25. When Mr Marshall arrived at the project office at about 10.00 am on 6 March 2009, he saw that what he described as a "picket line" was still in place, that there was a camping trailer, and that there were marquees and

CFMEU and AMWU flags on display. Those present wore clothing labelled with AMWU and CFMEU insignia. Mr Marshall noticed a number of former Civil Pacific employees amongst those present, as were Messrs Mavromatis and Powell. As he was entering the project office, Mr Marshall was heckled by those present. One former Civil Pacific employee yelled at him while he was trying to make his way through a group of about 10 persons to get to the door of the office. The former Civil Pacific employee said to Mr Marshall: "You think you can get fucking scab labour on this project Gary, you are a fucking idiot. We all know who you are. Where's our job?" Mr Marshall said to this person: "We have offered all of you the opportunity to apply for a position." The former Civil Pacific employee said: "I wouldn't work for the shit money you're offering." Mr Marshall then commented that the pay on the project was $5.00 an hour better than any construction job in Victoria, including Eastlink. (He explained in his affidavit that, when under construction, the Eastlink project was commonly regarded throughout the industry as involving very good pay for construction workers.) The former Civil Pacific employee said: "We will get what we want and there will be no scab labour getting past this picket line." According to Mr Clarke, Messrs Mavromatis, Powell and Stephenson advised him that nobody in their hearing said words to the effect that there would be no scab labour getting past the picket line. However that may be, Mr Powell was present at the time when Mr Marshall entered the door of the office. Mr Marshall said to Mr Powell: "You'd better control your boys, they're starting to get out of control." Mr Powell replied: "You getting worried? It's not my problem." At the time of making that statement, according to Mr Marshall, Mr Powell was laughing.

26. Once inside the office, Mr Marshall viewed the gathering from the inside. He noticed a number of persons present drinking beer. He saw people banging on the windows of the office, yelling, and kicking at the front door. Messrs Mavromatis and Powell advised Mr Clarke that they observed no banging on the windows and no kicking of the front door. Mr Marshall said that he called the police, and that they came and spoke to the persons present outside the project office. Once the police had left, Mr Marshall found no change in the behaviour of those persons.

27. At about 12.15 pm on 6 March 2009, Mr Marshall was required to leave the project office to attend a meeting elsewhere. When he arrived at his car, he noticed it had a flat tyre. Those gathered outside the project office were laughing at him. He repaired the tyre and proceeded to the meeting.

28. On the same day, 6 March 2009, Ms Rachel Hardinge, an investigator in the service of the intervener, returned the telephone call of Mr Lee, the security guard. Mr Lee told her that, when the picketers (as he described the persons outside the project office) were packing up for the day, he saw a man standing at the applicant's flagpole, and thought that this man was about to cut the ropes. Accordingly, he took a photograph of the man and the flagpole. According to what he told Ms Hardinge, at this point Mr Mavromatis yelled out the following words to him: "Smile you cunt your whole fucking family is going to be on this fucking camera ...and I will get every one of you. You think you're funny now you fucking copper wannabe cunt ... you're fucked and you don't know how fucked you are." The security guard told Ms Hardinge that Mr Mavromatis had said to him several times "You are a fucking cunt" and "You're fucked". According to the affidavit of Mr Clarke,

Mr Mavromatis advised him that he denied speaking in the terms alleged by Ms Hardinge.

29. After his meeting, Mr Marshall returned to the project office at about 2.00 pm on 6 March 2009. At that time, according to Mr Marshall, "the picket line and all its remnants were gone". Mr Marshall spoke to Mr Lee, the security guard, who told him that, earlier that day, Mr Mavromatis had abused him by saying things like: "You're gone you cunt, you're fucked, you're gone and your fucking family's gone, I'm gonna get you, you want to be a fucking cop." As is apparent from the terms of this alleged invective, Mr Lee was probably recounting to Mr Marshall the same incident as he recounted to Ms Hardinge. According to Mr Clarke's affidavit, he was advised by Mr Mavromatis that he did not make any such statement, or a statement to the effect, alleged by Mr Lee.

30. As Mr Marshall and Mr Lee were talking outside the front of the project office, a vehicle with two occupants drew up behind Mr Marshall's car. The driver was waving Mr Marshall over. Mr Marshall went to the car and noticed, through the open passenger window, that Mr Mavromatis was the driver. He had an open can of "Jim Beam" on his lap. Mr Marshall asked Mr Mavromatis: "What are you doing back here?" Mr Mavromatis responded: "I am watching you." Mr Marshall made a comment to the effect that he (Mavromatis) must be bored. According to Mr Marshall, Mr Mavromatis drove his car off with screeching tyres, yelling obscenities at the security guard to the effect of "you fucking grey haired cunt". According to the affidavit of Mr Clarke, Mr Mavromatis advised him that he (Mavromatis) did not make "the statement" attributed to him by Mr Marshall at the time of this encounter.

31. After Mr Mavromatis had left, and while still in the vicinity of the entrance to the project office, Mr Marshall took a telephone call from Mr Cassells, a General Superintendent in the employ of the applicant. While talking to Mr Cassells, and within minutes of Mr Mavromatis having left, four vehicles pulled up surrounding Mr Marshall's car. Three to five men got out of each vehicle, and they appeared to be drinking from cans of beer. According to Mr Marshall, within seconds he was "surrounded" by 12 to 15 men. The main entrance to the project office was shut at the time, and the doors would not open because, according to Mr Marshall, some of those on the "picket" had removed sensor plates that caused the doors to operate. This meant that Mr Marshall had no way of getting away from the group of men by whom he was surrounded. These men began yelling and chanting. According to Mr Marshall, some of them were "noticeably intoxicated". Mr Marshall terminated his telephone call with Mr Cassells. He then noticed that Mr Mavromatis had parked his vehicle on the other side of the road and was standing beside it with his arms crossed, laughing. The men were chanting and yelling things like "give us our jobs and give us our rights". Some called Mr Marshall "cunt" and "dog". Then the security guard managed to open the doors to the office, and Mr Marshall walked inside.

32. From the inside of the project office, Mr Marshall saw Mr Mavromatis walk across the road with an AMWU flag. Those present began chanting again, and banging on the windows of the project office. Mr Marshall saw some of them crowding around his car, and trying to open the doors. He saw some of them looking into the car and appearing to take a note about things

that were inside it. This behaviour continued for about half an hour, after which the police arrived (Mr Marshall having called the police immediately upon his entry into the office). When the police arrived, the group of persons disbanded, and left the vicinity. Until this happened, members of the applicant's staff working at the project office felt too concerned for their safety to leave the office.

33. Save to state that Messrs Mavromatis and Stephenson told him that they observed no person banging on the windows of the project office, Mr Clarke does not refer to any denial by the respondents of the events described in the previous two paragraphs.

34. At about 7.00 am on 10 March 2009, Mr Andrew Williams, an investigator in the service of the intervener (and the applicant in proceeding No. VID 83 of 2009) attended at the project office. He saw about 20 people outside the front of the project office in Williamstown Road. He saw two blue marquees in the garden area between the footpath and the building. He saw two men in the centre median strip waving flags bearing the letters "CFMEU". A little later, he saw a large trailer barbeque bearing the letters "CFMEU", on the front garden between the footpath and the building. At about 7.45 am, Mr Williams saw Mr Mavromatis approach the front door of the project office. From that position, Mr Williams could hear Mr Mavromatis call out "morning Lee" and, after saying something that Mr Williams could not hear, yell out "have a good weekend ... family ... did you take the kids to Moomba?" As this was said, Mr Williams was standing with Mr Lee, the security guard. At various stages between then and 8.48 am, when Mr Williams left the project office, he saw a number of people assembled outside, including Mr Powell and Mr Stephenson. In his affidavit, Mr Clarke does not refer to any denial by Mr Mavromatis of the events described in this paragraph.

35. In his affidavit, Mr Clarke refers to instructions which he has received which deal with, or from which may be inferred, the respondents' purposes in maintaining their presence at the project office, and (subject to their denials, where applicable) in doing the things referred to in the affidavits filed on behalf of the applicant. On the positive side, Mr Clarke deposes as follows:

I am advised by Stephenson and believe that civil construction rates in Victoria are largely similar regardless whether the AWU or the First and Second Respondents are parties. Generally the AWU agreements have less favourable conditions relating to RDO's and other general conditions. On projects which involve a large component of metal work, including projects such as the construction of Dams, power stations and bridges, it is common in Victoria that Agreements known as "mixed metal agreements" are made. These provide total pay which is approximately ten dollars per hour higher than that on civil construction agreements. All work conducted on the Westgate Bridge, from the 1970 collapse to date, has been performed under the metals award and later under mixed metal agreements. Stephenson and Powell inform me that they were advised by Allan Foster and Dave Cassells in a meeting on 21 January 2009 that the work to be performed on the project was fifty per cent metal work and that eighty boilermakers/welders would be required on the job. Stephenson and Powell inform me that Mr Hamersley confirmed Mr Foster's and Mr Cassell's comments in a later meeting. [PAR 6 FOLIO 42]

On the negative side, Mr Clarke deposes that he was advised by Messrs Stephenson and Mavromatis that the AMWU and the CFMEU "wish to have a site specific agreement and that they did not want to have that agreement registered under Part 8 of the WR Act". Further, Mr Clarke deposes that Messrs Stephenson and Mavromatis advised him that neither the AMWU nor the CFMEU "was or are pressing for the employment of any person on the project in circumstances where the conditions applicable to the employment were the AWU Southern Region Agreement conditions".

> 36. In a further affidavit affirmed on 10 March 2009, Mr Hamersley deals with the consequences, for the applicant, of the respondents' conduct. As mentioned above, the withdrawal of Civil Pacific from the project on 2 March 2009 meant that the applicant no longer had the benefit of the 32 employees of Civil Pacific working on the project after that date. There were, it seems, a further six employees of another labour hire company, Workpac Pty Ltd ("Workpac") also working on the project at that time. On 3 March 2009, the applicant requested Workpac to stand its workers down both because of a concern that continued work by them might lead to the resumption of picketing activities by the respondents and because it was not commercially viable for the project to be operating for the sake of six workers only. As a result of these events, no work was done on the project between 3 and 10 March 2009, save for the removal of red lead paint from the bridge by an external contractor. According to Mr Hamersley, this has meant that the applicant has fallen a further week behind in its schedule to perform works under what he describes as "its contractual arrangements with VicRoads".
>
> 37. Mr Hamersley states that it is the applicant's intention to obtain a peak workforce of 270 workers on the project by 1 April 2009. That number of workers is, he says, necessary to complete the project in the allotted time. It is proposed that much of the recruiting of this workforce will take place at the project office. Mr Hamersley said that he was informed by Mr Marshall that the applicant's efforts to recruit workers were being hindered by what was described as "the picket currently taking place at the project head office".
>
> 38. The applicant's claim for interim relief is made under s 49(1)(c) and (3)(a), and relies upon causes of action said to arise under ss 43 and 44, of the BCII Act. Relevantly to the present motion, s 43(1) provides as follows:

(1) A person (the ***first person***) must not organise or take action, or threaten to organise or take action, with intent to coerce another person (the ***second person***):

> (a) to employ, or not employ, a person as a building employee; ....

Section 44(1) provides as follows:

(1) A person must not:

> (a) take or threaten to take any action; or
>
> (b) refrain or threaten to refrain from taking any action;

with intent to coerce another person, or with intent to apply undue pressure to another person, to agree, or not to agree:

(c) to make, vary or terminate, or extend the nominal expiry date of, a building agreement under Part 8 of the Workplace Relations Act; ....

Under s 43, the applicant submits that the respondents have organised and taken action (and are threatening to continue to do so) with intent to coerce the applicant to employ the former Civil Pacific employees as building employees. Under s 44, the applicant submits that the respondents have taken action (and, unless restrained, threaten to continue to take action) with intent to coerce the applicant, or with intent to apply undue pressure to the applicant, to agree to make a building agreement under Part 8 of the WR Act.

> 39. It is convenient to commence by considering the respondents' purpose – or their "intent" (in the words of ss 43 and 44) – and to return later to the matters of coercion and undue pressure. It is strongly arguable that the activities and statements of the persons who have gathered outside the project office reflect the purposes of the respondents. Indeed, the contrary was not suggested by counsel for the respondents. Clearly the protest – which I shall, favourably to the respondents, call the gathering at the project office for the present – is a co-ordinated undertaking of the AMWU and the CFMEU. What is the purpose, or what are the purposes, of that undertaking?
> 40. There is ample evidence that the present unemployed status of the former Civil Pacific employees is a significant grievance felt by those of them who have attended in protest outside the project office. It is, in my view, established at least prima facie that an object of their protest is to secure a return to employment on the project. The respondents are conspicuously associated with that object. It was a significant feature of the respondents' representations to the applicant at the meeting at Abbottsford on 3 March 2009. It is no secret that the applicant is in the course of considering employment applications for the project, in which circumstances I consider it to be strongly arguable that the respondents' purpose involves, although it may not be confined to, the achievement of employment of the former Civil Pacific employees by the applicant itself.
> 41. It was argued on behalf of the respondents, however, that their desire to have the former Civil Pacific employees re-employed on the project was conditional upon the applicant first making a site agreement with the AMWU and the CFMEU. It was submitted that the evidence does not sustain the conclusion, even arguably, that the former Civil Pacific employees, and the respondents acting in their interests, are seeking immediate re-employment at the project on the rates and conditions which would apply under the Southern Region Agreement. My provisional view, however, is that there is a degree of forensic sophistication in this way of putting things that does not reflect the reality of the situation on the ground, as it were. The fact that a number of the protesters had lost their jobs with Civil Pacific, and the ability of the respondents to implicate the applicant in that event, provide elements of injustice which, evidently, are a significant justification for their protest.

Indeed, the colour of the protesters' statements outside the project office was not that the respondents were seeking a new agreement with the applicant which would have brought with it higher rates of pay than those provided in the Southern Region Agreement, but that the applicant, by causing the Civil Pacific workers to be dismissed, was driving rates down. In the respondents' apparent purpose, there is an industrial dispute which requires an industrial solution. I consider it to be strongly arguable that the respondents have, as it were, a composite agenda which involves an insistence upon the applicant providing employment for the former Civil Pacific employees, and doing so by reference to a new site agreement to which the AMWU and the CFMEU would be parties. Indeed, I consider it to be strongly arguable that the respondents presently have no intention of terminating their campaign against the applicant until the former Civil Pacific employees are returned to employment on the project.

42. For the purposes of provisions such as ss 43 and 44 of the BCII Act, it is sufficient if the intent referred to therein is a substantial and operative intent on the part of the persons having it: *Hanley v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2000] FCA 1188; (2000) 100 FCR 530, 541 [45]. In the circumstances of the present case, it has, in my view, been established prima facie that a substantial and operative intent of the respondents is to influence the applicant to employ the former Civil Pacific employees.

43. The other element of the respondents' apparent purpose is to have the applicant enter into a site agreement with the AMWU and the CFMEU to cover work on the project. That at least seems to be common ground. Where the parties part company is on the question whether the respondents intend that such an agreement be made under Part 8 of the WR Act (a requirement of liability under s 44 of the BCII Act). The applicant and the intervener submit that, as registered organisations, the AMWU and the CFMEU would be most unlikely not to want to have their proposed agreement made under Part 8, with the statutory means of enforcement which that (and the other steps for which Part 8 provides) would bring. The respondents rely on the evidence of Mr Clarke that he was instructed by Messrs Stephenson and Mavromatis that the CFMEU and the AMWU (respectively) did not want to have any agreement "registered" under Part 8. They also point to s 348(3) of the WR Act, and submit that any new agreement lodged under Part 8, and applicable at the project, would have no effect until after the nominal expiry date of the Southern Region Agreement. They invite me to infer, therefore, that they would have no reason to make a new agreement under Part 8.

44. The respondents' submission calls for a brief examination of the operation of Part 8 of the WR Act. Division 2 of Part 8 deals with the subject of "types of workplace agreements". The only "type" of agreement which appears relevant to the present circumstances is that referred to in s 328, which provides as follows:

An employer may make an agreement (a ***union collective agreement***) in writing with one or more organisations of employees if, when the agreement is made, each organisation:

(a) has at least one member whose employment in a single business (or part of a single business) of the employer will be subject to the agreement; and

(b) is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement.

Save as expressed in s 328, the WR Act provides no definition of what it describes as a "union collective agreement". The question then arises: what does it mean "to make ... [an] agreement under Part 8"? Unlike previous legislation, the WR Act does not provide for the certification of industrial agreements. The provisions of the WR Act which apply to union collective agreements are complex to a degree, but it is at least arguable that they provide for a staged process involving the making, the approval, the lodging and the commencement of operation of such agreements. Having been made under one of the provisions referred to in Division 2 of Part 8, a workplace agreement is then "approved" if the steps referred to in s 340(1) are carried out. Once having been approved, and once the other pre-lodgement procedures referred to in Div 4 of Part 8 have been completed, the employer may lodge the agreement under Div 5. Subject to various other requirements of Part 8 which do not need to be presently considered, the workplace agreement "comes into operation" on the seventh day after the Workplace Authority Director issues a notice to the effect that the agreement passes the no-disadvantage test under s 346M(1): see s 347(1)(b).

> 45. It seems that a union and an employer will make an agreement "under" s 328 if they make a conventional, traditional, industrial agreement without any conscious reference to Part 8, or to the WR Act at all. On the facts of the present case, the applicant employs no member of the AMWU or of the CFMEU whose employment would be subject to the agreement which those unions claim to be seeking. However, as I pointed out on a previous occasion, s 44(1) of the BCII Act is concerned not with the making of an agreement as such, but with influencing a person to *agree* to make an agreement. It is established, at least arguably, that the respondents have in mind, ultimately, achieving an agreement for the project, and having at least one member amongst the applicant's employees on the project. That is to say, the site agreement which they claim to want would seem to fall comfortably within the four corners of s 328 of the WR Act.
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> 46. *Pace* Messrs Stephenson and Mavromatis, Part 8 of the WR Act does not involve any process of registration. Assuming in favour of the respondents that, in giving their instructions to Mr Clarke, those men intended to refer to the lodgement of an agreement when they mentioned a process of registration, their evidence does not, in my view, go to the extent necessary to expunge what would otherwise be the applicant's arguable case that the respondents' intent is to have the applicant agree to "make" an agreement under Part 8. That is because, as I have explained, it is only the making of an agreement which is picked up by s 44 of the BCII Act, and the scheme of Part 8 of the WR Act is such that the making of an agreement under s 328 is an autonomous, and apparently quite simple, process which, of itself, involves neither registration nor lodgement. I consider, therefore, that the absence of a present intent on the part of the respondents to lodge the agreement which they presumptively hope to make with the applicant under Part 8 of the WR Act is not disqualifying apropos the applicant's prima facie case under s 44 of the BCII Act.
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> 47. Turning next to the matter of coercion, the authorities establish that what is required is an intent to negate choice, and to do so by conduct which is

unlawful, illegitimate or unconscionable: see *Seven Network (Operations) Limited v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* [2001] FCA 456; (2001) 109 FCR 378, 388 [41]. Here it is, in my opinion, important to recognise the connection between the "action" and the "intent to coerce" which together provide the axis along which ss 43 and 44 of the BCII Act relevantly operate. That is to say, the action must be taken with the intent referred to. This is important because of the meaning which the word "coerce" carries in context. The putative respondent's intent must be to negate choice on the part of his or her target, and the means employed must be unlawful, illegitimate or unconscionable. The means employed, of course, are one and the same thing as the "action" referred to in the sections. That is to say, the action which is considered to be unlawful, illegitimate or unconscionable must be the same action by reference to which the putative respondent intends to negate the choice of his or her target.

48. This analysis is important, and may ultimately be decisive, in a case such as the present which involves different types of conduct. The respondents' conduct at the project office falls into the following three categories:

(i) Activities and behaviour which could readily be described as illegitimate, if not unlawful. In this category I would place such activities as urinating on, or conspicuously in the vicinity of, the project office, damaging the applicant's property, banging on windows, abusing the applicant's staff, impeding persons in the act of entering or leaving the project office, and the like.

(ii) The display of union flags and paraphernalia and the peaceful presence of a multiplicity of persons who, by their numbers and demeanour, are not intimidating. Considered in isolation, I would not regard these kinds of activities as illegitimate, even arguably. Neither do I consider that there is any sense in which the applicant's choice is negated by them.

(iii) Interference with the applicant's process of hiring staff for employment on the project. I shall return to the question of whether such conduct arguably amounts to coercion presently.

49. Whether conduct in the first category is not only illegitimate but also negates the applicant's choice is a difficult question. On one view, the choice of a substantial corporation should not be considered to be negated merely by having to endure distracting and at times distressful conduct of the kind to which I have referred. It might also be said that, to the extent that the applicant's property was damaged by those attending outside the project office (a circumstance which itself is put strongly in contest by the respondents), the damage should be regarded as minor in the scale of things involved in the project, and as insufficient to negate the applicant's choice. On another view, however, there must be a real question whether, if confronted with the reality that conduct of this kind would go on indefinitely, the applicant would not reasonably take the view that the normal work of its staff at the project office would be so affected thereby as to give it no choice, in a practical sense, but to yield to the respondents' demands. It might also be said that the impact of the

protesters' activities outside the project office may not be confined to the applicant's balance sheet, as it were: the applicant's responsibility to its own employees (which is defined by reference to their "working environment": see *Occupational Health and Safety Act 2004* (Vic), s 21) should not be overlooked in the mix of factors that might, ultimately, if not immediately, move the applicant to act as it would never have acted if given a free choice in the matter.

50. These are difficult questions which will need to be resolved at trial. I express no concluded view about them. However, I think that the applicant has a prima facie case that conduct in the first category is such as would have the practical effect of negating choice, the apparent strength of which justifies a consideration of where the balance of convenience lies, and of other discretionary questions.

51. I turn next to the conduct in the third category. This was the aspect of the evidence upon which the applicant most strongly relied on the matter of the balance of convenience, something to which I shall later turn. It was also, however, part of the applicant's case on the merits that the pressure created by the respondents' interference in the hiring process, and the consequential delays to which, it is alleged, that would lead in the resumption of productive work on the project itself, were sufficient to involve a negation of choice in the relevant sense. I accept that it is arguable that an interference of this kind, and with those likely results, would, in a practical sense, negate the applicant's choice. In a project of this size, interfering with the employment of staff such as is necessary to permit the resumption of productive work would, at least arguably, place the applicant in an intolerable, and unsustainable, position. I would have little hesitation in holding it to be arguably established on the evidence that the negation of the applicant's choice is at least a substantial and operative factor in the intent behind the respondents' conduct.

52. However, are the means by which the respondents seek to interfere in the recruitment of staff unlawful, illegitimate or unconscionable? The only evidence of those means is that which relates to the two job applicants who arrived at the project office on 4 March 2009 for the purposes of being interviewed on their applications. Even on the applicant's evidence, the argument that the respondents' methods were illegitimate or unconscionable is a weak one, and no submission has been made that those methods were unlawful. On the applicant's evidence, the position seems to be, broadly, that the job applicants were informed about the respondents' dispute with the applicant and asked not to cross, or told that it would not be a good idea to cross, the "picket line". The respondents resisted the suggestion that they, or their supporters, referred to the gathering outside the project office as a "picket line". However, neither Mr Mavromatis nor Mr Powell gave evidence (either directly or through Mr Clarke) on the subject. Despite the denials of Mr Stephenson, I am disposed to think that the statements made by the job applicants themselves, related to the court through the affidavit of Mr Marshall, provide a sufficient foundation for a provisional finding that they were indeed advised not to cross, or that it would not be a good idea to cross, the picket line. Even so, is it arguable that, at trial, the court would regard it as illegitimate for the respondents to have spoken to the job applicants in these terms?

53. Here it must be remembered that the job applicants were not persons with established business or employment relationships with the applicant. They were persons proposing to attend interviews, after which it would, I presume, be a matter of their own choices, and of the choice of the applicant, whether new employment relationships would be created. Further, these persons were not independent trading enterprises with the operations of which the respondents could claim no legitimate connection. They were intending workers on a construction job and were, therefore, within the cohort of persons with whom the respondents had a conventional and, I consider, legitimate concern. In a nutshell, unless otherwise unlawful in some way, I do not consider that it should be regarded as industrially illegitimate for a trade union, in dispute with an employer, to draw to the attention of an intending worker the nature of that dispute, and to ask the worker to take the union's side, as it were, rather than accepting employment under terms and conditions which the union has placed in dispute. Describing their presence as a "picket line", and asking the job applicants not to cross the notional line, was, I consider, compendious and well-understood terminology which would not, without more, involve illegitimacy.

54. For the above reasons, while I accept it to have been arguably established that, by interrupting the applicant's recruitment process for the project, the respondents intend that the applicant's choice should be negated, I consider that, if the proposition that relevant aspects of the respondents' conduct were unlawful, illegitimate or unconscionable is arguable, it is barely so.

55. I would summarise my conclusions on the matter of coercion as follows. The respondents' conduct in the first category is arguably such as would negate choice and is (more clearly) arguably illegitimate. Accordingly, I consider that that conduct arguably bespeaks an intent to coerce the applicant. The argument that the respondents' conduct in the second category is such as would negate choice is a very weak one, as is the argument that such conduct is illegitimate. I do not consider that either argument is sufficiently viable to sustain interim restraints of the kind sought by the applicant. The respondents' conduct in the third category is, in my view, arguably such as would negate choice; but I am less impressed with the argument that that conduct is illegitimate. I would not say that the point is too weak to be responsibly argued but, if the evidence at trial remains as it is, I can foresee considerable problems for the applicant on the matter of illegitimacy.

56. I turn next to the notion of "undue pressure" employed in s 44 of the BCII Act. These words did not appear in s 170NC of the WR Act, which was the corresponding provision, applicable to industry generally, at the time when the BCII Act was enacted in 2005 (see now s 400 of the WR Act). Counsel were unable to assist me as to why these words were introduced. The Explanatory Memorandum to the BCII Act makes it clear that many of its provisions were introduced in consequence of the *Report of the Royal Commission into the Building and Construction Industry*, but that document appears to contain no recommendation which would have involved an extension of the concept of coercion as used in what was then s 170NC of the WR Act. The Explanatory Memorandum does not deal with "undue pressure" at all (other than, as frequently occurs, to explain the new provision in a grammatical paraphrase of the words of the section). The words have not, it

seems, been the subject of judicial exposition. In these circumstances, it appears that the court is thrown back on first principles in its task of giving a connotation to these words.

57. In the context in which it is used, the expression "undue pressure" could not, in my opinion, be limited to circumstances of the kind comprehended by the equitable doctrine of undue influence. If they were so limited, while there might, conceivably, be industrial situations in the building and construction industry to which they would be relevant, those situations would, in my estimation, be few and far between. I consider that the expression was intended to have a connotation that was relevant in the conduct of industrial relations in the building and construction industry over a much broader front than would be implied by the equitable doctrine.

58. Looking then at the normal meaning of the words used in the expression, there is no particular difficulty with the word "pressure". It is the word "undue" which is problematic. The dictionaries tell us that "undue" may carry a quantitative connotation – in the sense of going beyond what is warranted, or excessive – or a qualitative connotation – in the sense of being discordant with some rule or norm, unjust or, in a softer sense, inappropriate or unsuitable. I think it unlikely, given the industrial relations context, that a quantitative connotation was intended in s 44 of the BCII Act. It would, in my view, be almost impossible for a court to say that a given degree of pressure applied to induce a person to make an agreement (for example) was simply too much. Rather, I think it likely that the legislature intended that a qualitative standard of some kind was connoted by the expression.

59. What is clear, as a matter of construction, is that the application of undue pressure was regarded by the legislature as something different from coercion. Assuming, as I do, that the legislature intended the reach of s 44 to travel beyond the reach of the then existing s 170NC of the WR Act, it is at least respectably arguable that the legislature intended the expression to connote forms of pressure that were reprehensible, blameworthy or inappropriate in ways that could not be described as unlawful, illegitimate or unconscionable. In this respect, I do, of course, assume that, in 2005 when the BCII Act was enacted, the legislature was aware of the connotation which had been given to the word "coerce" in s 170NC in *Seven Network* (decided in 2001) and the earlier authorities referred to therein.

60. A very cursory survey of the recent use of the expression "undue pressure" in the industrial relations context reveals that it has been used to describe the kind of situation that might be regarded as a constructive dismissal (see *Allison v Bega Valley Council* (1995) 63 IR 68, 73) and the situation which may arise when an employee does not make a free decision to agree to a change of shift, for example (see *Victorian Hospitals Industrial Association v Australian Nursing Federation* [2002] AIRC 1124 [14]). Cases of this kind throw little light on the meaning of the expression used in s 44 of the BCII Act. They do, however, demonstrate that, in context, the expression "undue pressure" has at least the potential to cover forms of pressure which are somewhat more benign than those considered necessary to make good an allegation of coercion in the statutory sense.

61. Treating the expression "undue pressure" as of wider connotation than that of coercion, I would nonetheless adhere to the conclusion reached earlier with respect to the second category of the respondents' conduct outside the

project office. That is to say, I do not think the argument that conduct in that category constitutes the application of undue pressure to be sufficiently viable to sustain the imposition of the interlocutory restraints which the applicant seeks.

62. That leaves the matter of the third category of the respondents' conduct. The question here is whether a direction or request by the respondents, given to a person approaching the project office for the purpose of applying for, or taking up, employment, to the effect that he or she should not cross the picket line, or similar, constitutes the application of undue pressure on the applicant. It is not to the point that no such pressure is placed upon the intending employee. Assuming it to be arguable that the respondents act in the confidence that most intending employees will respect, and therefore refuse to cross, a union picket line, the question is whether the use by the respondents of this kind of influence to cut off the supply of future employees who are known, or reasonably supposed, by them to be intended for work on the project should be regarded as the application of undue pressure on the applicant.

63. This is clearly an important and difficult question in the present proceeding. On one view, it might be said that considerations of the kind to which I have referred in par 53 above could not be regarded as consistent with a conclusion that such pressure was "undue". On another view, however, the standard of delinquency, as it were, involved in undue pressure, is arguably (and, in my opinion, most probably), somewhat less than that involved in the concept of coercion. For reasons which I have attempted to explain above, I consider that the applicant has a good prospect of persuading the court at trial that illegitimacy is not required to make good an allegation of undue pressure. There is, therefore, a reasonably arguable prospect that the applicant would succeed in persuading the court that, however legitimate the conduct of a peaceful picket line might be as a matter of industrial relations, the use of such a means to stifle the flow of employment to a major construction project, with the delays and significant costs which would self-evidently result from that stratagem, should be regarded as the application of undue pressure.

64. In summary, I consider that the applicant has established a prima facie case in the relevant sense that, by engaging in conduct in the first category, the respondents have taken action, and are continuing to take action, with intent to coerce the applicant to employ the former Civil Pacific workers as building employees, contrary to s 43 of the BCII Act, and also to agree to make a building agreement under Part 8 of the WR Act, contrary to s 44 of the BCII Act. I consider the applicant has also established a prima facie case that, by engaging in conduct in the third category, the respondents have taken action, and are continuing to take action, with intent to apply undue pressure to the applicant to agree to make a building agreement under Part 8 of the WR Act. It remains to consider whether the balance of convenience, and other discretionary considerations, favour the grant of interim restraints in relation to conduct in those categories.

65. Commencing with conduct in the first category, the applicant's interest in not having to endure it during the period it takes to bring this case to trial is obvious. There is, in my view, a very real risk that, if such conduct were not restrained, the applicant might have no alternative but to resolve the issues which it has with the respondents in ways which do not recognise the

operation of, and the policy behind, ss 43 and 44 of the BCII Act, thereby effectively frustrating the exercise of the court's jurisdiction in this proceeding. Or, to put it differently, by their continued and unrestrained engagement in conduct which I have held to be arguably in contravention of those sections, the respondents would have succeeded in achieving their ends by means which the WR Act prohibits. It is not, in my view, in the interests of justice that such a regime should prevail during the interlocutory period. Save for relying on the broad common law right to communicate, the respondents did not claim that they would be disadvantaged by an interim restraint on conduct in this first category. In my view, it is quite unnecessary for the respondents to resort to conduct of this kind as a means of communicating with the applicant, its staff or job applicants, or the public generally. The balance of convenience does, therefore, favour the grant of an injunction against the continuation of this conduct.

66. Turning to conduct in the third category, here I have held that the applicant has a prima facie case under s 44, but not under s 43, of the BCII Act. If no interim injunction is granted, but the applicant ultimately succeeds at trial, the detriment which it will have by then suffered will depend upon its reaction to the respondents' conduct. If it holds the line, as it were, and refuses to agree to make an agreement, the likelihood is that no further work will have been done on the project, due to lack of staff. In a project of this size, it is self-evident that the losses to the applicant (or, to the extent that the applicant might achieve some adjustment in the contract price, or another contract condition, by negotiation with its client, to the Victorian community) will have been very substantial. It was not suggested by the respondents that the applicant could realistically look to them to make good its damages in such circumstances. Alternatively, if the applicant yields to the respondents' pressure and makes the agreement they seek, the achievement of the very policy which underlies s 44 will have been frustrated: that is to say, a party will have been able to achieve an agreement under Part 8 of the WR Act by the application of undue pressure. And the making of such an agreement is likely to bring into existence a new range of legal rights and obligations, and of industrial relations realities, which will prove difficult to undo. Either way, I consider that the applicant has done enough to justify the conclusion that the damage it will suffer is likely to be irreparable.

67. The alternative situation which requires consideration is that in which an interim injunction as sought is granted, but the respondents ultimately succeed at trial. Here, the only detriment upon which counsel for the respondents relied was the denial of the respondents' rights to communicate. I accept that the right of a trade union to communicate, peacefully and without intimidation, with workers who fall within its area of interest should be accorded considerable respect, particularly under an Act which is concerned with industrial relations. However, because of the applicant's case under s 44 of the BCII Act, to assert that there is a right to communicate in the terms arguably being used by the respondents is to beg the question. I am here concerned not to resolve the ultimate rights and wrongs of the respondents' conduct in relevant respects, but to arrive at a practical, just and workable regime of obligations that will govern the parties' conduct while this proceeding is being dealt with by the court. It was not submitted that either the respondents or any workers whose interests it was their concern to protect

would suffer any material detriment as a result of the short term restraints which the applicant proposes. In particular, no submission was made that either the respondents or those workers would be disadvantaged in any practical sense by the respondents' inability to continue to place pressure upon the applicant for the making of an industrial agreement. The respondents' case was not run, for instance, by reference to the need of the former Civil Pacific employees to regain remunerative employment.

68. For the above reasons, I consider that the balance of convenience favours the applicant's case, and I propose to grant its motion to the extent of restraining the respondents, pending the hearing and determination of this proceeding or further order, from engaging in the first and third categories of conduct identified in these reasons.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jessup.

Associate:

Dated: 17 March 2009

Counsel for the Applicant:	Mr J Bourke
Solicitor for the Applicant:	Herbert Geer
Counsel for the Respondents:	Mr E White
Solicitor for the First, Fourth and Fifth Respondents:	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
Solicitor for the Second and Third Respondents:	Slater & Gordon
Counsel for the Intervener:	Mr N Green QC with Mr G Pauline
Solicitor for the Intervener:	Australian Government Solicitor
Date of Hearing:	10 March 2009
Date of Judgment:	17 March 2009