Submission to the Senate Education, Employment and Workplace Relations Committee

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

Submitter:	Christopher Platt
Organisation:	AMMA
Address:	Level 10, 607 Bourke Street Melbourne VIC 3000
Phone:	03 9614 4777
Fax:	03 9614 3970
Email:	christopher.platt@amma.org.au
Date:	17 July 2009

Contents

1. Executive Summary

AMMA contends that the overall effect of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the BCII Amendment Bill) is to water down the capacity of the Building Industry Inspectorate to ensure building industry participants conduct their activities in accordance with the law.

The Cole Royal Commission Report and the Wilcox Report alone give the Government the proper basis upon which to transfer the entire powers of the existing Australian Building and Construction Commission (ABCC) to the new Fair Work Building Industry Inspectorate (Building Industry Inspectorate) on 1 February 2010.

The fact that the Government has committed to spending an additional $4.7 billion on infrastructure spending program between now and 2010 highlights the need to ensure that the building and construction industry conducts itself lawfully and efficiently in order to ensure the best value is achieved for taxpayer funds.

Forcing the tough cop off to the beat and leaving it to convince the Administration Appeals Tribunal and the Independent Assessor to allow access to the existing investigative powers is a step in the wrong direction.

The BCII Amendment Bill surgically neuters the building industry watchdog and reduces the capacity of its officers to act quickly, effectively and independently by:

- Removing the key means for achieving the object of the Act, including 'providing an effective means for investigation and enforcement of the law', 'respect for the rule of law', and 'ensuring that building industry participants are accountable for their unlawful conduct', take the focus away from the very heart of the problems that plagued the building and construction industry. [submission, section 6]
- Reducing the independence of the Building Industry Inspectorate by giving the Minister the capacity to issue Directions to the Director about the policies, programs and priorities, and the manner in which the powers and functions of the Building Industry Inspectorate are exercised and performed.[submission, section 7]

- Tying up the Building Industry Inspectorate in red tape by imposing additional onerous obligations in order to access its compulsory information gathering powers (without review rights). This moves flies in the face of comments in the Wilcox Report about the continuing level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia. [submission section 8]
- The removal of compulsory information gathering powers in 2010, without any requirement that the necessary cultural change in the industry has been achieved. [submission section 8]
- Removing the Building Industry Inspectorate's current powers to investigate and compulsorily acquire information, by giving an external Assessor the capacity to remove those powers upon application by an interested person (including unions), based on criteria which is not yet publicly available. [submission section 9]
- Reducing penalties for unlawful behaviour despite the persistence of unlawful behaviour that makes this industry unique. [submission section 10]
- Narrowing of the definition of industrial action, which reduces the area of the policeman's beat and overlooks industrial action taken solely by unions. [submission section 11]
- Removing the coercion and undue pressure provisions, which provide greater protection from such behaviour than under the *Fair Work Act 2009.* [submission section 11]
- Watering down of the Implementation Guidelines for the National Code of Practice for the Construction Industry, which regulates behaviour on Commonwealth Government funded projects and ensures that taxpayer investment in Government projects deliver value for money. [submission section 13]

Whilst some of the amendments are supported by AMMA, the effect of the BCII Amendment Bill is to disarm the tough cop and tie up the building industry watch dog in red tape. A summary of AMMA's key recommendations is provided overleaf.

KEY RECOMMENDATIONS

- That current means for achieving the object of the Act, in subsection 3(2)(b)(d) and (e) of the BCII Act, which encourage respect for the rule of law and the rights of building industry participants, accountability for unlawful behaviour and an effective means for both investigation and enforcement of relevant laws, be retained in the new Act.

- That the capacity for the Minister to undermine the independence of the Building Industry Inspectorate by issuing directions about policies, programs and priorities and the manner in which the powers and functions of the Inspectorate are exercised and performed, be removed.

- That the Bill be amended to explicitly state that any recommendation of the Advisory Board is non-binding.

- That Advisory Board members must be of good character and not be found to have breached any workplace or other law.

- That the existing compulsory information gathering powers in section 52 be retained in their entirety and not be automatically repealed in 2015.

- That a process be put in place for the Director to seek a determination as to whether public interest immunity applies to a particular document or information, if claimed.

- That existing penalties for unlawful behaviour not be reduced.

- That sections 38, 39 and 44 of the BCII Act, which deal with industrial action by unions and coercion or undue pressure, be retained as the *Fair Work Act 2009* does not adequately deal with these issues.

- That the government release the detail of regulations to the proposed Fair Work (Building Industry) Act 2009 prior to Senate review of the Bill, to enable scrutiny and further comment.

- That the behaviours and practices prohibited by the existing Australian Government Implementation Guidelines for the National Code of Practice not be watered down as is the effect of the August 2009 Australian Government Implementation Guidelines for the National Code of Practice.

2. Australian Mines and Metals Association (AMMA) Profile

2.1. AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries, including significant numbers of construction and maintenance companies in the resources sector. It is the sole national employer association representing the employee relations and human resource management interests of Australia's onshore and offshore resources sector and associated industries.

3. Resources Sector and the Construction Industry

3.1. The Australian resources sector is a significant contributor to Australia's wealth and prosperity, underpinning critical supply and demand relationships with the Australian manufacturing, construction, banking and financial, process engineering, property and transport sectors.

3.2. The continued growth of minerals and energy exports is supported by large capital expenditure programs in the resources sector, both on the expansion of existing projects and development of new projects. Construction in the resources sector provides strong employment growth in local communities, either directly or 'indirectly through local service industries such as catering, cleaning and maintenance';[1] and it 'can result in improved local infrastructure including roads, schools, community leisure and health facilities.'[2] Infrastructure development since 1967 includes the construction of 26 towns, 12 ports and additional port bulk handling infrastructure at many existing ports, 25 airfields and over 2,000 km of railway line.[3]

3.3. The following table extracted from ABARE's major minerals and energy projects listing, identifies selected key projects and their status, expected date for commencement of operations following completion of the construction stage, estimated capital expenditure and employment figures, where available.[4] The enormous significance of the resources sector,

---

[1] Australian Bureau of Statistics, 'A century of mining in Australia 1988-1999', *Australian Mining Industry*, Cat No. 8414.0, ABS.
[2] Australian Bureau of Statistics, 'A century of mining in Australia 1988-1999', *Australian Mining Industry*, Cat No. 8414.0, ABS.
[3] Minerals Council of Australia, *2004 Annual report: creating value through commitment and performance*, 2004, MCA, 5.
[4] Abare advises that most information come from publicly available sources and is sometimes supplemented from information direct from the company.

both in terms of export revenue and domestic capital investment, should not be undervalued. Consequently, the resources sector has a strong interest in workplace relations legislative reform in the Australian building and construction industry.

Project	Company	Status	Expected Start-up	Capital Expend.	Additional employment
Kestrel	Rio Tinto	Expansion, under construction	2012	$1.14b	na
Kipper Gas Project	Esso/BHP Billiton/Santos	New project, under construction	2011	$1.57b	na
North West Shelf project extension (fifth train)	Woodside Energy/ BHP Billiton/ BP/Chevron/ Shell/Japan Australia LNG	New project, under construction	Dec 2008	$2.6b	1500
Pluto (train 1)	Woodside Energy	New project, under construction	late 2010	$12b	2000
Western Australian Iron Ore Rapid Growth Project 4 (RGP4)	BHP Billiton	Expansion, under construction	2010	$3.06b	na
Argyle underground development (diamonds)	Rio Tinto	New project, under construction	2009	$2.14b	250
Worsley refinery Efficiency and Growth project	BHP Billiton/ Japan Alumina/ Sojitz Alumina	Expansion, committed	2011	$3.16b	4000
Yarwun alumina refinery expansion (CAR Stage 2)	Rio Tinto Aluminium	Expansion, under construction	Late 2012	$2.57b	2200
Olympic Dam expansion	BHP Billiton	Expansion, EIS under way	2013	($7 billion)	3000

Mangoola (Anvill Hill) open cut mine	Xstrata Coal	New project, committed	2011	$1b	400
Export terminal at Port of Newcastle	Newcastle Coal Infrastructure Group	Under construction	2010	$1.57b	500
Sino Iron project	CITIC Pacific Mining	Advanced	2010	$5.0b	4000
Hammersley Iron Brockman (A)	Rio Tinto	Expansion, under construction	2010	$2.1b	na
Boddington gold mine	Newmont/Anglo Gold Ashanti	Redevelopment, under construction	Mid 2009	$3.7b	650
Clermont open cut	Rio Tinto	New project, under construction	2010	$1.86b	400
Montaral Skua oilfield	PTTEP	New project under construction	Late 2009	$1b	na
North West Shelf CWCH	Woodside/BHP Billiton/BP/Chevron Texaco/Shell/Japan Australia LNG	Expansion, under construction	2011	$2.1b	na
North West Shelf North Rankin B	Woodside/BHP Billiton/BP/Chevron Texaco/Shell/Japan Australia LNG	New project, under construction	2012	$7.29b	na
Pyrenees	BHP Billiton/Apache Energy	New project, under construction	Early 2010	$2.4b	na
WA Iron ore Rapid Growth Project 5	BHP Billiton	Expansion, committed	2011	$8.1b (including infrastructure)	na

4. Introduction

4.1. This submission is made in response to the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the BCII Amendment Bill).

4.2. The BCII Amendment Bill will establish the Office of the Fair Work Building Industry Inspectorate (Building Industry Inspectorate). The Building Industry Inspectorate will replace the Australian Building and Construction Commissioner (ABCC) after the 31 January 2010.

4.3. On 29 August 2001, the Government appointed the Honourable Terrance Cole QC to conduct a Royal Commission into the Australian building and construction industry.

4.4. The Cole Royal Commission found that a culture of lawlessness existed in the Australian Building and Construction Industry. More recently the Hon Murray Wilcox QC accepted that *'….there can be no doubt that the Royal Commissioner was correct in pointing to a culture of lawlessness by some union officers and employees, and supineness by some employers, during the years immediately preceding his report…..*[5]

4.5. In his report of 24 February 2003, Mr Cole recommended the establishment of a special regulatory authority, to be called the Australian Building and Construction Commission (ABCC). The *Building Industry Improvement Act 2005* (BCII Act) created the ABCC on 1 October 2005.

4.6. The BCII Act operates in conjunction with the federal workplace relations legislation and regulates building industry participants. Until the 30 June 2009, this legislation was the *Workplace Relations Act 1996*, which 'provided the necessary grounding in the building and construction industry for agreement making, union right of entry, pattern bargaining, freedom of association, secret ballots and prohibited content.'[6]

4.7. Although the provisions in the *Workplace Relations Act 1996* are important for harmonious workplace relations, the success of the ABCC in the industry rests on the key provisions of the BCII Act that provided for:

[5] The Hon. Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry,* March 2009, Australian Government.
[6] AMMA, *Building industry regulator: A tough cop or a transition to toothless tiger*, 2008, AMMA, 16.

- a broader definition of industrial action, being unlawful industrial action;
- greater scope for injunctions to be granted in response to unlawful industrial action';
- strong anti-coercion provisions;
- higher penalties for unlawful conduct; and
- an independent regulatory body with effective compulsory interrogation powers.

4.8. The BCII Act is complemented by the Building Industry Code of Practice and Guidelines which are designed to lift standards in the industry. Together, they form a strong and effective regulatory framework that compels compliance with the rule of law, which traditionally has been starkly absent in the Australian building and construction industry.

4.9. In the period between 1 October 2005 and 3 February 2009 the ABCC conducted 128 compulsory interrogations and launched 36 court proceedings seeking the imposition of a civil penalty upon one or more building industry participants. Most of the completed proceedings have been successful.[7]

4.10. The *Fair Work Act 2009* commenced on 1 July 2009, with the exception of the minimum safety net of national employment standards and modern awards, which will operate from 1 January 2010. Like the *Workplace Relations Act 1996*, the *Fair Work Act 2009* regulates terms and conditions of employment, union right of entry, industrial action, agreement making and freedom of association. It provides remedies in response to unprotected action, penalises breaches and protects workplace rights.

4.11. On its own, the *Fair Work Act 2009* does not provide adequate protection against unlawful and inappropriate conduct by participants in the building and construction industry.

[7] The Hon. Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry*, March 2009, Australian Government, viewed 13 July 2009, http://www.workplace.gov.au/NR/rdonlyres/0B44B3D3-9ABD-4F4A-94FE-866F9ACDB2A6/0/WilcoxReport.pdf

4.12. This has been recognised by the government, which promised to retain a 'tough cop on the beat' that will focus on 'persistent or pervasive unlawful behaviour',[8] although it would be in the form of a specialist division within Fair Work Australia rather than the stand alone ABCC.

4.13. The Government commissioned the Hon. Murray Wilcox QC to consult and report on matters related to the creation of the Specialist Division within the Inspectorate of Fair Work Australia with responsibility for the building and construction industry.

4.14. In its submission and consultations to the Wilcox inquiry AMMA advocated the following:

- Continued legislative prohibition on taking unlawful industrial action, as defined, and significant penalties for breach;

- The transfer of the ABCC's existing coercive powers to the Specialist Division in order to overcome the culture of silence and intimidation in the building and construction industry;

- The payment of compensation to persons summonsed under the compulsory interrogation powers in respect of reasonable expenses necessarily incurred in respect of the hearing;

- The application of the principles recommended by Report 48 - *The Coercive Information-gathering Powers of Government Agencies* of the Administrative Review Council for fair, effective and efficient use of coercive information gathering powers[9]; and

[8] Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, Forward with Fairness, *Labor's plan for fairer and more productive Australian workplaces*, Australian Labor Party, April 2007.

[9] Administrative Review Council, Report No. 48 - The Coercive Information-gathering Powers of Government Agencies < http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf/$file/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf > (13 July 2009) ,

- The retention of the existing BCII Act requirements, powers and resources in the interests of achieving long term sustained cultural change in the building and construction industry.

4.15. On 3 April 2009 the Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, released the Hon. Murray Wilcox QC's report, *Transition to Fair Work Australia for the Building and Construction Industry* (the Wilcox Report).[10]

4.16. The Wilcox Report found that

- the ABCC has made a significant contribution to improved conduct and harmony in the building and construction industry;[11]

- there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the Building and Construction Division to undertake compulsory interrogation;

- any tough new regulator in the building and construction industry will need a power of coercive interrogation; at least under present conditions;[12] and

- repeated contraventions of the law, even if only industrial law, as distinct from criminal law, may cause considerable disruption to a building project. If the project is sufficiently large or urgent, or the conduct is replicated elsewhere, the breaches may take on national significance.[13]

4.17. However, rather than make recommendations that would retain a tough cop on the beat, the Hon. Murray Wilcox QC's recommendations in the Wilcox Report will lead to a Building Industry Inspectorate undermined by bureaucratic, administrative processes and weak laws. Recommendations of concern included;

---

[10] The Hon. Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry,* March 2009, Australian Government, viewed 13 July 2009, http://www.workplace.gov.au/NR/rdonlyres/0B44B3D3-9ABD-4F4A-94FE-866F9ACDB2A6/0/WilcoxReport.pdf

[11] Ibid, 2.

[12] Ibid, 59.

[13] Ibid, 60.

- The creation of an Advisory Group with responsibility for determining the policies, programs and priorities of the Specialist Division.

- The requirement that access to compulsory information gathering powers require approval of the use of the power by a presidential member of the Administrative Appeals Tribunal, who will be responsible for issuing notices.

- A five year sunset provision that will automatically repeal the compulsory information gathering power.

- Access by to public interest immunity for persons served a notice to compulsorily provide information.

4.18. AMMA responded to the recommendations of the Hon. Murray Wilcox QC in a submission to DEEWR in May.[14] AMMA argued that:

- The specialist division should be independent in order to maintain stakeholder confidence and avoid conflict of interest issues.

- The existing conduct provisions dealing with unlawful industrial action and coercion are necessary to address ongoing damaging conduct in the building and construction industry and are not adequately dealt with in the *Fair Work Act 2009*.

- The current penalty regime reflects the considerable financial consequences caused by unlawful and other inappropriate behaviour and are a necessary general and individual deterrent.

- The existing compulsory information gathering powers are an efficient and effective tool to assist investigations and should not be weakened or way laid by procedural processes.

[14]AMMA, *Submission to DEEWR on the Wilcox Report recommendations*, 15 May 2009, AMMA, viewed 14 July 2009, http://www.amma.org.au/home/publications/AMMA_Submission_DEEWR_WilcoxRecommendations_15May2009.pdf

- The ability to claim public interest immunity when compulsorily required to provide information, without processes in place to test this claim, will open it to misuse.

- Current penalties for failure to comply with a notice to compulsorily provide information should continue, so as to ensure compliance.

- The exclusion of 'off-site' work from the definition of 'building and construction industry' should not exclude temporary prefabrication yards established specifically to provide prefabrication work to a particular project.

5. The government's BCII Amendment Bill largely reflects the recommendations of the Hon. Murray Wilcox, with some minor modifications and the inclusion of a new Independent Assessor that can make a determination to 'switch off' the compulsory information gathering powers on specified building projects. The key matters contained in the BCII Amendment Bill that will be addressed in this submission are:

- The objects of the Act

- The new Advisory Body

- The new safeguards on the use of the coercive powers, public interest immunity, and the five year sunset provision

- The Independent Assessor and criteria which applies

- Reduced penalties for unlawful conduct

- Removal of key conduct provisions addressing unlawful behaviour

- Transitional matters

5.1. This submission also addresses the content of the Australian Government *Implementation Guidelines for the National Code of Practice for the Construction Industry*, as they are considered an essential component of any effective regulatory regime in the building and construction industry.

5.2. A number of key components in the BCII Amendment Bill rely on regulations to the proposed new Act, which have not yet been made available for public comment. Without a complete understanding of the operation of the new regulatory environment for the building and construction industry, it is not possible to provide comprehensive comment and is a major impediment to a full inquiry into the amendments to the BCII Act. These key matters which rely on regulations include:

- Who is an 'interested person' for the purposes of making an application that section 45 does not apply in relation to a building project (proposed section 36).

- Any other information, in addition to the grounds on which an application is made, that an 'interested person' must provide in an application that section 45 does not apply in relation to a building project (proposed section 40).

- Any additional matters that the AAT member must be satisfied of in order to issue an examination notice under proposed section 45 (clause 47(1)(a)).

- Any information to be included in the report given to the Commonwealth Ombudsman by the Director about any examination conducted under section 45 (proposed section 54A(2)(b)(iii)).

5.3. In addition, Schedule 2 of the BCII Amendment Bill covers transitional and consequential provisions, however it provides that matters of a transitional, saving or application nature relating to the amendments can be by regulation. No other transitional matters are provided for in the BCII Amendment Bill.

5.4. **AMMA calls on the government to publically release the regulations to the proposed Fair Work (Building Industry) Act 2009 to allow scrutiny and comment by stakeholders prior to the conduct of the Senate Review into the Bill.**

5.5. During the current economic climate it is even more important that investor confidence is strengthened and part of this confidence is drawn from the state of the industrial relations environment. AMMA members confirm that expected changes in the behaviour of industry participants prior to and post the operation of the ABCC and BCII Act will have an impact on

investment decisions concerning major projects. Key decision makers within member companies, as part of the due diligence process, will consider what the likely industrial relations environment will be for their project and in the absence of strong laws and an adequate enforcement body, it is likely that the concerns about the industrial environment will increase and impact on investment decisions.

6. The Objects of the Act

6.1. The object of the proposed Fair Work (Building Industry) Act 2009 'is to provide a balanced framework for cooperative, productive and harmonious workplace relations'. AMMA supports this object. Our contractor members face significant financial consequences where disharmony leads to liquidated damages for failure to meet their contractual requirements, and an unproductive workforce. Our project owner members are exposed to increased costs and delays in project completion.

6.2. Both the existing BCII Act and the BCII Amendment Bill list the means by which the object of the Act will be achieved. These are compared below:

BCII Act – Section 3(2)	BCII Amendment Bill – Section 3
(a) Improving the bargaining framework so as to further encourage genuine bargaining at the workplace level	
(b) Promoting respect for the rule of law	(a) Ensuring compliance with workplace relations laws by all building industry participants
(c) Ensuring respect for the rights of building industry participants	
(d) Ensuring that building industry participants are accountable for their unlawful conduct	
(e) Providing effective means for investigation and enforcement of relevant	(c) Providing an effective means of enforcing those rights and obligations

laws	(d) Providing appropriate safeguards on the use of enforcement and investigative powers
(f) Improving occupational health and safety in building work	(e) Improving the level of occupational health and safety in the building industry
(g) Encouraging the pursuit of high levels of employment in the building industry	
(h) Providing assistance and advice to building industry participants in connection with their rights and obligations under relevant industrial laws	(b) Providing information, advice and assistance to all building industry participants about their rights and obligations

6.3. The changes to the means for achieving the object of the Act proposed in the BCII Amendment Bill appear to lose sight of the big picture – the history of workplace relations in the building and construction industry identified by the Cole Royal Commission that made separate regulation a necessity in the first place. 'Respect for the rule of law',[15] 'ensuring that building industry participants are accountable for their unlawful conduct',[16] and 'providing an effective means for *investigation* and enforcement of the law'[17] [emphasis added] strike at the very heart of the problems identified by the Cole Royal Commission that plague the building and construction industry.

6.4. The Cole Royal Commission, and the Wilcox Report in respect of Victoria and Western Australia, found evidence of a culture characterised by a widespread disregard for the rule of law.[18] Instances of inappropriate behaviour include industrial action against employers with non-union agreements, work stoppages due to refusals to enter into union agreements, union failure to consult with and give regard to the views of the employees, union circulation of 'approved contractor lists', and disregard of the provisions of agreements.[19]

[15] BCII Act, s 3(2)(b).
[16] BCII Act, s 3(2)(d).
[17] BCII Act, s 3(2)(e).
[18] AMMA, *Building industry regulator: a tough cop or a transition to toothless tiger?* 2008, AMMA, 11.
[19] Ibid, 12-13; The Hon. Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry,* March 2009, Australian Government, viewed 13 July 2009, http://www.workplace.gov.au/NR/rdonlyres/0B44B3D3-9ABD-4F4A-94FE-866F9ACDB2A6/0/WilcoxReport.pdf

6.5. A history of disregard of Australian Industrial Relations Commission and Court orders combined with a 'culture of silence' undermined attempts to effectively carry out investigations and enforce the law,[20] thus encouraging industrial anarchy in the building and construction industry.

6.6. The ABCC (supported by the BCII Act) was created to address this lawless behaviour and enforce the rule of law as a means of achieving long term, sustainable cultural change in the building and construction industry. This was acknowledged by the Hon. Murray Wilcox in his discussion paper.[21]

6.7. While the behaviour has improved since the commencement of the BCII Act it is has by no means undergone a cultural change. This position is supported by the table of tribunal and court decisions dealing with unlawful and inappropriate conduct in the industry since the Cole Royal Commission (refer Appendix 1).

6.8. The continued unlawful and inappropriate behaviour was also referred to by Deputy Prime Minister Julia Gillard in her speech to the ACTU congress this year, where she said in respect of the building and construction industry[22]:

> 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.
>
> And the Rudd Labor Government will do everything necessary to ensure that we do not see this appalling conduct again.

6.9. The ABCC is currently involved in 69 investigations and 25 cases dealing with unlawful industrial action, coercion, freedom of association and union right of entry.[23] AMMA submits

[20] AMMA, *Building industry regulator: a tough cop or a transition to toothless tiger?* 2008, AMMA, 16.
[21] The Hon. Murray Wilcox, *Proposed building and construction division of Fair Work Australia discussion paper*, Australian Government, 7.
[22] 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

that respect for the rule of law remains lacking in the building and construction industry and the rights of building industry participants continue to be disregarded.

6.10. AMMA contends that the means for achieving the object of the new Fair Work (Building Industry) Act 2009 proposed in the government's amendments, namely 'ensuring compliance with workplace relations laws' and 'providing an effective means of enforcing…rights and obligations' are not sufficiently strong enough in their expression to address the problems identified by the Cole Royal Commission and in the Wilcox Report, which are still continuing in the building and construction industry. Of notable absence is reference to an effective means of investigation as well as enforcement in proposed new subsection 3(2)(c), which is present in the current BCII Act.

6.11. Subsection 3(2)(b)(c)(d) and (e) of the current BCII Act are appropriate and acknowledge and address the behavioural issues in the building and construction industry and must remain.

6.12. Respect for the rule of law, respect for the rights of building industry participants and ensuring accountability for unlawful conduct by providing an effective means for investigation as well as enforcement are key drivers for cultural change in the industry and should remain explicit objects of the Act.

6.13. **AMMA submits that the following means for achieving the object of the Act, specified in section 3(2)(b)(c)(d) and (e) of the BCII Act, must be retained:**

- **Promoting respect for the rule of law**
- **Ensuring respect for the rights of building industry participants**
- **Ensuring that building industry participants are accountable for their unlawful conduct**
- **Providing effective means for investigation and enforcement of relevant laws**

7. The New Advisory Body

[23] John Lloyd, ABC Commissioner, Australian Building and Construction Commission Presentation, *Industry Forum*, June 2009.

7.1. The ABCC is an independent statutory body responsible for investigating breaches of workplace laws, enforcing those laws and educating and providing advice to building industry participants on their rights and obligations under those laws.

7.2. An independent body was recommended by the Cole Royal Commission on the basis that the ABCC would have a greater chance of succeeding where there will be 'confidence in its impartiality' if it is 'seen to act even-handedly and independently' and 'not subject to ministerial direction in its operations.' [24]

7.3. While unions are the subject of more investigations than any other building industry participants (at 67 percent), in 2007-08 this represents a 6 percent decrease from the previous year.[25] Investigations into head contractors and employers have increased from 9 percent to 16 percent.[26] Given that unlawful industrial action accounts for one quarter of contraventions investigated, followed by right of entry, coercion and strike pay, it is not surprising that unions are the subject of more investigations than any other building industry participant. It should also be noted that a number of matters dealing with sham contracting arrangements, wages, unlawful or unfair employment, safety and OHS training and long service leave were referred to other agencies for investigation.[27]

7.4. The independent status of the ABCC allows it to respond effectively and efficiently to matters that arise and are identified in direct enquiries or site visits and ensures public confidence.

7.5. Schedule 1 of the BCII Amendment Bill proposes to establish an Advisory Board. The proposed Advisory Board will be comprised of the Director of the Building Inspectorate, the Fair Work Ombudsman, a representative of employees, a representative of employers and not more than three others and will be responsible for making recommendations about policies and priorities of the new Building Inspectorate.

---

[24] The Hon. Terrance Cole, Royal Commission into the Building and Construction Industry, Final Report, Chapter 3: reform achieving cultural change, February 2003, viewed 7 July 2009, http://www.royalcombci.gov.au/docs/finalreport/V11CulturalChng_PressFinal.pdf

[25] ABCC, Annual Report 2007-08, Part two: performance, Australian Government, viewed 7 July 2009, http://www.abcc.gov.au/NR/rdonlyres/DD705ED2-AA55-402A-9009-6F1615AE6512/0/AR0708Performance.pdf

[26] Ibid.

[27] Ibid.

7.6. According to the Second Reading Speech, the creation of an Advisory Board is 'consistent' with the recommendations made by the Hon. Murray Wilcox.[28]

7.7. Combined with the capacity for the Minister to give directions to the Director about the policies, programs and priorities, and the manner in which the powers and functions of the Building Industry Inspectorate are exercised and performed,[29] the creation of an Advisory Body has the potential to put at risk the independence of the Director of the Building Industry Inspectorate. This could lead to loss of confidence in the capability of the Inspectorate to act impartially and to be able to respond to issues across the industry as they arise, which is necessary to achieve the required cultural change.

7.8. An example of how Ministerial Directions could be misused was the 17 June 2009 attempt by the Minister for Employment and Workplace Relations to direct the ABCC as to how it should use its compulsory information gathering powers.[30] Interference of this type (if successful) could undermine the independence of the future Building Industry Inspectorate and public confidence in it.

7.9. **AMMA does not support the capacity for the Minister to issue Directions to the Director of the Building Industry Inspectorate about the policies, programs and priorities, and the manner in which the powers and functions of the Building Industry Inspectorate are exercised and performed.**

7.10. **Further, AMMA does not support proposed section 24(c) which requires the Advisory Board to make recommendations to the Director about 'any matter that the Minister requests the Advisory Board to consider'.**

7.11. AMMA does not oppose the establishment of an Board that would operate in a purely advisory capacity, with no decision making authority. Members of this Board can express their views and concerns in order to assist the Director in setting the Inspectorate's policies,

---

[28] The Hon. Julia Gillard MP, Deputy Prime Minister, *Second Reading Speech*, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, House of Representatives, 17 June 2009.
[29] Building and Construction Industry Improvement (Transition to Fair Work) Bill 2009 s 11.
[30] The Hon. Julia Gillard MP, Deputy Prime Minister, *Second Reading Speech*, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, House of Representatives, 17 June 2009.
http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/1680FA250270FD05CA2575DD002226F3/$file/CoercivePowersDirection.pdf (13 July 2009)

programs and priorities but will have no authority or ability to 'hijack' matters in order to pursue their own individual agendas.

7.12. The Second Reading Speech clearly states that the Advisory Board will not 'determine' the priorities or policies but rather make recommendations to be considered by the Director when determining the policies or priorities of the Building Industry Inspectorate.[31]

7.13. It is AMMA's view that this intention has not been adequately reflected in the BCII Amendment Bill.

7.14. **AMMA contends that BCII Amendment Bill be amended to explicitly state that any recommendation of the Advisory Board under proposed section 24 is a non-binding recommendation.**

7.15. Of particular interest in the creation of an Advisory Board is the appointment of members to that Board. Proposed section 26 provides that members of the Advisory Board (other than the Director or the Fair Work Ombudsman) will be appointed by the Minister. Subsection 26(2) requires the Minister to be satisfied that the person has knowledge of or experience in workplace relations, law, business, industry or commerce.

7.16. It is important that the members of the Advisory Board are carefully selected in order to ensure its integrity. To that end, additional restrictions should be imposed on the appointment of members to ensure that they are of good character and have not been found to have breached any workplace or other law.

7.17. **AMMA submits that the BCII Amendment Bill be amended to exclude persons from membership of the Advisory Board who are not of good character and have been found to have breached any workplace or other law.**

[31] Ibid.

8. Compulsory Information Gathering Powers

Coercive Powers

8.1. Section 52 of the existing BCII Act empowers the ABC Commissioner to compulsorily require a person to provide information or documents, or attend to answer questions, where the following prerequisites are met:

- The ABC Commissioner has *reasonable grounds* to believe the person has information, documents or is capable of giving evidence; and

- The information, documents or evidence is *relevant to the investigation*.

8.2. The ABCC has advised that its compliance powers have been critical to the success of its Court proceedings.[32] This position is supported by the Wilcox Report. Of considerable importance, beyond the ability to compel a person to give information, produce documents or attend to answer questions, is the protection such power gives to those persons who are otherwise willing to assist the ABCC but do not want to be seen to be willing.

8.3. **AMMA supports the retention of the compulsory information gathering powers contained in section 52 of the BCII Act.**

8.4. Item 52 of the BCII Amendment Bill repeals section 52 of the BCII Act and proposes to replace it with a new Division 3 – Examination Notices. While it continues to enable the Director of the new Building Industry Inspectorate to compulsorily acquire information, documents and evidence where there is a belief on reasonable grounds that a person has such information, documents or evidence relevant to an investigation, it imposes a number of new requirements:

- The Director must apply to a nominated Administrative Appeals Tribunal (AAT) Presidential Member for the issue of an examination notice requiring a person to give

[32] Australian Building and Construction Commissioner, *Report on the exercise of compliance powers by the ABCC for the period 1 October 2005 to 31 March 2008*, ABCC, Australian Government viewed 2 September 2008, http://www.abcc.gov.au/NR/rdonlyres/4CB84879-678F-4E2C-94CD-F46DEE7E6B48/0/CPowersReportMar08.pdf

information, produce documents or attend to answer questions (proposed section 45(1)(c)(d) and (e));

- Only the Director can make this application (proposed section 45(1));

- The application must be in a form prescribed by the regulations (proposed section 45(3));

- The application must be accompanied by an affidavit by the Director containing information including details of the investigation, the grounds for holding the 'reasonable belief', details of other methods used to attempt to obtain the information and information about whether the Director has made or expects to make any other applications for an examination notice and the person in relation to whom those applications relate (proposed section 45(5)(a)-(g));

- The Director is to provide further information, in writing, if requested to do so;

- The nominated AAT member must issue the examination notice if satisfied of a number criteria, including that an investigation has commenced, reasonable grounds exist, other methods for obtaining information have been attempted or are not appropriate, the information would be likely to be of assistance and it would be appropriate in the circumstances to issue the examination notice; and

- The Director must notify the Commonwealth Ombudsman of issue of an examination notice.

8.5. These additional 'safeguards', which are based on the recommendations of the Hon. Murray Wilcox QC, are considered necessary by the government, which advised in the Second Reading Speech, that it agrees with the following assessment of the Hon. Murray Wilcox:[33]

> '…I am confident the safeguards I have recommended, if implemented, will minimise the unnecessary use, and potential misuse, of the power, without impeding, or significantly delaying, investigations…'

[33] The Hon. Julia Gillard MP, Deputy Prime Minister, *Second Reading Speech*, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, House of Representatives, 17 June 2009.

8.6. There are some key points to this assessment that require further comment:

- 'unnecessary use'
- 'potential misuse'
- 'without impeding, or significantly delaying, investigations'

8.7. Since October 2005, the ABCC has issued 178 notices to attend and answer questions, and conducted 148 examinations as a result.[34] Importantly, there is no evidence to suggest that the ABCC has *unnecessarily* invoked its power to compel a person to attend and answer questions. In his report, the Hon. Murray Wilcox QC wrote the following based on information provided by the ABC Commissioner:[35]

> [O]n his analysis, information obtained at section 52 interrogations has been important to the decision to prosecute nine of the 36 penalty proceedings commenced by the ABCC up to 3 February 2009. Even leaving aside the 27 ongoing investigations, one-quarter is not an insignificant proportion. Moreover, I have been told there were cases in which information obtained at an interrogation persuaded the ABCC that a penalty proceeding was unlikely to succeed; thereby obviating waste of the ABCC and court resources and infliction of an unnecessary burden on the prospective respondent.

8.8. Likewise no evidence has been presented that the ABCC has misused its power to compel a person to give information, produce documents or attend to answer questions. An application before the Federal Court against the ABCC claiming it had used its powers for an improper purpose was dismissed.[36] AMMA contends that there is no justification for the imposition of safeguards.

8.9. The introduction of the onerous pre-conditions on the use of compulsory information gathering powers is likely to delay the investigations of the ABCC. This is hardly surprising given the numerous steps to be taken in order for the Director to be granted an examination notice, which is highly bureaucratic and administrative. AMMA contends that these additional

[34] Australian Building and Construction Commissioner, *Report on the exercise of compliance powers by the ABCC for the period 1 October 2005 to 31 March 2009*, ABCC, Australian Government viewed 10 July 2009, http://www.abcc.gov.au/NR/rdonlyres/A517C71A-A84D-4779-9974-A9DFD2B5EA63/0/CPowersReportMar09.pdf

[35] The Hon. Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry,* March 2009, Australian Government.

[36] *Washington v Hadgkiss* [2008] FCA 28.

obligations will lead to reduced access to the compulsory information gathering powers when they are needed and thus undermine the effectiveness of investigations. It is also concerning that there appears to be no means for the Director to request a reconsideration of any decision of the nominated AAT presidential member to refuse to issue an examination notice, or other appeal process.

8.10. The Cole Royal Commission identified an embedded culture of silence in the building and construction industry where workers were advised to refuse to speak with those bodies carrying out investigations, contact their union and 'sit in sheds whenever an inspector was on site'.[37] Intimidation was rife among the industry as a means of preventing persons from assisting investigations.[38] The compulsory information gathering powers were recommended by the Cole Royal Commission to overcome this behaviour. The imposition of an administrative, bureaucratic process represents a significant watering down of powers and further erodes the independence of the Director.

8.11. If the effectiveness of the Building Industry Inspectorate's investigative powers are no match to the existing powers of the ABCC, this culture of silence is likely to return and again take hold. This will make successful investigations difficult and lead to persons not being held accountable for their unlawful behaviour. A weakened compliance regime, to be discussed below, will further encourage the return to the behaviours of old.

8.12. **AMMA does not support the imposition of additional safeguards on the compulsory information gathering powers of the Building Industry Inspectorate.**

8.13. **Further, AMMA contends that if an external body is given responsibility for issuing an examination notice, a review mechanism must be provided to allow the Director to appeal an unfavourable decision.**

<u>Five year sunset clause</u>

[37] AMMA, *Building industry regulator: a tough cop or a transition to toothless tiger?* 2008, AMMA, 11.
[38] Ibid.

8.14. AMMA supports the continuation of the existing compulsory information gathering powers with a review of those existing powers in five years.[39]

8.15. However, the inclusion of a five year sunset clause (see proposed section 46) that will automatically repeal those powers five years from the commencement of the new Act, in addition to the proposed 'safeguards', represents a further weakening of the existing compliance regime.

8.16. The Hon. Murray Wilcox QC's reasoning for the continuation of the compulsory information gathering powers rested on the level of unlawfulness that still continues in the building and construction industry.[40] He stated in his report that 'under present conditions' the power will be needed and '[t]he reality is that, without such a power, some types of contravention would be almost impossible to prove.'[41]

8.17. There is however, no evidence that the 'present conditions' in the building and construction industry will not be present in five years time, that would justify an automatic repeal of the compulsory information gathering powers at a set date. Given that the BCII Amendment Bill proposes to repeal provisions dealing with 'unlawful industrial action', weaken protection against coercion and undue pressure and reduce penalties for unlawful conduct, it is quite likely that the present conditions will continue and worsen. These particular issues are discussed separately below.

8.18. The Second Reading Speech identifies an intention to conduct a review of the powers prior to the sunset, consistent with the recommendation of the Hon. Murray Wilcox QC.[42] This may result in the power being left to lapse, even where conditions of the industry have not changed to justify its cessation, if a review is not instigated or is delayed. Reinstatement of the power beyond the sunset day may prove difficult.

---

[39] AMMA, Major construction projects need IR investment certainty now, Media Release, 16 October 2008, AMMA, viewed 10 July 2009, http://www.amma.org.au/home/Media%20Releases/MR_16October2008.pdf
[40] The Hon. Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry,* March 2009, Australian Government, 3.
[41] Ibid 59, 3.
[42] The Hon. Julia Gillard MP, Deputy Prime Minister, *Second Reading Speech*, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, House of Representatives, 17 June 2009.

8.19. **AMMA contends that the grant of a compulsory information gathering power should be removed only by positive action of Parliament and submits that proposed section 46 be removed.**

Public Interest Immunity

8.20. Proposed subsection 52(2)(b) allows a person to refuse to give information, produce documents or answer questions if it would disclose information that would be protected by public interest immunity.

8.21. AMMA does not oppose the availability of public interest immunity in respect to the use of the compulsory information gathering power; however it must not be vulnerable to misuse.

8.22. The person claiming public interest immunity must provide a statement setting out the basis of the claim. An efficient process must then be made available to the Director of the Building Industry Inspectorate to seek a determination from an appropriate body as to whether a document or information is subject to public interest immunity. Public interest immunity should not allow unions to delay investigations by claiming that its service to its members is provided under an assurance of confidentiality and that it is injurious to the public interest to disclose information on the basis that it would discourage employees from using that service.

8.23. **AMMA contends that a process must be put in place for the Director to seek a determination as to whether public interest immunity applies to a particular document or information, if has been claimed.**

9. The Independent Assessor

9.1. Item 52 of the BCII Amendment Bill introduces a new Part 1 of Chapter 7 that will establish an Office of the Independent Assessor – Special Building Industry Powers. This new part would allow an 'interested person' to apply to an Independent Assessor for the compulsory information gathering powers to be 'switched off' on a particular project.

9.2. Proposed subsection 36(2) defines an 'interested person' as being the Minister and 'a person prescribed by the regulations'.

9.3. Proposed subsection 39(1) provides that following application by an interested person the Independent Assessor may make a written determination that section 45 (the compulsory information gathering powers) does not apply to one or more building projects. Proposed subsection 39(3) prevents the Independent Assessor from making a determination unless satisfied it is appropriate having regard to the objects of the proposed Building Industry (Fair Work) Act 2009, any matter prescribed by the regulations, and that it would not be contrary to the public interest.

9.4. The government has recently advised that it is intended that the regulations will require the Office of the Independent Assessor to be satisfied that all of the relevant building industry participants had a demonstrated record of compliance with workplace relations laws, including Court or tribunal orders. In reaching this assessment the Independent Assessor would consider the views of 'interested persons' which, in this case, will mean 'building industry participants' as defined in the existing BCII Act.

9.5. As at the date of lodgement of this submission to Government is yet to publically release the detail of proposed regulations. AMMA contends that in order to properly assess the key provision of the BCII Amendment Bill the final text of the regulations be publically available.

9.6. AMMA supports the requirement that all participants on the relevant project have a demonstrated record of compliance.

9.7. AMMA contends that the 'interested person' whom the Independent Assessor would be required to consider should be restricted to building industry participants who are (or will be) bound by the relevant industrial agreements.

9.8. AMMA contends that an appropriate consultation model can be found in section 289(1) of the *Fair Work Act 2009.* This model will ensure procedural fairness.

9.9. AMMA contends that the term 'project' should be defined by the scope of the relevant commercial contract.

9.10. The compulsory information gathering powers are a key element of the regulatory regime in the building and construction industry and deemed a necessary tool for identifying unlawful

conduct and holding those responsible for such conduct accountable. A legislative option to 'switch off' this power is therefore of significant interest to the resources sector that to fail to publicly release regulations containing key information about the operation of this 'switch off' provision is completely unsatisfactory.

9.11. **AMMA calls on the government to publicly release the regulations to the proposed Building Industry (Fair Work) Act 2009 and allow for further review and comment.**

9.12. **AMMA contends that in addition to the criteria foreshadowed in the regulations, that the regulations require the Independent Assessor to have regard to the following matters before making a determination:**

- **The probability of improper behaviour occurring;**
- **The outcomes of previous applications in respect of the project.**

9.13. Proposed subsection 40(3) allows for an application to relate to more than one building project. Circumstances are likely to arise where the project involves different contractors, subcontractors and unions. The projects may also be in different states or territories.

9.14. **Subject to the release of the regulations, AMMA does not oppose the ability to make an application that relates to more than one building project, but submits that each project should be considered separately on its individual merits when making a determination.**

10. Penalties

10.1. In 2006, 91 employees on the Perth to Mandurah Railway Project took unprotected industrial action causing losses of approximately $1.6 million.[43]

10.2. Also in 2006, 192 employees on the Roche Mining Murray Darling Basin Project engaged in unprotected industrial action rather than following agreed dispute resolution processes, causing significant financial loss.

[43] AMMA, *Submission to Wilcox Review of the transition of the ABCC to specialist division of Fair Work Australia*, 5 December 2008.

10.3. These are just two of a number of examples, but they encapsulate the significant damage that unlawful behaviour has on individual employers, industry productivity and its international reputation. They illustrate that the disregard for the rule of law still pervades the industry.

10.4. The BCII Amendment Bill removes the higher penalties for building industry participants to reflect the penalties that apply under the *Fair Work Act 2009*.

10.5. The current higher penalties contained in the BCII Act reflect the considerable financial consequences of unlawful conduct engaged in by building industry participants. These financial consequences are magnified by the fact that building and construction industry projects invariably involve multi-million or billion dollar investment. Failure to meet contractual requirements can incur significant liquidated damages.

10.6. The Cole Royal Commission characterised the building and construction industry as unique, with the behaviour occurring in the industry, and the extent of that behaviour, not reflected in any other industry. Both the government and the Hon. Murray Wilcox have accepted that there is still a level of unlawfulness in the industry. In its submission to the Hon. Murray Wilcox, AMMA drew attention to pertinent observations made in court proceedings. These are reproduced below:

- '**[I]t is difficult…to imagine a commission of contravention of the freedom of association provisions by an individual delegate that could be more blatant or significant than those that occurred here'**. Burchardt FM, *Stuart-Mahoney v CFMEU and Deans* (No3) [2008] FMCA 1435 (27 October 2008) under appeal

- '[T]he conduct of the Union and the third and fourth respondents indicated a **calculated indifference to the provisions of the Act of the kind that Commissioner Cole spoke about in his report**'. Lander J, *Ponzio v B & P Caelli Construction* [2007] FCAFC 65 (14 May 2007)

- **'There is a long and well-documented history of unlawful activity by union organisers and delegates in the building industry in Australia** that counsel for the CFMEU acknowledged, but submitted that there has been a considerable change in culture over recent years. **This makes it desirable that any return to the**

bad old days be appropriately penalised.' Gyles J, *A & L Silvestri Pty Limited v Construction, Forestry, Mining and Energy Union* [2008] FCA 466 (11 April 2008)

- **'[the] representation…was…deliberate, contumacious and serious and involved a…flouting…of the relevant legal requirement directed at ensuring freedom of association**'. Graham J, *Hadgkiss v Construction, Forestry, Mining and Energy Union (No. 5)* [2008] FCA 1040 (14 July 2008)

- **"The breaches, although in response to a safety issue, were deliberate.** Resolution of the safety issue did not require the taking of industrial action. **There was no reason why work could not continue on other parts of the site which were unaffected by the spill**'. *Cahill v Construction, Forestry, Mining and Energy Union* [2008] FCA 495 (11 April 2008)

- 'There is nothing oppressive about requiring parties in an industrial relationship to adhere to the law. Where the parties have agreed upon dispute resolution procedures there is nothing oppressive about insisting upon their complying with the terms of such agreement. **The strike action was quite arbitrary. The absence of any prior negotiations concerning the claims suggests that they may not have been the real, or sole, reason for the strike**'. Dowsett J, *Temple v Powell* [2008] FCA 714 (23 May 2008)

- '[T]he loss of two and a half day's labour by three hundred employees must necessarily have involved a substantial financial impost…**the contraventions were deliberate in nature and in defiance of the law. There is no basis upon which the justification of the action on the basis of health and safety grounds can be maintained**'. Burchardt FM, *Cruse v CFMEU & Anor* [2007] FMCA 1873 (14 November 2007)

- '**[T]he respondents have shown a preparedness to engage in industrial action in contravention of the AIRC Order**'. Gilmour J, *CBI Construction Pty Ltd v Abbott* [2008] FCA 1629 (28 October 2008)

10.7. The imposition of a penalty on a person for breaching the law serves to hold that person accountable for their actions and aims to deter that person and others from engaging in

similar action – leading to the necessary cultural change required in the industry and respect for the rule of law.

10.8. Reducing the higher penalties now, before the culture of the industry has changed, will undo those improvements that have occurred since the commencement of the ABCC and the BCII Act. The lower penalties of the *Fair Work Act 2009* are clearly not adequate:

- Building industry participants show a propensity for breaching orders of the Australian Industrial Relations Commission. Reducing penalties for breach of an order will not deter that behaviour.

- It is rare for a court to order a maximum penalty. Applying the lower maximum penalty threshold in the *Fair Work Act 2009* to the building industry will reduce the deterrent effect if the penalties which are available are not significant.

- A significantly lower penalty for individuals under the *Fair Work Act 2009* may result in unions using employees a 'human shields' and encourage wildcat action.

10.9. It is not unusual for repeated unlawful conduct, as exhibited by building industry participants, to be dealt with more harshly under the law. If unions and employees continue to behave differently than those in other industries, significant penalties should apply until they can demonstrate that they are ready to act in accordance with the rule of law and be treated like those in other industries.

10.10. **AMMA contends that the existing higher penalties applying to building industry employees must continue to apply in order to effectively deter unlawful and inappropriate behaviour.**

11. The Rules Applying to Building Industry Employees

11.1. The government has accepted the recommendation of the Hon. Murray Wilcox QC that the same rules under the *Fair Work Act 2009* apply to building industry employees.

11.2. As a consequence, the BCII Amendment Bill repeals the broad definition of unlawful industrial action contained in Chapter 5 of the BCII Act and also repeals Chapter 6, which relates to discrimination, coercion and unfair contracts.

11.3. In a submission to DEEWR, AMMA responded to the recommendation of the Hon. Murray Wilcox opposing the narrowing of the definition of unlawful industrial action and loss of protection from coercion or undue pressure.[44] AMMA noted particular concerns with the reasoning adopted by the Hon. Murray Wilcox in coming to his recommendations on the rules to apply in the building and construction industry. The following discussion therefore is drawn from AMMA's submission to DEEWR in response to the Wilcox recommendations.

11.4. The recommendation will impact on the continuation of the following sections of the BCII Act:

- Section 38: prohibition against taking unlawful industrial action (defined in sections 36 and 37);

- Section 39: the power to grant an injunction in respect to threatened, impending or probable unlawful industrial action; and

- Section 44: protection against coercion or undue pressure in respect to making, varying or terminating a collective agreement, etc.

11.5. Section 38 of the BCII Act prohibits unlawful industrial action, referred to as 'building industrial action' in section 37, which in turn is defined in section 36. Section 36 currently defines 'industrial action' more broadly than the *Fair Work Act 2009*.

11.6. The Hon. Murray Wilcox' recommendation to not continue section 38 of the BCII Act is based partly on the assumption that under the new agreement making regime of the *Fair Work Act 2009* almost all workplaces will have an agreement in operation, with the result that any industrial action will be unlawful.[45] He considered it unnecessary and of no practical

[44] AMMA, *Submission to DEEWR on the Wilcox Report recommendations*, 15 May 2009, AMMA.
[45] The Hon. Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry,* March 2009, Australian Government, para 4.26.

difference, to retain the broad definition of industrial action contained in section 38 of the BCII Act.[46]

11.7. AMMA's contends that the assumption of the Hon. Murray Wilcox that almost all workplaces will have an operating agreement under the *Fair Work Act 2009* (meaning that any industrial action will be unlawful) is incorrect for the following reasons:

- Large mining expansion and construction projects will extend beyond the nominal operating life of an agreement, which has been reduced to four years under the *Fair Work Act 2009*. Furthermore, building industry unions continue to seek agreements with a three year nominal term.

- It does not give consideration to the award modernisation process and the role of Modern Awards. If the relevant Modern Award is sufficiently flexible, employers could rely on the award, and/or individual flexibility agreements and/or common law agreements to regulate the employment relationship without having to enter into formal statutory agreements.

- It does not give consideration to the continuation of enterprise awards as Modern Enterprise Awards.

11.8. It is therefore entirely possible for workplaces in the building and construction industry under the *Fair Work Act 2009*, to operate without an agreement or with an expired agreement.

11.9. The Hon. Murray Wilcox also does not believe that employers will be any worse off under the *Fair Work Act 2009* on the basis that definition of 'industrial action' in section 19 is almost identical to the wording 'building industrial action' in section 36 of the BCII Act, after making the necessary adjustments for the definition to fit all industries.[47]

11.10. AMMA does not agree with this view as unlike the BCII Act, section 19(1)(a)-(c) of the *Fair Work Act 2009* is concerned with the conduct of employees only. For example, industrial action is defined in section 19(1)(b) as 'a ban, limitation or restriction on the performance of work *by an employee*' [emphasis added]. It appears therefore, that unions are not capable of

[46] Ibid.
[47] Ibid, para 4.15.

engaging in or organising industrial action by their own conduct only – the 'industrial action' as defined must be imposed by an employee. For this reason, the continuation of the unlawful industrial action provisions of the BCII Act is necessary to cover union conduct that is not adequately covered in the *Fair Work Act 2009*.

11.11. 'Building industrial action' was considered by Kenny J in *Cahill v CFMEU* (No2) [2008] FCA 1292, who accepted that if any ban, limitation or restriction on the performance of work had been imposed by *a union*, then the definition of 'building industrial action' might be satisfied:

> The respondents' argument was that there was no "building industrial action" as defined in s 36(1) and, therefore, no unlawful industrial action for the purposes of ss 37 and 38 of the BCII Act. This was because there was no "ban, limitation or restriction on the performance of building work" within the meaning of paras (b) and (c) of the definition of "building industrial action" in s 36(1), because there was no ban, limitation or restriction imposed by employees.
>
> The respondents submitted, and it was not in dispute, that the applicant led no evidence that any of Hardcorp's employees had imposed a ban, limitation or restriction on the performance of work. The question is, however, whether or not the words "a ban, limitation or restriction on the performance of building work" in paras (b) and (c) of the definition of "building industrial action" refer to a ban, limitation, or restriction imposed only by employees, or can extend to union action.
>
> Paragraphs (b) and (c) of the definition of "building industrial action" in terms contain no limitation of the kind for which the respondents contend. The expression "a ban, limitation or restriction on the performance of building work" in paras (b) and (c) may as naturally comprehend that which is imposed by a union as by employees. If the expression "a ban, limitation or restriction on the performance of building work" in paras (b) and (c) of the definition of "building industrial action" refer only to that which is imposed by employees in respect of their work, and cannot refer to a prohibition or restriction on the performance of work imposed by a union, then it is unlikely that union action could ever amount to "building industrial action" (for which the union could be held responsible under s 38). It is to be borne in mind, however, that when the definition of "industrial action" in the WR Act was amended by the introduction of s 420, with the effect that it became clear in terms that a relevant "ban, limitation or restriction on the performance work" must be imposed "by an employee", the Parliament did not adopt the same course with respect to the definition of "building industrial action" in the BCII Act.

11.12. It is clear therefore, that the broad definition of industrial action in the BCII Act is quite necessary and of practical significance to efforts to address persistent and pervasive unlawful behaviour in the industry.

11.13. Likewise section 39 is also important to ensuring unlawful action is appropriately dealt with. Section 39 allows an appropriate court to grant an injunction where it is satisfied that unlawful industrial action (as broadly defined) is threatened, impending or probable. This general power to grant an injunction is wider than the *Fair Work Act 2009*, which is limited only to instances where industrial action (as more narrowly defined) is being organised or engaged in, not that which is threatened, impending or probable. The court can also grant an injunction under the BCII Act whether or not the person has previously engaged, intends to engage again or continues to engage in such conduct.

11.14. Section 44 of the BCII Act also provides additional protection from coercion or undue pressure in respect to making, terminating, varying or extending etcetera, agreements under the *Workplace Relations Act*. The Hon. Murray Wilcox argues that sections 343 and 340 of the *Fair Work Act 2009* cover the same ground as section 44, yet he acknowledges that section 44 is in fact different as it covers both an intention to 'coerce' and an intention to 'apply undue pressure'.[48] He reasons that 'the application of undue pressure would be regarded as force, and therefore a form of coercion. If I am wrong, the difference hardly warrants a different rule for the building and construction industry'.[49]

11.15. It is AMMA's view that the assertions of the Hon. Murray Wilcox that sections 340 and 343 of the *Fair Work Act 2009* cover the same ground as section 44 are incorrect. Firstly, section 340 of the *Fair Work Act 2009* is limited to 'adverse action' and the type of conduct which is considered to be 'adverse action', defined in section 342, is quite restrictive. Item seven of section 342 covers action taken by a union that includes the less broadly defined 'industrial action', action that has the effect of prejudicing a person's employment or an independent contractor's contract for services, and action involving the imposition of a penalty on a member. If action is taken by a union that does not fall within this meaning of 'adverse action', but yet is taken with the intent to coerce another to make, vary etc an agreement, section 343

[48] The Hon. Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry,* March 2009, Australian Government, para 4.77.
[49] Ibid, para 4.78.

will not adequately deal with that behaviour. Section 44 of the BCII Act on the other hand, does not restrict the type of action and refers only to 'any action'.

11.16. Secondly, the absence of 'undue pressure' from section 343 is significant. In *John Holland v AMWU* [2009] FCA 235 at paragraph 60, the following statement was made in respect to 'undue pressure':

> [T]he expression 'undue pressure' has at least the potential to cover some forms of pressure which are somewhat more benign than those considered necessary to make good allegations of coercion in the statutory sense.

11.17. Therefore, section 343 of the *Fair Work Act* imposes a higher threshold than the BCII Act and may not adequately deal with some of the inappropriate and unlawful conduct that continues to plague the industry – reliance on the *Fair Work Act 2009* may mean that some behaviour in the industry will 'fall under the radar' so to speak. Furthermore, while section 344 of the *Fair Work Act* does specifically cover undue influence or pressure, it is restricted to the conduct of employers as against employees.

11.18. **AMMA contends that the *Fair Work Act 2009* is unable to adequately deal with all types of unlawful and inappropriate conduct in the building and construction industry. AMMA opposes the repeal of sections 38, 39 and 44 of the BCII Act.**

12. Transitional Matters

12.1. As at June 2009 the ABCC was involved in 69 current investigations and 25 current court matters. These investigations and court proceedings must not be undermined.

12.2. **AMMA calls on the government to release the regulations that contain the transitional arrangements for the replacement of the ABCC by the Building Industry Inspectorate.**

13. National Code of Practice and Implementation Guidelines

13.1. The National Code of Practice for the Construction Industry and Implementation Guidelines are a requisite element of the regulatory environment in the building and construction industry

and has a significant role in changing the culture of the industry. The Code and Guidelines set out the principles and standards of behaviour to be met by industry participants who wish to tender for government work, ensuring that workplace relations laws are complied with. They can prevent anti-competitive conduct that arises through collusive tendering practices that deny opportunity to others. The continued application of the Code and Guidelines, in their current form to all projects, whether public or private projects, is an important factor in ensuring that a new culture takes hold in the industry.

13.2. The government has recently released revised Implementation Guidelines for the National Code of Practice for the Construction Industry.

13.3. The new Guidelines are to take effect from 1 August 2009, applying only to those projects that were the subject of an expression of interest or tender for the first time on or after that date.

13.4. The government has advised that the Code and Guidelines have been revised to reflect the *Fair Work Act 2009* and suggestions the Honourable Murray Wilcox QC made in the Wilcox Report.

13.5. Section 6.1.3 states that unregistered written agreements are inconsistent with the Code and Guidelines. Characterisation of unregistered written agreements[50] as non-compliant with the Code and Guidelines is a positive step in the right direction that will have the effect of reducing pressure on building industry participants to enter into 'side deals' in addition to their formal registered agreement. This is supported by AMMA.

13.6. The new Guidelines also continue to specify a number of behaviours and practices contained in the existing Guidelines that will be considered non-compliant and inconsistent with the Code of Practice. The continued prohibition against these behaviours is supported by AMMA. They include:

- unregistered written agreements (side deals);
- requiring or attempting to unduly influence subcontractors or suppliers to have particular workplace arrangements in place; and
- directly or indirectly coerce or pressure another party to make over-award payments.

[50] Except in respect to common law agreements made between an employer and individual employee (Implementation Guidelines section 6.1.3).

- providing names of new staff, job applicants, subcontractors or contractors to union;
- 'no ticket, no start' signs or 'show card' days;
- requiring employees to identify their union status; and
- requiring non-working shop stewards to be employed.

13.7. However there remain some clear omissions in the new Guidelines that, combined with the amendments proposed in the BCII Amendment Bill, will weaken the regulatory regime in the industry and lead to lower standards of behaviour at a time when Australia needs to be more productive. These behaviours or practices considered non-compliant under the existing Guidelines, but which have been omitted from the new Guidelines include:

- notices such as posters, helmets, stickers or union logos or flags etcetera;
- using site delegates to undertake or administer site induction processes;
- a requirement for an employer to apply union logos, mottos or other indicia to company supplied property or equipment, including clothing;
- a requirement for an employee to be exclusively represented by a union in a dispute settlement;
- attempts to avoid right of entry requirements by allowing delegates or shop stewards to perform a similar function;
- agreements that do not contain an express limitation that any outcome determined by a third party cannot be inconsistent with the Code and Guidelines;
- 'One-in-all-in' arrangements, such as in relation to overtime; and
- 'Last on, first off' clauses and clauses determining redundancy solely by reference to seniority of employees.

13.8. This represents a watering down of the Guidelines that will undermine their positive contribution to improving the culture of the industry.

13.9. **AMMA contends that the Implementation Guidelines, as recently released, be amended to restore the full gamut of behaviours and practices that have pervaded the building and construction industry and which negatively impact on productivity and harmonious relationships.**

14. BIBLIOGRAPHY

Primary

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

Fair Work Act 2009

Workplace Relations Act 1996

Building and Construction Industry Improvement Act 2005

Secondary

AMMA, *Submission to DEEWR on the Wilcox Report recommendations*, 15 May 2009, AMMA, viewed 14 July 2009, http://www.amma.org.au/home/publications/AMMA_Submission_DEEWR_WilcoxRecommendations_15May2009.pdf

AMMA, *Building industry regulator: A tough cop or a transition to toothless tiger*, 2008, AMMA.

AMMA, *Submission to Wilcox Review of the transition of the ABCC to specialist division of Fair Work Australia*, 5 December 2008, Appendix A.

AMMA, *Submission to DEEWR on the Wilcox Report recommendations*, 15 May 2009, AMMA.

AMMA, Major construction projects need IR investment certainty now, Media Release, 16 October 2008, AMMA, viewed 10 July 2009, http://www.amma.org.au/home/Media%20Releases/MR_16October2008.pdf

Australian Bureau of Statistics, 'A century of mining in Australia 1988-1999', *Australian Mining Industry*, Cat No. 8414.0, ABS.

Australian Bureau of Statistics, *Industrial Disputes*, Australia, March 2009, Cat No. 6321.0.55, ABS.

Minerals Council of Australia, *2004 Annual report: creating value through commitment and performance*, 2004, MCA, 5.

Government

Australian Building Construction Commissioner, Annual Report 2007-08, Part two: performance, Australian Government, viewed 7 July 2009, http://www.abcc.gov.au/NR/rdonlyres/DD705ED2-AA55-402A-9009-6F1615AE6512/0/AR0708Performance.pdf

Australian Building and Construction Commissioner, *Report on the exercise of compliance powers by the*
ABCC for the period 1 October 2005 to 31 March 2008, ABCC, Australian Government viewed 2 September

2008, http://www.abcc.gov.au/NR/rdonlyres/4CB84879-678F-4E2C-94CD-F46DEE7E6B48/0/CPowersReportMar08.pdf

Australian Building and Construction Commissioner, *Report on the exercise of compliance powers by the*
ABCC for the period 1 October 2005 to 31 March 2009, ABCC, Australian Government viewed 10 July 2009, http://www.abcc.gov.au/NR/rdonlyres/A517C71A-A84D-4779-9974-A9DFD2B5EA63/0/CPowersReportMar09.pdf

Administrative Review Council, Report No. 48 - The Coercive Information-gathering Powers of Government Agencies < http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf/$file/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf > (13 July 2009) ,

John Lloyd, ABC Commissioner, Australian Building and Construction Commission Presentation, *Industry Forum*, June 2009.

Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, Forward with Fairness, *Labor's plan for fairer and more productive Australian workplaces*, Australian Labor Party, April 2007.

The Hon. Murray Wilcox, *Proposed building and construction division of Fair Work Australia discussion paper*, Australian Government.

The Hon. Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry,* March 2009, Australian Government, viewed 13 July 2009, http://www.workplace.gov.au/NR/rdonlyres/0B44B3D3-9ABD-4F4A-94FE-866F9ACDB2A6/0/WilcoxReport.pdf

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

The Hon. Julia Gillard MP, Deputy Prime Minister, *Second Reading Speech*, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, House of Representatives, 17 June 2009.

The Hon. Julia Gillard MP, Deputy Prime Minister, *Second Reading Speech*, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, House of Representatives, 17 June 2009.
http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/1680FA250270FD05CA2575DD002226F3/$file/CoercivePowersDirection.pdf (13 July 2009)

The Hon. Terrance Cole, Royal Commission into the Building and Construction Industry, Final Report, Chapter 3: reform achieving cultural change, February 2003, viewed 7 July 2009, http://www.royalcombci.gov.au/docs/finalreport/V11CulturalChng_PressFinal.pdf

APPENDIX A: Instances of unlawful and inappropriate behaviour

INSTANCES OF UNLAWFUL AND INAPPROPRIATE BEHAVIOUR			
Case name	**Offending conduct**	**Date of offending conduct**	**Court's comments**
Williams v CFMEU and Mates, (no2) [2009] FCA 548 (28 May 2009)	Stoppage of work with intent to coerce the builder to employ a person as an employee or engage as a building contractor	31 July 2006	Jessup J: The task of the court is "to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations…The conduct of the respondents on 31 July 2006 was, in my view, squarely within the general class of conduct with which s 43(1) of the BCII Act is, as a matter of policy, concerned. While I recognise the importance of a workplace which is safe and without risks to health, I consider it no less important that such issues, when they arise and become matters of controversy, be resolved according to procedures established for the purpose (as existed in the present case). Thus I substantially accept the case put on behalf of the applicant that Mr Mates had no need to procure a stoppage of work on 31 July 2006 even if he did hold the concerns that he expressed in his evidence, and that the source of those concerns should not be regarded as mitigatory apropos the inherent seriousness of his conduct.
Alfred v CFMEU & Ors [2009], FMCA 613, (10/7/09)	Union organiser making threats with intent to coerce subcontractor and workers to be members of the union	11 April 2006	Smith FM: In my opinion, Mr Manna used threatening language to procure either the union membership of the Anything Concrete workforce or to force it to abandon the project so as to allow a union approved contractor to be employed. In the light of the person who made the threats, and the context in which they were made, they were capable of exerting overwhelming influence on a contractor in the building industry…either to conform to union demands…or to abandon his contractual rights. This is notwithstanding that the threats used colloquial and imprecise language: "bankrupt", "have audited", and "screw you and make your life a misery". In the context, the vagueness of their language is likely to have increased, not lessened, the apprehensions of Mr Holm and the coercive effects of the threats. The threats were capable of "negating choice" in a practical sense. This is

			apparent from the obvious vulnerability of a relatively small subcontractor in the building industry to a union-organised attack on its financial stability.
Cahill v CFMEU & Mates [2006] FCA 196 (10 March 2006)	Unlawful industrial action; coercion in relation to the engagement of workers Prevented crane from entering site	Period of events leading up to climax on 21 February 2006	Kenny J: On the evidence before me, the union's alleged conduct is causing losses to TJV of around $50,000 per day, with a risk that the project might not proceed at all, occasioning further significant damage of up to $3 million. Further, if the project were not to proceed, then the employment prospects of 24 of Hardcorp's employees, 10 sub-contractors and 7 of TJV's staff would be jeopardised. According to Mr Goss, retrenchments at the site have already commenced and will continue without this grant of relief. The conduct in question does not apparently involve any possibility of protected action.
Carr v AMWU, Mulipola, Eiffe, Thomas and Mansour [2005] FCA 1802 (4 November 2005)	Coercion at two building sites to enter a certified agreement	June 2003	Finkelstein J: In the circumstances, prima facie at least, a harsh penalty was justified.
There were 18 separate proceedings against multiple respondents arising out of events on 5 August and 6 August 2003 across building sites in Melbourne based on application of industry wide policy following fatality on one site. Cases include: Cruse v Multiplex Limited [2008] FCAFC 179 (5 November 2008) Ponzio v B & P Caelli Construction [2007] FCAFC 65 (14 May 2007)	Claim for strike pay Taking industrial action to coerce payment of strike pay	5 and 6 August 2003	Goldberg and Jessup JJ In Cruse v Multiplex: the stoppage of work was for the express purpose of claiming payment for time not worked, rather than to facilitate the conduct of the safety audit itself. Lander J in Ponzio: There can be no doubt that the Union and the third and fourth respondents were aware that what they were doing was a contravention of s 187AB(1)(a) and s 187AB(1)(b). They were aware that if Caelli paid its employees in response to that pressure Caelli would also be caused to contravene the Act. The Union should have been aware that, by causing Caelli to make the payments in contravention of s 187AA, any of their member employees who accepted the payment would also be contravening the Act. In my opinion, the conduct of the Union and the third and fourth respondents indicated a calculated indifference to the provisions of the Act of the kind that Commissioner Cole spoke about in his report. Marshall J in Ponzio v Maxim: The Union has agreed that it breached s 187AB(1)(b) of the Act by organising or engaging in industrial action against an employer with intent to coerce it to make a payment to employees in relation to a period during which those employees engaged in industrial action and did not work.

Furlong v Maxim Electrical Services (Aust) Pty Ltd [2006] FCA 1705 (26 November 2006) Ponzio v Maxim Electrical Services (Vic) Pty Ltd [2006[FCA 579 (17 May 2006)			
A & L Silvestri Pty Ltd Pty Ltd & Hadgkiss v Construction, Forestry, Mining and Energy Union [2007] FCA 1047 (13 July 2007) A & L Silvestri Pty Limited v Construction, Forestry, Mining and Energy Union [2008] FCA 466 (11 April 2008) – penalty hearing	Threatening to take action to coerce the employer to enter into a union certified agreement Engaging in secondary boycott by hindering or preventing the supply or acquisition of services (TPA s 45D) Inducing a breach of contract	20 and 21 October 2003	Gyles J: It can safely be concluded that Lane's intent in making the threats was to coerce the officers of LGB into agreeing to an EBA. The threat of disruption to work on the project by any available means was pressure that was illegitimate and unconscionable. LGB had completion of a project of some $16 million at stake. Any disruption to progress would have significant adverse financial consequences. It was clear enough that the threats also envisaged unlawful action. Threats of picketing were made. There would appear to be no lawful basis for picketing in relation to this site. Gyles J (penalty hearing): There is a long and well-documented history of unlawful activity by union organisers and delegates in the building industry in Australia that counsel for the CFMEU acknowledged, but submitted that there has been a considerable change in culture over recent years. This makes it desirable that any return to the bad old days be appropriately penalised.
Hadgkiss v Construction, Forestry, Mining and Energy Union (No. 4) [2007] FCA 425 (26 March 2007) Hadgkiss v CFMEU [2008] FCAFC 22 (5 March 2008) Hadgkiss v	Making a false or misleading representation that union membership was required to work on site	19 January 2004 18 February 2004	Graham J ([2008] FCA 1040): [the] representation…was…deliberate, contumacious and serious and involved a…flouting…of the relevant legal requirement directed at ensuring freedom of association

Construction, Forestry, Mining and Energy Union (No. 5) [2008] FCA 1040 (14 July 2008)			
Standen v Feehan [2008] FCA 1009 (3 July 2008)	Union official intentionally hindered and obstructed the employer and employees	5 May 2004	Lander J: I am satisfied that the respondent did what he did with the purpose of intentionally obstructing Mr Potter carrying out his duties and the Boral employee from entering the site in his truck. The fact that the respondent parked his vehicle there demonstrates, in my opinion, that the respondent had in mind to make the pour which was to take place on this day as difficult as possible. The delay was such that he and his employees were required to work quite late and under lights in an attempt to finish the concrete pour.
Standen v Feehan (No 2) [2008[FCA 1574 (23 October 2008)	Hinder/Obstruct/Intimidate	5 May 2004	Lander J: the conduct was premeditated and was designed to hinder the contractor and the subcontractor in the carrying out of their work…(and) continued over a relatively long period.
Cahill v Construction, Forestry, Mining and Energy Union [2008] FCA 495 (11 April 2008)	Making a claim for strike pay Organising and engaging in industrial action to coerce payment of strike pay Threatening to organise industrial action to coerce payment of strike pay Imposing bans to coerce payment of strike pay	13 May 2004 to 18 May 2004 11 May 2004 to 18 May 2004 14 May 2004 14 May 2004	Marshall J: The breaches, although in response to a safety issue, were deliberate. Resolution of the safety issue did not require the taking of industrial action. There was no reason why work could not continue on other parts of the site which were unaffected by the spill. So much is consistent with the safety disputes resolution procedure which is commonly applied on building sites. That procedure involves the immediate problem being isolated and work being performed elsewhere when it is safe to do so.
Martino v CFMEU and Maher (T02692326 Melbourne Mag. Court) (10 May 2006)	Conduct intending to coerce subcontractor to enter into an agreement with the union with intent to prevent subcontractor from performing work unless agreement was made	26 October 2004 and 28 October 2004	Magistrate Hawkins: By engaging in conduct in breach…the…defendant caused Civiltest to lose the benefit of its contract.
Hadgkiss v Sunland	Making a false and	4 November 2004	Dowsett J: Concerns have arisen that workers not be compelled or

Construction (Qld) Pty Ltd [2006] FCA 1566 (25 October 2006)	misleading representation that the employee was obliged to be a member of the union Dismissing an employee due to non-membership of the union		persuaded, using inappropriate methods, to join trade unions. It is in those circumstances that the present legislation has emerged. It is a serious matter that an employer should seek to pressure an employee into joining or remaining in a union, just as it has traditionally been treated as a serious matter that an employer should seek to dissuade an employee from joining a union using inappropriate methods of persuasion. It is, of course, also important that employers who, by their position, are more likely to be aware of the law than are their employees, not mislead them as to their legal obligations.
Martino v CEPU & Mooney (Industrial Magistrate 7 May 2007)	Engaging in conduct intending to coerce employer to make an agreement with the union	8 November 2004	Magistrate Hawkins: The contraventions by the Union organiser, Mr Mooney were deliberate.
Alfred v Lanscar & CFMEU [2007] FCA 1001 (4 July 2007)	Inciting company to refuse to engage non-union members, thereby breaching freedom of association provisions	9 February 2005	Buchannan J: The conduct admitted by Mr Lanscar and by the CFMEU is serious. It must be regarded as a deliberate breach of a clear legislative prohibition.
Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union [No 4] [2006] WASC 317 (3 November 2006)	Unlawful industrial action by way of unauthorised meetings, and strikes and work bans	Various dates between 9 March 2005 and February 2006	Le Miere J: The first and second defendants have each admitted, and the evidence establishes that they committed 18 and five contraventions of s 38 of the Act respectively during the period from 9 March 2005 to February 2006. The agreed facts establish that the third defendant committed 16 contraventions of s 38 of the Act. The contraventions have involved: meetings of project employees during working hours which have not been sanctioned by the plaintiffs; the imposition of bans by project employees on overtime work; and strikes.
Temple v Powell [2008] FCA 714 (23 May 2008)	Taking Industrial action during the term of an agreement and in breach of the agreement dispute resolution procedure	17 March 2005 and 25 August 2005	Dowsett J: There is nothing oppressive about requiring parties in an industrial relationship to adhere to the law. Where the parties have agreed upon dispute resolution procedures there is nothing oppressive about insisting upon their complying with the terms of such agreement. The strike action was quite arbitrary. The absence of any prior negotiations concerning the claims suggests that they may not have been the real, or sole, reason for the strike.
Cruse v Construction, Forestry, Mining & Energy Union [2008] FCA 1267 (22 August 2008)	Making a false and misleading representation about the employee's obligation to join the union Telling a person they cannot work at a	May 2005	Marshall J: Intention to coerce requires intent to exert pressure that would in a practical sense negate choice…The exertion of such pressure involved unconscionable conduct which gave a party to the bargaining process no say in that process.

	particular location without being party to an agreement in order to coerce that person to enter into a union certified agreement (s 170NC WRA)		
Cruse v CFMEU & Anor [2007] FMCA 1873 (14 November 2007)	300 employees taking industrial action during the term of a certified agreement, and in breach of the dispute resolution procedure for safety concerns	23 September 2005, 27 September and 28 September 2005	Burchardt FM: the strike occurred in direct breach of the applicable certified agreement and in circumstances where Mr Stewart and the employees and the union all knew that this was the case. The provisions of the certified agreement which were breached were dispute resolution procedures expressly designed to avoid this sort of strike…on any view, the strike cost RMJR money and disruption. There is no formal proof that it cost $300,000.00 or any other figure, but the loss of two and a half day's labour by three hundred employees must necessarily have involved a substantial financial impost…the contraventions were deliberate in nature and in defiance of the law. There is no basis upon which the justification of the action on the basis of health and safety grounds can be maintained.
Stuart-Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426 (19 September 2008)	Engaging in industrial action by imposing an overtime ban during the term of an agreement. Organising unlawful industrial action by imposing an overtime ban in order to coerce the employer to engage an apprentice.	6 October 2005 to 12 October 2005	Tracey J: the conduct was serious and was designed to coerce Hooker Cockram (or, through it, one of its sub-contractors) to meet the Employment Requirement. The ban was imposed in preference to alternative, lawful, actions such as negotiations or resort to dispute resolution procedures which were available to the CFMEU and its members… there is no evidence of any contrition on the part of the respondents
Alfred v Wakelin (No. 1) [2008] FCA 1455 (25 September 2008)	Engaging in industrial action during the term of an agreement	10 November 2005 to 11 November 2005	Jagot J: Mr Wakelin and the employees: - (i) failed or refused to attend for building work, (ii) engaged in action that was industrially-motivated and constitutionally-connected within the meaning of s 36 of the BCII Act, and (iii) engaged in action that was not protected action for the purposes of the Workplace Relations Act and was unlawful industrial action in contravention of s 38 of the BCII Act.
Carr v CEPU and Anor [2007] FMCA 1526 (4 September 2007)	Engaging in unlawful industrial action during the term of an agreement.	14 December 2005	Lucev FM: The unlawful industrial action was serious. It involved withdrawal of labour by 81 employees for a full day of work on 14 December 2005… The contraventions were deliberate.
Hadgkiss v Aldin and Ors [2007] FCA	Unlawful industrial action by approximately 100	24, 25, 27 and 28 February and 1, 2, 3	Gilmour J: "The conduct demonstrated a complete disregard for the terms of the Certified Agreement and struck at the very heart of the main object of the

2069 (20 December 2007)	employees	March 2006	legislation. Such is the case also in relation to those respondents who have admitted contravention of the WR Act. This conduct was even more serious, as it deliberately flouted the very clear terms of an order of the AIRC. Furthermore they were warned on several occasions during the Period at workforce meetings by representatives of the CMFEU that they should not take unlawful industrial action as they would be exposing themselves to very serious penalties if they did so… The consequences of the respondents' action were serious. It has involved very considerable costs to the LKJV, the delay of a very major infrastructure project in this State, involving public inconvenience, it had the potential to have caused substantial safety issues with associated damage to machinery and property.
Furlong v Australian Workers Union and Ors [2007] FMCA 443	Engaging in industrial action during the term of an agreement	24 and 25 March 2006	Burchardt FM: there was a two day strike at a particularly sensitive time, in terms of the project in which RMJR was engaged, as I would readily infer both the union and the officers and members were well aware. It was designed to bring pressure to bear and to cause difficulty. It did so. Very substantial financial loss on any view was occasioned to RMJR.
Martino v McLaughlin [2007] AIRC 717 (29 August 2007)	Union official failed to produce right of entry permit (at four different building sites between June and December 2006) Union official failed to sign the visitor book and undertake a site induction on exercising a right of entry Union official conducted an unauthorised meeting, interrupting work for 26 minutes.	21 June 2006, 6 July 2006, 11 July 2006, 26 July 2006, 10 August 2006 3 August 2006 and 15 August 2006 1 June 2006	SDP Watson: In my view, the legislative objective of avoidance of disruptive entry into workplaces and abuse of right of entry laws is best achieved, in the circumstances of the present matter, by a suspension of Mr McLoughlin's permit for a limited period of time, together with the imposition of conditions on the permit, directed to avoiding any future abuse of Part 15 rights by Mr McLoughlin, in reliance upon his permit.
Stuart-Mahoney v CFMEU & Anor (No.2) [2008] FMCA 1015 (4 August 2008) Stuart-Mahoney v CFMEU & Anor (No.3) [2008] FMCA	Coercing an employee to be a member of the union Making a false and misleading statement that the employee must be a member of a union to work on the site	12 September 2006 (in respect to two separate employees)	Burchardt FM: It is difficult to think of anything more readily fitting the idea of coercion than being told you cannot work if you are not a member of a union. It is plainly conduct intended to negate choice. Similarly, the assertion that Mr Gauci could not start work if he was not a union member was plainly false and misleading. It is entirely unreasonable to suppose he wanted to do anything other than to start work. The fact is he was prevented from doing so because of the actions of Mr Deans, and in the circumstances this conduct, in my view,

1435 (27 October 2008) (under appeal)	Requiring an employee to settle their outstanding union membership fees before commencing employment, which prejudiced the employee		plainly contravenes s.797 of the Act. He was made to go and sort his financial status out before he was allowed to start work. Penalty hearing: is difficult in some ways to imagine a commission of contravention of the freedom of association provisions by an individual delegate that could be more blatant or significant than those that occurred here.
Alfred v Primmer & Ors (No.2) [2008] FMCA 1476 (3 November 2008)	Advising and encouraging a company to stop an independent contractor it has engaged from performing work which would cause the company to contravene the Workplace Relations Act	12 October 2006	Cameron FM: it is clear that Mr Primmer was saying that C&C should dissociate itself from Fine Line, by preventing that company from working on the Project, and the root cause of this was the NSWIRC proceedings". "If C&C had acted on this advice and encouragement of Mr Primmer it would have, at least, altered the position of Fine Line to Fine Line's prejudice. Depending on the precise action which C&C took, it might also have terminated Fine Line's contract or injured Fine Line in relation to the terms and conditions of its contract with C&C…and thus from enjoying the fruits of its contract…
Jeff Radisich v Michael Buchan, Doug Heath, Walter Molina and Construction, Forestry, Mining and Energy Union [2008] AIRC 896 (20 November 2008)	Abuse of right of entry by three union officials, including entry without the required permit.	14 February 2007, 24 and 27 April 2007	Lacy SDP: failed to exercise the purported rights with due diligence, reasonable civility and avoidance of unnecessary obstruction by repeatedly making offensive statements to site personalities; refused repeated directions to leave the site when he had no lawful basis to remain on site; deliberately sought to mislead the occupier of the site as to the basis of his right to enter… acted in an improper manner by refusing to comply with reasonable directions regarding site safety; remained on site contrary to reasonable requests and directions to leave; embarked on a general safety inspection despite reasonable requests to comply with OHS requirements applicable to the areas inspected and generally…threaten to disrupt the site; used the OHS right for a collateral purpose, namely to promote the CFMEU by distributing union paraphernalia to workers
Paper Australia Pty Ltd v CEPU [2007] AIRC 505 (20 June 2007)	Organisation of unlawful industrial action	19 June 2007	SDP Watson: I am satisfied that it appears that industrial action, within the meaning of s.420 of the Act, by an employee or employees of contractors to PAPL at its Maryvale site is happening and that further industrial action is probable. The jurisdictional prerequisites for the making of an order pursuant

Paper Australia Pty Ltd & Bilfinger Berger Services (Australia) Pty Ltd v AWU			to s.496 have been established
Kaefer Integrated Services Pty Ltd v AMWU & CFMEU [2008] AIRC 412	Unlawful Industrial action	27 August 2007, 27 September 2007, 19 January 2008, 14 and 15 February 2008, 26, 27 and 28 April 2008	DP McCarthy: I…have formed the view that there is a probability that there will be further and future failures to follow the issue resolution procedures
Mayfield Engineering Pty Ltd v AMWU [2007] AIRC 490 (18 June 2007)	Unlawful challenge to termination of Agreements	5 April 2007	SDP Cartwright: During January 2007, Blair C conciliated over one and a half to two days to assist the negotiation process. Protected industrial action occurred between 8 February and 5 March 2007, followed by further meeting and negotiation.
Radisch v Buchanan, Heath, Molina & FCMEU [2008] AIRC 2185 (17 November 2008)	Abuse of right of entry permit system	24, 27 April 2007 and 14, 22 February 2008	SDP Lacy: A duly authorised officer of the CFMEU give written direction to Mr McDonald that Mr McDonald must not purport to rely on any right of entry under the Workplace Relations Act 1996 in order to facilitate access to construction sites when he in fact holds no right of entry permit under the Act.
Brookfield Multiplex Pty Ltd v CFMEU & Others [2008] AIRC 323 (10 April 2008)	Abuse of right of entry provisions	Dates unavailable	SDP Watson: The Construction, Forestry, Mining and Energy Union, by Kevin Reynolds, the State Secretary of the Construction, Forestry, Mining and Energy Union hereby undertake that it will direct Joe McDonald not to enter any construction site owned, occupied or controlled by Brookfield Multiplex Constructions Pty Ltd or any related body corporate of Brookfield Multiplex Constructions Pty Ltd until such time as Joe McDonald holds a valid right of entry permit under the Workplace Relations Act 1996.
CBI Construction Pty Ltd v Abbott [2008] FCA 1629 (28 October 2008)	Industrial demands and threat to take unlawful industrial action if demands not met Unlawful industrial action taken by around 150 employees (number varied each day)	1 October 2008 and 13 October 2008 14 October, 17- 24 October 2008	Gilmour J: This also is not a case of idle threats. The respondents have made good their threat to engage in a week of industrial action and … threatened further industrial action if the Demand is not met. Further, the respondents have shown a preparedness to engage in industrial action in contravention of the AIRC Order… 12,720 hours have been lost. The effect on the applicant if there is further industrial action will be significant. The estimated wasted costs alone exceed $600,000 a week. There are further potential consequences of industrial action such as damage to the applicant's reputation and loss of production.
Bovis Lend Lease v CFMEU & CEPU [2008] AIRC 693 (3 September 2008)	Failing to follow lawful direction of employer Unlawful industrial action	23 May; 11 July; 5 August; 14 August 2008	SDP Watson: There is sufficient direct evidence to support findings that the employees of subcontractors on the Projects have refused to obtain and use the BG swipe card and that each of the unions have organised such refusal.