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

Submission to the Senate Standing Committee on Education, Employment and Workplace Relations

17 JULY 2009

AUSTRALIAN INDUSTRY GROUP

AUSTRALIAN CONSTRUCTORS ASSOCIATION

Summary of Ai Group / ACA's position

The Australian Industry Group (Ai Group) and the Australian Constructors Association (ACA) believe that legislative amendments to implement the Government's construction industry workplace relations policy should not lose sight of, and should give significant weight to, the recommendations of the Royal Commission into the Building and Construction Industry. The reforms introduced after the Royal Commission have largely removed the unlawful and inappropriate conduct that permeated the industry and which cost project owners (including Governments), employers and the Australian community vast sums. The industry has never been a better place in which to work and invest as is evident in the record low level of industrial disputation, high wages growth and higher productivity. However, whilst behaviour has changed, in our opinion a new culture has not yet been achieved.

The industrial laws arising from the Royal Commission treat employers and employees in the construction industry differently than those in other sectors. The different approach reflects the fact that behaviour in the construction industry was so far removed from the standards in other industries, that strong measures were required. At some point in the future the special provisions applying to employers and employees in the construction industry may be able to be removed – but not until the conduct in the industry reflects the standards of contemporary Australian society.

Following the Wilcox Review, the Government introduced the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* into the Parliament and the Bill has been referred to the Senate Standing Committee on Education, Employment and Workplace Relations for an inquiry.

Ai Group and ACA believe that some important amendments need to be made to the Bill to ensure that the reforms, that have been so vital to the industry, are not lost. These amendments include the following:

- **The provisions relating to the Independent Assessor need to be deleted**

  It is not appropriate to permit the compulsory examination powers of the Fair Work Building Industry Inspectorate to be "switched off". Justice Wilcox recommended extensive safeguards for the compulsory examination powers (which have been incorporated into the Bill) but he did not recommend that the powers be able to be "switched off". Under the Bill, applications to the Independent Assessor to "switch off" the powers can be made before a project even commences. Before the commencement of a project it is impossible to know whether the powers will be needed. Unless the Bill is amended, unions are likely to make an application to the Independent Assessor before the start of every project.

- **The five year sunset provision applicable to the compulsory examination powers should be deleted and replaced with a review after five years**

  Clearly the compulsory examination powers are needed at the present time. This was confirmed by Justice Wilcox following his recent review. The powers may or may not be needed after five years. A review after five years (say, through a Senate Committee inquiry) is appropriate, but a provision which automatically removes the powers after five years unless further legislation is passed by both Houses of Parliament is not appropriate. Prior to the powers being implemented, construction industry unions had implemented a policy of refusing to cooperate with the

regulator, including refusing to allow officials or delegates to answer any questions. Unless there is a vast change in the attitudes of construction industry unions, the removal of the powers will result in the removal of the "strong cop on the beat" at the end of the sunset period. Therefore, a cautious approach is warranted.

- **The higher penalties which apply to building industry participants for breaches of industrial law should be retained**

  Given the level of industrial lawlessness that was prevalent in the construction industry prior to the *Building and Construction Industry Improvement Act 2005*, and the fact that an enduring change in behaviour has not yet occurred, the existing higher penalties should continue to apply. It would be risky to reduce maximum penalties to only one third of what they currently are as proposed in the Bill.

- **The Fair Work Building Industry Inspectorate needs to focus upon ensuring appropriate and lawful industrial behaviour and preventing unlawful industrial action, similar to the existing Office of the Australian Building and Construction Commission (ABCC). It should not have its resources diverted to dealing with underpayment claims which are best addressed by the Fair Work Ombudsman**

  It is not appropriate for the Fair Work Building Industry Inspectorate to take over responsibility for the large number of construction industry underpayment claims which until 1 July were dealt with by the Office of the Workplace Ombudsman, and are now being dealt with by the Fair Work Ombudsman.[1] The skills of existing ABCC staff are

[1] 84 per cent of all matters dealt with by the Workplace Ombudsman between 27 March 2006 and 31 May 2008 related to underpayment claims. During this period, the Workplace Ombudsman dealt with 3072 claims relating to the Construction Industry. The Construction Industry had the 4th highest number of claims across all industries. See http://www.airc.gov.au/awardmod/databases/general/submissions/wo_sub.pdf

not suited to this work. In contrast, the inspectors employed by the Fair Work Ombudsman are well-suited to this type of work. Substantially more resources than those currently allocated to the ABCC would need to be given to the Fair Work Building Industry Inspectorate if it is to assume responsibility for underpayment claims as proposed in the Bill.

The Director of the Fair Work Building Industry Inspectorate will be subjected to very substantial oversighting, if the Bill is passed, including the following:

- The Minister for Employment and Workplace Relations may, by legislative instrument, give directions to the Director about the policies, programs and priorities of the Director and the manner in which the Director is to perform functions and exercise powers;
- An Advisory Board will make recommendations to the Director about policies, priorities and programs and any matter that the Minister requests the Advisory Board to consider;
- The Fair Work Ombudsman is a member of the Advisory Board;
- The Commonwealth Ombudsman must monitor and review the exercise of the compulsory examination powers, including receiving a copy of all examination notices, plus receiving a report, video recording and transcript of every examination;
- A Presidential Member of the Administrative Appeals Tribunal must issue an examination notice before the Director is able to use the compulsory examination powers; and

- The Independent Assessor may determine that the compulsory examination powers do not apply to particular building projects.

Whilst some safeguards are warranted, it is extremely important that the Director and the Fair Work Building Industry Inspectorate are able to perform their functions effectively and without undue delays.

If the Fair Work Building Industry Inspectorate proves to be ineffective, the risks associated with industrial lawlessness will again be priced into construction contracts, at great cost to project owners (including Governments) and the Australian community.

It is essential that the legislative amendments arising from the Bill, once implemented, are carefully monitored and that Parliament remain open to any necessary changes.

Ai Group / ACA were heavily involved in the Wilcox Review:

- Ai Group / ACA made three submissions during the Wilcox Review, the first in December 2008, and two supplementary submissions in January and March 2009;
- Ai Group met with Mr Wilcox in his very first industry consultation at the start of his inquiry;
- Mr Wilcox spoke at Ai Group's National PIR Conference in December 2008;
- The ACA Board met with Mr Wilcox in September 2008;
- Ai Group spoke at the University of Melbourne Law School Forum organised by Mr Wilcox in February 2009;

- Ai Group / ACA made a detailed submission to the Government on 15 May setting out our views on the recommendations made by Justice Wilcox.

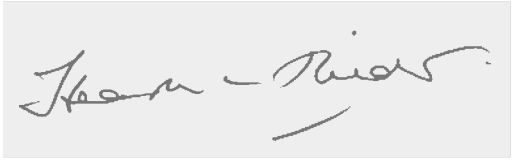
Ai Group represents industries with around 440,000 businesses employing around 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees. Ai Group itself provides services to approximately 10,000 companies employing around 750,000 employees.

Ai Group has a large membership in the construction industry including both major builders and large and small subcontractors. Ai Group has longstanding relationships with all stakeholders in the construction industry including project owners, head contractors and subcontractors.

The ACA is a national industry association which represents Australia's major construction contractors. A list of ACA member companies is included in ***Annexure A***. ACA member companies have a combined turnover in excess of $40 billion and employ 95,000 people in their Australian and international operations.

Ai Group / ACA's views on the provisions of the Bill are set out in this submission. It is not our intention to comment on all aspects of the Bill but rather to outline Ai Group / ACA's position on the most significant legislative amendments proposed.

The views expressed are subject to the important qualification that at the time of drafting this submission the intended Regulations had not been publicly released, even though the Government had provided information about some of its policy intentions to the Committee on Industrial Legislation (COIL), upon which Ai Group is represented.[2] The Regulations will contain provisions of central importance to the operation of the legislation.



Heather Ridout
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[2] The Government has given Ai Group permission to refer to the documents provided to COIL participants at a meeting held on 15 July, in this submission.

Ai Group / ACA's views on specific provisions on the Bill

Ai Group / ACA's views on the provisions of the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* are set out in the following table:

Provisions of the Bill	***Ai Group / ACA's Position***	***Basis of Ai Group / ACA's Position***
Schedule 1 **Commencement**		Consistent with the public commitment given by the Government, it is essential that Schedule 1 not commence until at least 1 February 2010.
Section 1 – Short title The *Building and Construction Industry Improvement Act 2005* is renamed the *Fair Work (Building Industry) Act 2009*. ***[Item 1]***	**Supported**	The title is appropriate.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Section 2 – Object of the Act The existing Object of the Act is replaced with a new Object. ***[Item 2]***	**Supported**	The new Object includes the necessary elements and hopefully will ensure the achievement of all of the elements referred to in the equivalent provision of the *Building and Construction Industry Improvement Act 2005* (BCII Act 2005) such as *"promoting respect for the rule of law"* and *"ensuring respect for the rights of building industry participants"* and *"encouraging the pursuit of high levels of employment in the building industry".*
Section 4 – Definitions **The following definitions are inserted:** AAT presidential member; Advisory Board; building matter; Commonwealth Ombudsman; Director; examination; examination notice; Fair Work Building Industry Inspector; Fair Work Inspector; Fair Work Ombudsman; inspector; investigation; lawyer; nominated AAT presidential member; Office; safety net contractual entitlement; and this Act. ***[Items 3, 6, 10, 16, 19, 23, 24, 25, 26, 27, 31, 35, 36, 37, 38, 39, 43, 44]***	**Amendment needed**	We oppose the insertion of a definition of "Independent Assessor" and all of the other provisions of the Bill relating to the Independent Assessor. It is not appropriate to permit the compulsory interrogation powers of the Fair Work Building Industry Inspectorate to be "switched off". The powers are subject to numerous safeguards and are only able to be used in appropriate circumstances.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
The following definitions would be repealed: ABC Commissioner; ABC Inspector; AIRC; bargaining representative; building enterprise agreement; civil penalty provision; collective agreement; Commissioner; Commonwealth authority; Deputy ABC Commissioner; eligible conditions; employee organisation; enterprise agreement; full-time Commissioner; Grade A civil penalty provision; Grade B civil penalty provision; industrial body; industrial instrument; industrial law; part-time Commissioner; penalty unit; protected industrial action; unlawful industrial action; and Workplace Relations Act. ***[Items 4, 5, 7, 8, 9, 11, 12, 13, 14, 17, 20, 21, 22, 28, 29, 30, 32, 33, 34, 40, 41, 42, 46, 47]***	**Amendment needed**	We oppose the deletion of the definitions of "civil penalty provision", "Grade A civil penalty", "Grade B civil penalty" and "penalty unit" and the associated reduction in penalties for breaches of the Act.
The following definitions are amended: Commonwealth industrial instrument; designated building law; and transitional award. ***[Items 15, 18, 45]***	**Supported**	These amendments appear to be appropriate.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Section 5 – Definition of *building work* **Subparagraph 5(1)(d)(iv)** Off-site pre-fabrication of made-to-order components is removed from the definition of "building work". ***[Item 48]***	**Supported**	This amendment is consistent with Recommendation 6 (ii) of the Wilcox Review. Importantly the Explanatory Memorandum clarifies that: *"It is intended …… that pre-fabrication of building components that takes place on auxiliary or holding sites separate from the primary construction site(s) will remain covered by the definition of building work".* It is essential that the pre-fabrication of components on-site, or in a temporary yard or other facility set up by a construction contractor to prefabricate substantial parts of a building or structure (eg. pre-castings) remain covered.
Chapter 2 – Fair Work Building Industry Inspectorate **Part 1 – Director** This Part deals with various matters relating to the statutory office of the Director of the Fair Work Building Industry Inspectorate. ***[Item 49, sections 9 to 22]***		

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Section 10 - Functions	**Amendment needed**	**Intervention rights** The functions of the Director do not refer to the vital function of intervention as included in Section 10 of the BCII Act 2005. This intervention function needs to be referred to in Section 10 and is discussed in more detail later in this submission. **Investigation of breaches of safety net contractual entitlements** The BCII Act 2005 assigns a function to the ABC Commissioner to investigate suspected contraventions of the *Workplace Relations Act*. However, via an administrative arrangement with the Office of the Workplace Ombudsman, and now the Fair Work Ombudsman, the Fair Work Ombudsman handles underpayment claims relating to the construction industry. We submit that this arrangement should continue under the *Fair Work (Building Industry) Act 2009.* Specifically, we propose that: • Fair Work Building Industry Inspectors should not deal with underpayments relating to safety net contractual entitlements; • Fair Work Inspectors should handle underpayments relating to safety net contractual entitlements. ABC Inspectors are highly skilled and typically carry out complex work, relating to unlawful industrial action, coercion, strike pay and similar matters. Most have a law enforcement background. It is important that the skills of Inspectors not be diluted under the Fair Work Building Industry Inspectorate.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		It is not appropriate for the Fair Work Building Industry Inspectorate to take over responsibility for the large number of construction industry underpayment claims which until 1 July were dealt with by the Office of the Workplace Ombudsman, and are now being dealt with by the Fair Work Ombudsman.[3] The skills of existing ABCC staff are not suited to this work. In contrast, the inspectors employed by the Fair Work Ombudsman are well-suited to this type of work. Substantially more resources than those currently allocated to the ABCC would need to be given to the Fair Work Building Industry Inspectorate if it is to assume responsibility for underpayment claims as proposed in the Bill. **Independent Assessor** Sub-section 10(h) and all other provisions of the Bill relating to the Independent Assessor should be deleted. It is not appropriate to permit the compulsory interrogation powers of the Fair Work Building Industry Inspectorate to be "switched off". The powers are subject to numerous safeguards and are only able to be used in appropriate circumstances. This issue is discussed in detail in a later section of this submission.

[3] 84 per cent of all matters dealt with by the Workplace Ombudsman between 27 March 2006 and 31 May 2008 related to underpayment claims. During this period, the Workplace Ombudsman dealt with 3072 claims relating to the Construction Industry. The Construction Industry had the 4th highest number of claims across all industries. See http://www.airc.gov.au/awardmod/databases/general/submissions/wo_sub.pdf

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Section 11 – Minister's directions	**Supported**	It is essential that the independence of the Director is not compromised. Accordingly, Sub-section 11(2), which prevents directions about a particular case, is very important. Sub-section (4) is also important. This provision facilitates oversight by Parliament and enables disallowance under s.42 of the *Legislative Instruments Act 2003* in appropriate circumstances.
Part 2 – Fair Work Building Industry Inspectorate Advisory Board ***[Item 49, sections 23 to 26H]***	**Supported**	It is very important that the Advisory Board only have the power to make recommendations to the Director of the Fair Work Building Industry Inspectorate, as specified in section 24 – Role, of the Bill. If the Board was given the power to direct, the Director's independence would be compromised.
Part 3 – Office of the Fair Work Building Industry Inspectorate ***[Item 49, sections 26J to 26L]***	**Supported**	These provisions are appropriate.
Section 28 – Building industry participants to report on compliance with Code This section is repealed. ***[Item 50]***	**Supported**	We do not oppose the repeal of this section of the Act, given the compliance requirements set out in the *Implementation Guidelines for the National Code of Practice for the Construction Industry*.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Chapter 5 – Industrial action etc This chapter is repealed. ***[Item 51]***	**Not supported**	We submit that the following provisions of Chapter 5 of the BCII Act 2005, need to be retained: • Section 38 – Unlawful industrial action prohibited: This section provides for a specific penalty if unlawful industrial action is taken, with a maximum penalty of $110,000 for a body corporate; • Section 39 – Injunction against unlawful industrial action: This section enables an injunction to be obtained if unlawful industrial action is occurring, threatened, impending or probable. There are no equivalent provisions to sections 38 and 39 in the *Fair Work Act 2009*. The Act does not include a specific, stand-alone penalty for the taking of unlawful industrial action, and the provisions relating to injunctions are narrower. Also, the existing penalties should continue to apply. It would be risky to reduce maximum penalties to only one third of what they currently are as proposed in the Bill. (This issue is discussed in more detail below).
Chapter 6 – Discrimination, coercion and unfair contracts This chapter is repealed. ***[Item 51]***	**Supported**	The issues dealt with in this chapter are covered by Part 3-1 – General Protections, of the *Fair Work Act 2009*.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Chapter 7 – Enforcement **Part 1 – Contravention of civil penalty provision** The existing provisions of Part 1 are repealed. ***[Item 52]***	**Amendment needed**	We oppose the removal of the existing maximum penalties which apply to all building industry participants, including employers and trade unions. In his report to Government, Mr Wilcox expressed the view that there is no justification for perpetuating different behavioural rules and different maximum penalties for building employees. This view is inconsistent with Mr Wilcox's reasoning that the construction industry faces unique and special challenges that justify the retention of the compulsory examination power. Given the level of industrial lawlessness that was prevalent in the construction industry prior to the BCII Act 2005, and the fact that an enduring change in behaviour has not yet occurred, the existing higher penalties should continue to apply. It would be risky to reduce maximum penalties to only one third of what they currently are as proposed in the Bill. The importance of the higher penalties is explained in the letter from the ABC Commissioner to the Deputy Prime Minister which is included in ***Annexure B***.[4] As stated by Mr Lloyd (in paras 7 to 9): *"I consider that the high and distinct penalty levels for the building and construction industry are justified.*

[4] This letter was reported upon and made available in an article by *Workplace Express* on 25 June 2009 entitled *"Powers will be inadequate says Lloyd".*

Provisions of the Bill	***Ai Group / ACA's Position***	***Basis of Ai Group / ACA's Position***
		The industry has a record that sets it apart from other industries. It has over the years recorded excessive levels of unlawful industrial action, coercion and discrimination. The majority of cases initiated by the ABCC involve these types of contraventions. *Penalty provisions are designed to deter unlawful conduct. The (Wilcox) report at Pn 4.61 observes that a court will always take into account a person's previous record in selecting a penalty. The courts are generally awarding higher penalties as time goes on. A number have exceeded the maximum levels in the Fair Work Act. Also, some organisations and persons are repeat offenders. Maximum penalties at the levels proposed will considerably reduce the court's discretion in determining penalties. The deterrence of the penalty regime will be markedly reduced."*
A new Part 1 is included within the Bill entitled: **Part 1 – Powers to obtain information etc** **Division 1 – Preliminary** This Division deals with definitions and application provisions. ***[Item 52, sections 36 and 36A]***	**Amendment needed**	**Definition of *"building project"*** "Building project" needs to be more tightly defined. Sub-section 36(1) defines the term "building project" as a project that consists of, or includes, building work. "Building work" is defined in Section 5 of the Act and includes an extensive range of activities.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		Industry participants generally understand a "building project" as building work: • with a scope defined in the relevant tender document; and • carried out on specific site or sites. The current definition of a building project in the Bill is so widely drawn that, for example, all construction, alteration, extension, restoration, repair, demolition of buildings in a particular State, could be deemed to be a "building project". This definition is particularly important when considered with Section 40 of the Bill which gives the Independent Assessor the power to make a determination that section 45 – the compulsory examination power – will not apply in relation to **one or more** "building projects". The definition is also very important in the context of the commitment given by the Deputy Prime Minister, the Hon Julia Gillard MP, in her Second Reading Speech relating to the Bill. The Deputy Prime Minister advised the Parliament that the capacity to make application to the Independent Assessor would not apply to building projects that commenced prior to 1 February 2010. This commitment is discussed below, in the section of this submission relating to the Independent Assessor.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		Definition of *"interested person"* Sub-section 36(2) defines an "interested person" in relation to a building project as the Minister or a person prescribed by Regulations. This definition is particularly important when considered with Section 40 of the Bill which allows an "interested person" to apply to the Independent Assessor for a determination that Section 45 will not apply in relation to a building project. It is our understanding from documents provided during a meeting of COIL on 15 July 2009[5] that the Government's policy intentions are reflected in the following statement: *"Subject to the outcomes of the Senate inquiry, it is the Government's intention that the Regulations prescribe all 'building industry participants' (as defined by the existing Act) in relation to the project to which the application relates, to be 'interested persons'. This means all project employers, employees, their respective associations and the client(s) would be able to make application to the Independent Assessor".* If the provisions relating to the Independent Assessor are retained, despite our strong objections – for the purposes of qualifying a union to make an application to the Independent Assessor, an "interested person" should only include a union which is covered by an enterprise agreement which applies on the project or has members employed on the project.

[5] The Government has given Ai Group permission to refer to the documents provided to COIL participants at the 15 July meeting, in this submission.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Division 2 – Role of the Independent Assessor **[Item 52, sections 36B to 43]**	**Not Supported**	**Division 2 should be deleted in its entirety** We are opposed to the concept of the compulsory examination powers being able to be "switched off" and, therefore, we are opposed to the establishment of the office of the Independent Assessor – Special Building Industry Powers. Justice Wilcox recommended extensive safeguards on the use of the compulsory examination powers (which have been incorporated within the Bill) but he did not recommend that the powers be able to be "switched off". Sections 36B to 43 are not warranted or logical, and should be removed from the Bill. **Division 2 would negatively change the risk profile on projects** Any responsible client, and certainly all contractors, would take comfort from knowing that the compulsory examination powers apply during the relevant project. The removal of the compulsory examination powers would substantially change the industrial risk profile of a project. Knowledge that the compulsory examination powers are available reduces the risk of industrial turmoil on a project and hence this lower risk would be taken into account in project pricing.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		In contrast, if there is the possibility that the compulsory examination powers will be "switched off" on the project, the risk of industrial turmoil increases and this increased risk would be taken into account in determining project pricing, potentially substantially increasing building costs for project owners (including Governments) and the Australian community. **Exclusion of projects commenced prior to 1 February 2010** The Deputy Prime Minister, the Hon Julia Gillard MP, in her Second Reading Speech relating to the Bill, advised the Parliament that the capacity to make application to the Independent Assessor would not apply to building projects that commenced prior to 1 February 2010. Section 38 of the Bill states that the provisions relating to determinations by the Independent Assessor only apply *"in relation to a building project if the building work that the project consists of, or includes, begins on or after the commencement of"* Subdivision B. The Government's intentions regarding Section 38 were set out in a document provided during a meeting of COIL on 15 July 2009 as follows: *"The impact of this provision with the definition of building work as defined in section 5 of the current BCII Act means that an 'existing project' would be one which has had on-site activity commence prior to 1 February 2010".*

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		We submit that deeming a project to commence when *"on-site activity"* commences would result in uncertainty regarding the status of particular projects. To ensure certainty, the approach reflected in *Implementation Guidelines for the National Code of Practice for the Construction Industry* should be adopted. (Refer to subsection 2.1 of the Guidelines). The Independent Assessor should not be able to issue a determination in respect of any project where the **expression of interest or tender was let for the first time** before 1 February 2010. **The potential extremely wide scope of a determination** The compulsory examination powers set out in Section 52 of the BCII Act 2005 relate to the gathering of information or documents, relevant to an investigation by the ABC Commissioner into a contravention of a designated building law by **a building industry participant.** In contrast, Section 39 of the Bill provides that the Independent Assessor may make a determination that Section 45 of the Bill does not apply in relation to **one or more building projects.** Therefore, the focus of the compulsory examination powers has been moved from the investigation of an individual building industry participant to a blanket exception for a poorly defined range of building activities characterised as a "building project" (see discussion above re. Section 36).

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		Criteria which the Independent Assessor must apply in making decisions The Bill and Explanatory Memorandum give very little guidance as to the criteria the Independent Assessor must apply in making a determination under Section 39. The Explanatory Memorandum includes the following commentary: *"The Independent Assessor must have regard to the object of the Act and any matters prescribed by the regulations when considering whether he or she is satisfied that it would be appropriate to make a determination. Matters prescribed by the regulations might include, for example, a demonstrated record of compliance with workplace relations laws, including court and tribunal orders, in connection with the building project. The Independent Assessor must also be satisfied that it would not be contrary to the public interest to make a determination."* It is our understanding from documents provided during a meeting of COIL on 15 July 2009 that the Government's policy intentions are reflected in the following statement: *"Subject to the outcomes of the Senate inquiry, it is the Government's intention that the Regulations prescribe the Independent Assessor must be satisfied that the building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, including court or tribunal orders and that the views of other interested persons in relation to the project being considered."*

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		If the provisions relating to the Independent Assessor are retained, despite our strong objections, we concur with the Government that it is essential that: 1. building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, plus court or tribunal orders; and 2. the views of interested persons in relation to the project must be considered. These issues are discussed below. ***1. Demonstrated record of compliance*** **All** building industry participants who are likely to have any involvement in the building project should be required to have a demonstrated record of compliance with workplace relations laws, plus court and tribunal orders. Any other approach would not be logical or in the public interest. Furthermore, consistent with section 69 of the BCII Act 2005, building associations should be deemed to be responsible for conduct of their divisions, branches, officers, employees, delegates, etc, when determining whether the association has a demonstrated record of compliance. (NB. The Bill proposes the deletion of Section 69 and Ai Group / ACA strongly oppose this).

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		2. Consultation with interested stakeholders Section 41 requires the Independent Assessor to provide the Director with a copy of all applications for a determination and the opportunity to make submissions in relation to the application. If the provisions relating to the Independent Assessor are retained, despite our strong objections, it is essential that the Independent Assessor have an obligation to consult with interested stakeholders before making a determination. We propose that the following provision be included in the Bill, based upon Sub-section 289(1) of the *Fair Work Act 2009*: *"The Independent Assessor must, in relation to every application for a determination, ensure that all 'building industry participants' in relation to the project to which the application applies, are given a reasonable opportunity to make written submissions and provide other relevant materials to the Independent Assessor for consideration".* **Timing of applications** Under the Bill, applications to the Independent Assessor to "switch off" the powers can be made before a project even commences. How could the Independent Assessor know whether there is "*a demonstrated record of compliance with workplace relations laws, including court and tribunal orders, in connection with the building project"* before the project commences?

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		Before the commencement of a project it is impossible to know whether the powers will be needed. All of the employers, employees and unions who will be involved in the project are not usually known at the commencement of the project because packages of work are typically progressively released during the life of the project. Also, it is impossible to know, in advance, what behaviours will be exhibited by building industry participants on the project. Unless the Bill is amended, unions are likely to make an application to the Independent Assessor under Section 39 before the start of every project. Sub-section 40(5) provides for an application to be made to "turn off" the compulsory examination powers for a completed project. It is difficult to envisage circumstances where such an application and determination would need to be made. **Reasons for decisions** The Bill should be amended to expressly require that the Independent Assessor give written reasons for its decisions. This will promote consistency, fairness and justice. We understand that this proposal is also supported by unions.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		Applications which have no reasonable prospect of success If the provisions relating to the Independent Assessor are retained in the Bill, a provision similar to Subsection 587(1) of the *Fair Work Act 2009* is needed to enable the Assessor to dismiss applications which have no reasonable prospect of success (eg. a further application relating to the same project when circumstances have not changed). The following provision is proposed: *"Dismissing applications* *Without limiting when the Independent Assessor may dismiss an application for a determination, the Independent Assessor may dismiss an application if:* *(a) the application is not made in accordance with this Act;* *(b) the application is frivolous or vexatious; or* *(c) the application has no reasonable prospect of success."* **Resources** The Independent Assessor is a part-time role and currently no resources appear to have been assigned to the Office to enable it to carry out its functions. The Office could conceivably receive hundreds of applications / statements from "interested persons" in relation to a single Section 39 determination.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		Summary of Ai Group / ACA's position In summary, as stated above, Division 2 of the Bill is not warranted or logical and needs to be deleted in its entirety.
Division 3 – Examination Notices ***[Item 52 - sections 44, 45 and 47 to 51, Items 53 and 54]***	**Supported with amendment**	The Director of the Fair Work Building Industry Inspectorate will be subjected to very substantial oversighting, if the Bill is passed, including the following: • The Minister for Employment and Workplace Relations may, by legislative instrument, give directions to the Director about the policies, programs and priorities of the Director and the manner in which the Director is to perform functions and exercise powers; • An Advisory Board will make recommendations to the Director about policies, priorities and programs and any matter that the Minister requests the Advisory Board to consider; • The Fair Work Ombudsman is a member of the Advisory Board; • The Commonwealth Ombudsman must monitor and review the exercise of the compulsory interrogation powers, including receiving a copy of all examination notices, plus a report, video recording and transcript of every examination; • A Presidential Member of the Administrative Appeals Tribunal must issue an examination notice before the Director is able to use the compulsory interrogation powers; and

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		• The Independent Assessor may determine that the compulsory interrogation powers do not apply to particular building projects. Whilst some safeguards are warranted, it is extremely important that the Director and the Fair Work Building Industry Inspectorate are able to perform their functions effectively and without undue delays. If the Inspectorate proves to be ineffective, the risks associated with industrial lawlessness will again be priced into construction contracts, at great cost to project owners (including Governments) and the Australian community. It is essential that the legislative amendments arising from the Bill, once implemented, are carefully monitored and that Parliament remain open to any necessary changes. **Section 47 – Issue of examination notice** Sub-section 47(1) sets out the factors which the nominated AAT member **must** be satisfied of in order to issue an examination notice. Such factors include: *"(g) any other matter prescribed by the regulations"* It is our understanding from documents provided during a meeting of COIL on 15 July 2009[6] that the Government's policy intentions are reflected in the following statement:

[6] The Government has given Ai Group permission to refer to the documents provided to COIL participants at the 15 July meeting, in this submission.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		"Subject to the outcomes of the Senate inquiry, it is the Government's intention that the Regulations prescribe that the nominated AAT presidential member also consider additional criteria relating to the nature and likely seriousness of the suspected contravention and the likely impact upon the person subject to the notice. The Government's view that these criteria could be considered was set out in paragraph 128 of the Bill's Explanatory Memorandum". Enabling the AAT presidential member to "consider" the above two factors is one thing, requiring that the AAT presidential member be "satisfied" in respect of the above two factors is another thing entirely (as would result given the terminology used in Section 47). The imposition of such a requirement would most likely make the proposed process unworkable and potentially lead to most, if not all, applications by the Director being rejected. It is not appropriate for *"the likely impact upon the person subject to the notice"* to be included as a factor to be considered. The Director and the AAT member are unlikely to know the impact that the examination will have on a person. Also, the use of the compulsory examination power is a last resort and, even if the examination is likely to have a negative impact upon the person, this should not prevent the examination going ahead if the factors set out in Section 47 of the Bill are satisfied. If the "*nature and likely seriousness of the suspected contravention"* is to be included in the Regulations, this factor should only be a factor that the AAT member **may consider** in deciding whether to issue an examination notice.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		Item 55 – Section 52 We oppose paragraph 52(2)(b) of the Bill. A person should not be able to refuse to give information, produce a document or answer questions based upon "public interest immunity". Public interest immunity is a relatively vague concept which would no doubt be frequently cited as a ground for refusing to cooperate, and result in numerous problems during compulsory examinations. If the intention is to address, say, matters of "national security" then this term should be used rather than "public interest immunity". Paragraph 53(1)(c) of the existing BCII Bill 2005 expressly states that: *"a person is not excused from giving information, producing a document, or answering a question, under section 52 on the ground that to do so:* *----* *(c) would otherwise be contrary to the public interest."* Item 58 of the Bill would delete paragraph 53(1)(c) of the BII Act 2005 and this is opposed by Ai Group / ACA. Accordingly, paragraph 52(2)(b) of the Bill needs to be deleted and paragraph 53(1)(c) of the BCII Act 2005 needs to be retained.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Sunset provision ***[Item 52, Section 46]***	**Not supported**	The five year sunset provision applicable to the compulsory interrogation powers should be deleted and replaced with a review after five years Clearly the compulsory interrogation powers are needed at the present time. This was confirmed by Justice Wilcox following his recent review. The powers may or may not be needed after five years. A review after five years (say, through a Senate Committee inquiry) is appropriate, but a provision which automatically removes the powers after five years unless further legislation is passed by both Houses of Parliament is not appropriate. Prior to the powers being implemented, construction industry unions had implemented a policy of refusing to cooperate with the regulator, including refusing to allow officials or delegates to answer any questions. Unless there is a vast change in the attitudes of construction industry unions, the removal of the powers will result in the removal of the "strong cop on the beat" at the end of the sunset period.
Secrecy Provisions ***[Item 68, section 57]***	**Supported**	This section is similar to subsection 52(7) of the BCII Act 2005.
Payment for expenses incurred in attending an examination ***[Item 68, section 58]***		In his report Mr Wilcox notes that he finds it unacceptable that the BCII Act allows a person attending for interrogation to be legally represented but contains no provision for payment of the cost of representation, the reimbursement of travelling and accommodation expenses or lost wages, and recommends that this issue be addressed in legislation.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		Section 58 is supported but the person should not be reimbursed expenses if they do not cooperate in making cost effective arrangements for carrying out the interrogation. It is important that the resources of the Fair Work Building Industry Inspectorate are not drained by claims for the payment of excessive legal expenses. In Mr Lloyd's letter to the Deputy Prime Minister of 27 April 2009 (***Annexure B***), he estimated that 33% of compulsory examinations were conducted with people who asked to give information pursuant to section 52 of the BCII Act because they feared reprisals if seen to be cooperating with the ABCC. It is appropriate that these people are reimbursed reasonable expenses.
Chapter 7, Part 2 – Fair Work Building Industry Inspectors ***[Item 69, sections 59 to 59G]***	**Supported**	These provisions are appropriate.
Chapter 7, Part 3 – Federal Safety Officers ***[Items 70, 71, 72, 73]***	**Supported**	These provisions are appropriate.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Section 64 – Project agreements not enforceable ***[Item 74]***	**Not supported**	Section 64 of the BCII Act 2005 was amended recently via the *Fair Work (State Referral and Consequential and Other Amendments) Bill 2009, Schedule 8*, to achieve consistency with the provisions of the *Fair Work Act 2009*. The provision implements an important recommendation of the Cole Royal Commission (Recommendation 13) and needs to be retained. It is also relevant that the Implementation Guidelines for the National Code of Practice for the Construction Industry (August 2009) state that: *"6.1.3 The use of unregistered written agreements (other than common law agreements made between the employer and an individual employee) are inconsistent with the Code and Guidelines. The entity / entities to which such an agreement applies will be deemed non-compliant with the Code and Guidelines".*
Disclosure of Information by the Director and the Federal Safety Commission, various technical and consequential amendments etc ***[Items 74, 75, 76, 77, 78, 79, 80, 81, 82, 83]***	**Supported**	These provisions are appropriate.

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Section 69 – Building association responsible for conduct of members ***[Item 84]***	**Not supported**	Section 69 is a very important provision of the BCII Act which prevents unions from refusing to accept any responsibility for the actions of their officials, employees and delegates. The provision implements an important recommendation of the Cole Royal Commission and needs to be retained. This provision will be essential to prevent a union denying responsibility for the actions of its divisions, branches, officials, employees and/or delegates when the Independent Assessor is determining whether the union has a "demonstrated record of compliance with workplace relations laws, plus court and tribunal orders". The relevant extract from the Final Report of the Cole Royal Commission is set out below: ***"Issue*** *In the building and construction industry, industrial action rarely occurs without the presence and encouragement of union officials and delegates. They should be presumed to act for their union as in reality they do. Yet when unions are sued or prosecuted in respect of actions of their officials or delegates, they frequently seek to deny responsibility based on technicalities, including the provisions of their rules. The unions take credit for the benefits of collective action: they should be held liable for losses caused by unlawful industrial action. The Building and Construction Industry Improvement Act should reflect this reality and thus make unions presumptively responsible for the actions of their officials and employees.*

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
		Recommendation 205 *The Building and Construction Industry Improvement Act contain, for all relevant purposes, a deeming provision modelled on s298B of the Workplace Relations Act 1996 (C'wth)."* Recommendation 205 was implemented via Section 64 of the BCII Act 2005.
Section 70 – Capacity, state of mind etc of person being coerced ***[Item 84]***	**Supported**	This topic is now covered by Part 3-1 – General Protections of the *Fair Work Act 2009*.
Rights of the Director and Fair Work Building Industry Inspectors to intervene **[Items 85 and 86]**	**Supported** **Supported**	**Section 71** It is essential that the Director have the right to intervene in civil proceedings before any court, relating to a building industry participant or building work. **Section 72** It is essential that the Director have the right to make submissions to FWA, in matters relating to a building industry participant or building work.

Provisions of the Bill	***Ai Group / ACA's Position***	***Basis of Ai Group / ACA's Position***
		The importance of this intervention function is explained in the letter from the ABC Commissioner to the Deputy Prime Minister which is included in ***Annexure B***.[7] As stated by the ABC Commissioner (in paras 42 to 45): *"I consider that a statutory right to intervene in the same terms as the BCII Act should be retained.* *The intervention rights have been exercised frequently. We have intervened in 108 cases – 93 AIRC and 15 courts cases.* *Intervention ensures building industry participants are aware of their obligations and rights under the legislation. The parties, tribunal and courts are sometimes unaware of the full range of legal obligations and rights applying to building industry participants.* *The majority of AIRC interventions are in cases involving actual or threatened unprotected industrial action. Regular anecdotal feedback indicates that the presence of the ABCC facilitates a quick return to work. The intervention right also assists the visibility of the ABCC and complements the important education role that we undertake.* *The intervention right enables the ABCC to appeal decisions of the AIRC. Also, the right to intervene in court proceedings is available on public interest grounds. These two aspects of intervention rights should be retained."*

[7] This letter was reported upon and made available in an article by *Workplace Express* on 25 June 2009 entitled *"Powers will be inadequate says Lloyd".*

Provisions of the Bill	*Ai Group / ACA's Position*	*Basis of Ai Group / ACA's Position*
Rights of the Director and Fair Work Building Industry Inspectors to institute proceedings; Jurisdiction of Courts; Court not to require undertaking as to damages; ***[Items 87, 89, 90, 91, 92]***	**Supported**	We have not identified any problems with these provisions.
Section 74 – General Manager of FWA must keep Director informed ***[Item 88]***	**Supported**	This notification process is essential to enable the Fair Work Building Industry Inspectorate to carry out its functions.
Definition of "protected person" ***[Items 93, 94]***	**Supported**	These provisions are appropriate.
Section 78 – Regulations **Schedule 2 – Transitional and consequential provisions re. Regulations**	**Supported**	We have not identified any problems with these provisions.

Annexure A – List of ACA Members

Abigroup Limited

Baulderstone Pty Ltd

BGC Contracting Pty Ltd

Bilfinger Berger Australia Pty Ltd

Bovis Lend Lease Pty Ltd

Brookfield Multiplex Limited

CH2M Hill Australia Pty Ltd

Clough Limited

Downer EDI

Fulton Hogan Pty Ltd

John Holland Pty Ltd

Laing O'Rourke Australia Construction Pty Limited

Macmahon Holdings Limited

Leighton Contractors Pty Limited

Leighton Holdings Limited

McConnell Dowell Corporation Limited

Thiess Pty Limited

United Group Limited

Annexure B – Letter from the ABC Commissioner to the Deputy Prime Minister

Australian Government
Australian Building and Construction Commissioner

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f. 03 8509 3020

27 April 2009

The Hon Julia Gillard MP
Deputy Prime Minister
Minister for Education, Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

Dear Deputy Prime Minister

Murray Wilcox QC submitted his report "Transition to Fair Work Australia for the Building and Construction Industry" to you on 31 March 2009.

In the course of his inquiry I and senior officers met with Mr. Wilcox. I also supplied him with some data about our operations. I did not make any public comment about the inquiry.

I attach my comments on some of the recommendations/conclusions of the report. This may assist your consideration of the report.

Yours sincerely

John Lloyd
ABC Commissioner PSM

WILCOX REPORT – ABCC COMMENTS

Chapter 3 – Specialist Division of What?

1. An organisational structure is outlined at **Pn3.26** of the report. The proposed structure means the BCD Director has considerably less independence than the ABC Commissioner.

2. It is proposed that an advisory board would determine the policies and programs to be followed by the BCD. It is my experience that the work of the ABCC has been driven to a large extent by the nature of complaints and the complexity of investigations. A prescriptive set of policies and programs may conflict with the management of issues arising "in the field." It is important for any regulator to be capable of dealing appropriately with matters as they arise. Accordingly, the role of an advisory board would have to be carefully defined to avoid such complications.

3. Also, it is common for an agency that conducts investigations to have strong confidentiality obligations. The strict non-disclosure rules applying to the ABCC are found in s65 BCII Act. A strong non-disclosure regime is required for the industry to have confidence in the regulator.

4. It is reasonable to expect that such strict confidentiality rules would apply to the BCD. I anticipate this would be material to the relationship between the BCD and the advisory board. It may also have implications for the selection of members of the advisory board. Selection of current industry participants may give rise to frequent conflict of interest situations. Potential complainants may be deterred from complaining against a party associated with the advisory board.

5. The reputation and confidence in a regulator is strongly influenced by the perception of independence that attaches to the office. The proposed structure involves a significant risk that the perception of independence will be diminished. This could adversely affect the confidence of the industry's participants in the regulator.

Chapter 4 – The Content of the Rules Governing Building Workers

6. **Maximum Penalties**. A recommendation from this chapter that warrants comment is the proposal that the penalties for contraventions be at the level of the Fair Work Act. This would reduce the maximum level of penalties to 1/3 of the levels set by the BCII Act. The maximum penalty of $110,000 against a body corporate is reduced to $33,000. The maximum penalty of $22,000 against an individual is reduced to $6,600.

7. I consider that high and distinct penalty levels for the building and construction industry are justified.

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

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

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

    a. the apportioning of most risk to contractors;
    b. the sequencing of work and interlocking tasks on projects;
    c. high liquidated damages for not completing a project on time;
    d. the large number of sub-contractors on a project;
    e. most workers employed by sub-contractors and not the head contractor;
    f. a union culture supporting direct action; and
    g. a willingness of some contractors to adopt a short term perspective and ignore unlawful conduct.

11. The report places some emphasis on the fact that persons suffering damage because of a contravention can seek compensation. This entitlement is in the BCII Act and is persevered in the Fair Work Act. In our experience this avenue for redress has limitations and has been rarely used. The courts require strict proof of loss and the preparation of evidence is complex. The entitlement is useful in cases involving protracted disruption to work and affecting parties with the capacity to undertake complex and lengthy litigation.

12. In summary, it is our experience that the building and construction industry has a number of special characteristics and many of its participants have a poor attitude towards lawful conduct. These considerations justify the retention of the maximum penalty levels in the BCII Act.

13. **Industrial Action.** The definition of building industrial action excludes action authorised in advance and in writing by the employer, s 36(1)(e) BCII Act. This is designed to combat defences where settlements included an implied or retrospective agreement by the employer to the action, so that the strikers could be paid. The Fair Work Act definition of "industrial action" may allow these defences to succeed again. This will make prosecutions more difficult.

14. **Undue Pressure.** The BCII Act at s44 enables prosecution for *"undue pressure"* to make, vary or terminate an agreement. This ground is in addition to contravention through *"coercion"*, also found in s44 BCII Act. The Report at **Pn4.79** considers undue pressure to be a form of coercion and should not be retained. Contravention through undue pressure is a lower threshold for a prosecutor to satisfy. This ground has been relied upon in ABCC prosecutions. It should be retained.

Chapter 5 –Coercive Interrogation

15. The chapter is primarily devoted to analysing submissions to the inquiry about the compulsory interrogation power. The arguments for and against the power are examined.

16. The chapter concludes with the recommendation that the power be retained and then reviewed after 5 years. I support the recommendation.

17. However, I regard it important to correct frequently quoted misconceptions about how the ABCC used the power. This may assist when considering the responses of industry parties to the Wilcox Report.

18. At **Pn5.2** the report states:

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

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

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

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

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

Chapter 6 – Safeguards

23. The report at **Pn6.42** proposes the threshold tests to be applied by an AAT presidential member when determining whether a person should be required to attend a compulsory examination.

24. It must be recognised that not all persons subject to a compulsory examination are "hostile" witnesses. A significant number of examinees are persons who ask to give information pursuant to this power. They take this approach because they fear reprisals if seen to be cooperating with the ABCC. We consider such a fear to be a genuine concern for many people. It is a feature of many of our investigations that people fear reprisals if seen to be cooperating with the ABCC. We estimate that 33% of examinations are conducted on this basis.

25. This protection from retribution has proved to be a most effective means of assisting investigations uncover the facts. It will be important for any threshold tests included in the legislation to accommodate an examination undertaken for this reason.

26. The report canvasses various approaches to external monitoring of a compulsory examination power. It recommends a process involving the Commonwealth Ombudsman, **Pn6.73**. Some elements of the proposed monitoring regime are modelled on arrangements applying to the exercise of compulsory examination powers by the Victoria Police.

27. Care will need to be exercised that monitoring arrangements are not too cumbersome or expensive. In this regard video recording every examination may be expensive relative to the benefits derived. A transcript is kept of every examination. An option is to video record on a selective basis.

Chapter 7 – The Code and Guidelines

28. The report at **Pn7.32** makes a number of comments.

29. The Code and Guidelines have been important and very effective in reforming conduct throughout the industry. The comment at **Pn7.32(a)** that they be retained is strongly supported. The Code and Guidelines have ensured that several thousand industry contractors pay close attention to maintaining code compliance.

30. I strongly oppose the comment at **Pn7.32(e)** that the Guidelines be made a disallowable instrument. I have held this position over many years in advising governments federal and state, Coalition and ALP.

31. It is legitimate for the Government in its role as a client of the industry to stipulate the standards of conduct it expects from contractors it engages. This is an equivalent position to that adopted by many major private sector clients.

32. The promulgating of this requirement through an administrative document ensures that the Guidelines are flexible and adaptable. New trends and developments can be readily responded to. A disallowable instrument raises the prospect of Parliamentary scrutiny, and tribunal and court interpretation. A significant degree of flexibility and adaptability would be lost.

33. Much of the comment outlined in the chapter is inaccurate. A common inference is that the Guidelines and associated sanctions are applied in an ill-considered manner. On the contrary, the compliance and sanction arrangements are rigorous. Reports on audits and inspections are made. Contractors are given an opportunity to respond to an adverse comment if the Code Monitoring Group is considering the application of a sanction. I therefore consider the comment at **Pn7.32(i)** that decisions be made judicially and administratively reviewable to be unjustified. A move in this direction will reduce the flexibility and adaptability of the Guidelines.

34. A particularly powerful aspect of the Code and Guidelines is that compliance is required on both government and privately funded work. **Pn7.32(b)** supports the retention of this requirement. I support that conclusion.

35. A document in the nature of the Guidelines is effective if a high degree of clarity and certainty attach to it. Accordingly, I caution against frequent amendments to the Guidelines. However, I concur that rationalisation of the coverage of the Guidelines is desirable, **Pn7.3(c).** The most effective solution would be to align the coverage of the Guidelines with the definition of building work in the legislation.

36. A comment is made, **Pn7.32(d)**, that the Guidelines be used to achieve compliance with a range of government goals such as apprentices, women, indigenous employment and environmental standards. I caution against this approach. It would dilute the clarity of the Guidelines application to on site industrial relations practices and reduce the certainty that contractors so eagerly seek. Also, other mechanisms are available to address these issues in the building and construction industry.

Chapter 8 – The Building and Construction Division

37. The report at **Pn8.10** recommends that the definition of "building work" be confined to on-site work. In our experience, the manufacture of pre-cast concrete panels for buildings, pre-cast concrete girders for bridges and pre-cast pipeline pieces for desalination or oil and gas plants resembles very closely on-site building work. The extended definition in s 5 BCII Act to include "*pre-fabrication of made-to-order components to form part of any building, structure or works*" has proved useful and should be retained.

38. A number of the observations/recommendations in the chapter have resource implications. Educational programs are proposed on skills training and OHS, **Pn8.15**. I question the suitability of this work as other government agencies have the responsibility and capacity to meet the industry's education requirements in these areas.

39. The investigation of phoenix companies, their prevention and perhaps prosecution are seen a possible roles for the BCD, **Pn8.17**. This matter falls into the jurisdiction of other federal and state agencies. BCD coverage would involve duplication. The BCD, like the ABCC, should be required to refer any evidence it obtains about phoenix companies to the relevant authority. This role would also have resource implications.

Chapter 9 – What of the BCII Act?

40. The report at **Pn9.15** opposes a statutory right of intervention to guard against cases being hijacked.

41. I consider that a statutory right to intervene in the same terms as the BCII Act should be retained.

42. The intervention rights have been exercised frequently. We have intervened in 108 cases – 93 AIRC and 15 court cases.

43. Intervention ensures building industry participants are aware of their obligations and rights under the legislation. The parties, tribunal and courts are sometimes unaware of the full range of legal obligations and rights applying to building industry participants.

44. The majority of AIRC interventions are in cases involving actual or threatened unprotected industrial action. Regular anecdotal feedback indicates that the presence of the ABCC facilitates a quick return to work. The intervention right also assists the visibility of the ABCC and complements the important education role that we undertake.

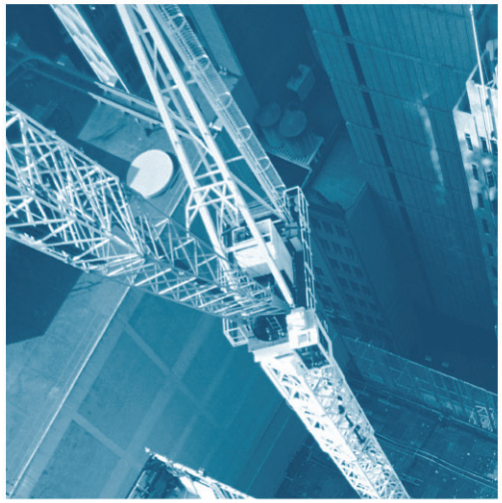
45. The intervention right enables the ABCC to appeal decisions of the AIRC. Also, the right to intervene in court proceedings is available on public interest grounds. These two aspects of intervention rights should be retained.

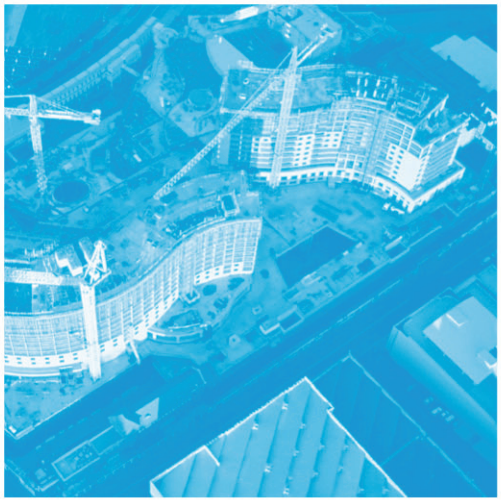
46. The removal of the statutory right of intervention has the capacity to reduce the effectiveness of dispute resolution and accountability for unlawful conduct across the industry.

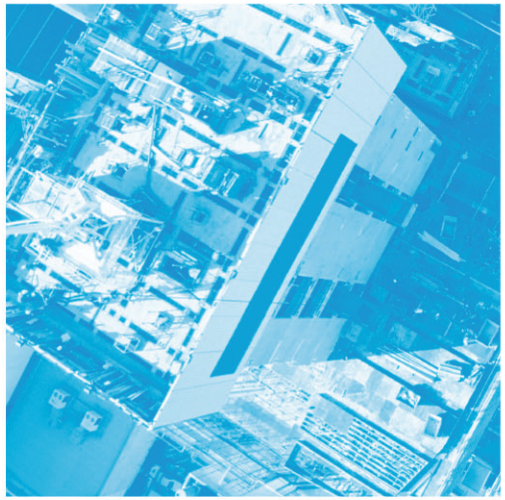
47. The report at **Pn9.13** sees no need to retain the provision enabling the ABC Commissioner to publish a non-compliance report.

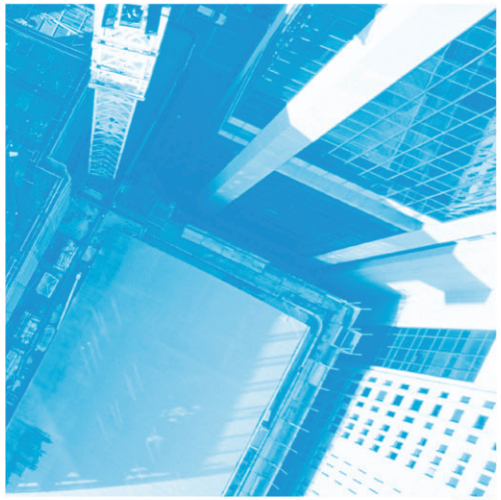
48. The power to publish a report about findings of non-compliance with the relevant legislation has proved useful. The industry is characterised by numerous disputes of short duration involving unlawful conduct. Court litigation, with extensive evidentiary requirements and time delays, has limitations in being the sole means to hold people accountable for their conduct. Court proceedings are not appropriate in many of these cases. However, if unchallenged such disputes can entrench a lack of respect for the law.

49. The s67 report option therefore has been useful in highlighting unlawful conduct that does not warrant a formal court proceeding.









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