

**THE GOVERNMENT'S APPROACH TO RE-ESTABLISHING THE AUSTRALIAN BUILDING  
AND CONSTRUCTION COMMISSION**

SUBMISSION TO THE SENATE EDUCATION AND EMPLOYMENT REFERENCES  
COMMITTEE

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## Summary

The *Fair Work Act* constructs a considered industrial relations policy framework which is applicable to all industries and there is no compelling argument for competing separate regulation in the building and construction industry. Workers in the building and construction industry should be subject to the same industrial laws as apply to other workers. This is consistent with the fundamental principle of equality of all persons before the law. To subject any group of workers or industry to special more punitive laws is unnecessary and discriminatory, but this is exactly what this Bill does: it penalises conduct not because of the nature of that conduct or its effects, but because of *who participates in it*.

The ABCC, as it existed under the former BCII Act, distinguished itself by the aggressive, coercive and biased manner in which it carried out its activities. It focused overwhelmingly on the investigation and prosecution of workers and trade unions, thus failing in its primary obligation as a regulator to enforce the law impartially. It did very little to address the significant and widespread issues in the building industry such as the underpayment or non-payment of wages and entitlements, occupational health and safety issues or sham contracting.

There is no evidence that the re-establishment of the Australian Building and Construction Commission will have any positive impact on the Building and Construction Industry. The claims of supposed productivity improvement, championed in the title of the Bill, are baseless and there is no defensible hypothesis that the number of days lost to industrial disputes in the industry will shift as a consequence of this reactionary reform.

The re-establishment of the Australian Building and Construction Commission, given effect to by the Bill, will breach international law, provide a platform for government intimidation of unionists and, particularly if accompanied by a *Building Code* in similar form to predecessor guidelines, prohibit workers from negotiating important terms and conditions of employment with their employers.

The coercive investigative powers afforded to the ABCC by this Bill and under the last Liberal Government were unprecedented in the industrial relations arena and erode the right to protection of property and privacy, the right to silence, and statutory rights to the protection of personal information. A return to this oppressive regime and its lack of any effective oversight is a serious threat to human rights and personal freedoms.

The extension and modifications of common law conspiracy and criminal accessorial liability for "attempted" contraventions are draconian and unwarranted particularly when the conduct such extended liability will apply to causes no loss, damage or injury to person.

The extension of the operation of the Bill and the ABCC into distribution, supply and manufacturing industries and into offshore areas is ill considered and widely opposed. No effort has been made by the government to mount any credible case for these extensions.

## 1. Introduction

### ***About the ACTU***

1. Our organisation is the peak national body representing trade unions. The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.
2. The ACTU welcomes the opportunity to contribute to this inquiry. Our submission complements, and we unreservedly support, the submissions of our affiliates who have significant membership in the industries affected by this Bill.
3. The ACTU remains fundamentally opposed to the continuance of separate labour inspectorate for the construction industry (however defined), particularly one with coercive powers. The ACTU supports a legislative regime that facilitates free collective bargaining and supports industrial rights within the internationally accepted framework. The *Fair Work Act* constructs a considered industrial relations policy framework which is applicable to all industries and there is no compelling argument for competing separate regulation in the building and construction industry. Ultimately this is an issue of equality before the law, which in most civilised societies is accepted as a reasonably compelling argument.

### ***General view on the re-establishment of the ABCC***

4. There is no evidence that the re-establishment of the Australian Building and Construction Commission will have any positive impact on the Building and Construction Industry. The claims of supposed productivity improvement are baseless, as explained in section 4 and there is no defensible hypothesis that the number of days lost to industrial disputes in the industry will shift as a consequence of this reactionary reform.
5. The re-establishment of the Australian Building and Construction Commission, given effect to by the Bill, will however breach international law, provide a platform for government intimidation of unionists and, particularly if accompanied by a *Building Code* in similar form to predecessor guidelines, prohibit workers from negotiating important terms and conditions of employment with their employers. All criticism's we have previously levelled against the Australian Building and Construction Commission remain valid, and are canvassed in our 2009 submission to the Wilcox Consultations (attachment 1).

6. In addition, it is important to appreciate that what is now proposed as the re-establishment of the Australian Building and Construction Commission in fact has a broader scope than is the case with any previous iteration thereof.

## 2. Key concerns regarding the scope of the Bill.

### *Meaning of 'building work'*

7. The definition of 'building work' in clause 6 of the Bill is central to defining the scope and application of the Bill. It is integral to defining key terms in the Bill, such as 'building industry participant', 'building employee', 'building employer', as well as to defining the scope of the Office of the ABC Commissioner's operations, and the application of the Building Code.
8. The ACTU notes that the lack of clarity with respect to the scope of the former BII Act was a significant issue from the Act's inception.<sup>1</sup> It led to ongoing confusion over the boundaries of the Act and the respective responsibilities of the two labour inspectorates. More fundamentally and problematically, it rendered it difficult for people to know with any certainty which laws applied to them. This Bill does not fix, and in fact compounds, this problem.
9. Compared to the BCII Act and the FW (BI) Act, the definition in the Bill extends the scope of the new laws in at least two ways. First, it clarifies beyond doubt that the definition of building work contained in sub-clauses (1)(a) – (e) of clause 6 applies to work to land beneath the water.<sup>2</sup>
10. Second, clause 6(1)(e) extends the definition of 'building work' captures the transport or supply of goods to be used in work covered by paragraphs (1)(a) – (d) directly to building sites (including any resource platform) where that work is being or may be performed.
11. The ACTU is particularly concerned that the extension of the definition of building work in this regard will lead to a misapplication of the legislation to vessels in the offshore oil and gas industry performing work that is not properly characterised as building work.
12. Vessels in these offshore industries predominantly conduct seismic analysis for possible traces of hydrocarbons (Seismic vessels). These vessels are not involved in building work.
13. In addition, vessels that supply Seismic vessels with food, water and fuel, diving support vessels, and vessels that are involved in repositioning of larger vessels are all involved in the offshore oil and gas industry, but again, are not involved in building work.

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<sup>1</sup> See, e.g., the observations of the Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole - the Future of the Construction Industry: Confrontation or Cooperation?* 2004, pp. 53-55.

<sup>2</sup> Clause 6(1), (2) and accompanying note, and (6). This is subject to constitutional limitations and those set out in the *Seas and Submerged Lands Act 1973* and the *Convention on the Law of the Sea*.

14. Furthermore, whilst some vessels may supply vessels involved in construction of, for example, a fixed platform, they are usually also simultaneously providing supplies to a diving vessel, or a seismic vessel or some other vessel that is not involved in building work, and might spend one day in a swing of two weeks or more supplying a vessel involved in building work.
15. Accordingly, in the ACTU's submission, the nature of work of the type of vessels involved in the offshore oil and gas industry as described above does not support an extension of the application of the proposed legislation to them.
16. Objectively determined, such vessels are not performing building work, nor are they properly characterised as working in the construction industry. Whilst they might supply vessels involved in construction, the fleeting manner of the supply does not support the application of the legislation to them.
17. The ACTU has concerns that, because the definition of building work continues to apply to offsite pre-fabrication,<sup>3</sup> the inclusion of clause 6(1)(e) as drafted may bring significant parts of the transport, warehousing and manufacturing industries within scope.
18. We understand the intent of the clause as drafted is to capture the direct transporting or supplying of goods to be used in building work. The second reading speech, for example, notes that this extension has been included so as to capture 'coordinated go-slows' on the supply of materials to large resource construction projects.<sup>4</sup> Similarly, the explanatory memorandum at [12] explains '*This provision was not part of any predecessor Acts, and has been included in the Bill to ensure that the supply and transport of building goods to be used for building work falls within the scope of the Act.*'
19. Notwithstanding our strong objection to the extension per se, we have serious reservations over the potential for this clause to extend the scope of the Bill beyond what is intended.
20. Firstly, the poor (or at best imprecise) drafting of the clause appears to extend the definition of building work into the logistics supply chain. As an example, it is arguable that the new definition extends to any general haulage transport operator delivering to a building site, or to a warehouse storing any building materials where materials are despatched direct to a site.
21. Second, we believe there is the scope for it to be read by the courts so as to cover significant elements of the manufacturing industry. We recognise that the inclusion of manufacturing within the scope of the Bill may not be intentional. Indeed, the explanatory memorandum at [12] explicitly notes in relation to clause 6(1)(e) that '*It is not intended to pick up the manufacture of those goods.*' Nonetheless, it is a well-

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<sup>3</sup> Clause 6(1)(d)(iv).

<sup>4</sup> Second Reading Speech, House of Representatives, 14 November 2013, 16.



established principle of statutory interpretation that the ordinary and plain meaning of a provision as conveyed by its text will prevail. In cases where the statutory provision under consideration is clear and unambiguous and will not lead to a result that is absurd or unreasonable, extrinsic material (including any explanatory memorandum to a Bill) cannot be used to alter the interpretation which a court, without reference to those materials, would place upon the provision.<sup>5</sup> For this reason, we suggest that subclause 6(1)(e) be redrafted so as to make clear on the face of the statute that it does not extend to cover the manufacture of goods.

22. These extensions may be unintentional, but taken together would result in a significant extension of the remit of a restored ABCC into the broader economy on no grounds. The ACTU has consulted with its affiliates in industries affected by this extension (including the Transport Workers' Union, the National Union of Workers, the Maritime Union of Australia and the Australian Manufacturing Workers' Union). Our affiliates have significant membership in these industries and a deep understanding of their operation, and they are equally concerned about these extensions.

### ***Geographical scope***

23. Clause 11 of the Bill provides that the Bill extends to or in relation to any resources platform and certain ships in the exclusive economic zone (EEZ) or in the waters above the continental shelf. The ACTU opposes this extension of the scope of the laws and the jurisdiction of the ABCC.
24. In this regard the ACTU points the Commonwealth to the decisions of the Federal Court in *Allseas Construction SA v Minister for Immigration* [2012] FCA 529 regarding the geographical extension of the Migration Act to vessels in the offshore oil and gas industry, and *Fair Work Ombudsman v Pocomwell Limited (No 2)* [2013] FCA 1139 regarding the geographical extension of the FW Act to vessels in the offshore oil and gas industry.
25. Both of those decisions reveal the jurisdictional complexities facing the Commonwealth when attempting to extend Australian employment regulation to the offshore and highlight the need for a considered approach to the manner in which such regulation is achieved.
26. In the ACTU's submission, the Bills presently under consideration and accompanying Explanatory Memoranda do not deal with these complex issues.

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<sup>5</sup> *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 and *Re Bolton; Ex parte Beane* (1987) 70 ALR 225 at 227-8, *Acts Interpretation Act 1901*, s. 15AB.



**3. Term of Reference (b): “The need or otherwise for a specialist industrial regulator in the building and construction industry”**

27. The ACTU strongly opposes the *Building and Construction Industry (Improving Productivity) Bill 2013* (‘the Bill’) and calls for its rejection.
28. The ACTU regards the existence of special laws and a special inspectorate for the building and construction industry – as they existed between 2005 and 2012 by virtue of the *Building and Construction Industry Improvement Act 2005* (‘BCII Act’) – as a shameful aberration in Australia’s industrial history. The regime operated oppressively and unfairly against workers and constituted a serious breach of Australia’s international obligations. We welcomed, with some reservations, the passage of the *Building and Construction Industry Improvement (Transitional to Fair Work) Act 2012*, which abolished the Australian Building and Construction Commission (‘ABCC’) and renamed, and made significant amendments to, the BCII Act (now known as the *Fair Work (Building Industry) Act 2012* (‘FW (BI) Act’).

**There is no need for special laws and a specialist inspectorate**

29. The ACTU continues to strongly oppose the need for special laws in the building and construction industry. Workers in the building and construction industry should be subject to the same industrial laws as apply to other workers. This is consistent with the fundamental principle of equality of all persons before the law. To subject any group of workers or industry to special more punitive laws is unnecessary and discriminatory.
30. The ACTU does not accept that there are any special or unique features of the building and construction industry that warrant or justify a departure from the standard model of industrial regulation in Australia. We refer the Committee to our analysis rebutting some of the myths concerning the ‘special nature’ of the building and construction industry found in our 2009 submission to the Wilcox Consultations (pp. 5 – 12 of Appendix 1).
31. We further emphasise that it is misleading and incorrect to seek to justify the Bill by reference to any alleged criminal conduct in the building industry.<sup>6</sup> This Bill, as the BCII Act before it, does not deal with or seek to address criminal conduct. It regulates industrial activity and (with the exception of two clauses in

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<sup>6</sup> Second Reading Speech, *Building and Construction (Improving Productivity) Bill 2013*, 14 November 2013.

the Bill that provide for criminal penalties in the case of failure to comply with an examination notice or the disclosure of information obtained under an examination notice)<sup>7</sup> the breach of the Bill's provisions give rise to civil proceedings and civil penalties.

32. There is no need for a specialist statutory regulator for the building and construction industry. The creation of the ABCC in 2005 was the first time in Australian history that an industry-specific industrial inspectorate had been legislated into existence by the Federal Parliament. The existence of such an inspectorate is undesirable and unnecessary. The *Fair Work Act 2009* ('FW Act') constitutes an adequate and appropriate framework for the regulation of industrial relations in Australia, including with respect to promoting and securing compliance with industrial laws. The industrial inspectorate established under the FW Act (the Fair Work Ombudsman) has broad investigatory powers, and has proven to be an active and well-resourced agency that has carried out its functions in an effective and impartial manner. It is for this reason that the ACTU opposed the establishment of the Fair Work Building Industry Inspectorate (FWBC). If, however, a specialist inspectorate is to be maintained, the ACTU believes the current arrangements are superior and preferable to the re-establishment of the ABCC, as proposed by this Bill.
33. The ABCC, as it existed under the former BCII Act, distinguished itself by the aggressive, coercive and biased manner in which it carried out its activities. It focused overwhelmingly on the investigation and prosecution of workers and trade unions, thus failing in its primary obligation as a regulator to enforce the law impartially. It did very little to address the significant and widespread issues in the building industry such as the underpayment or non-payment of wages and entitlements, occupational health and safety issues or sham contracting.

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<sup>7</sup> Clauses 62 and 106 of the Bill respectively.

#### **4. Term of Reference (c): “The potential impact of the bills on productivity in the building and construction industry”**

34. It is alleged that the introduction of the Bill will improve productivity. This is a key rationale for the Bill's introduction – the claim is made in the title of the Bill itself. Yet there is no credible evidence that the existence of the ABCC led to improved productivity in the construction industry while it was in existence, and nor is there evidence that the introduction of this Bill will improve productivity. Claims about the allegedly productivity-enhancing effects of the ABCC are based on flawed and discredited analysis.

##### ***The alleged nine per cent productivity improvement***

35. In his second reading speech to the Bill, Mr Pyne stated the following, in reference to the period in which the ABCC was in operation:

*‘A 2013 Independent Economics report on the state of the sector during this period found that building and construction industry productivity grew by more than nine per cent.’*

36. The report to which Mr Pyne referred contains no such finding. The report employed a Computable General Equilibrium (CGE) model of the Australian economy to calculate the macroeconomic effects of increased productivity in the construction sector. It *assumed* that productivity in the construction industry was 9.4 per cent higher than it would have been in the absence of the ABCC. This is not an estimate generated by the CGE model – it is an assumption used in the modelling process, as is made clear on page 28 of the report. It is not accurate to assert, as the Minister did, that the report in question found that productivity in the industry grew by more than nine per cent as a result of the ABCC's existence.

37. The assumption that the ABCC lifted the industry's productivity by 9.4 per cent is drawn from the 2007 report by Independent Economics, formerly known as EconTech. The Hon. Murray Wilcox QC, in his examination of the ABCC, found that “the 2007 EconTech report is deeply flawed. It ought to be totally disregarded.”<sup>8</sup> He concluded as follows:

*‘I am not persuaded that the BCII Act, and the work of the ABCC, has lifted labour productivity in the industry by 9.4%, as claimed by EconTech in 2007; or 10%, as assessed by JHG. As Professor Peetz’*

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<sup>8</sup> The Hon M Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry: Final Report*, Commonwealth of Australia, Canberra, 2009, p.46.

*submission demonstrated, increases of this magnitude are irreconcilable with the ABS National Accounts data.*<sup>9</sup>

38. By 2010, the ABCC Commissioner Leigh Johns confirmed that the EconTech reports had been removed from the ABCC's website.<sup>10</sup> Politifact Australia rated the claim that the reinstatement of the ABCC would substantially add to productivity growth as "mostly false."<sup>11</sup> More recently, in a Digest concerning the Bill, the Parliamentary Library observed:

*"There is little other statistical evidence as to the impact of the ABCC. Justice Wilcox concluded that the EconTech report was deeply flawed and should be disregarded, but noted that in response to his request for evidence as to the impact of the ABCC most submissions merely reproduced this work. It has remained in wide circulation, and indeed EconTech has build on it despite having admitted that it was wrong."*<sup>12</sup>

39. Despite being widely discredited, this same claim regarding productivity is used as a modelling assumption in the 2013 Independent Economics report. It should be disregarded.

#### ***The Independent Economics model of labour productivity growth***

40. The 2013 Independent Economics report and its predecessors have been widely cited by proponents of the reinstatement of the ABCC, including by the Minister in his second reading speech. The report is deeply flawed. It makes claims regarding the contribution of the ABCC to improved productivity in the industry that are not supported by the data. These claims are examined in detail below.

41. A central chart in the report is chart 2.1 on page 15, reproduced as Figure 1.

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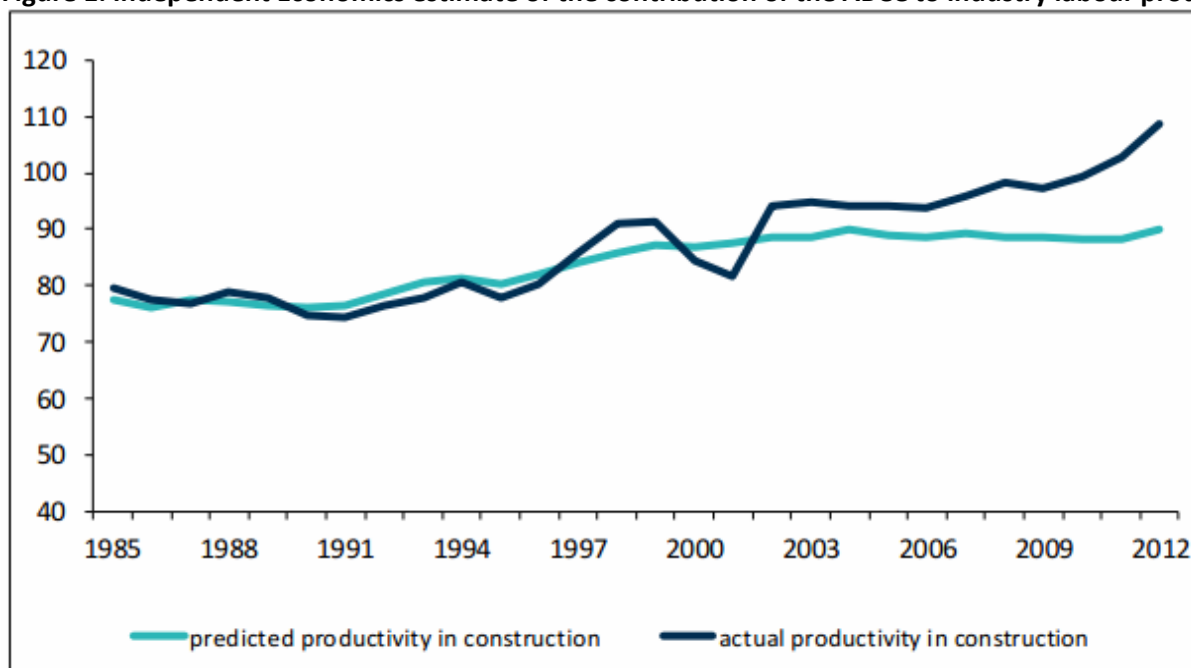
<sup>9</sup> Ibid., p.57.

<sup>10</sup> Official Committee Hansard, Senate Education, Employment and Workplace Relations Legislation Committee, Estimates, Wednesday 20 October 2010.

<sup>11</sup> Martin, P. 2013, 'Is Tony Abbott's 'cop on the beat' worth \$6 billion?', *The Age*, August 28.

<sup>12</sup> *Bills Digest No.34, 2013-14, 23 January 2014.*

Figure 1: Independent Economics estimate of the contribution of the ABCC to industry labour productivity



Source: Independent Economics estimates based on ABS data

42. This chart is the basis on which the report claims that productivity in the industry was 21.1 per cent higher in 2011-12 than it would have been if the ABCC had not been in place. Independent Economics explains the chart as follows:

*‘The historical productivity performance of the construction industry is assessed using data for the period prior to the establishment of the Taskforce/ABCC (from 1985 to 2002). For this period, regression analysis was used to establish the trend in productivity in the construction industry, relative to the trend in productivity for the economy as a whole.’<sup>13</sup>*

43. The model used to generate the ‘predicted productivity’ line is not made explicit in the report. Nevertheless, the ACTU has replicated the report’s analysis. The report’s approach appears to be to estimate a regression model using data for the period 1985-86 to 2001-02, with the level of construction industry productivity as the dependent variable and the level of productivity for the total economy as the explanatory variable:

$$LP_{cons_t} = \alpha + \beta LP_{total_t} + e_t \quad \text{(Equation 1)}$$

Where  $LP_{cons_t}$  = construction gross value added per hour worked in year ‘t’

$LP_{total_t}$  = GDP per hour worked

<sup>13</sup> Independent Economics 2013, ‘Economic Analysis of Building and Construction Industry Productivity: 2013 Update’, Report for Master Builders Australia, 26 August, p.15.

e = the error term

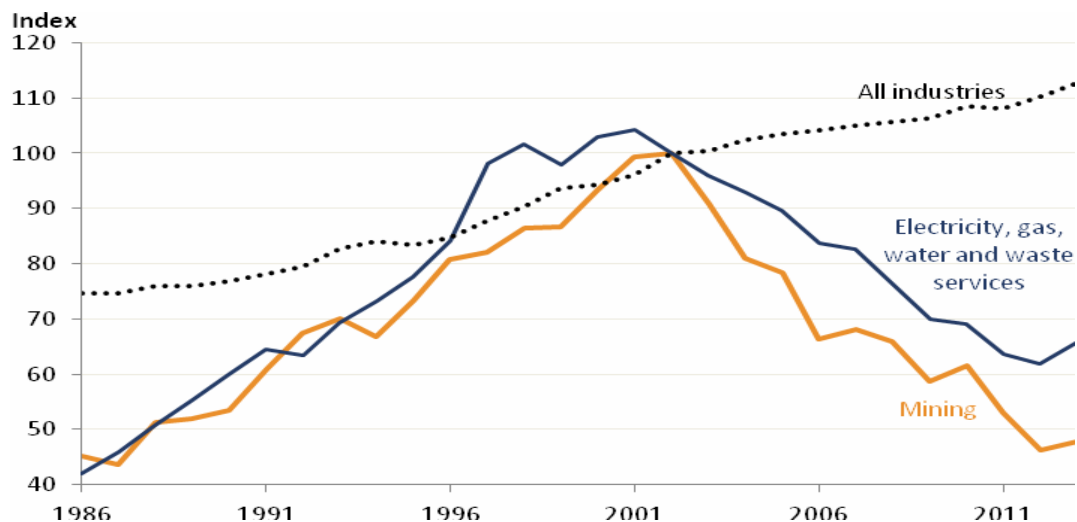
44. Independent Economics use the estimated coefficients from this regression to calculate what the level of labour productivity in the construction industry would have been in each year in the ABCC period if the relationship between construction productivity and total economy productivity had remained unchanged from the earlier period. This is shown in the chart as 'predicted productivity in construction'. It compares this to the actual level of labour productivity in the industry. The difference between the two lines is ascribed to the influence of the ABCC.
45. The approach is deeply flawed. Construction industry productivity grew faster, relative to the all industries average, in the ABCC period than it had done in the earlier period not because construction industry productivity grew particularly rapidly, but because the all industries average growth rate fell.
46. Around the time the ABCC came into operation, the Australian economy began experiencing the largest increase in its terms of trade in the nation's history, driven by a sharp appreciation in commodity prices. This has had a negative effect on Australia's measured productivity outcomes, as has been widely documented. This occurs because the higher prices mean firms find it profitable to extract lower grade and more difficult resources (which take more labour and capital per unit), and because new projects use up inputs for several years before generating output.<sup>14</sup> Investment in utilities (in the form of electricity generation and transmission capacity and water desalination facilities) has also detracted from productivity growth. The scale of the fall in measured labour productivity in these two industries is apparent in Figure 2.

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<sup>14</sup> See, for example, [ACTU 2011](#); [Eslake 2011](#); [Dolman 2009](#); [PC 2010](#); [D'Arcy and Gustafsson 2012](#); [Richardson and Denniss 2011](#).



**Figure 1: Level of labour productivity in utilities, mining, and the total economy  
(Index: 2001-02=100)**



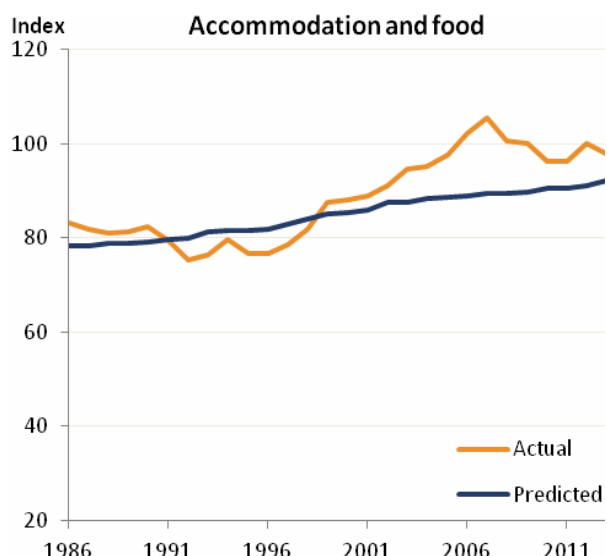
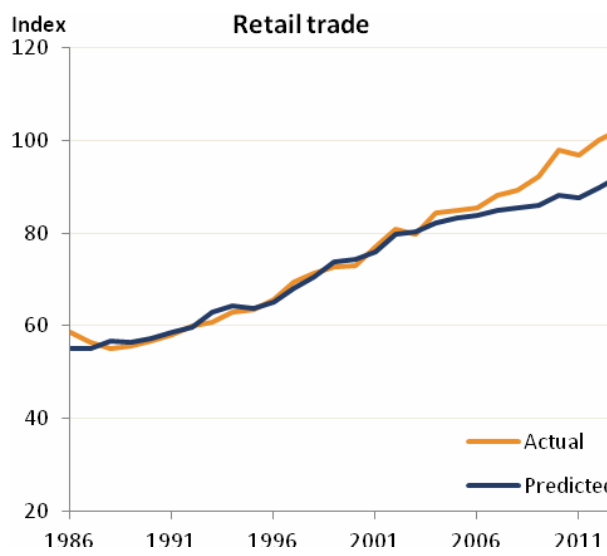
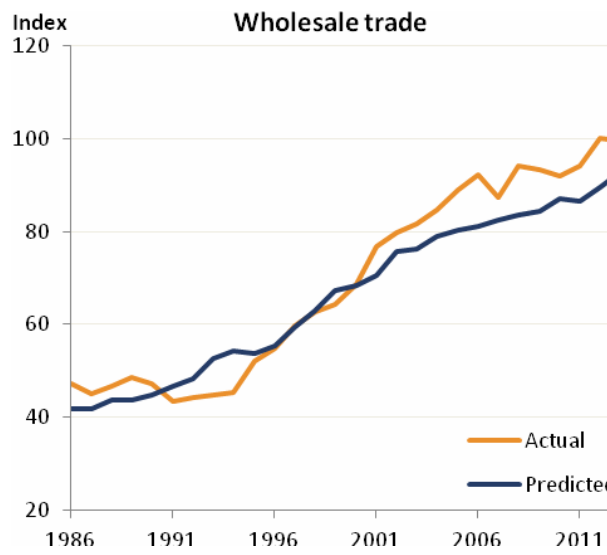
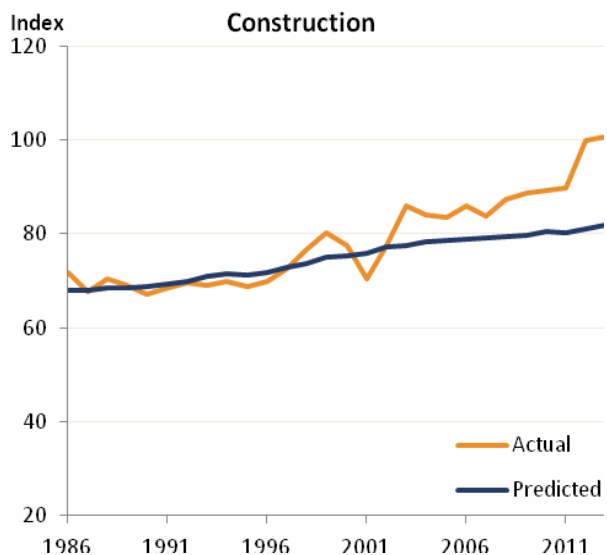
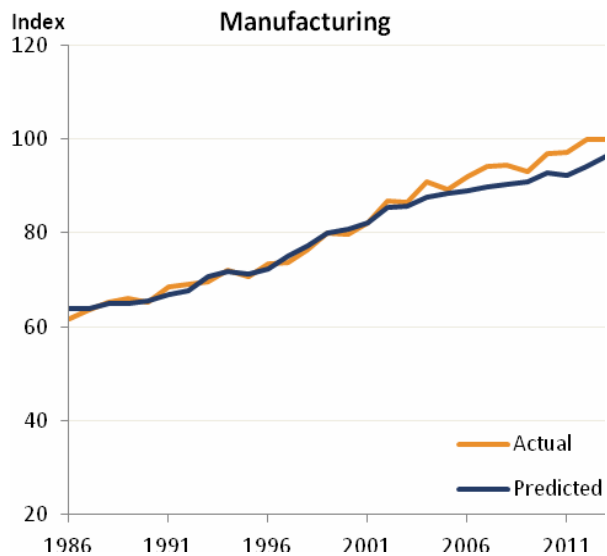
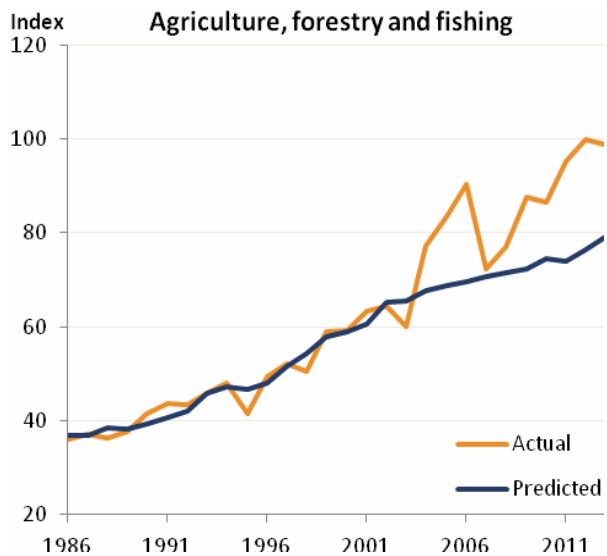
Source: ACTU calculations based on ABS 5204.

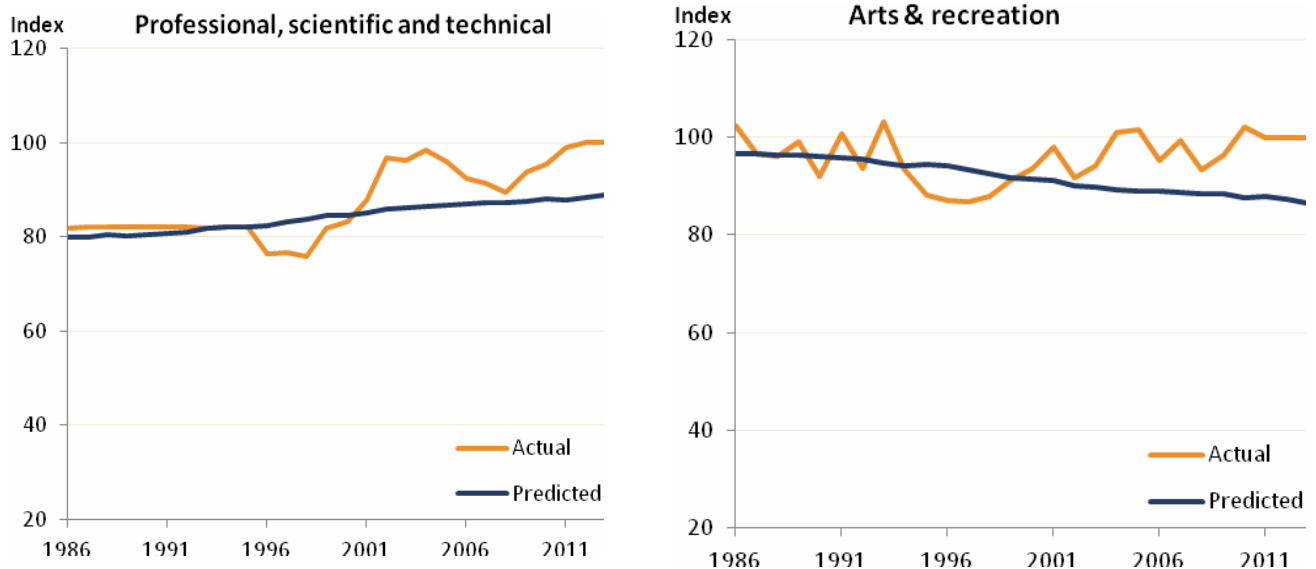
47. The special factors in these two industries have the effect of dragging down the economy-wide level of measured labour productivity (GDP per hour worked) relative to where it otherwise would have been. This affects the relationship between other industries' productivity growth and the total economy figure, which is the metric used by Independent Economics to assess the effect of the ABCC.

48. For example, consider the Retail Trade industry. Between the period 1985-86 and 2001-02, labour productivity in the industry rose by 37.7%, quite close to the economy wide average of 34%. If you projected retail industry productivity for the period after 2002 based on this relationship in the earlier period, you would expect that retail industry productivity would grow approximately in line with the total economy figure. However, in the period since 20002 the mining and utilities industries have dragged down the total economy average rate of productivity growth without affecting the retail industry figure. As a result, the retail industry has 'outperformed' relative to what would be expected based on a regression of the sort used by Independent Economics. Retail productivity rose by 26.5% between 2001-02 and 2012-13, while the total economy figure rose by 12.7%.

49. This has occurred in most industries – 12 out of the 19 industries 'outperformed' relative to the labour productivity level that would be predicted for the industry based on a regression of the sort used by Independent Economics. Industries as varied as agriculture, accommodation and food, retail, manufacturing, and construction, experienced a productivity 'outperformance' after 2002. This is not necessarily due to any factor related to these industries themselves, but is rather due to the decline in the rate of productivity growth in the total economy, which was in large part due to mining and utilities. We have conducted a regression analysis of each industry using the methodology employed by Independent Economics. The results for eight industries are illustrated in the figures below. You can see that our

estimate of the 'predicted' productivity in construction very closely resembles that of Independent Economics, which suggests we have successfully replicated their unspecified methodology.





Source: Actual productivity growth figures from ABS 5204, table 15. 'Predicted' productivity growth figures based on estimation of the model  $LP_{i,t} = \alpha + \beta LP_{total,t} + e_t$  for each industry 'i', using data for the period 1985-86 to 2001-02, as per Equation 1.

50. The approach taken by Independent Economics would ascribe the gap between the actual level of labour productivity and the 'predicted' level to the presence of the ABCC – in agriculture, forestry and fishing; in manufacturing; in wholesale and retail trade; in accommodation and food; in arts and recreation; and in professional, scientific and technical services. This is obviously spurious, given the evidence above.

51. For it to be accepted that the outperformance of the construction industry is due to the ABCC, it must be accepted either:

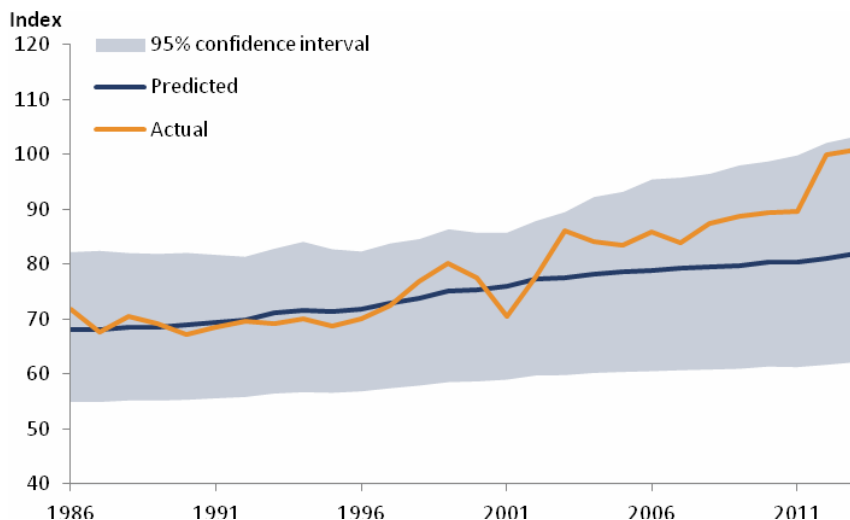
- that the ABCC exerted an influence on productivity in a range of industries other than construction; or
- that some economy-wide factor like mining affected the relationship between predicted and actual productivity in all industries other than construction; or
- that the ABCC lifted productivity in construction while some other factor served to lift productivity relative to its predicted level in a majority of other industries at exactly the same time while not affecting construction.

52. None of these is plausible. The simplistic assertion that the gap between 'predicted' and 'actual' productivity in Independent Economics' chart 2.1 can be ascribed solely to the ABCC should be dismissed. The claim that labour productivity in the industry is 21.1% higher than it otherwise would have been should therefore be disregarded.

53. Using our replication of Independent Economics' chart 2.1, we have constructed 95% confidence intervals around the 'predicted' level of labour productivity in the construction industry. These intervals are shown

in Figure 3. It is apparent that the actual level of construction industry labour productivity for each year lies within the 95% confidence interval.

**Figure 2: Replication of Independent Economics' Chart 2.1 with 95% confidence intervals**



Source: Actual productivity growth figures from ABS 5204, table 15. 'Predicted' productivity growth figures based on estimation of Equation 1. The intervals are based on an estimated  $\beta$  coefficient of 0.4, plus or minus 0.19.

54. Based on the above, the difference between the actual and predicted levels of labour productivity in construction is not statistically distinguishable from zero. That is, even if it were accepted that the difference between actual and predicted productivity is due to the ABCC (which we have demonstrated is spurious), then it would still not be possible to conclude that there is a statistically meaningful difference between the two.

55. We have also expanded Independent Economics' analysis by adding an additional explanatory variable into their model. The level of gross value added per hour worked in the mining industry is added to the model. This is shown below as equation 2.

$$LP_{cons_t} = \alpha + \beta_1 LP_{total_t} + \beta_2 LP_{mining_t} + e_t \quad \text{(Equation 2)}$$

Where  $LP_{cons_t}$  = construction industry gross value added per hour worked in year 't'

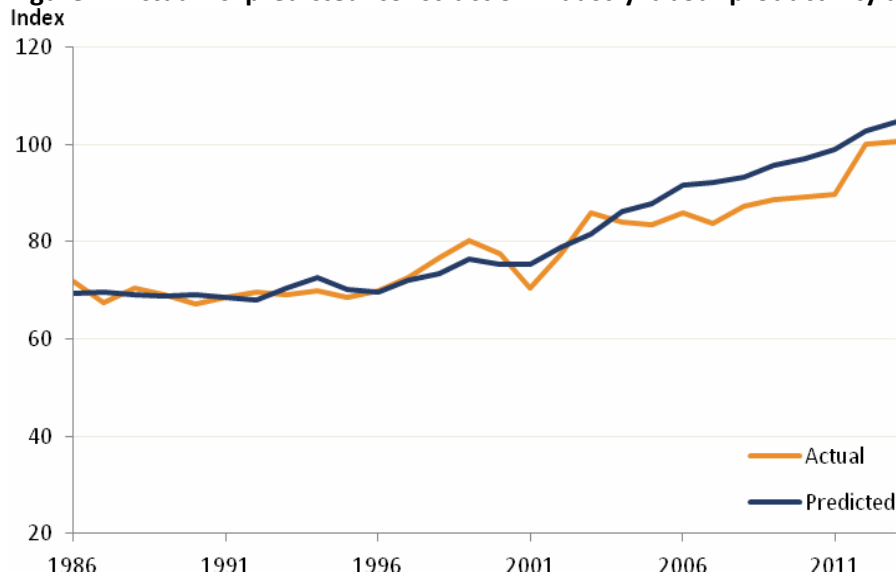
$LP_{total_t}$  = GDP per hour worked

$LP_{mining_t}$  = mining industry gross value added per hour worked

e = the error term

56. When this model is estimated, we find that the actual level of labour productivity in the construction industry is slightly lower than would have been expected based on the historical trend in the period 1985-86 to 2001-02. This is shown in Figure 4. This adds weight to our contention that the improvement in construction industry productivity relative to its modelled level is not due to factors in the industry itself, but rather mining-related effects on the economy-wide average level of productivity.

**Figure 4: Actual vs 'predicted' construction industry labour productivity using Equation 2**



Source: Actual productivity growth figures from ABS 5204, table 15. 'Predicted' productivity growth figures based on estimation of Equation 2.

57. The assertions in Independent Economics' 2013 report are based on a flawed methodology. This methodology ascribes all the difference between actual and 'predicted' labour productivity in construction over the period 2002-2012 to the presence of the ABCC. This approach ignores other factors at work in the economy. It ignores the fact that the majority of industries experienced a productivity 'outperformance' over the same period, measured in the same way. It ignores the fact that the difference between the actual and 'predicted' levels of construction productivity is not statistically significant. The 'over performance' disappears when mining industry productivity is added to the model as an additional explanatory variable.

58. Claims about the effect of the Bill on productivity that are based on estimates of the ABCC's effect on productivity calculated using this methodology should not be accepted as factual.

**5. Term of Reference (d): “Whether the bills are consistent with Australia's obligations under international law”**

59. Australia is subject to international obligations in the field of human rights under customary international law and as a result of ratification of international legal instruments. Failure of Australia to abide by its obligations to respect human rights (which include a number of basic workers' rights) has significant implications for the protection and promotion of human rights in Australia and Australia's reputation internationally.

60. The former BCII Act – upon which this Bill is explicitly based<sup>15</sup> - was found repeatedly and unequivocally by the UN's International Labour Organisation (ILO) to constitute a serious breach of Australia's obligations both as a member-state and as a signatory to specific conventions including the *Freedom of Association and Protection of the Right to Organise Convention, 1947 (No. 87)*, the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* and the *Labour Inspection Convention, 1947 (No. 81)*.

61. The following features of the BCII Act were found by the ILO supervisory bodies (the tripartite Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations) to contravene Australia's international obligations:

- (i) Those provisions which rendered a wide range of industrial action 'unlawful';
- (ii) The imposition of penalties and sanctions upon workers and unions that engage in 'unlawful industrial action' that were significantly higher than those imposed by the *Workplace Relations Act 1996*;
- (iii) Provisions within the Act that rendered project agreements unenforceable;
- (iv) Provisions of the National Code of Practice for the Construction Industry and the associated Implementation Guidelines (as they then existed) which sought to promote, through the availability of Commonwealth funding, restrictions on freedom of association and collective bargaining;
- (v) The 'expansive' monitoring, investigatory and enforcement powers of the ABCC which, according to the ILO's Committee on Freedom of Association, '... could give rise to serious interference in the internal affairs of trade unions';
- (vi) the absence of any provision within the Act to ensure that any penalties imposed under its provisions were proportional to the offence committed;<sup>16</sup> and

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<sup>15</sup> Second Reading Speech, *Building and Construction (Improving Productivity) Bill 2013*, 14 November 2013.

<sup>16</sup> ILO: Committee on Freedom of Association, *Case No 2326 (Australia)*: Report No. 338, November 2005; Report No. 342, June 2006; Report No. 348, November 2007; and Report No 353, March 2009; i ILO: *Report of the Committee of Experts on the Application of*

(vii) the ABCC's focus on investigating, examining and prosecuting workers and trade union officials.<sup>17</sup>

62. The majority of the provisions in the BCII Act which were the subject of criticism by the ILO are reproduced in the current Bill. It is clear, therefore, that without significant amendment, passage of this Bill will take Australia significantly further from compliance with Australia's obligations under international law. The ACTU submits that this is a matter that the Government, and the Australian Parliament, should consider of significant import.
63. Finally, with respect to Australia's international obligations, the ACTU strongly objects to the proposition in the Statement of Compatibility with Human Rights (attached to the Explanatory Memorandum) to the effect that the Bill is compatible with the human rights and freedoms recognised or declared in international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.
64. As the Statement of Compatibility recognises, the statute has far-ranging and serious implications on human rights. This includes, but is not limited to, implications for rights to freedom of association under article 22 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 8 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), as well as the right to peaceful assembly in article 21 of the ICCPR and rights to freedom of expression under article 19(2) of the ICCPR. We respectfully refer to and endorse the comments of the MUA in this regard. Further, while omitted from the Statement of Compatibility's summary of the obligations in article 8(1) of the ICESCR,<sup>18</sup> it is also important to note that this sub-article of the ICESCR explicitly protects the right to strike.
65. We note the failure of the Compatibility statement, in the context of its discussion of the implications of the Bill for freedom of association as protected in article 22 of the ICCPR and article 8 of the ICESCR, to identify or engage with comments made by the Committee on Economic, Social and Cultural Rights (the UN Committee of experts tasked with reviewing UN member-states compliance with the ICESCR)

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*Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 95th Session, Geneva, 2006; p. 43; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 96th Session, Geneva, 2007, p. 43 and p.47; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 97th Session, Geneva, 2008, pp.47-48 and p.54; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 98th Session, Geneva, 2009, pp. 54-55 and p. 58; ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 99th Session, Geneva, 2010, p.58 and p. 60; and ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 101st Session, Geneva, 2012, pp. 60-61 and p. 63.

<sup>17</sup> ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 100th Session, Geneva, 2011, p. 500; and ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 99th Session, Geneva, 2010, p. 490.

<sup>18</sup> Statement of Compatibility with Human Rights, p. 51.

specifically in relation to the BCII Act. In its Concluding Observations on Australia's Fourth Periodic Report under the ICESCR in 2009, the Committee stated:

*'The Committee is concerned that provisions of the Building and Construction Industry Improvement Act 2005 seriously affect freedom of association of building and construction workers, by imposing significant penalties for industrial actions, including six months of incarceration. The Committee is also concerned that before workers can lawfully take industrial action at least 50 per cent of employees must vote in a secret ballot and a majority must vote in favour of taking the industrial action which unduly restricts the right to strike, as laid down in article 8 of the Covenant and ILO Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise.(art. 8).*

***The Committee recommends that the State party continue its efforts to improve the realization of workers' rights under the Covenant. It should remove, in law and in practice, obstacles and restrictions to the right to strike, which are inconsistent with the provisions of article 8 of the Covenant and ILO Convention No. 87 . In particular, the Committee recommends that the State party abrogate the provisions of the Building and Construction Industry Improvement Act 2005 that imposes penalties, including six months of incarceration, for industrial action ....<sup>19</sup>*** [emphasis in original].

66. In light of this Observation, as well as the consistent and unequivocal criticism of the former BCII Act by the ILO supervisory bodies (outlined above), we find the proposition in the Statement of Compatibility with Human Rights that 'the Bill will enhance workers' right to freedom of association' to be highly objectionable.<sup>20</sup>

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<sup>19</sup> Committee on Economic, Social and Cultural Rights, Forty-Second Session, Geneva, 4 – 22 May 2009 at [19].

<sup>20</sup> Statement of Compatibility with Human Rights, p. 52.



**6. Term of reference (e): “The potential impact of the bills on employees, employers, employer bodies, trade and labour councils, unions and union members”**

67. The Bill will have significant impacts on employees and their representatives because it will subject them different laws and a different enforcement mechanism than applies to their counterparts in all other industries. The investigative and enforcement powers are commented on in chapter 7 of this submission. Our comments below are directed to the industry specific laws introduced by the Bill.

**Industrial action**

68. The ACTU strongly opposes those clauses in the Bill that have the effect of modifying (and creating more stringent) rules concerning the taking of industrial action by workers in the building and construction industry. These include:

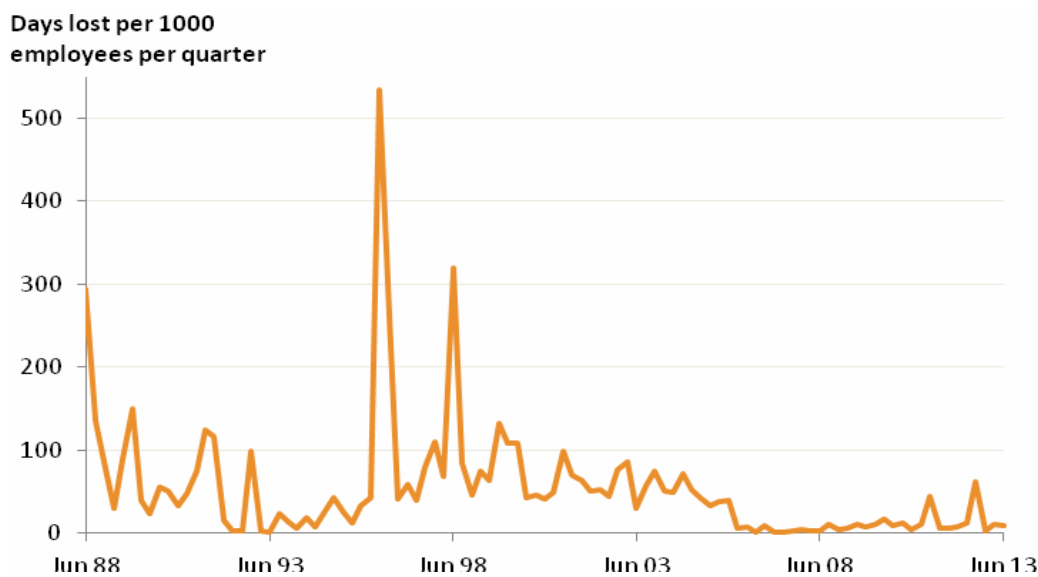
- (i) Clause 8 of the Bill which modifies the definition of ‘protected industrial action’ within the meaning of the FW Act so as to exclude industrial action if it is engaged in concert with, or if the organisers include, persons other than an employee or an employee organisation, its members or an officer, that are bargaining representatives for the proposed enterprise agreement;
- (ii) Clauses 47 and 48, which introduce a new and wide prohibition on persons engaging in or organising ‘unlawful pickets’, defined to include action that is industrially motivated and restricts persons from accessing or leaving a building site (and ancillary sites as defined in clause 9), has the purpose of doing so, or ‘would reasonably be expected to intimidate’ such persons;
- (iii) Clause 48 of the Bill which enables *any person* to apply to a court for an injunction against unlawful industrial action or an unlawful picket and expands the circumstances in which the general discretionary power to act would not ordinarily be exercised; and
- (iv) Clause 49 of the Bill, which modifies the rules concerning payment relating to periods of industrial action found in Division 9 of Part 3-3 of the FW Act so that the rules only apply to the more narrow definition of ‘protected industrial action’ provided in the Bill.

69. The *Fair Work Act 2009* already comprehensively regulates, and imposes significant restrictions on, the ability of workers and unions to take protected industrial action. It also contains a number of provisions through which employers may obtain relief against action taken outside the protected action regime. These additional rules are unnecessary and unjustifiable. There are also remedies available under other

legislation such as the secondary boycott provisions of the *Australian Competition and Consumer Act 2010* (Cth), and at common law.

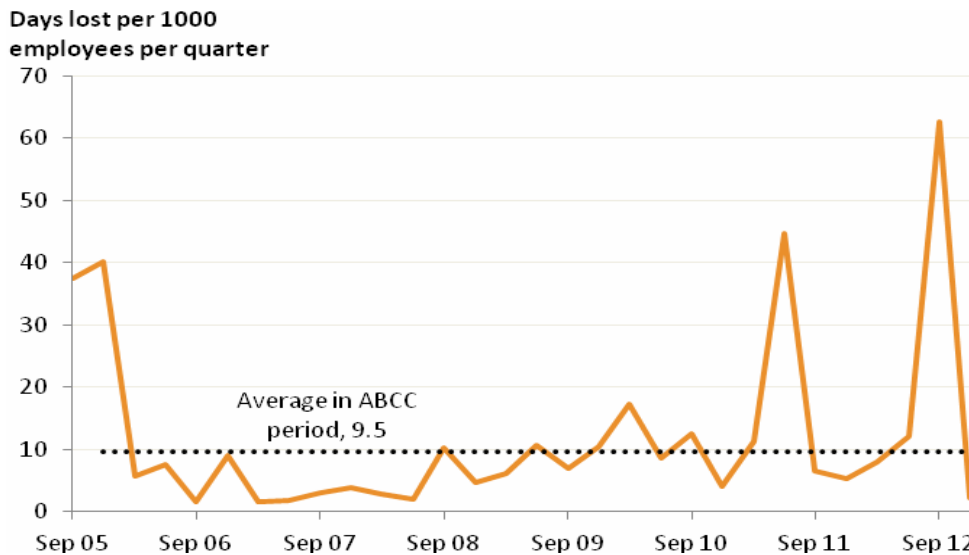
70. In addition, there is no evidence to suggest that industrial disputation in the building industry is at historically high levels or that the rate of disputation in the industry has materially increased in the period since the ABCC was abolished. Indeed, the rate of industrial disputation in the industry remains extremely low relative to its historic levels.

**Figure 5: Construction industry industrial disputes**



Source: ABS 6321.0.55.001

71. During the ABCC's operation, there was an average of 9.5 working days lost to disputes per 1000 employees per quarter in the construction industry. In the four quarters after the abolition of the ABCC, the rate of disputation in the industry has been below the ABCC-era average twice (in December 2012 and June 2013) and above it twice (in September 2012 and March 2013). Further, it is not possible to infer from the data that any proportion of the industrial action which occurred during this period was not lawful protected industrial action. Any suggestion that, in the absence of this Bill, the number of days lost to industrial disputes in the industry will increase, is without any credible foundation.



### Coercion provisions

72. The ACTU notes that the general protections provisions in Chapter 3, Part 3-1 of the FW Act already prohibit a range of actions in relation to the taking of adverse action and coercion or attempted coercion. There is no justification for Chapter 6 of the Bill.

73. Similar provisions were contained in Chapter 6 of the BCII Act. After analysis of those provisions as against the provisions of the *Fair Work Bill 2008*, the Hon Mr Wilcox QC concluded in his report that “there is nothing in Chapter 6 of the BCII Act that needs to be carried forward into the new legislation”<sup>21</sup> and that the provisions of the *Fair Work Bill* governing related matters should “..apply, unchanged, to participants in the Building and Construction Industry”<sup>22</sup>.

74. We are particularly concerned that clause 54 of the Bill is expressed to operate to the exclusion of provisions in the FW Act. This could conceivably operate to allow conduct to occur which would otherwise be unlawful, and deprives disputants of access to the dispute resolution functions of the Fair Work Commission under Subdivision B of Division 8 of Part 3-1 of the FW Act.

### Project agreements

75. The ACTU does not believe there is any justification for the re-introduction of clause 59 of the Bill, which renders project agreements unenforceable. We note that this clause constitutes a breach of the principle of free and voluntary collective bargaining embodied in Article 4 of the *Right to Organise and Collective*

<sup>21</sup> The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry – Final Report*, Commonwealth of Australia, Canberra, 2009, p. 30.

<sup>22</sup> *Ibid.*

*Bargaining Convention, 1949 (No. 98).*<sup>23</sup> This principle includes placing no restrictions on the freedom of parties to choose the level at which they bargain.<sup>24</sup>

76. We note also that, as protected action is not in any event available in support of the agreements which the provision targets, it cannot be assumed that this provision will result in a change in the number of days lost to industrial action in the industry.

## Penalties

77. The ACTU strongly opposes the provision within the Bill of maximum penalties in relation to the taking of unlawful industrial action, unlawful picketing, payments relating to periods of industrial action and coercion offences that far exceed those applicable to the same or similar provisions provided for in the FW Act.<sup>25</sup> There is no justification for imposing higher penalties on workers simply because of the industry in which they work. We do not believe there is any basis to the proposition –advanced in the second reading speech to the Bill – that ‘[h]igher penalties are justified in an industry that is so critical to Australia’s economic performance.’ There are a number of other major industries in Australia that are of great significance to our economy, in which employers and workers are subject to the FW Act. We also note that the FW Act contains a range of provisions which enable protected industrial action to be terminated on certain grounds where deemed necessary, including where the action is causing significant harm to the economy.

78. We further note that the Hon Mr Wilcox QC, in his 2009 review of the building and construction laws, recommended that there be no differences between building and other employees in relation to penalties. He stressed:

*‘There is a substantial difference in penalties, between the BCII Act and Fair Work Bill. However, by enacting that Bill, Parliament has recently determined the maximum penalties appropriate for particular contraventions. There is no justification for selecting a different maximum penalty, for the same contravention, simply because the offender is in a particular industry. Of course, both the circumstances of the contravention and the offender’s previous contraventions (if any) will be taken into account by the court in determining the actual penalty in the particular case; but that will be so regardless of the offender’s industry.’<sup>26</sup>*

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<sup>23</sup> Section 64 of the BCII Act, upon which this clause was presumably modelled, was found by the Committee on Freedom of Association and the Committee of Experts to contravene Australia’s obligations under Convention No. 98.

<sup>24</sup> ILO, *General Survey on Freedom of Association and Collective Bargaining (1994)*, at [249]

<sup>25</sup> These are ‘Grade A civil remedy provisions’ under the Bill: s.46, s.47, s.49 and Chapter 6 respectively.

<sup>26</sup> The Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry – Final Report*, Commonwealth of Australia, Canberra, 2009, p. 3.

79. With the maximum penalty for a 'Grade A' civil remedy provision at 200 penalty units for an individual and 1000 penalty units for a body corporate (currently \$34,000 and \$170,000 respectively), these are significantly higher than the maximum fines under the FW Act and are grossly disproportionate to the public harm (if any) occasioned by the taking of unprotected industrial action. The level of penalties proposed in the Bill are at around the level associated with people smuggling,<sup>27</sup> unauthorised mining operations in the Antarctic,<sup>28</sup> carrying out electrical work without the requisite qualification/license,<sup>29</sup> and sex offenders loitering around schools.<sup>30</sup>

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<sup>27</sup> *Criminal Code*, Division 73.

<sup>28</sup> *Antarctic Treaty (Environment Protection) Act 1980*, s.19B.

<sup>29</sup> *Home Building Act 1989* (NSW), s. 14.

<sup>30</sup> *Crimes Act 1958* (Vic), s.60B(2A)(b).

**7. Terms of Reference (f) and (g):**

**“The extreme and heavy-handed proposed powers of the Australian Building and Construction Commission, including coercive powers, conduct of compulsory interviews, and imprisonment for those who do not co-operate”**

–and–

**“The provisions of the bills relating to requirements to provide information to the Australian Building and Construction Commission during interviews including provisions that interviewees have no right to silence”**

80. The ACTU strongly opposes the re-introduction in Chapter 7 of the Bill of coercive powers exercisable by the ABCC in a similar form to that existing under the former BCII Act. Under clause 61 of the Bill, the ABC Commissioner is empowered to require any person to provide information or documents in relation to an investigation of a suspected contravention of the Bill or a designated building law, or to compulsorily interrogate any person who may have such information or documents. A person must comply with an examination notice, on pain of six month's imprisonment.<sup>31</sup>
81. Coercive information gathering powers have no place in the enforcement of industrial laws. These powers impinge upon the rights of individuals, including the right to protection of property and privacy, the right to silence, and statutory rights to the protection of personal information. These types of coercive powers are similar to those available in connection with the examination of suspected terrorists, save that compulsory interrogation of suspected terrorists requires a warrant to be issued by a Federal Judge or Magistrate,<sup>32</sup> whereas the ABCC under this Bill may issue its own.<sup>33</sup>
82. These extraordinary powers are not used to investigate allegations of criminal behaviour, but rather they are used to investigate whether workplace laws have been breached. The public interest favours keeping these types of powers out of the industrial arena to ensure that, insofar as the powers are directed towards workers (as they have been overwhelmingly in Australia), they do not impinge upon the exercise of industrial rights, like the right to associate, organise and take collective action.

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<sup>31</sup> Clause 62.

<sup>32</sup> *Australian Security Intelligence Organisation Act 1979*, Part 3, Division 3.

<sup>33</sup> Clause 61.

83. We note that the Minister, in his submission to this inquiry, has sought to colour the re-introduction of these coercive powers as unexceptional, on the basis of similar powers being available to other agencies, such as the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission, the Australian Taxation Office, Centrelink and Medicare. The obvious and critical difference of course is that each of those agencies is the monopoly regulator under a legislative scheme whereas the Bill marks an intrusion into an already regulated area. Furthermore:

- a. Under the *Competition and Consumer Act* 2010, ACCC inspectors are only able to utilise coercive powers to examine on oath where they reasonably believe that goods, services or their misuse poses a risk of injury<sup>34</sup>. The powers do not exist in respect of the whole of the conduct regulated by the legislation. Nor is non compliance with those powers (or powers to ask questions after an authorised entry<sup>35</sup>) subject to imprisonment.
- b. The Australian Prudential Regulation Authority's powers under section 61 of the *Banking Act* 1959 do not explicitly abrogate the right to silence. Its powers (and those of Medicare, the Commissioner of Taxation and ASIC) under the *Superannuation Industry (Supervision) Act* 1993<sup>36</sup> and the *Retirement Savings Accounts Act* 1997<sup>37</sup> to require a person to attend an examination are not punishable by imprisonment for non compliance.
- c. Failure to comply with a requirement by the Australian Securities and Investment Commission to attend an examination under the *Australian Securities and Investment Commission Act* 2001 is only offence where the non compliance is intentional, reckless, and without reasonable excuse<sup>38</sup>.
- d. The requirement to attend for an examination before the Commissioner of Taxation<sup>39</sup> is clearly a provision that is central to the protection of Commonwealth funds. It is an offence to not comply with such a requirement, however imprisonment is not available for a first offence and the financial penalty for a first offence is \$3,400<sup>40</sup>.
- e. The powers afforded to the *Social Security (Administration Act)* 1999 to compel persons to attend examinations<sup>41</sup> are also clearly directed to the protection of multi billion dollar Commonwealth programs from fraud. It is an offence to not comply with such requirements, however no offence is committed where there is a reasonable excuse<sup>42</sup>.

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<sup>34</sup> Section 133D.

<sup>35</sup> *Ibid.*, sections 135-135C.

<sup>36</sup> Sections 276-289

<sup>37</sup> Sections 106-119.

<sup>38</sup> Section 63

<sup>39</sup> *Income Tax Assessment Act* 1936, section 264.

<sup>40</sup> *Tax Administration Act* 1953, section 8E.

<sup>41</sup> Sections 192, 196(4)

<sup>42</sup> Section 197.

- f. Each of the above powers are ordinarily exercised in association with suspected non-compliance by a person (e.g. a taxpayer, a registered corporation, a welfare recipient) with their obligations to the Commonwealth that are the incident of their legal relationship with the Commonwealth. The powers in the Bill are intended to be exercised to as a means of interference in relationships to which the Commonwealth is not a party.

84. While maintaining our strong objection to the retention of coercive information gathering powers in this context, the ACTU supported the introduction through the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* of safeguards surrounding the use of these powers. We strongly oppose the removal of some of these critical safeguards through the Bill. These include:

- (i) the requirement for the inspectorate to make an application for an examination notice to a Presidential Member of the Administrative Appeals Tribunal;<sup>43</sup>
- (ii) the requirement for the presidential member to be satisfied that a case has been made out for the use of the coercive powers, having regard to a number of factors;<sup>44</sup>
- (iii) the capacity under the FWBI Act for certain stakeholders to make an application to an Independent Assessor to have such compulsory powers 'switched off' on particular building projects. The Independent Assessor must not switch off compulsory powers at a particular building project unless the Independent Assessor is satisfied that it would be appropriate to do so having regard to the objects of the FWBI Act and the public interest;<sup>45</sup>
- (iv) the prohibition on the Director requiring a person attending an examination to enter into a confidentiality undertaking in relation to the examination;<sup>46</sup>
- (v) the sunseting on the use of coercive powers after 3 years, with a decision whether to extend those powers to be made at that time<sup>47</sup>; and
- (vi) the removal of the provisions for the payment of legal expenses incurred as a result of attending a compulsory examination<sup>48</sup>.

85. There is no evidence to suggest that the existence of these safeguards impeded in the work of Fair Work Building Industry Inspectorate (FWBII) in any way. Nor is any such evidence proffered in any of the material supporting the Bill.

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<sup>43</sup> FW (BI) Act, s.45.

<sup>44</sup> FW (BI) Act, s.47.

<sup>45</sup> FW (BI) Act, s. 39.

<sup>46</sup> FW (BI) Act, s.51(6).

<sup>47</sup> FW (BI) Act, s. 46.

<sup>48</sup> FW (BI) Act, s.58(1)



86. Further, we are concerned at the extension of inspectors' powers under the Bill as compared to the powers of inspectors under the FW Act. Whilst both the Bill and the FW Act contain similar provisions in respect of entry to premises by inspectors and the powers exercisable once entry is made, including heavy handed provisions that permit entry to premises without consent or warrant (contrary to the Attorney General's Department *Guide to Framing Commonwealth Offences, Infringements Notices and Enforcement Powers*), there are subtle differences of concern, as follows:

- a. Unlike a FW Act inspector, and inspector under the Bill is entitled to enter premises of ascertaining whether a court order is being complied with, including it would seem a court order which the ABCC is a stranger to<sup>49</sup>.
- b. The ABCC and its agents have exclusive power to declare the accuracy of copies of documents produced to it, to the extent that no evidence is a receivable in a court to challenge the proposition that a document "certified" by the ABCC as a true copy of a document is in fact a true copy.<sup>50</sup>
- c. A Grade A civil penalty exist in the Bill for hindering or obstructing an inspector in the exercise of their compliance power.<sup>51</sup> The effect of this is to make all such compliance powers, such as the power to require to interview a person on a premises, enforceable by way of civil penalty. No corresponding provision exists in the FW Act. This additional effect of these powers provides further weight to the concerns, already identified by the Senate Committee on the Scrutiny of Bills, that these powers are cast such that their scope of application can be expanded by delegated legislation<sup>52</sup> ,and, moreover, that there is no use or derivate use immunity in respect of information obtained using *these* powers (as distinct from examination notices), notwithstanding that the abrogation of the privilege against self-exposure to a penalty applies where these powers are exercised<sup>53</sup>.

87. Finally, we note the abolition of the tripartite advisory board, established under the FW (BI) Act, to make recommendations to the organisation about policies to guide the performance of its functions and the exercise of its powers; as well as its priorities and programs. There is no explanation for the deliberate isolation of the regulator from its stakeholders.

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<sup>49</sup> Clause 70(1)(b)

<sup>50</sup> Clause 79

<sup>51</sup> Clause 78

<sup>52</sup> See <http://www.aph.gov.au/~media/Committees/Senate/committee/scrutiny/alerts/2013/pdf/d09.ashx> at p12

<sup>53</sup> *Ibid.* page 16-17.

**8. Term of reference (h): “The provisions of the bills that introduce the law of conspiracy into the industrial regulation of the building and construction industry”**

88. There are several features of the Bill which introduce some features of the law of conspiracy into the regulation of the building and construction industry, however they build upon that law in a manner that should be of concern to the Committee and are most certainly of concern to our organisation and those we represent.
89. The law of conspiracy has its limits, however the approach reflected in the Bill is one which permits the ABCC to have its cake and eat it too. In Australia there exists both criminal conspiracy and civil conspiracy.
90. Criminal conspiracy involves an agreement between two or more persons to commit an offence, with the intention of carrying it out, and the defendant to the charge must have committed an overt act pursuant to the agreement. A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person withdrew from the agreement and took all reasonable steps to prevent the commission of the offence. Likewise a person cannot be found guilty of conspiracy to commit an offence if all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal, or if he or she is a person for whose benefit or protection the offence exists.
91. Civil conspiracy is a tort which, unlike criminal conspiracy, requires proof of damage in order to be actionable. The damage (usually economic loss) must have been the *result* of the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means – as a matter of practicality this means that the agreement must have been implemented (at least to some extent) in order for the cause of action to be proved. If the alleged conspiracy is one involving unlawful means, it is sufficient for the plaintiff to prove that the agreement of the defendants to do one or more of those unlawful acts *resulted* in damage to them. It is only necessary for the plaintiff to further prove that the predominant purpose of the conspirators was an intention to injure the applicants, if the allegation is of conspiracy by lawful means.
92. The key provisions of the Bill which build on the notion of conspiracy, in an unprecedented manner, are civil provisions and are as follows:

- Clause 8 of the Bill modifies the definition of 'protected industrial action' within the meaning of the FW Act so as to exclude industrial action if it is engaged in concert with, or if the organisers include, persons other than an employee or an employee organisation, its members or an officer, that are bargaining representatives for the proposed enterprise agreement. The consequence of this exclusion is that industrial action that is lawful today, becomes unlawful<sup>54</sup> not because of what it inherently is, *but because of who is involved in it*. The reach of this provision, particularly when the terms of clause 92 are also considered, is very wide: it effectively means that community support for industrial campaigns will be unlawful. The mere provision, for example, by a football club of public address equipment to address a group of lawfully striking workers outside their workplace, could render the otherwise lawful strike unlawful, exposing the workers and the union to prosecution under clause 46 and the supplier of the equipment to prosecution under clause 92. The same facts could not amount to a civil conspiracy because it is actionable in the absence of any damage, because the acts of the independent parties are lawful and because there is no requirement of intent to injure.
- Clause 92 (1)(a) renders *attempts* to contravene a civil penalty to be a separate contravention. This builds upon the pre-existing provision for accessorial liability in the 2005 Act<sup>55</sup> (all of which required that the "head" contravention had occurred), by allowing persons to be penalised for conduct that hitherto has been lawful – for example an attempted refusal to perform work (e.g. where an employee has communicated their refusal to carry out certain tasks but agrees to do so when requested). This could not amount to a civil conspiracy because it requires no proof of any agreement or association, because it is actionable in the absence of any damage, because the acts of the independent parties are lawful and because there is no requirement of intent to injure.
- Clauses 47, 48 and 58 introduce a prohibition on persons engaging in or organising 'unlawful pickets'. This includes action that is motivated for the purpose of advancing industrial objectives of *any* building association (including one wholly disconnected from the site at which the action takes place) and which *restricts* (i.e. need not prevent) or has the purpose of restricting persons from accessing or leaving a building site, or an ancillary site (as defined in clause 9). Notably the definition of an ancillary site includes any site from which goods are transported or supplied directly to a building site, or the interstate head office of a construction contractor, or a truck supplying goods. The provision is further expanded by its interplay with clause 92(1)(a) referred to above. The combined breadth of this provision means that it can effectively be used:

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<sup>54</sup> See the definition of "unlawful industrial action" in clause 5 (and the definitions there referred to), clause 46 and clause 92.

<sup>55</sup> Section 48(2).

- To disperse and penalise any assembly (and penalise any attempted assembly) that slows the movement of persons in or out of any place that in some way connected to building work, if the purpose of the assembly is in some way connected with the industrial objectives of any union that enrolls building workers;
- To penalise the health and safety officer of a union for warning a worker not to drive a defective truck<sup>56</sup>;
- To penalise union delegates from encouraging dissenting workers to remain at work (rather than engage in industrial action by leaving the site) in accordance with the resolution of a members meeting.

The conduct caught by these unlawful picket provisions could not amount to a civil conspiracy because it is actionable in the absence of any damage, because the acts of the independent parties are lawful and because there is no requirement of intent to injure.

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<sup>56</sup> We note that one of the objects of the Transport Workers' Union as set out in its registered rules is "to ensure Members are provided with a safe and healthy work environment".

**9. Term of Reference (i): Whether the provisions of the bills relating to occupational health and safety in the building and construction industry are adequate to protect the health and safety of employees and contractors in the industry.**

93. The Bill provides very little detail on what steps, if any, will be taken by a re-established ABCC to protect the health and safety of employees and contractors in the industry. Much of what could impact on health and safety in any positive way is to be set out in delegated instruments<sup>57</sup> - a matter which has drawn the comment of the Senate's Standing Committee on the Scrutiny of Bills.

94. The construction industry is known to be a dangerous industry, and whilst we agree that State and Territory Health and Safety Legislation is an appropriate vehicle to regulate this, we note that those laws assume or are dependent upon properly functioning workplace organisation to identify, address and monitor health and safety risks. Accordingly, unions play a critical role in those frameworks. The provisions of the Bill are directed to toward discouraging or hindering the participation of workers in unions and to that end might undermine the efficacy of those models.

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<sup>57</sup> *The Building Code and The Accreditation Scheme*

## 9. Term of Reference (j): "Any other related matter"

### Intervention rights

95. The ACTU regrets that the Bill provides the ABCC with the right to intervene in any civil proceedings under the FW Act or the *Independent Contractors Act 2006*.<sup>58</sup> We believe it is highly inappropriate for an inspectorate, which is purportedly established to enforce the law, to seek to be involved in proceedings relating to private interest-based disputes concerning enterprise bargaining, including applications for secret ballots, bargaining orders and the suspension of industrial action.
96. We further note that such an intervention right was opposed by the Hon Mr Wilcox QC in his report on the basis that it carried the risk that a case could be hijacked, and that it was preferable for a right to intervene to be granted by the Fair Work Commission or the Court.<sup>59</sup> In our view, if a right to intervene is to be retained in the Bill, it should be subject to the usual discretionary processes applicable in the tribunal and the courts.

### Pursuit of litigation in relation to settled matters

97. The ACTU notes that the Bill does not include equivalent provisions to sections 73 and 74 of the FW (BI) Act, that prevent the Director (or an inspector) of FWBII from continuing to participate in proceedings or instituting civil proceedings in relation to a matter that arises under a designated building law, where parties have settled or discontinued matters. Rather, Item 20 of Schedule 2 of the Consequential and Transitional Provisions Bill explicitly permits the re-agitation of such matters.
98. The ACTU does not believe there is any benefit to anyone in subjecting parties to multiple proceedings or by permitting an inspectorate, or any other person, to seek to have penalties imposed even where the parties to the matter do not consider this necessary or a desirable course of action to take. Such a course of action does nothing to facilitate the resolution of disputes or to foster cooperative longer-term relationships between parties in the industry.

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<sup>58</sup> Clauses 109 and 110.

<sup>59</sup> Recommendation 9.15., p. 99.

## **The Building Code**

99. Given the general “Back to the Future” approach to regulation in this area, one can only assume that the Building Code will replicate large parts of the Code and Implementation Guidelines previously in place under a Coalition government. There were numerous objectionable features in the past, including:

- The abolition of the common law right to invite union officials onto a building site;
- Restrictions on the content of enterprise agreements (then workplace agreements);
- Restrictions on the potential outcomes of arbitration or workplace disputes;
- Prohibiting on-site union delegates from investigating breaches of the law, or holding discussions with employees during non-working time; and
- Banning site delegates from undertaking or administering any site induction process

100. These clearly would mark a substantial restriction in the freedom of parties to agree their industrial arrangements. Further, by virtue of the extension of the definition of “building work”, such restrictions could be imposed in new industries which have had settled industrial arrangements for some time.

## **Matters raised by the Standing Committee on the Scrutiny of Bills**

101. We note, for completeness, that there are number of provisions of the Bill that above Committee has identified as requiring further explanation. Those provisions that we have not already identified elsewhere in this submission, include:

- a. The delegation, in clause 5, of the power to broaden the categories of persons entitled to bring proceedings to enforce a civil remedy provision;
- b. The delegation, in clause 6(4), of the power to broaden the definition of “building work”, which sets the outer limits of the operation of the Bill (and the power to do so retrospectively);
- c. The reversal of the onus of proof in clause 7 in relation to action taken by an employee based on a reasonable concern of the employee about an imminent risk to their health and safety and in particular why it should fall upon an employee to prove that they did not unreasonable fail to comply with a direction to perform other available work that was safe and appropriate for him or her to perform;
- d. The delegation, in clause 11(2), of the power to extend the geographic application of the Bill; and
- e. The delegation, in clause 19(1)(d), of the categories of persons to whom the ABC Commissioners powers may be delegated.

## **Comments on the Building and Construction Industry (Consequential And Transitional Provisions)**

### **Bill 2013**

102. The ACTU opposes Item 2 of the T&C Bill, which provides that the ABCC's new investigative powers may be applied to conduct occurring, or investigations begun, prior to the new Act taking effect. We believe any such powers, if they are to be introduced, should operate prospectively. It is a fundamental principle of fairness and a basic precept of the rule of law that laws are applied prospectively. No indication has been given to the number of investigations, or the incidence of conduct, intended to be pursued in reliance on this provision.
103. Item 20 in the T&C Bill provides that the ABCC may initiate or pursue matters (including instigating court proceedings) in respect of matters that were settled prior to the new Act taking effect. The retrospective operation of this provision is deeply unfair to those parties who may have made significant concessions in order to settle a matter and, on the basis of the existence of sections 73 and 74 of the existing FW (BI) Act, could until now be confident that such arrangements would not be disturbed. Whether sufficient attention has been given to the potential constitutional implications of this provision will fall to be determined in an appropriate case. Again, no indication has been given as to the number of matters that the ABCC might be intending to re-litigate or why such course is considered necessary.
104. Parties should be entitled to rely upon the law as it exists and applies at the time. The ACTU believes that retrospective rule-making that seeks to impose penalties on those who transgress the legislation prior to it having become law is not the mark of a fair society and, unless there are persuasive reasons for doing so (which there are certainly not in this case), should be avoided.





## APPENDIX 1 ACTU Submission to the Wilcox Consultations on the Proposed Building and Construction Division

<b>SUBMISSION TO THE WILCOX CONSULTATIONS ON BEHALF OF THE ACTU AND STATE AND TERRITORY LABOR COUNCILS</b>
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This submission is put in response to the Discussion Paper on behalf of the ACTU and the State and Territory Trades and Labour Councils.

Our submission will specifically address the questions asked in the 'checklist' appended to the Discussion Paper. However, before doing so, we would like to make some introductory remarks.

## **1 THE FAIR WORK BILL**

The government has now introduced its Fair Work Bill into the Parliament. Assuming that no major amendments are made by the Senate, this Bill contains the future framework for regulating industrial relations in the building and construction industry. Its contents necessarily affect the discussion in the Discussion Paper, and go directly to some of the questions you have asked. As such, it is necessary to note some of the Bill's important features.

First of all, the laws are of general application. There is *no* provision for special oppressive laws to apply to any particular industry or group of workers. The same penalties apply in respect of breaches of the law across every industry sector.

Secondly, the law strongly protects employees' right to act collectively, and to strike. This is to be expected from a law which is expressly based on 'fairness and representation at work ... [including] the right to freedom of association and the right to be represented'.<sup>60</sup> In particular, the laws are designed to 'take into account Australia's international labour obligations'.<sup>61</sup>

Industrial action (outside the nominal life of agreements) is lawful, whether or not it may be 'protected'.<sup>62</sup> If protected or unprotected action is occurring (whether unlawful or not), only an affected party (or, in some cases, the Minister) can apply to have the action stopped; the inspectorate has no such power.<sup>63</sup> It is both lawful and protected to take industrial action in support of agreement even if unprotected third parties are also taking action.<sup>64</sup> It is also lawful for workers, and unions, to bargain for workplace agreements that deal with matters that pertain to the employer-union relationship,<sup>65</sup> including better union rights of entry (save for entry for discussion or compliance purposes).<sup>66</sup>

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<sup>60</sup> FW Bill cl 3(e).

<sup>61</sup> FW Bill cl 3(a)

<sup>62</sup> FW Bill cl 417. Cf BCII Act s 38.

<sup>63</sup> See FW Bill cll 417(2), 418(2), 419(2), 423(7), 424(2), 425(2), 426(6). Cf BCII s 39(1).

<sup>64</sup> Cf BCII Act s 40.

<sup>65</sup> FW Bill cl 172(1)(b). Cf WRA s 356(1)(f); Workplace Relations Regulations 2006 (Cth) rr 2.8.5, 2.8.7.

<sup>66</sup> FW Bill cl 194(f).

Thirdly, unions maintain their traditional role in compliance. Unions may enter an employer's premises to investigate suspected breaches of the law affecting a member, and may prosecute those employers who are in breach of the law.<sup>67</sup> This is an important, and longstanding, compliance function, which the construction unions routinely perform in this sector.

Fourthly, although the Terms of Reference proposed a 'Fair Work Inspectorate' as part of Fair Work Australia, it appears that the government has instead decided to establish the industrial inspectorate as the Office of the Workplace Ombudsman. This will be an independent statutory office that is separate from Fair Work Australia.

The functions of the head of the office, the Ombudsman, are:

- firstly, to promote compliance with the law 'by providing education, assistance and advice';
- secondly, to 'monitor' compliance with the law, and to 'investigate' suspected breaches; and
- thirdly, to 'commence proceedings' against those in breach of the law.<sup>68</sup>

It is obvious that this 'enforcement pyramid' has a focus on prevention of breaches through education, with prosecution as a last resort.

The Ombudsman is independent of both the Minister and the President of Fair Work Australia (although the Minister may issue him or her with general directions, which are disallowable by the Senate).<sup>69</sup> The Ombudsman may appoint Fair Work Inspectors, and may issue them with general directions (which are disallowable) or specific instructions about the exercise of their statutory powers (provided the direction is not inconsistent with those powers).<sup>70</sup> In accordance with current practice, it is understood inspectors with special skills in dealing with particular issues or industries may be assigned, within the inspectorate, to work in those fields.

As under the current legislation, the inspectors have the power to enter premises,<sup>71</sup> interview persons (with their consent),<sup>72</sup> inspect documents (even without their custodian's consent)<sup>73</sup> and, ultimately, bring proceedings against those in breach of the law<sup>74</sup> or else refer the matter to another agency for enforcement.<sup>75</sup> They will also have a new power to issue 'compliance notices', requiring persons to remedy a breach of the law

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<sup>67</sup> FW Bill cl 481, 539.

<sup>68</sup> FW Bill cl 682.

<sup>69</sup> FW Bill cl 684.

<sup>70</sup> FW Bill cl 704-5.

<sup>71</sup> FW Bill cl 708.

<sup>72</sup> FW Bill cl 709(b).

<sup>73</sup> FW Bill cl 712.

<sup>74</sup> FW Bill cl 539.

<sup>75</sup> FW Bill cl 718.

in a specified way.<sup>76</sup> The activities of the inspectorate are transparent in that the Ombudsman makes regular reports to the Minister<sup>77</sup> and to Parliament.<sup>78</sup> Furthermore, stakeholders will have the capacity to provide feedback, to the Ombudsman and to government, on the activities of the Office under the proposed new laws.<sup>79</sup>

We provide this summary of the Bill because, as we argue below, we consider that it provides an adequate and appropriate framework for compliance in industrial relations, whether in the building and construction activity or otherwise. The important features of the general compliance regime (which we will stress repeatedly in this submission) are:

- No 'singling out' of particular industries, although inspectors with special skills or expertise may be assigned to deal with particular industries;
- An enforcement pyramid that has its focus on education, not prosecution;
- An even-handed approach to ensuring that *all* parties comply with industrial law;
- No coercive questioning powers; and
- A truly independent and respected compliance unit.

We now turn to examine in more detail the question of whether any features of the building and construction industry warrant a departure from the standard model of industrial regulation that is proposed in the Fair Work Bill.

## **2 THE 'SPECIAL' NATURE OF THE BUILDING AND CONSTRUCTION INDUSTRY?**

The Discussion Paper notes Royal Commission Cole's opinion that the building and construction industry is special or 'singular' in nature.<sup>80</sup> This singularity is said to stem from an alleged inequality of bargaining power between supposedly powerful unions with 'long-term aspirations' to improve working conditions for their members, and supposedly vulnerable head-contractors who are sensitive to short-term delays and additional project costs. These contractors are said to be unwilling or unable to oppose allegedly unlawful industrial conduct because of the weakness of legal compliance mechanisms, and because they desire the long-term co-operation of unions in the industry.<sup>81</sup>

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<sup>76</sup> FW Bill cl 716.

<sup>77</sup> FW Bill cl 685.

<sup>78</sup> FW Bill cl 686.

<sup>79</sup> FW Bill Explanatory Memorandum, lxxvii.

<sup>80</sup> Discussion Paper [4].

<sup>81</sup> Discussion Paper [4], [6].

We are pleased that the Discussion Paper notes that these views are 'controversial',<sup>82</sup> and does not adopt them.<sup>83</sup> However, because the Terms of Reference essentially assume that there *is* something 'singular' about the building and construction industry that, at the very least, warrants a 'special' (or rather 'Specialist') division of Fair Work Australia (or the Office of the Fair Work Ombudsman), we think it is necessary, once again, to rebut some of the myths about the building and construction industry.

### **Myth 1: Vulnerable Employers**

The building and construction industry was characterised in the Cole Royal Commission as being dominated by powerful unions, who are able to impose their wishes upon 'vulnerable' employers.

However, the evidence shows that the true picture of the building and construction industry is one of an industry dominated by large, sophisticated employers, and four unions that have been progressively weakened during 12 years of a Coalition government. We do not think that the evidence bears out Royal Commissioner Cole's supposition that there is an imbalance of power in the industry, in favour of unions.

The power of the large employers is borne out in the statistics. In 2006/07, the largest 100 companies (all having revenues above \$50 million per year) won a 68% share of the \$55.3 billion in contracting work awarded. The top 10 companies accounted for 55% of this take.<sup>84</sup> The largest entity, the Leighton group of companies, won \$11 billion in work. Its revenue in 2007/08 was \$14.5 billion, and its profit after tax was \$608 million.<sup>85</sup>

According to the most recent ABS data, in 2002–03 construction businesses with an annual turnover of more than \$10 million accounted for 51% of income earned in the sector.<sup>86</sup> They directly employed 24% of all employees in the industry (some 105,000 people) but, most importantly, provided \$13.9 billion in contracting work. This is equivalent to work for 292,000 full-time sub-contractors.<sup>87</sup> In other words, large businesses employed, or controlled the work of, over 397,000 people.<sup>88</sup> That represents 55% of the workforce of the entire sector.

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<sup>82</sup> Discussion Paper [8].

<sup>83</sup> Discussion Paper [9], [11].

<sup>84</sup> Housing Industry Association, *Construction 100 (2006-2007)* 2.

<sup>85</sup> Leighton Holdings Ltd, *Concise Annual Report 2008 (2008)* 10.

<sup>86</sup> ABS cat 8772.0, Table 2.

<sup>87</sup> Assuming average weekly cash earnings of \$915 for contractors (working proprietors of incorporated businesses): ABS cat 6306.0, Table 15.

<sup>88</sup> ABS cat 8772.0, Table 2.

## **Myth 2: Uncommitted Employees**

A second myth is that the industry is characterised by high job turnover, which causes low employee commitment to the employer (and to stable industrial arrangements), and a greater preparedness on the part of employees to 'hold the employer to ransom' for higher wages in the short-term, without consideration of the long-term impact on the viability of the business.<sup>89</sup>

However, the evidence does not bear this claim out. Seventy eight percent of employees in the sector have been with their employer for more than 12 months, 66% for over 2 years, and 24% have worked for the same employer for more than 10 years.<sup>90</sup> These percentage figures are exactly consistent with the all-industries averages. In other words, the construction industry is *not* a high-turnover industry.

The real reason for any lack of commitment on the part of some employees to their employers is that many employees are exploited by their employer. The hard facts about working in this industry, as an employee, are as follows:

- Wages are subdued: in 2006, full-time non-managerial male employees earned an average of \$27.20 per hour, which was below the all-industries average of \$27.50. Comparable women earned \$21.70 per hour, which was 11% below the female all-industries average of \$24.40 per hour. Only women working in the hospitality and retail sectors received a lower hourly wage.<sup>91</sup>
- Many workers are denied standard leave entitlements: 24% of employees are casual and so do not receive paid sick leave or paid annual leave. However, 4.5% of permanent employees (292,700 people) are also denied these entitlements (probably unlawfully). Furthermore, only 27% of employees receive paid parental leave (compared to the all-industries average of 40%), and only 66% receive long service leave.<sup>92</sup>
- Apprentices are particularly vulnerable: in Victoria, a newly apprenticed bricklayer earns \$4.60 per hour.<sup>93</sup> Apprentices are particularly vulnerable to bullying and exploitation because of their youth and inexperience. Women and indigenous apprentices appear to be particularly at risk.<sup>94</sup>
- Foreign workers are also vulnerable: there are 7,220 foreign construction workers legally working in Australia under subclass 457 Business (Long Stay) visas ('section 457 visas').<sup>95</sup> The anecdotal evidence

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<sup>89</sup> See, eg, Cole Report, 5.

<sup>90</sup> ABS cat 6209.0, Table 4.

<sup>91</sup> ABS cat 6306.0, Table 7.

<sup>92</sup> ABS cat 6306.0, Table 17; ABS cat 6359.0, Table 10.

<sup>93</sup> *National Building and Construction Industry Award* [AW790741CRV] cl 20.6.3(c).

<sup>94</sup> Supplementary submission of the CFMEU NSW Branch (Construction and General Division) to the Building Industry Inquiry, 6.

of severe exploitation of these workers has recently motivated the government to seek to pass laws for their protection.<sup>96</sup>

- Underpayment and non-payment of entitlements is rife: between 1996 and 2002, the CFMEU recovered over \$18 million from employers in unpaid wages and entitlements (including superannuation and redundancy entitlements), in New South Wales alone.<sup>97</sup>
- Employers are often able to escape their obligations to employees: for example, by engaging workers who are, at law, employees as 'independent contractors', or by 'phoenixing' the business to escape debts owed to workers.<sup>98</sup>
- Most workers have no protection from unfair dismissal: of the 944,000 workers in the sector, about 40% are contractors and so have no unfair dismissal rights.<sup>99</sup> Of the remaining 560,000 people working as employees, 82% worked in small businesses employing fewer than 20 people, and so are not covered by federal unfair dismissal laws.<sup>100</sup> In addition, perhaps 13% of employees had been with their employer for less than 6 months, and so would be excluded from federal (and most State) unfair dismissal laws in any event.<sup>101</sup>
- Workers are vulnerable to employer disregard for their safety: in 2005-06, there were 14,360 injuries in the sector requiring one or more weeks off work, and 33 fatalities at work. This is the third highest incident rate of any industry in Australia.<sup>102</sup> Many workers are so concerned for their employment prospects that raising safety concerns is often not an option for them. The ABCC has consistently failed to address these occupational health and safety concerns.

This high degree of vulnerability by employees, on the one hand, and the strong position of employers, on the other, is the very reason why unions do, indeed, have legitimate 'long-term aspirations' to improve working conditions for their members, as the Royal Commissioner pointed out.

### ***Myth 3: The lack of international competition causes problems***

A third myth is that the absence of international competition in the domestic industry means that the industry is protected from the competitive forces that would otherwise limit, or prevent, industrial disruption. The

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<sup>95</sup> Department of Immigration and Citizenship, *State/Territory Summary Report: Subclass 457 Business (Long Stay) (2007-08)* 10.

<sup>96</sup> Migration Legislation Amendment (Worker Protection) Bill 2008.

<sup>97</sup> Submission of the CFMEU NSW Branch (Construction and General Division) to the Building Industry Inquiry, Attachment A, 2-3.

<sup>98</sup> *Ibid* 2.

<sup>99</sup> ABS cat 6359.0, Table 3; ABS cat 8772.0, Table 2.

<sup>100</sup> ABS cat 1321.0, Table 3.3.

<sup>101</sup> ABS cat 6209.0, Table 4.

<sup>102</sup> Australian Safety and Compensation Council, *Construction* (2008) Information Sheet, 1.



argument is that, in the absence of these market forces, state regulation is needed to ensure that workers' wage claims are kept in check, and that industrial disruption is minimised.

However, the evidence shows that there is no link between the degree of international competition in an industry, and either wage outcomes or levels of industrial disputation. For example, the hospitality industry also faces a very low level of international competition, but has perhaps the *lowest* rate of industrial disputation, and pays the some of *lowest* wages in the economy. At the other end of the spectrum, mining (non-coal) is one of the *most* trade exposed industries, but has an extremely low level of industrial disputation, and pays the highest wages in Australia.<sup>103</sup>

In the words of a famous American TV show: 'This myth is busted'.

#### ***Myth 4: Unions undermine growth and productivity***

A fourth myth, adopted by the Cole Royal Commission, is that union activity in the industry undermines economic growth and productivity. A related myth, propagated by the authors of the Econotech report (commissioned by the ABCC) is that that the introduction of the BCII Act regime has boosted growth and productivity.

The Econotech report suggested that unions had traditionally inflated costs for commercial builders, by up to 17%, but that the differential suddenly fell to less than 2 per cent in 2007, allegedly due to the introduction of the BCII Act. We are pleased that the Discussion Paper queries the 'provenance' of these figures, and disputes the conclusions that Econotech seeks to draw from them. Instead, the Discussion Paper correctly calls for 'hard evidence' of the economic circumstances of the industry.

The available evidence is as follows. The construction industry has grown reasonably steadily at an average rate of 3.9% over the last 20 years (in terms of value added, in volume terms).<sup>104</sup> There was a drop of 14% in value added output following the introduction of the GST in 2001, but there has been a strong recovery since then, with a construction boom (some would say 'bubble') fuelled by a low inflation rate and high levels of investment in the mining sector. Over the long term, however, construction is classified as a 'low growth' sector, compared to a sector like telecommunications, which has grown at 8% per year for the last 20 years.<sup>105</sup>

The evidence shows that most of the growth in the sector has come from an increase in the quantity of labour inputs – that is, additional employment and/or additional hours worked by existing workers. This accounts for

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<sup>103</sup> Industrial disputes data from ABS cat 6321.0.55.001, Table 2b; earnings data from ABS 6306.0, Table 7.

<sup>104</sup> ABS cat 5260.0.55.001, 49.

<sup>105</sup> Ibid 17.

2.3 percentage points of the 3.9% average annual increase, or 60% of the total. A further percentage point (25%) of the growth rate can be explained by an increase in capital investment in the industry each year. Only 0.7 percentage points (18%) can be explained by an increase in 'multifactor productivity', that is, increases in the quality or efficiency of capital and labour inputs (ie more skilled and efficient workers, working with faster and more effective machines and technology).<sup>106</sup>

It is not possible to establish what part of the 0.7% annual increase in multifactor productivity is due to better quality capital, rather than better quality labour, inputs. However, given that the last 20 years has been one in which the application of new information, communication and design technologies have resulted in significant (capital) productivity increases in many industries, it is reasonable to assume that the introduction of computers and computerised equipment in the sector represent a large part of the 0.7 percentage points. This interpretation is given weight by the figures showing that investment in equipment in the sector has skyrocketed since the late 1990s, especially investment in 'electrical and electronic equipment', which doubled between 2000 and 2006.<sup>107</sup> Greater levels of capital investment have been accompanied by greater returns to capital: in 1985/86, capital owners took 16 per cent of the income generated in the construction sector. By 2005/06, that share had doubled, to 32 per cent.<sup>108</sup>

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

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

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

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<sup>106</sup> Ibid.

<sup>107</sup> Ibid 51–2.

<sup>108</sup> Ibid 18 (Table 2.29).

### 3 AUSTRALIA'S INTERNATIONAL OBLIGATIONS

The final introductory remark that we wish to make, in response to the background material included in the discussion paper, is in relation to Australia's international obligations. The Discussion Paper notes that fact that the ILO considers that the BCII Act breaches our international obligations, by restricting workers' rights to freedom of association, and by allowing the ABCC to interfere in union affairs. It acknowledges that the views of the ILO '*may warrant attention in the design of the Specialist Division*' (emphasis added).

With respect, we consider that it is *imperative* that the government, and this consultation process, pay serious attention to the fact that the existing laws are in breach of our international obligations, and take all necessary steps to remedy this situation. The fact of our breach of key ILO Conventions – which have been declared as establishing 'fundamental' rights – is an extremely serious matter.<sup>109</sup> We are now on the ILO watch-list of countries in continued breach of these fundamental rights, in the company of countries such as Myanmar, Columbia and Gabon.<sup>110</sup>

Given that the Terms of Reference are premised upon the importance of ensuring compliance with the 'rule of law' in the domestic building and construction industry, it would be unfortunate if the consultations ignored the importance of compliance with, and the rule of, international law, in respect of all matters touching upon the establishment and operation of the Specialist Division of FWA.

We therefore contend that the views of the ILO not only 'may' warrant attention in these consultations, but that it is absolutely necessary that the outcome of these consultations is consistent with Australia's international obligations, and the rule of international law.

### 4 THE NEED FOR A SPECIALIST DIVISION

The unions, and many others, have consistently maintained the position that building and construction workers, and their representative organisations, should not be discriminated against by special laws that single the industry out for 'special' treatment, particularly when such treatment involves restrictions on workers' fundamental rights, and the imposition of an aggressive, coercive and biased inspectorate for the industry.

We continue to maintain the position that industrial law should be enforced in the building and construction industry as it is in every other industry – by the general industrial inspectorate, wielding the traditional robust

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<sup>109</sup> ILO, *Declaration on Fundamental Principles and Rights at Work* (1998).

<sup>110</sup> ILO, *350th Report of the Committee on Freedom of Association* (June 2008) 52.

powers of entry and inspection, and with an even-handed focus on encouraging compliance with industrial law by *all* parties.

Accordingly, we maintain our position that there is simply no need for a Specialist Division of FWA (or the Office of the Fair Work Ombudsman) for the building and construction industry. We have already pointed out that there is capacity, within the general inspectorate, to assign inspectors with specialised skills and experience in the construction industry to work on compliance issues within that industry. We consider that this is a more than satisfactory approach.

We acknowledge that the Terms of Reference inform you that the government has committed to establish a Specialist Division, of some sort, and ask you to report on 'matters related to the creation of the Specialist Division'. We do think that it is within the scope of this reference to recommend that the creation of the Specialist Division not be proceeded with. The Discussion Paper suggests that you 'must assume there will be a Specialist Division'.<sup>111</sup> With respect, we do not think this is the case, and think that it is open to you to simply recommend that the idea be abandoned by the government.

We now turn to address the specific questions raised in the discussion paper.

## **5 SPECIFIC RESPONSES**

### **5.1 Special laws**

The ACTU and Trade and Labor Councils have participated in these consultations on the basis that the general industrial law (as now proposed under the Fair Work Bill) will apply to all workers, including those in the building and construction industry. We understood that the only question before you, under the Terms of Reference, was whether there was a need for any specialist enforcement agency for the industry, under the aegis of Fair Work Australia.

We do not consider that it is within your remit to consider whether special laws are appropriate for the industry. We maintain our opposition to special oppressive laws for any industry or group of workers. In particular, the special laws in question – namely, the additional penalties for taking protected or unprotected industrial action (BCII Act ch 5); the power of coercive interrogation (section 52); and the oppressive rules contained in the Code – are particularly objectionable. We set out our concerns about these provisions below.

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<sup>111</sup> Discussion Paper 3.

## 5.2 Additional penalties for taking industrial action

### *Question 1(a) – Special laws*

The BCII Act:

- imposes a penalty on conduct that is *not* unlawful when engaged in by other workers (such as taking unprotected industrial action outside the life of a workplace agreement); and
- more than triples the penalties for action that *is* unlawful, if engaged in by other workers (namely, taking unprotected industrial action during the life of an agreement).

These new, or increased, penalties violate the fundamental legal principle of the equality of all persons before the law.

Moreover, the level of the penalty is out of all proportion to the public harm (if any) occasioned by the taking of unprotected industrial action. For example, the maximum fine (\$22,000 for a natural person, and \$110,000 for a body corporate) is roughly on par with the fines for the following criminal offences under the Victorian *Crimes Act 1914*:

- sex offenders loitering near schools (section 60B(2A)(b));
- attempting to destroy evidence to be used in legal proceedings (section 254, 321P);
- attempting to make a bomb hoax (section 317A, 321P).

They are also equivalent to fines, under Commonwealth legislation, for:

- giving false evidence to a Royal Commission,<sup>112</sup> or the Australian Crime Commission,<sup>113</sup> or concealing evidence in an ASIC investigation,<sup>114</sup>
- endangering life at sea;<sup>115</sup>
- recruiting people to serve in foreign armies;<sup>116</sup>
- damaging the Great Barrier Reef,<sup>117</sup> polluting the sea<sup>118</sup> or an airport,<sup>119</sup> or destroying a lighthouse;<sup>120</sup>

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<sup>112</sup> *Royal Commissions Act 1902* (Cth) s 6H.

<sup>113</sup> *Australian Crime Commission Act 2002* (Cth) s 33.

<sup>114</sup> *Australian Securities and Investments Commission Act 2001* (Cth) s 67.

<sup>115</sup> *Navigation Act 1912* (Cth) ss 212, 268, 269A. Also operating an unsafe workplace on a ship, oil rig or offshore mine: *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) ss 15-16, 19, 22-5; *Offshore Petroleum Act 2006* (Cth) sch 3; *Offshore Minerals Act 1994* (Cth) ss 123, 183, 259, 308.

<sup>116</sup> *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 9.

- trespassing onto Aboriginal sacred sites,<sup>121</sup> or trafficking in pornography in certain Aboriginal communities;<sup>122</sup>
- engaging in market misconduct (such as market manipulation, market rigging and false trading)<sup>123</sup> or failing to disclose market sensitive information;<sup>124</sup>
- deliberately misleading people in relation to a company's affairs,<sup>125</sup> financial products,<sup>126</sup> or when providing financial advice.<sup>127</sup>

These Victorian and Commonwealth penalties are directed to morally reprehensible conduct that occasion serious harm to the community. The taking of unprotected industrial action is simply not in the same league.

### 5.3 Coercive interrogation

#### *Question 1(b) – Special laws*

The BCII Act allows the ABCC to compulsorily interrogate any person who may have information or documents that are of interest to the ABCC. A person must submit to the interview, on pain of six months' imprisonment. They may have a lawyer present, but not necessarily a lawyer of their own choosing.

These are extreme laws that violate people's fundamental legal right to silence, as well as the right to legal representation. They overturn the presumption that it is the State which must prove a person's breach of the law, and that citizens are not compelled to assist the State to develop a case against themselves or against another person, unless they are ordered to by a court.

The Discussion Paper suggests that the obligation to submit to a coercive interview is no different to the obligation to respond to a subpoena, and that neither 'raise a human rights issue'.<sup>128</sup> However, there are significant important differences between the coercive interview process and a subpoena process.

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<sup>117</sup> *Great Barrier Reef Marine Park Act 1975 (Cth)* ss 38A-K.

<sup>118</sup> *Protection of the Sea (Prevention of Pollution from Ships) Act 1983 (Cth)* s 26FEI.

<sup>119</sup> *Airports Act 1996 (Cth)* s 131C.

<sup>120</sup> *Lighthouses Act 1911 (Cth)* s 19.

<sup>121</sup> *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* s 69.

<sup>122</sup> *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* s 103.

<sup>123</sup> *Corporations Act 2001 (Cth)* s 1041A-G.

<sup>124</sup> *Ibid* s 674.

<sup>125</sup> *Ibid* ss 1308-9.

<sup>126</sup> *Ibid* ss 1021D-K.

<sup>127</sup> *Ibid* ss 952D-G.

<sup>128</sup> Discussion Paper [113].

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

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

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

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

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

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

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

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

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

We do not think that any analogies can be drawn to other areas of law, where coercive interviews are permitted in place of the subpoena process. As the Discussion Paper notes, this is only permitted where there is a public interest in the strictest enforcement of the law. This occurs in those areas where non-compliance with the law would jeopardise:

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

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

The Discussion Paper seems to be attracted to the Victorian OPI as a possible model for the proposed Specialist Division. We strongly oppose applying an anti-corruption model to the regulation of industrial law. First of all, the OPI's mandate is to investigate cases of 'police corruption and serious misconduct'. This mandate is inherently inapplicable to the industrial jurisdiction. Firstly, 'corruption' generally refers to an abuse of office, or perversion of the course of justice, by a person who holds a public office.<sup>129</sup> On this

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<sup>129</sup> See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 6.



definition, 'corruption' cannot arise in an industrial setting, since the parties do not have public duties. Secondly, the 'serious misconduct' that the OPI investigates is relevantly limited to conduct which 'constitutes an offence punishable by imprisonment'.<sup>130</sup> In contrast, the industrial jurisdiction is a non-criminal jurisdiction; there is no relevant prohibition under the WRA or the BCII Act the breach of which results in imprisonment.<sup>131</sup>

In summary, it is clear that the role of the OPI is to investigate serious, criminal, misfeasance by persons who hold important public offices. Police officers' decisions directly impact upon the liberty (and, because of their possession of firearms, the life) of individuals in the community. Their strict adherence to the law is vital to the proper administration of the system of justice, and the safety of the community. This high public purpose is the reason why it has been given extensive coercive powers of investigation. These compelling public interest justifications are not present in the industrial jurisdiction. For this reason, we submit that it would be wrong to apply an OPI model to industrial relations.

In conclusion, we oppose coercive interview powers for inspectors in the Specialist Division (if one is created). We think that the capacity for inspectors to subpoena evidence from persons is an appropriate way for them to obtain evidence, and provides much greater protections for the legitimate rights and interests of persons from whom information is sought.

### **Questions 11, 12 – Safeguards**

We have already put our view that there should be no power of compulsory interrogation. If workplace inspectors wish to obtain evidence from a person, in our opinion it suffices for them to use their (existing) power to commence legal proceedings and apply for interrogatories (directed to the defendant),<sup>132</sup> or subpoenas (directed to a third party witness).<sup>133</sup>

The criteria for taking this course of action are:

- Firstly, there are sufficient grounds for commencing proceedings – namely, there is sufficient evidence to commence prosecuting the case, and that it is in the public interest to do so;<sup>134</sup> and
- Secondly, that the court grants leave for the subpoena or notice to answer interrogatories to be issued – which it will only do if the person is likely to have relevant evidence to give.<sup>135</sup>

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<sup>130</sup> *Police Integrity Act 2008* (2008) s 3.

<sup>131</sup> Apart from misconduct in relation to AIRC proceedings (such as giving false evidence, or contravening orders): WRA s 814(3).

<sup>132</sup> *Federal Court Rules 1999* (Cth) O 16.

<sup>133</sup> *Ibid* O 27.

<sup>134</sup> WO Litigation Policy, above n 145, [9.4].

<sup>135</sup> See discussion page **Error! Bookmark not defined.** above.

We believe that court control of the evidence-gathering process is vital to guard against abuse. It is simply not enough to have internal monitoring of the inspectors, whether by a supervisory board within any Specialist Division, or otherwise.

### **Question 13 – Expenses**

We believe that a person who is compelled by a workplace inspector to provide evidence (for example, under a subpoena) should be compensated for any losses or expenses they occur in participating in the investigation or proceedings.

The rules of most courts already provide that a person who takes out a subpoena against a witness must give that witness conduct money (ie reimburse their travel expenses) and may also be ordered by the court to compensate them for their losses and expenses in complying with the subpoena.<sup>136</sup> We think that this is an appropriate provision.

## **5.4 The Code**

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

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

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

These include:

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<sup>136</sup> *Federal Court Rules 1999* (Cth) O 27 rr 6(1), 11(1).

- facilitating the wishes of employees who are, or want to be, union members (by allowing payroll deduction of union dues, or providing leave to attend union meetings or training);<sup>137</sup>
- facilitating employees communicating with unions (by allowing expanded union rights of entry to the workplace, beyond those set out in the WRA);<sup>138</sup>
- facilitating a role for employees to have unions protect their collective interests (such as by giving unions an automatic role in rostering, or dispute resolution);<sup>139</sup>
- supporting employee job security (for example, by agreeing not to engage casuals or contractors);<sup>140</sup>
- facilitating equality of treatment for employees on project sites (by agreeing to project agreements);<sup>141</sup>
- respecting employees' wishes to collectively bargain, by agreeing not to use statutory individual contracts.<sup>142</sup>

The result of these restrictions has been that many progressive industrial relations developments have been forestalled. For example, recently the ACTU and the Telstra unions attempted to negotiate a 'memorandum of understanding' ('MOU') with the company,<sup>143</sup> under which Telstra would recognise the important role that unions play in its business, and would acknowledge 'collective bargaining as the preferred model of employee relations and agree to negotiate collective agreements in good faith'. Telstra refused to enter into the MOU, claiming that it breached the Code. It appears that Telstra is bound by the Code, even though it is not principally in the building and construction industry, because it engages in a small amount of construction work as an incident of its main telecommunications business. This highlights another problem with the current Code, namely its reach far beyond the building and construction industry.

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

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

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

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<sup>137</sup> The 'prohibited conduct' rules are extended to side-deals: Guidelines [8.1.2].

<sup>138</sup> Guidelines [8.6].

<sup>139</sup> Guidelines [8.7.4].

<sup>140</sup> Guidelines [8.5.3].

<sup>141</sup> Guidelines [8.4].

<sup>142</sup> Code 7; Guidelines [8.2.3].

<sup>143</sup> Available from <[www.rightsatwork.com.au/mou](http://www.rightsatwork.com.au/mou)>.

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

#### 5.4 Structure of the inspectorate

##### ***Question 6 – Role of Specialist Division***

Our position is that there should not be a Specialist Division, for the reasons outlined above. Instead, the Ombudsman should assign Fair Work Inspectors who have special skills or experience in the building and construction activity to focus on compliance issues in that industry.

Under our proposal, it would be up to the Ombudsman to decide what resources (human or financial) to allocate to compliance functions in the construction industry. If the Minister felt strongly that compliance

activities in the sector were under-resourced, she could direct the Ombudsman to allocate more resources to it.<sup>144</sup>

### **Questions 3, 5, 7 – Independence**

Under our proposal, the inspectors would be independent, and would be seen to be independent by the public. They would exercise their functions in accordance with the enforcement pyramid set out in the Fair Work Bill, as reinforced by litigation guidelines issued by the Ombudsman.<sup>145</sup> The inspectors might work full-time on construction industry issues or, if there is insufficient work, they may be assigned to other duties, on a permanent or temporary basis, in the discretion of the Ombudsman.

Of course, given that under the ABCC regime, public confidence in the independence of workplace inspectors has been significantly eroded, it may be necessary to make some changes (mostly in relation to hiring practices) to ensure that FWA inspectors:

- either have experience in the industry or else are drawn from a *civil* law enforcement background (rather than an anti-corruption or criminal law enforcement background);
- are non-partisan and are drawn from both sides of industry;
- work across all industries so they become familiar with 'education-first' compliance strategies;
- are free from direct or indirect control or influence by the government or by political appointments to statutory offices;
- do not have their salary or career prospects affected by the degree to which they have pleased the head of the inspectorate, or the government.

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<sup>144</sup> FW Bill cl 684.

<sup>145</sup> See, eg, the WO's Litigation Policy: <[www.wo.gov.au/data/portal/00007407/content/94111001196051899657.pdf](http://www.wo.gov.au/data/portal/00007407/content/94111001196051899657.pdf)> [4.2]-[4.4].

## 5.5 Activities

### ***Question 8, 10 – Compliance functions***

We consider that the traditional system of enforcing industrial law has worked relatively well. That system has distinguished, in practice, between:

- Violations of employee entitlements and industrial rights; and
- Breaches of procedural rules under industrial law.

First of all, in relation to employee entitlements and industrial rights (such as freedom of association rights), unions have historically been responsible for enforcing these provisions in those workplaces where they have members (or in workplaces without members where the union has decided to act). In recent years, the general inspectorate has been increasingly active in enforcing these rights and entitlements for the remainder of the workforce.

In enforcing employee rights and entitlements, the unions (and the inspectors) have tended to take a tough approach to enforcement, with a focus on ensuring that employees are compensated for any losses, and that there is general and specific deterrence against further breaches of the law.

We think that the primary role of unions in enforcing employee entitlements and industrial rights, with assistance from the general inspectorate, should continue.

Secondly, in relation to enforcing the general (mostly procedural) rules under industrial legislation (such as those relating to bargaining or the taking of industrial action), the traditional approach has been that these rules are primarily enforced by the parties, rather than the inspectorate. For example, if one party fails to fulfil the requirements for taking protected industrial action, it is generally up to another affected party (if they so wish) to apply to the independent umpire for relief (namely, an order stopping the action).

Inspectors generally do not have power to enforce these procedural provisions. Even where they do have such power, the inspectorate has generally declined to intervene in cases where the affected parties have themselves declined to take a remedy which is available to them.

Moreover, when the inspectorate *does* decide to enforce the 'general' industrial law, we have noted above that the inspectorate adopts an approach (mandated by the legislation) which has an emphasis on education rather than prosecution. This approach is in stark contrast to the enforcement policy of the ABCC, as set out in

section 10 of the BCII Act. Section 10 turns the enforcement pyramid on its head. Investigation and prosecution are listed as the ABCC's primary compliance activities, with the function of advising building industry participants of their rights and obligations, and public dissemination of information about workplace laws, relegated to the end of the list.

In our view, the traditional enforcement approach is overwhelmingly preferable to the approach under the BCII Act. The emphasis on encouraging compliance with procedural rules through education, with prosecution as a last resort, is particularly appropriate in the building and construction industry, given the very high proportion of small employers in the sector.

Finally, we believe that the inspectorate should investigate and prosecute breaches by any person, not only employees or unions. This has been the historical practice. Your question 10 seems to suggest that the Specialist Division (if there is one) might focus on employee and union breaches of the law, with another division of the general inspectorate to prosecute employer breaches. We strongly believe that there should be one inspectorate for employers, unions and employees, with the same powers in relation to each of the regulated parties. To do otherwise would undermine public confidence in the impartiality of the inspectorate, and would breach the fundamental rule-of-law principle that the law should be enforced equally against all, without fear or favour towards particular groups or individuals.

### ***Questions 15, 16 – Litigation practices***

#### *Power to prosecute*

Under the current law, and the Fair Work Bill, workplace inspectors may bring legal actions in their own names to enforce workplace laws.<sup>146</sup> We see no reason why this rule should change.

We note that, since taking unprotected industrial action is *not* prohibited under the WRA, workplace inspectors do not have the power to seek injunctions to stop industrial action (although they do have power to enforce any stop orders issued by the AIRC).<sup>147</sup> The position is different under the BCII Act, where it is *unlawful* for workers to take unprotected industrial action, and where 'any person' (including an inspector) can seek injunctions to stop such action.<sup>148</sup>

We are strongly of the view that there is no legitimate role for workplace inspectors to be able to bring independent proceedings to stop industrial action (whether unprotected or not). Such a power is repugnant in that it involves the state directly intervening in workplace relations to deny workers their fundamental human

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<sup>146</sup> WRA s 718(1); FW Bill cl 539.

<sup>147</sup> WRA s 496(4), 718(1) item 5. See above n 63.

<sup>148</sup> BCII Act s 39(1).

right to strike. The taking of industrial action is a private matter between employers, workers and unions; there is no basis for the state to intervene, unless the industrial action is endangering the life, personal safety or health of the population.<sup>149</sup>

#### *Power to intervene in proceedings*

Under the WRA, workplace inspectors may only intervene in other parties' litigation with the leave of the court concerned.<sup>150</sup> The exception occurs in relation to breaches of the law relating to bargaining, where inspectors can compulsorily 'take over' proceedings initiated by another party.<sup>151</sup> Under the Fair Work Bill, there is no statutory right for workplace inspectors to intervene in other parties' litigation (although a court may grant an inspector leave to do so, under the rules of the relevant court).

We do not think that workplace inspectors require a statutory right to intervene. If there are strong public interest reasons to intervene, a court will grant leave to do so. The matter should be left to the discretion of the court.

## **5.6 Oversight**

### ***Questions 4, 14 – Monitoring***

We have already set out our view that there should not be a Specialist Division or, if there is to be one, that it be staffed by regular inspectors exercising general compliance powers under the Fair Work Bill. That would include the provisions dealing with internal and external monitoring of the inspectors, be by way of:

- General and specific directions from the Ombudsman;<sup>152</sup>
- Indirect direction from the Minister via the Ombudsman;<sup>153</sup>
- Regular reports to the Minister;<sup>154</sup> and
- Annual reports to Parliament;<sup>155</sup>
- Monitoring by the Commonwealth Ombudsman;<sup>156</sup>
- Informal monitoring by stakeholders (through feedback to the Ombudsman);

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<sup>149</sup> ILO, *Freedom of Association and Collective Bargaining* (1994) General Survey [159]. Cf WRA ss 430-4, 496-8.

<sup>150</sup> WRA s 855.

<sup>151</sup> WRA s 404.

<sup>152</sup> FW Bill cl 704-5

<sup>153</sup> FW Bill cl 684.

<sup>154</sup> FW Bill cl 685.

<sup>155</sup> FW Bill cl 686.

<sup>156</sup> *Ombudsman Act 1976* (Cth) s 5(1)(a).



- Oversight by the High Court (through constitutional writs);<sup>157</sup>
- Oversight by other courts (who may scrutinise the inspectors' litigation practices).<sup>158</sup>

If our views about the existence and role of the Specialist Division are accepted, then no additional monitoring is required.

In any event, we do not favour using the OPI as a model for overseeing the functions of workplace inspectors. First, as we explained above, we object as a matter of principle to extending an anti-corruption model to the industrial jurisdiction. The OPI model was developed to deal with the very serious issue of criminal activity (involving crimes punishable by imprisonment) on the part of public officials. 'Tough' interrogation of suspected corrupt police is, arguably, warranted, because of the strong public interest in rooting out corruption in the police force. However, we think that extreme caution should be exercised in trying to extend any aspect of this model to the industrial sphere, where the industrial actors are not public officials (and indeed are often vulnerable workers), where the prohibited conduct involved is not criminal in nature, and where breaches of the law generally only affect private interests, rather than the public at large.

Secondly, and more specifically, the OPI model of oversight is inadequate to prevent abuse of interrogation powers in that the Special Investigations Monitor:

- only investigates misconduct after the fact (and so cannot act before or during an *ultra vires* interview);
- does not have to give his or her consent to the holding of a coercive interview; and
- is not able to issue binding recommendations to the OPI.

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<sup>157</sup> See *Constitution* s 75(v). Note that the Federal Court has jurisdiction to oversee the role of ABCC inspectors, but not general workplace inspectors: *Judiciary Act 1904* (Cth) s 39B(1), (2).

<sup>158</sup> See, eg, *Washington v Hadgkiss* (2008) FCA 28.

These deficiencies led the minority (non-government) report of the Parliamentary Inquiry into the Police Integrity Bill 2008 (Vic) to conclude:

*On the key issue of accountability, The Police Association of Victoria and Liberty Victoria agreed that the lack of a stringent reporting and accountability framework for an office dealing with police corruption is a most serious concern, also shared by the authors of this minority report which we refer to Parliament for its earnest consideration.*

...

*The overriding view amongst key stakeholders is that the Police Integrity Bill 2008 does not provide for sufficient powers of oversight from the Parliament or from the Special Investigations Monitor to enable this new regime to operate effectively and with some level of public confidence.<sup>159</sup>*

In summary, even the OPI model, which the Discussion Paper appears to be attracted to, is highly controversial. We think that extending this model to the *civil* law that applies in the workplace is absolutely inappropriate, and would set an extremely dangerous precedent.

## 5.6 Use of information

### **Questions 9, 17 – Use of Information**

The traditional position under the WRA, which is preserved in the Fair Work Bill, is that:

- evidence obtained under entry and inspection powers may be used by the inspectors as evidence in proceedings against the person under industrial law or else referred to another law enforcement agency for use in other law enforcement proceedings.<sup>160</sup>
- a person may refuse to divulge information to inspectors on the grounds of legal professional privilege,<sup>161</sup> or public interest immunity;<sup>162</sup>
- in practice, the inspectors do not disclose the information to anybody else (such as a person affected by the alleged breach), even though they formally have the power to do so where the inspector reasonably believes that it is 'necessary or appropriate to do so' in the course of exercising their powers.<sup>163</sup>

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<sup>159</sup> Available at <[www.parliament.vic.gov.au/sarc/Police Integrity Bill 08/Report/minority.htm](http://www.parliament.vic.gov.au/sarc/Police_Integrity_Bill_08/Report/minority.htm)>.

<sup>160</sup> WRA 169(9); FW Bill cl 718(1).

<sup>161</sup> *Rilstone v BP Australia Pty Ltd* [2007] FCA 1557 (Besanko J).

<sup>162</sup> *Commonwealth v CFMEU* [2000] FCA 453 (Full Court).

<sup>163</sup> WRA s 166U(1); FW Bill cl 718(2).

In contrast, in relation to the ABCC:

- a person cannot refuse to divulge information on the grounds that doing so would be against the public interest (so ousting public interest immunity)<sup>164</sup> or would contravene any other law;<sup>165</sup>
- information can be divulged to a third party (whether a law enforcement agency or another person) '*in the course of*' the inspector's duties – without any test of necessity or appropriateness.<sup>166</sup> There is evidence that, in practice, the ABCC does not treat evidence gathered as confidential and is, for example, willing to pass it to third parties (such as persons affected by the alleged breach).

We consider that the WRA contains the better balance between the rights of private citizens and the public interest in effective law enforcement. In particular, we think that it is desirable to:

- preserve a person's right to refuse to produce information on public interest immunity grounds;
- restrict the freedom of inspectors to pass material on to third parties who are not law enforcement agencies (such as another party at the workplace); and
- ensure that inspectors may only refer matters to other agencies where it is 'necessary or appropriate' to do so.

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<sup>164</sup> BCII Act s 53(1)(c).

<sup>165</sup> BCII Act s 52(7).

<sup>166</sup> BCII Act s 65(3)(b).

## 5.7 Transition to FWA

### **Question 18(c) – Abolition of the ABCC**

We strongly believe that the BCII Act should be repealed and the ABCC disbanded immediately. The Office of the Fair Work Ombudsman is scheduled to commence operations on 1 July 2008; inspectors from the Workplace Ombudsman could perform compliance functions in the building and construction industry until that date.

### **Question 18(a) – Resources**

In 2007-08, the ABCC had a budget of \$33 million (and 155 staff),<sup>167</sup> whereas the general inspectorate had a budget of \$61 million (and staff of 293, including 220 inspectors).<sup>168</sup> This means that the WO has a budget of about \$9-12 for every employee within its jurisdiction, while the ABCC had a budget of about \$74-105 for every building worker within its jurisdiction.<sup>169</sup> In other words, the ABCC is eight or nine times better resourced than the WO.

While we would welcome the government adding the budgets of the WO and the ABCC together, so that the FWA inspectorate would have a total annual budget of about \$100 million, we think it is preferable if this budget is available for enforcement activities across all industry sectors.

In particular, we do not think it would be appropriate to quarantine a third of the budget and direct it towards enforcement activities in the construction sector. We would trust the head of the FWA inspectorate to use his or her discretion as to how to allocate total funds across all industries. This flexibility is important considering that compliance with workplace law is particularly poor in other sectors of the economy. For example, in 2006-07, the WO commenced 'targeted compliance campaigns' in the retail, hospitality, clothing, fast food, patient transport and horse training industries. It recovered \$1.85 million in unpaid employee entitlements from 3,119 businesses audited.<sup>170</sup> Clearly, if the WO had the funds to double the number of businesses audited in these campaigns, it might have doubled the number of employees whose entitlements were enforced. This would have been an excellent use of Commonwealth resources, we submit, compared to using the funds to prosecute workers who take short periods of industrial action.

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<sup>167</sup> ABCC, *Annual Report 2006-07* (2007) 35.

<sup>168</sup> WO, *Annual Report 2006-07* (2007) 16, 108.

<sup>169</sup> These figures are based on the estimate that the WRA covers 60-85% of the 8.3 million employees in Australia (excluding owner-managers of incorporated enterprises), and the same proportion of the 520,000 construction employees: ABS cat 6310.0, Table 6. The 60-85% estimate is from George Williams, *Inquiry into Options for a New National Industrial Relations System: Issues Paper* (2007) 4, 8.

<sup>170</sup> WO, *Annual Report 2006-07* (2007) 18.

## CONCLUSION

In our view, the BCII Act and the ABCC have been an ugly blot on the landscape of industrial relations in Australia. The special regime established for building and construction industry employees has been unfair, oppressive, in breach of workers' fundamental rights, and in breach of our international legal obligations to protect those rights. The sooner that the BCII Act is repealed, and the ABCC abolished, the better. We look forward to the day when building and construction employees have their rights protected under the *Fair Work Act*, with unions and the Fair Work Ombudsman enforcing those rights – just like every other employee in the federal industrial relations system.

## GLOSSARY

<b><u>Abbreviation</u></b>	<b><u>Title</u></b>
<b>ABS</b>	Australian Bureau of Statistics
• cat 1321.0	<i>Small Business in Australia, 2001</i>
• cat 5260.0.55.001	<i>Information Paper: Experimental Estimates of Industry Multifactor Productivity, 2007</i>
• cat 6209.0	<i>Labour Mobility, Australia, Feb 2008</i>
• cat 6306.0	<i>Employee Earnings and Hours, Australia, May 2006</i>
• cat 6310.0	<i>Employee Earnings, Benefits and Trade Union Membership, Australia, Aug 2007</i>
• cat 6321.0.55.001	<i>Industrial Disputes, Australia, Sep 2008</i>
• cat 6359.0	<i>Forms of Employment, Australia, Nov 2007</i>
• cat 8165.0	<i>Counts of Australian Businesses, Including Entries and Exits, Jun 2003 to Jun 2007</i>
• cat 8772.0	<i>Private Sector Construction Industry, Australia, 2002-03</i>
<b>ABCC</b>	Australian Building and Construction Commissioner
<b>ACTU</b>	Australian Council of Trade Unions
<b>AIRC</b>	Australian Industrial Relations Commission
<b>BCII Act</b>	<i>Building and Construction Industry Improvement Act 2005 (Cth)</i>
<b>Building Industry Inquiry</b>	Senate Education, Employment and Workplace References Committee, Building and Construction Industry Inquiry (2004)
<b>CFMEU</b>	Construction, Forestry, Mining and Energy Union

<b>Code</b>	Australian Procurement and Construction Council, <i>National Code of Practice for the Construction Industry</i> (1997)
<b>Cole Report</b>	The Hon Terence Cole QC, <i>Reform: Achieving Cultural Change</i> (2003) Final Report of the Royal Commission into the Building and Construction Industry, vol 11
<b>Discussion Paper</b>	The Hon Murray Wilcox QC, <i>Proposed Building and Construction Division of Fair Work Australia: Discussion Paper</i> (2008)
<b>FWA</b>	Fair Work Australia
<b>FW Bill</b>	Fair Work Bill 2008 (Cth)
<b>Guidelines</b>	Department of Employment and Workplace Relations, <i>Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry</i> (June 2006).
<b>ILO</b>	International Labour Organisation
<b>OPI</b>	Office of Police Integrity, Victoria
<b>WO</b>	Workplace Ombudsman
<b>WRA</b>	<i>Workplace Relations Act 1996</i> (Cth)



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