Senate Education and Employment References Committee

Building and Construction Industry (Improving Productivity) Bill 2013 and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013*

SUBMISSION

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

10 February, 2014

1. Introduction

1.1 On 14 November 2013 the Federal Government introduced the *Building and Construction Industry (Improving Productivity) Bill 2013* (the BCIIP Bill) and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (the C and T Bill) into the House of Representatives. The BCIIP Bill substantially reproduces and expands on the terms of an earlier Act, the *Building and Construction Industry Improvement Act* 2005 (the BCII Act). The BCII Act was replaced by the *Fair Work (Building Industry) Act 2012* by the previous Labor Government in June 2012.

1.2 If assented to, the 2013 Bills will re-establish the Australian Building and Construction Commissioner (ABCC) and restore the unrestricted coercive powers which were available to the ABCC under the BCII Act. The Bills also include building industry specific provisions relating to unlawful action, coercion, discrimination and unenforceable agreements. It will restore higher civil penalties for contraventions of those provisions against individuals, unions and other bodies corporate.

1.3 On 14 November, 2013 the 2013 Bills were referred to the Senate Standing Committee on Education and Employment for inquiry and report. On 4 December 2013 the Senate referred the Government's approach to re-establishing the ABCC for inquiry and report by the last sitting day in March 2014 (27 March, 2014). Submissions were required by 10 February 2014.

Media and Allegations of Criminality

1.4 The CFMEU unreservedly opposes criminal behaviour whether it occurs in the construction industry or any other.

1.5 Recent sensationalist media reports concerning allegations of violence, corruption and criminality in the construction industry have been seized upon by advocates of

the 2013 Bills and the ABCC. These reports have been cited by some as a justification for the passage of the Bills. This is political spin and opportunism at its very worst.

1.6 The present Prime Minister Mr. Abbott, The Employment Minister Mr. Abetz and even a previous Prime Minister Mr. Howard, have all publicly referred to these reports in support of the return of the ABCC. Each would know full well, particularly given their legal qualifications, that the ABCC and the legislation under which it would operate, have no role whatsoever in the 'policing' of criminal behaviour in the industry.

1.7 The two major corporate stakeholders in the Australian construction industry have been the subject of a number of media reports in recent times alleging serious wrongdoing. In October 2013, reports emerged of an Australian Federal Police investigation into allegations of multi-million dollar 'consultancy fees' paid by Leighton Holdings to a UAE businessman in return for securing lucrative Iraqi government construction projects.[1]

1.8 In late 2012 there was extensive media coverage of a significant misreporting of profits and losses on two major AbiGroup Ltd projects, the D2G project in Queensland and the Peninsula Link Project in Melbourne. This misreporting came to light shortly after an audit of the company's operations and resulted in intervention and 'internal review' by the parent company Lend Lease. Several Abigroup executives were stood aside. There was an immediate drop in the company's share price and a number of other reports suggested that there might be broader compliance and corporate governance issues within the corporate group. Earlier that year, a U.S. subsidiary of Lend Lease pleaded guilty to charges of systematic overbilling of clients, including government agencies, on major U.S. projects, including the 9/11 memorial in New York City. The FBI described the case as involving a *'systematic pattern of audacious fraud by one of the world's largest*

[1] See articles attached – Appendix 1.

construction firms'. The company agreed to pay US$56m in fines and victim restitution.[2]

1.9 Employer organisations have also been referred to in media reports. In December 2013 disgraced former Queensland Liberal MP Scott Driscoll was said to be likely to face charges over allegations of fraud and misappropriation relating to the sale of the Queensland Retail Traders and Shopkeepers Association headquarters and his ongoing dealings with that association through his electorate office.[3] In 2012 Tasmanian State Government funding to the Tasmanian Chamber of Commerce and Industry was suspended while an investigation was conducted into what the Chamber itself described as an 'irregular' transfer of money.[4]

1.10 None of these incidents has prompted a frenzied political response from the Government, including calls for changes to the law or a royal commission into corporate or employer association wrongdoing. In fact the Treasurer, Mr. Hockey, has asserted that there has been no suggestion of employer organisation wrongdoing.[5]

1.11 In contrast, recent allegations against unions and union officials have drawn a sharp response. At the time of writing, the Government was set to announce a Royal Commission into union conduct and administration.

1.12 The CFMEU takes allegations of criminality made against its own officials extremely seriously. Officials of the CFMEU who engage in such behaviour will not be tolerated. This kind of conduct within any trade union is antithetical to the objectives of organised labour, which relies on public advocacy, the building of public support and the confidence of its membership for its actions and policy

[2] http://articles.chicagotribune.com/2012-04-24/news/sns-rt-us-construction-fraud-newyorkbre83n169-20120424_1_james-abadie-restitution-criminal-court
[3] http://www.abc.net.au/news/2013-12-24/scott-driscoll-allegations-lobby-group/5174592
[4] http://www.examiner.com.au/story/86727/tcci-blocked-from-funding/
[5] ABC '7.30 Report' 29 January 2014

positions. However the many problems attached to trial by media are made worse where, as here, political point-scoring is also involved.

1.13 The present law enforcement agencies that are charged with the responsibility of investigating criminal matters generally do so in a non-political way, focusing on the conduct in question and not the political predispositions of those involved or the political consequences that any prosecutions may bring. No-one has seriously suggested that the laws that regulate this kind of criminal behaviour whether it be in the construction industry or elsewhere, are deficient, or that the agencies themselves are incapable or ill-equipped to bring wrong-doers to account.

1.14 Following the recent media allegations against the CFMEU, the union has publicly called on those agencies to investigate the allegations as a matter of priority and for those who have information that will assist, including the media outlets that have reported on them, to provide this material to the authorities. However the reports should not be used as a smokescreen for the implementation of an ideological agenda targeting trade unions.

1.15 For its part, however, the ABCC is not one of those agencies. Indeed, if its history in investigating matters is anything to go by, the ABCC could have the undesirable effect of frustrating prosecutions of purely criminal matters through the gathering of evidence by unlawful and unfair means.[6] The ABCC should leave criminal investigations to the police.

1.16 The central task of this Committee therefore is to cut through the media hysteria and innuendo and to focus on the terms of the Bill and the substance of the changes that it will bring about.

[6] See further below at 5.19-5.25.

ABCC – A 'One-Eyed' Industrial Regulator

1.17 The ABCC/FWBC has no role in investigating or prosecuting violence, extortion or any of the other forms of criminality that have been reported on. The current FWBC, Mr. Hadgkiss recently confirmed this position when he said *'The FWBC does not prosecute these matters.'*[7] Nor do these Bills propose to confer that role on the new ABCC. As the Minister points out in his submission to this Committee, '*The ABCC's role under the Bill will be to regulate workplace relations.'*[8]

1.18 The ABCC/FWBC is not apolitical. It has shown itself to be a partisan player in the industrial relations arena. Its focus has been overwhelmingly on investigating and prosecuting worker and union behaviour in an industry where there is widespread flouting of industrial and other laws by employers, including underpayments, sham contracting, phoenix companies and victimisation of union members.

The 2013 Bills

1.19 The 2013 Bills, like the current Act and the BCII Act before it, regulate industrial behaviour. They create *civil* penalty provisions for certain industrial behaviour that does not conform to the norms it establishes. They do not create criminal offences for that behaviour or impose criminal sanctions. However, because the 2013 Bills propose to regulate industrial conduct in a particular way, it is designed to and will change the balance of power between the industrial parties. The Bills do this by both limiting the rights available to workers and their unions in the construction industry as opposed to those in all other industries, and by interposing a Government regulator with an explicit agenda and long history of enforcing the new industrial laws in favour of employers only. This gives the 2013 Bills and the ABCC an intrinsic political and industrial bias which is unacceptable and which the CFMEU will continue to oppose.

[7] http://www.heraldsun.com.au/news/law-order/labor-leader-daniel-andrews-under-pressure-as-kickback-allegations-claim-senior-cfmeu-scalp/story-fni0fee2-1226811620548
[8] Submission pg 9

1.20 Many features of the 2013 Bills appeared in the 2005 Act. The 2005 Act was also the subject of inquiry and report by predecessor Committees. We refer the Committee to the submissions which we made in relation to the Bills which led to the 2005 Act.

1.21 Fundamentally, the Bills adopt the flawed notion that there is a need for a separate statutory regulator for the construction industry. The creation of the ABCC in 2005 was the first time ever that an industry-specific industrial inspectorate had been legislated into existence by the Federal Parliament. Up to then, all industries had been covered by a single government inspectorate.

1.22 The idea that there should be one standard applying equally to all citizens is not simply a matter of efficiency or administrative convenience. Equal treatment before the law is a bedrock principle underpinning our democratic tradition. If a separate statutory regulator is maintained for this industry, this will mean persisting with a range of other laws that go with it and will be an unnecessary departure from the principle of having a single set of laws for all citizens.

1.23 The BCIIP Bill also removes safeguards against coercive powers for use in the investigation of industrial issues. Prior to the BCII Act, these powers were unprecedented. No other industrial inspectorate in Australia or anywhere else in the world had ever been given such intrusive and far-reaching powers to compel its citizens to attend and face interrogation over what has happened in the workplace.

1.24 Coercive powers have no place in the industrial laws of a democracy. The history of the use and abuse of these coercive powers by the ABCC makes a compelling case for their repeal and for the abolition of the FWBC/ABCC.

1.25 **The construction industry should be regulated by the same general laws applying to everyone else in the federal system. The separate inspectorate,**

additional laws and coercive powers proposed by these Bills cannot be justified and the 2013 Bills should not be proceeded with.

2. Background

2.1 The BCII Act had its origins in the recommendations of the Cole Royal Commission into the Building and Construction Industry. That Commission was created by the Howard Government in the lead-up to the closely–fought 2001 federal election. The Commission was not a response to any crisis in the industry or because of any consensus on the need for reform. It was set up purely as a political stunt designed to generate sensationalist anti-union headlines, to damage by association the Labor Opposition and to give the Coalition Government an electoral advantage.

2.2 It is important to recall that the Government's justification for calling the Cole Royal Commission was to deal with widespread criminality and corruption said to exist in the industry, particularly amongst union officials. The Liberal Government relied on a flimsy and hastily concocted ten page 'exposé' put together by its own agency, the Office of the Employment Advocate as providing substance to these allegations. The document was full of colourful anecdote and speculation. No-one believed it justified a royal commission. Even the media was alive to the cynical political motivations that gave rise to it.

2.3 The Cole Royal Commission was an intensely politicised process from the outset. Its focus, processes, findings and recommendations were all controversial. Employer wrongdoing was not subjected to anything like the scrutiny given to trade unions by this Commission. Virtually without exception, the recommendations that were ultimately made neatly coincided with existing Liberal Party industrial relations policy. Many of the Royal Commission's recommendations went on to find their way not just into the BCII Act, but also into the 'WorkChoices' legislation that followed it.

2.4 Despite its enormous cost to the public (over $60m) and the intense scrutiny of union activity, and contrary to the political hyperbole both before and after the

Commission, the Cole Royal Commission did not uncover endemic criminality, violence or institutionalised corruption.[9]

2.5 The Report did identify what it described as unlawful and 'inappropriate' industrial behaviour. These conclusions were disputed by the unions who complained bitterly during the inquiry that the hearing process, which was largely at the discretion of the Commissioner, did not give them a proper opportunity to present their case.

2.6 Contrary to the recent ABC '7.30 Report', the Cole Royal Commission did not find 'evidence of widespread involvement of organised crime in the industry.'[10] Nor for that matter, did the Gyles Royal Commission into the NSW building industry in the early 1990s. In fact, Gyles's key finding was:

(i) there is no acceptable evidence of widespread or serious corruption of full-time union officials; and

(ii) there has been no evidence of systematic violence or physical intimidation by unions or unionists.[11]

2.1 Mr. Gyles confirmed this in a Radio National 'Breakfast' interview on 30 January 2014 when he said - with understandable circumspection - 'if they were correct', the current media reports alleging criminality amongst unions would represent a 'quantum difference' from the industry he examined.

2.2 However, of the 392 instances of so-called 'unlawful conduct' in the Cole Final Report, only one was ever pursued and it was ultimately dropped, without being prosecuted to finality.[12] Of the supposed more serious instances contained in the 'secret volume' of the Final Report, six years after the Report was released, the

[9] c.f. 'The Cole Royal Commission uncovered a pattern of criminal behaviour by building industry unions.' H. Ergas '*The Australian'* 10 February 2014 pg. 10.
[10] '7.30 Report' 28 January, 2014. http://www.abc.net.au/iview/#/view/80257851
[11] Vol 7 Final Report Appendix A Extracts from Interim Reports Overview and Key Findings pgs 133 – 134.
[12] Senate Employment, Workplace Relations and Education References Committee 25/05/04 Hansard page 81.

Government confirmed that 98 referrals to external agencies had resulted in ***one*** prosecution of a company for the payment of strike pay and one prosecution for giving false testimony to the Commission itself.[13]

[13] See letter from Deputy Prime Minister to CFMEU dated 13 January 2009.

3. Busting the Myths –

Industrial, Not Criminal Laws

3.1 It is important to be clear about what the 2013 Bills will do and not do. The Bills make virtually all forms of industrial action unlawful and those taking the action will be subject heavy penalties. The Bills recreate the ABCC and give it power to compel people to attend interviews, answer questions and/or provide documents or information relating to its investigations. The practice with these interrogations has been that they are conducted in private and interviewees are generally not allowed to disclose to anyone else what happens during the interrogation. The maximum penalty for not complying with a notice to attend is six months imprisonment.

3.2 There is no 'right to silence' under these laws. People can be compelled to 'dob in' their workmates over industrial matters.

3.3 Fundamentally however, the BCII Act (and now the FWBI Act) ***did not now or ever*** deal with ***criminal*** conduct. It was concerned with the regulation of ***industrial*** behaviour.

3.4 Alleged breaches of the industrial action provisions of the BCII Act could result in ***civil*** proceedings[14] and where breaches were proved, civil, not criminal, penalties were applied. This is not a semantic distinction. It goes to the heart of the debate about the justifications which have been used to underpin these laws.

3.5 Arguments about the need to reintroduce the laws because of allegations of widespread violence or threats of violence, criminal damage to property, extortion and the like are not only misplaced but have the effect of distorting the policy debate and the public perception of what the laws are designed to achieve.

[14] There were two criminal offences created by the BCII *Act.* The first was refusing to provide information/evidence/documents when required under the coercive powers, discussed below. The second was the disclosure of 'protected information' by ABCC officials/staff.

3.6 A lack of understanding about the nature of the laws is widespread in the community.

3.7 The public commentary surrounding the laws perpetuates these misconceptions. In some cases it is difficult to discern whether the commentary is simply inaccurate or intentionally misleading.

(i) An opinion writer for the *Melbourne Herald Sun* has described the BCII Act as a law that *'compels building workers to give evidence to regulators investigating criminal activity, or face jail*.'[15]

(ii) *The Adelaide Advertiser* has editorialised about the *'widespread corruption'* in the industry and the need to ensure that employers, contractors and suppliers have the right to operate free from *'threats of physical violence.'*[16]

(iii) On 9 June 2009, *ABC News* reported that the Australian Building and Construction Commissioner was *'set up by the previous government to crack down on violent behaviour.'*[17]

3.8 Many employer organisations have made similar public comments, a number of which will no doubt be repeated during the course of the debate about this Bill.

3.9 Of most concern however are the ongoing references by lawmakers to the *ABCC* as an antidote to criminal behaviour. This problem extends right back to the time when the BCII Act was first brought before the Parliament but continues to plague the current discussion about the need for the ABCC.

3.10 During the life of the former ABCC, the spectre of criminality was used in the media by the ABCC itself to justify its continuing existence and powers. On 4 June 2007, at the very height of the political debate about the future of ABCC in the lead-up to the 2007 federal election, the ABC Commissioner was reported in the

[15] Andrew Bolt, *Herald Sun* Friday 19 June 2009 page 38. 4 15 June, 2009, page 16. 5
[16] 15 June , 2009, pg 16
[17] http://www.abc.net.au/news/stories/2009/06/09/2592647.htm

print media as saying *'a rogue union official had issued a death threat'* and *'the unions are behind a threat to kill one of my people.'* The CFMEU immediately wrote to the Commissioner asking him to either confirm which official was involved so that the union could consider the matter or if no official was involved, to immediately correct the public record. The Commissioner did neither, but simply denied the report and allowed the story to stand uncorrected.

3.11 The incident in question was said to have occurred about six months prior to it being raised in the media. No explanation was ever offered as to how the story became public at a politically opportune time rather than at the time the incident was supposed to have happened. The ABCC would have known at the time the allegation was aired that the person who was alleged to have been involved was not and had never been a union official. When the charges were ultimately withdrawn in September 2008, the ABCC made no attempt to correct the public record.

3.12 In the BCIIP Bill Outline, there are references to 'violence in city streets', 'protesters intimidating the community' and 'attacks on police horses', 'throat-cutting gestures', 'threats of stomping heads in', death threats, 'shoving, kicking and punching motor vehicles' and 'Columbian neckties'. One Liberal MP recently wrote about the importance of the ABCC in targeting 'intimidation', 'corruption' and 'extortion'.[18]

3.13 Yet the target of the 2013 Bills (and the BCII Act before it), is and has always been, so-called 'unlawful industrial action'. This is dealt with by civil sanctions.

3.14 In the debate about the powers that a government agency should have to investigate these matters the starting point should be that the powers must be appropriate having regard to the types of matters that are being investigated. The point was well summarised by Williams and McGarrity in their submission

[18] K O'Dwyer AFR 3 February 2014 pg 46.

to a Senate Committee in the inquiry into the *Building and Construction Industry (Restoring Workplace Rights) Bill* in 2008:-

> *'The ABCC is primarily responsible for monitoring, investigating and enforcing civil law, or more specifically, federal industrial law like the BCII Act and industry awards and agreements. Investigatory powers of the type bestowed on the ABC Commissioner had previously been unheard of in the industrial context. In this light, the powers of the ABCC are not only extraordinary, but unwarranted...Such powers should not be bestowed on a body dealing with contraventions of the civil law and potentially minor breaches of industrial instruments.'*

3.15 No-one has suggested that the criminal law is not adequate to deal with criminal behaviour whether it occurs in the workplace or elsewhere. There is a wide range of criminal offences contained in legislation which covers the kind of conduct that has been suggested by the media reports. In the State of New South Wales, for instance, most criminal conduct is covered by the *Crimes Act 1900* (NSW), and includes such crimes as:-

- *Demanding property with intent to steal* (s 99);
- *Blackmail* (unwarranted demands, menace and obtaining gain or causing loss) (Part 4B, ss 249K-249O);
- *Fraud* (Part 4AA, ss 192B-H);
- *Participation in criminal groups and receiving material benefit derived from criminal activities or criminal groups* (ss 93T-93TA);
- *Riot and affray* (Division 1, Part 3A);
- *Corruptly receiving commissions and other corrupt practices* (Part 4A); and
- *Criminal destruction and damage* (Part 4AD).

3.16 Other States and Territories have corresponding offences to those contained in the *Crimes Act 1900* (NSW) and, for its part, the Commonwealth Criminal

Code contains corresponding offences where these involve officers of the Commonwealth. That is not to mention the recent Queensland 'bikie laws'. These and other laws can be read in stark contrast to the BCII Act and the 2013 Bills, which are uniquely concerned with matters pertaining to industrial relations and the powers and framework of the ABCC.

3.17 The trade union movement has always accepted that criminal behaviour must be dealt with under the criminal law. The Parliament is not being asked here to consider criminal sanctions to bring criminal behaviour to account. References to criminality in this debate are completely misplaced and show that there are no other arguments of substance to justify these laws. Particularly in the discussion about coercive powers, the real question is whether they are desirable or necessary in an *industrial* context.

3.18 The 2013 Bill, if passed, will not change the focus of investigations by the re-instated ABCC. In the same way as the FWO investigates alleged (civil) industrial breaches in other industries, the ABCC will have that responsibility in the construction industry. What is abundantly clear however is that the FWO has operated very successfully without coercive interrogation powers. There is no justification for allowing such powers to continue to apply to construction workers, let alone remove the existing safeguards on their use.

The Economic Case for the Reintroduction of the ABCC

3.19 The Coalition Government and employer groups have sought to rely heavily on the so-called economic case for the reintroduction of the ABCC/FWBC. According to this argument the ABCC/FWBC and the availability of coercive interrogation powers, has resulted in quantifiable improvements in industry productivity. Heavy reliance for these assertions is placed on an analysis originally undertaken by Econtech (now Independent Economics) which have been commissioned, variously, by the ABCC and the Master Builders Association (EconTech Reports). These reports have been widely criticised by a range of people,

including Hon. Murray Wilcox QC who described the report as 'deeply flawed' and said it 'ought to be totally disregarded'[19], as well as various academics and economic writers.

3.20 A report by PriceWaterHouseCoopers (PwC) in October 2013 on Productivity in the Construction Industry described the EconTech/Independent Economics reports as *'found wanting on a number of methodological grounds'* and found no discernible contribution by the ABCC to productivity in the construction industry. Rather, data used in the PwC report demonstrates that construction industry labour productivity has grown steadily since at least 1994-95 and appears to be broadly consistent with comparable industries. Indeed, these and similar conclusions were reached in the robust analysis conducted by the Australian Council of Trade Unions (ACTU) in its submission to this Committee. The CFMEU refers to and relies upon the ACTU submission.

3.21 The EconTech Reports are the source of the oft-quoted figure that the ABCC and the 'industry reform package' of the Howard Government was responsible for a 9.4% productivity improvement across the industry. The method used in the EconTech Reports to produce this figure was to simply compare the costs of completing standard tasks (e.g. laying concrete) in the less unionised housing sector against the more unionised commercial construction sector, as though union density were the only feature which distinguishes the two sectors.

3.22 The Reports' systematic finding is that there are significantly larger costs for completing specified tasks in the commercial construction sector than in the domestic housing sector, which, without fuller analysis, is attributed to union density differentials across the sectors. The Reports also claim that the gap in costs across the industry sectors narrowed during the period of the ABCC. Unsurprisingly, the reports have been criticised by economists for assuming union density accounts for all costs differentials across the two sectors, and for

[19] Wilcox, M. '*Transition to Fair Work Australia for the Building and Construction Industry'* (Report March 2009) at 5.48.

ignoring other factors such as greater site complexities and different profit margins in the two sectors. The Reports also argued that the data demonstrated that productivity in the industry during the 'ABCC period' was higher than that which could be predicted as being the case without the ABCC, based on the broader national productivity figures.

3.23 We urge the Committee to pay close attention to the submission made by Professor David Peetz on the 'productivity' aspect of this inquiry. Professor Peetz's submission shows that *not only* was there no evidence of costs narrowing between the two sectors since the establishment of the ABCC or Taskforce, but if anything, the gap slightly widened.[20] Further, on closer analysis the EconTech Reports do not provide any evidence that supports the hypothesis that the introduction of the ABCC had any impact on improved productivity in the construction industry. This because the EconTech methodology fails to take into account the effect on the 'all industries' productivity figures of unusually low productivity in the mining and utilities sectors.

3.24 The ACTU submission undertakes a similar analysis and reaches the same conclusion. The EconTech regression analysis could be applied to any number of sectors (save for mining and utilities) and similar results would emerge, yet no-one would attribute those results to an 'ABCC factor' since it has no role in those sectors. As Professor Peetz puts it: *'there is nothing unusual about productivity growth in an industry running above or below some 'predicted' average based on national productivity growth, and it certainly cannot be attributed to the ABCC or construction industry 'reform''*[21]

3.25 When actual construction industry labour productivity (as opposed to some predicted figure generated by an economic model) is compared with national productivity figures, Professor Peetz's submission shows that for most of the 'ABCC reform period' it lagged behind national levels, a trend which was only

[20] Submission 8 Page 3.
[21] Ibid, p 5

reversed in 2011-12 after the ABCC began making less frequent use of its coercive powers.[22]

3.26 Professor Peetz is able to conclude:

> *'Overall, then, construction industry labour productivity followed a path broadly comparable to that of the rest of the economy.* ***There was no magical 9.4 per cent increase in productivity as a result of the ABCC or other reforms,*** *and no equally magical 7per cent drop in productivity (75 per cent of 9.4 per cent) evident as a result of the FWBC coming into effect.*
>
> *The Reports' claims of productivity gains from the use of coercive powers are also not borne out and nor are they discernable in ABS or Productivity Commission data.*
>
> *In short, if 'economic case' refers to productivity gains, there is no economic case for the reinstatement of the ABCC. If, however, the aim is to increase the share of income going to profits, or reduce it going to wages, then that is an 'economic' objective that would be served by the reintroduction of an institution that may more effectively use coercive powers against workers. If this is the aim, however, it should be more clearly stated.'* (emphasis added)

3.27 The thoroughgoing analysis and critique made by Professor Peetz not only effectively demolishes the EconTech Reports but sounds a timely warning to lawmakers who might be tempted to reach for self-serving reports commissioned from commercial economic model-builders.

3.28 The so-called 'economic case' is now so widely and thoroughly discredited it should be seen for what it is; a flimsy attempt to prop up a continuation of the WorkChoices ideology with economic modelling which does not withstand scrutiny.

[22] Ibid, p 7.

4. Additional Features of the Bills

Definitions and Scope of the BCIIP Bill

4.1 The BCIIP Bill re-establishes the ABCC by replacing the Office of the Fair Work Building Industry Inspectorate (FWBC), Like the BCII Act, additional laws are created for the construction industry covering industrial action, coercion, discrimination and provisions that make certain project agreements in the industry unenforceable. Other changes include:

(i) Expanding the definition of 'building work' to 'transporting or supplying goods to be used in [building work], directly to building sites (including any resources platform where that work is being done)'.

(ii) Extending the definition of 'land' for the purposes of defining 'building work' to include 'land beneath water' (that is, to offshore building work).

(iii) Prohibiting 'unlawful picketing'.

4.2 Further, important transitional provisions under the C and T Bill provide that:

(i) Restored powers, including coercive powers, to obtain information shall apply in relation to any contravention or alleged contravention of the former BCII Act and the FW(BI) Act; and

(ii) The ABCC (or an inspector) may begin or continue to participate in proceedings even if matters have been settled between the parties and reliance placed on the settlement provisions of the current legislation. This introduces an element of retrospectivity into the Bill.

Meaning of 'building work'

4.3 The definition of 'building work' in clause 6 of the Bill is of critical importance in defining the scope and application of the Bill including the scope of the proposed ABCC's operations. The Bill intentionally extends the operation of its provisions beyond what applied under the BCII Act. It does this by extending the reach of its provisions to off-shore operations and by including the transport or supply of goods used in building work. The exclusion of the domestic housing sector, which was also a feature of the 2005 Act, has been retained.

4.4 The proposed definition will extend the real ambiguity and uncertainty as to the operation of these provisions and the field in which the ABCC is to operate. These problems of definitions and boundaries have been a feature of the legislation since the introduction of the 2005 Act. This problem is compounded by the differences in industrial rights between those covered by the proposed legislation and those who are not, which differences are created by this legislation.

4.5 Notwithstanding the attempts to delineate the reach of the Bill in the Explanatory Memorandum, there will inevitably be ambiguity as to the application of the Act in respect of transport, storage and warehousing and even manufacturing operations as a result of these provisions. Although the Explanatory Memorandum says it is not intended that the manufacture of goods used for building work be covered, it is likely that manufacturing businesses that themselves physically supply their goods to site, rather than contract that function out to a specialist transportation company, will be caught by these provisions.

4.6 The submission of the MUA to this Committee draws attention to the problems associated with the extension of these laws to vessels which might be engaged in the supply of goods for building work associated with the

construction of offshore resource platforms, particularly where, as is most often the case, these operations represent a very small proportion of the overall work carried out by these businesses and their employees.

Industrial action

4.7 The CFMEU strongly opposes those clauses in the Bill that modify the rules relating to the taking of industrial action and other action in the building and construction industry. In particular, Clause 8 of the Bill excludes from the concept of protected action as defined in the *Fair Work Act*, action engaged in concert with persons who are not protected persons, or where the organisers of the action include one or more such persons. 'Protected persons' is defined for the purposes of section 8 as including unions and officers of unions that are bargaining representatives, but not employees of unions, which in the construction industry, would commonly include union organisers, who would routinely be involved in the organisation of protected action. This would render virtually all action unprotected and expose the union, its employees and the employees taking the action, to significant civil penalties.

Picketing

4.8 Clauses 47 and 48, introduce a new and unprecedented prohibition on 'persons' (a wider concept than 'building industry participants') engaging in or organising 'unlawful pickets'. An unlawful picket is defined to include any action that is industrially motivated and directly restricts persons from accessing or leaving a building site, *or has that purpose.* The Explanatory Memorandum provides that this latter prohibition would operate irrespective of whether someone is actually accessing or leaving a site. It follows that for picketing to be unlawful, it does not actually have to restrict or prevent in any material way, access or egress to a building site. Any group of persons, including members of the general public, who have assembled with the purpose of preventing or restricting access where that purpose is industrially motivated would be

infringing the provision and be exposed to fines and injunctions irrespective of whether they had done anything to restrict access. In fact the *organising* of such action is also unlawful even before persons are physically assembled. The provisions focus on the purpose of those involved in the picket rather than its effects.

4.9 The new restrictions may include such conduct as peaceful assembly and the conveying of information to persons entering or leaving a building site. Thus even action that is not unlawful at common law and action which is motivated by an otherwise perfectly lawful industrial purpose can be caught by these provisions.

4.10 As recently as 5 February 2014, a number of workers and subcontractors in NSW were left out of pocket to the tune of an estimated $30 million as a result of contractor Steve Nolan Constructions going into external administration. For its part, the client developer, the Ralan Group, has maintained that it paid every invoice to the contractor. But despite this, workers and subcontractors who were still completing work onsite had not been paid. Some subcontractors involved were small family businesses and are owed as much as $2 million, in addition to some 200 workers and their families who are set to lose wages and entitlements as a result of the contractor's failure to pay. Those unpaid workers and business owners – 'persons' under s. 47 of the Bill – who maintain a protest 'picket' which is consistent with the industrial purpose of the CFMEU, namely that those who perform work get paid for it, would face significant penalties for doing so. In instances such as this, heavy-handed prohibitions on 'picketing' add insult to injury. It is unacceptable that ordinary families bear the brunt of companies going into administration, jeopardising substantial amounts of money that form their livelihoods, and then face possible sanctions for speaking up about it in an otherwise peaceful and democratic way.

4.11 The Government has sought to assuage public concern about the extent to which these proposed laws might restrict non-industrial community gatherings such as

environmental protests, by saying that only pickets that have an industrial motivation (or that are unlawful because it involves for example, actionable obstruction or besetting) would be caught. However this does not justify restricting the rights of people in the first place merely because their concern has an industrial element to it.

4.12 These restrictions have potentially far-reaching consequences for fundamental democratic rights such as freedom of assembly and freedom of speech and may even infringe the implied freedoms under the Commonwealth Constitution (per *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520).[23] The Statement of Compatibility with Human Rights which is annexed to the Explanatory Memorandum concedes that *'The right to freedom of peaceful assembly is limited by the prohibition on unlawful picketing that is contained in s. 47 of the Bill*.'

4.13 The restrictions are all the more concerning when coupled with the new reverse onus provisions in Clause 57 of the Bill and the fact that under clause 48, 'any person' can apply to a court for an injunction against an 'unlawful' picket.

Transitional and Consequential Provisions

4.14 The CFMEU strongly supports the ACTU submissions in relation to the effect of the transitional provisions associated with the main Bill. In particular we condemn the retrospective operation of Item 20 of the Bill which has the potential to open up matters which have been previously settled by parties on the basis of the law as it applied at the time such settlements were reached.

[23] See also *Unions NSW v New South Wales* [2012] HCA 58 (18 December, 2013).

5. How Has The ABCC/FWBC Operated?

ABCC Investigations

5.1 The ABCC's 2009-2010 Annual Report disclosed that 55% of all its investigations were directed at trade unions.[24] Only 7% of the ABCC's investigations in 2009-2010 were directed to employers.[25] Unions or employees were the subject of on average 76.5%[26], or more than three-quarters of all ABCC investigations, between 1 July, 2006 and 30 June, 2009.

5.2 The types of matters which are investigated also show a strong bias towards the examination of alleged conduct of unions and workers. For example, 24% of all investigations related to alleged contraventions of right of entry provisions.[27] Unlawful industrial action investigations constituted 22.5% of the ABCC's investigation.[28]

5.3 The fact that the overwhelming majority of the ABCC's investigations concerned the alleged conduct of trade unions or union members/workers was not accidental. It was the result of a policy decision of the ABCC to direct their resources toward union-related matters.

5.4 In more recent times, in a belated and cynical effort to establish its credentials as something other than publicly funded union-busters (or, in the ABCC's language, to show that they are a 'full service' regulator) and to carve out an ongoing role for itself, the ABCC (and the FWBC) argued that it devoted more resources to investigating employer breaches of industrial law. It has also tried to give the appearance of taking issues such as sham contracting seriously. The fact remains that the ABCC/FWBC has over many years chosen to ignore the

[24] At page 29
[25] 11% of investigations were conducted in respect of head contractors and 15% were for subcontractors.
[26] The figure is the average of the total percentage for unions and employees being the subject of investigations from 2006-2009
[27] 2009-2010 Annual report page 30
[28] ibid

main role of any government industrial inspectorate, namely securing the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work.[29]

5.5 The priorities and the allocation of investigative resources continue to be reflected in the identity of the parties who are prosecuted by the ABCC/FWBC.

ABCC Prosecutions

5.6 Until October 2010 the ABCC had a policy position, unique for an industrial inspectorate, that they did not investigate or prosecute employers who had not paid the wages and entitlements legally owing to their employees. Once this policy was reversed, from October 2010 to 30 June 2012 they recovered $847,505.61 in unpaid entitlements.

5.7 The CFMEU prosecutes many employers for underpayment and non-payment and recovers significantly more than this amount for its members every year.

5.8 Despite this policy reversal by the ABCC/FWBC, the heavy bias of the ABCC/FWBC in targeting trade unions with these prosecutions continues to be evident from the official figures.

The Case of Sham Contracting

5.9 The problem of sham contracting is widespread in the construction industry. The practice of sham contracting undermines employee entitlements and the industrial safety net and deprives public revenue of millions of dollars every year. The ATO's Compliance Programme Report for 2012-13 showed that of the 1,100 audits of business which were conducted which involved 41,000 'contractors' of whom 18,000 were individuals, a staggering 48% of businesses that engaged contractors were wrongly treating individuals as contractors. These workers

[29] See ILO Convention 81 Labour Inspection Article 3.

were legally employees but were missing out on employee entitlements such as superannuation.[30] About one third of all so-called 'independent contractors' work in the construction industry.

5.10 In 2011 the CFMEU released a report which argued that between 26-46% of all so-called 'contractors' in the industry were in fact sham arrangements and that the leakage of tax revenue to the Commonwealth because of this practice was in the order of $2.475b per annum.[31]

5.11 The ABCC/FWBC conducted its own inquiry into sham contracting and released a report in December 2012 which concluded that 13% of all self-identified contractors (or 5% of the total industry) were 'possibly misclassified' as 'contractors'. The report went as far as to say it would not be unreasonable to estimate that the figure could actually be between 5 and 10% of the entire industry.

5.12 Despite all the evidence of widespread and systematic breaches of industrial law and the massive loss of public revenue, the ABCC/FWBC has only ever conducted a handful of prosecutions relating to sham contacting.

Prosecution Track Record

5.13 From October 2005 until June 2011 the ABCC brought a total of 86 prosecutions against unions and union officials.[32] This compared to 5 prosecutions against employers in the same period.[33] In the period 1 July 2009 to 30 June 2010 there were 29 prosecutions brought against unions and union officials and

[30] Page 24
[31] '*Race to the Bottom – Sham Contracting in Australia's Construction Industry'* CFMEU March 2011.
[32] Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Additional Estimates 2010-2011 Question No.EW0675_11
[33] ibid

none against employers.[34] From 1 July 2010 to 1 June 2011, union prosecutions still outnumbered employer prosecutions by almost three to one.[35]

5.14 The matters which were prosecuted by the ABCC/FWBC demonstrate its bias in pursuing union and employee-related conduct. Allegations of unlawful industrial action accounted for 61 per cent of cases commenced in 2009-2010, followed by right of entry prosecutions at 26 per cent.

5.15 The prosecution of unions and workers by the ABCC/FWBC was made worse by the fact that the laws they are enforcing have been repeatedly found by the International Labour Organisation (ILO)[36] to be contrary to core international labour standards including Conventions 87 and 98.

5.16 The courts and tribunals have also been strongly critical of the way the ABCC has conducted prosecutions. For example the Australian Industrial Relations Commission criticised the evidence-gathering processes of the ABCC:

> *'[…]the manner in which the investigation and interviews appear to have been conducted and recorded by ABCC Inspectors was to cast Mr McLoughlin in the worst possible light, rather than to provide full evidence as to the manner in which Mr McLoughlin exercised his right of entry on to sites.'*[37]

5.17 Following this decision the ABCC wrote to the CFMEU saying it did not accept the AIRC's observations, and further:

> *'The ABCC is not obliged in an administrative proceeding, to ensure that everything in favour of the respondent finds its way into witness statements.'*[38]

[34] Ibid
[35] Ibid
[36] Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association – see below
[37] *Martino* RE 2007/2179.
[38] ABCC letter to CFMEU 17 July 2008.

5.18 The Federal Court of Australia has also cast serious doubt on the objectivity of the ABCC making reference to it 'casting a blind eye' to employer illegality. The Court went on:-

> *'The promotion of industrial harmony and the ensuring of lawfulness of conduct of those engaged in the industry of building and construction is extremely important, but it is one which requires an even-handed investigation and an even-handed view as to resort to civil or criminal proceedings, and that seems very much to be missing in this case'*

ABCC Coercive Interviews

5.19 From 1 October 2005 to 21 June 2011, 235 notices for compulsory examinations were issued pursuant to section 52(1)(e) of the *BCII Act*. Further, 7 notices requiring the production of documents were issued pursuant to section 52(1)(d)of the Act.[39]

5.20 The breakdown by classification of persons examined by use of these compulsory notices in the period 1 October 2005 to 30 April 2011 is as follows[40]:-

Employees - 138
Management - 54
Union Officials - 10
Independent Witness - 1
Government Official - 1

5.21 In *Commonwealth Director of Public Prosecutions v Tribe (Ark) (File No: MCPAR-09-2146 Magistrates Court SA)* the Court held that the Notice issued by the ABCC to construction worker Ark Tribe, was defective. Mr Tribe was therefore

[39] Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Budget Estimates 2011-2012 Question No.EW0117_12
http://www.aph.gov.au/Senate/committee/eet_ctte/estimates/bud_1112/answers/EW0117_12.pdf
[40] Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Budget Estimates 2011-2012 Question No. EW0118_12
http://www.aph.gov.au/Senate/committee/eet_ctte/estimates/bud_1112/answers/EW0118_12.pdf

acquitted of the charge of failing to attend in response to a coercive interview notice.

5.22 Since the Tribe decision, the ABCC/FWBC has confirmed that **all 203 coercive notices issued from October 2005 until the date of the Tribe decision on 24 November 2010, suffered from the same defect as the Tribe notice.**[41]

5.23 The only advice provided by the ABCC/FWBC to people issued with one of the 203 defective notices was to contact one of them and tell them that the interview was not going ahead.[42]

5.24 A number of prosecutions have proceeded on the basis of information or material obtained by the ABCC/FWBC through the use of defective s 52 notices.[43] The ABCC also conceded that evidence which has been obtained through the use of a defective s 52 notice has been subsequently admitted into evidence by a court in the course of a prosecution.[44]

5.25 In February 2011 the ILO's Committee of Experts said:

> *'Noting with concern that the manner in which the ABCC carries out its activities seems to have led to the exclusion of workers in the building and construction industry from the protection that the labour inspection system ought to secure for these workers under the applicable laws, the Committee urges the Government to ensure that the priorities of the ABCC (or the Fair Work Building Industry Inspectorate) are effectively reoriented so that labour inspectors in the building and construction industry may focus on their main functions in full conformity with Article 3(1) and (2) of the*

[41] Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Budget Estimates 2011-2012 Question No.EW0119_12 – See attached at Appendix 2.

[42] Ibid Question No.EW0124_12

[43] Ibid Question No.EW0121_12

[44] Ibid Question No EW0122_12

Convention.'

5.26 By its own conduct the ABCC undermined any notion that it is independent and apolitical. It is now beyond any doubt that:-

(i) The ABCC/FWBC's track record of investigations, advice, prosecutions and interventions clearly favoured employers;

(ii) Enforcement of employee rights such as wages and entitlements and freedom of association were consciously overlooked by the ABCC/FWBC even though they had a statutory responsibility to deal with them;

(iii) The ABCC/FWBC had no proper regard to the public interest in determining which matters to litigate and on whose behalf litigation should be brought; and

(iv) The ABCC/FWBC had been the subject of extensive criticism by superior courts and other tribunals both as to their investigative methods, choice of matters for prosecution and conduct of cases.

5.27 On the basis of the ABCC/FWBC annual reports, we can say that the total cost of the ABCC/FWBC to the Australian taxpayer to June 2013 has been **$259.107m.**

6. Health and Safety – Impact Of the ABCC and *BCII Act* and the 2013 Bills

Occupational Health and Safety in the Construction Industry

6.1 The construction industry is a dangerous and arduous industry to work in. It is characterised by a system of sub-contracting, many small employers, widespread use of a 'labour hire' workforce and intense competitive pressures. These can contribute to corner-cutting on safety issues, breakdowns in the chain of responsibility and difficulties in maintaining effective employee representation on safety issues from job to job. Injury and fatality rates remain unacceptably high.

6.2 Incidents such as falls, trips or slips (including from heights), vehicle incidents, being hit by moving or falling objects, body stress, electrocution, fire, exposure to hazardous substances and the elements are risks that invariably present themselves to workers' health and safety on building and construction sites. According to data published by Safe Work Australia[45], over the five year period from 2007-08 to 2011-12, some 211 construction workers were killed as a result of work-related injuries. That figure equates to 4.34 fatalities per 100,000 workers in the building and construction industry, which is approximately twice the all-industry rate of 2.29 per 100,000 workers over the same period.[46]

6.3 The construction industry also accounted for 11% of all serious workers' compensation claims from 2007-08 to 2011-12, or an average of 39 claims per day.

6.4 It is indisputable that the legal regulation of how work is organised and performed can have a significant impact on workplace health and safety outcomes – especially in sizeable, high-risk, and indeed high-incidence, industries

[45] Construction Industry Fact Sheet, 2012. The data presented are restricted to accepted claims for serious injury and disease. Serious claims include fatalities, claims for permanent disability and claims for conditions that involve one or more weeks of time lost from work.
[46] *Ibid*.

like building and construction. This has been an almost unanimously held view since at least the 1960s, when there was a growing recognition that the traditional 'red light' model of workplace regulation failed to prevent occupational disease and injury.[47] By 1970, this prompted the then Conservative UK Government to set up a Committee of Inquiry into legal responses to workplace health and safety, chaired by Lord Robens who delivered his Report in 1972.[48] The Robens Report proved highly influential across the political spectrum, both in the UK and in other jurisdictions, as a benchmark for legal approaches in workplace health and safety. Indeed, all nine Australian jurisdictions have enacted legislation which is underpinned by Robens.

6.5 The Robens-style approach to workplace regulation foresees a critical role for employees and their representatives in upholding OHS standards. Indeed, a key recommendation of the Robens Report was for there to be a statutory duty on employers to '*consult with employees or their representatives at the workplace on measures for promoting safety and health at work [and to] provide arrangements for the participation of employees in the development of such measures.*'[49] Other studies have pointed to the positive correlation between trade union involvement at workplaces and improved OHS outcomes.

6.6 In all Australian jurisdictions, this two-pronged recommendation has translated into statutory obligations and corresponding rights that (amongst other things) enable employees to elect their own OHS representatives and that enable OHS representatives to inspect workplaces and take action towards improving workplace health and safety, including by directing that specific improvements be made and/or that dangerous or unsafe work cease.[50]

[47] Williams 1960 in Creighton, WB & Rozen, P, 2007, *Occupational Health and Safety Law in Victoria* (3rd Ed, Federation Press, Sydney).
[48] Robens, Lord, 1972, Committee on Health and Safety at Work, *Report* (Cmnd 5034, HMSO, London).
[49] Ibid, at [59].
[50] Eg Occupational Health and Safety Act 2004 (Vic), s 54.

6.7 These aspects of Australian workplace OHS legislation are consistent with international legal norms, namely the *Occupational Safety and Health Convention (Convention No 155)* of 1981, as read with paragraph 12 of the ILO's *Occupational Safety and Health Recommendation* of 1981 and the *Promotional Framework for Occupational Safety and Health Convention 2006*.

6.8 Peter Rozen has observed that the growth in precarious employment and insecure work in Australia, which is indeed characteristic of most employment in the transient and project-based building and construction industry, has had the potential to weaken self-regulation under workplace health and safety laws as a result of workers' fears about being victimised for raising safety issues at the workplace.[51] As evidence of this, Rozen points to (amongst other things) a 2005 survey conducted by the Australian Council of Trade Unions, which revealed that 28% of surveyed employee workplace health and safety representatives said they had been pressured by management not to raise workplace health and safety issues and, further, that 25% of those surveyed claimed to have been bullied or intimidated by management because they did so. Clearly, improper managerial pressure undermines the notion of self-regulation and leads to poor OHS outcomes.

6.9 Conversely, empirical studies both in Australia and abroad support the notion that cooperative workplace health and safety regulation, buttressed by trade union representation, are *crucial* elements of improved workplace health and safety.[52] Indeed, as put by Johnstone and Tooma, the evidence:

> *'Supports the notion that joint arrangements and trade union representation at the workplace are associated with better health and safety outcomes than when employers manage work and safety without representative worker participation.'*[53]

[51] Rozen, P, "'But It's Not Safe!': Legal Redress for Workers Who are Victimised for Raising a Safety Issue at Work" (2013) 26 AJLL 326.
[52] National Review into Model Occupational Health and Safety Laws (2009) in Rozen.
[53] R Johnstone and M Tooma, *Work Health and Safety Regulation in Australia: The Model Act*, Federation

6.10 With particular regard to the building and construction industry, one US study[54] compared OHS enforcement in union and non-union construction sites. The data collated for that study disclosed that unionised sites achieved better and improved OHS outcomes as a result of a higher probability of inspection and greater scrutiny during inspections, as compared to non-union sites. The study found that employers at union sites were required to correct health and safety violations more quickly and bear higher overall penalties for those violations than employers with a non-unionised workforce. The study attributes the success of trade unions in monitoring OHS to trade union OHS training programmes, workshops, and trade union knowledge materials such as manuals and practitioner reports, and to the fact that the involvement of trade unions protects employee OHS representatives from managerial reprisals. This is consistent with the experience of the CFMEU, which, through a vast network of representatives on the job, the provision of support for workers organising, and the development and provision of OHS information and knowledge, plays a critical role in upholding OHS at construction sites across Australia.

Prohibition on Industrial Action – OHS Implications

6.11 The prohibition on 'unlawful industrial action'[55] in the former BCII Act – and reintroduced by the BCIIP Bill - includes not just commonly accepted instances of industrial action, such as strikes; it can include any situation where work is carried out '*in a manner different from that in which it is customarily performed'*[56]. Unless the action falls within the 'OHS exemption' for industrial action in s. 7(2) of the 2013 Bill, it can also include certain occupational health and safety related disputes.[57] Employees are therefore faced with the impossible dilemma of having to assess and balance an occupational health and safety issue

Press, Sydney, 2012, pp 142-3.
[54] Weil, D, "Building Safety: The Role of Construction Unions in the Enforcement of OSHA", Journal of Labor Research, Vol XIII(1), 1992.
[55] (see ss. 38, 37 and 5 *BCII Act*)
[56] (ss. 5 and 36)
[57] *('The Investigatory Powers of the ABCC' (2008)* 21 Australian Journal of Labour Law *246 at 273)*

against the prospect of large fines if they take industrial action in response to any risk.

6.12 For the OHS exception to apply, action taken by an employee must be based on a reasonable concern by the employee about an 'imminent' risk to *his or her own* health and safety. It is possible to highlight the unsatisfactory state of this aspect of the Bill through the example of a construction worker who has formed a reasonable concern about an imminent OHS concern about his or her workmates, but not him or herself personally, and responds in a way that delays the performance of work. That worker may face serious fines on the basis that the risk was to the health and safety of their workmates but not them personally. Alternatively, an employee might reasonably identify a work practice that, if continued, would pose a serious OHS risk but nonetheless not one which is 'imminent' within the meaning of the Bill. In that case, any departure from ordinary work practices as a result of such a risk would expose those taking the action to a pecuniary penalty and, in the case of the present Bill, a substantially higher pecuniary penalty for building and construction workers.

6.13 Other examples of action that may not fall within the OHS exception would include:

(i) site-wide action to insist on a safety audit after a fatality where the 'imminent risk' is deemed by the employer to have 'passed' and the employees are unable to overcome the legal niceties of reverse onus provisions;

(ii) site-wide action in response to the identification of a genuine OHS issue that is isolated to a particular part of the site, but which nonetheless raises concerns about other parts of that site, requiring an audit;

(iii) action in response to a problem with amenities that may not pose an imminent OHS risk, but which exposes employees to unacceptably poor onsite sanitation; or

(iv) action in support of the right to a genuine OHS representative, rather than a hand-picked agent of management.

There is little doubt that had these laws applied many decades ago, when the building unions mounted an industrial campaign to ban the use of asbestos, the unions and their members would have been exposed to significant fines for action that proved not only to be warranted, but also instrumental in outlawing this deadly product and saving many thousands of Australian lives.

Role of ABCC

6.14 Whilst the ABCC/FWBC has played no direct role in the prosecution of OHS breaches in the industry, its prosecution record demonstrates scant regard for promoting the importance of OHS and compliance with OHS laws.

6.15 In the case of *Cahill v. CFMEU and Mates* the ABCC brought proceedings alleging that the union and an official had unlawfully coerced an employer to engage certain employees, including OHS officers, on a site in Heidelberg Victoria and had taken unlawful industrial action to prevent a crane company from working on the site.

6.16 The company whose interests the proceedings were brought to protect, Melbourne Transit Pty Ltd (Melbourne Transit), had previously been the subject of very strong criticism by the County Court of Victoria in relation to a workplace fatality of an employee in September 2004. The Court said: -

> *'I regard the defendant company's actions before and after this accident to be reprehensible in the extreme, involving a dismissive and careless approach to the safety of its employees, such that a young life was cut short by what was clearly and easily avoidable accident… In my view the company was seriously at fault and its moral culpability was high.' (R v. Melbourne Transit Pty Ltd [2006] VCC 1037, 17 August 2006).*

6.17 A fine of $10,000 was imposed on the company even though the Court acknowledged that as the company was in receivership, the fine would not be paid.

6.18 The ABCC appeared to have no regard for the public interest considerations that would ordinarily weigh against a public authority pursuing a prosecution for a company such as this, at great public expense. The fact that they chose to pursue such a matter sends a clear signal to the rest of the industry that occupational health and safety is of little or no concern to the ABCC.

6.19 The *BCII Act* and the ABCC emboldened employers to take an aggressive anti-union approach to union entry, presence and activities on site. The actions of the ABCC restricted union organisers from carrying out their historic role of detecting workplace hazards and agitating for rectification before accidents occur. Workers fearing prosecution or compulsory interrogation are less likely to raise issues of safety with their union representatives or their employer.

7. Wilcox Inquiry

7.1 On 31 March 2009 the final report of the Government inquiry into the construction industry was delivered to the Australian Government by Hon. Murray Wilcox QC (the *Wilcox Report*).[58] The *Wilcox Report* made a number of specific recommendations many of which are now reflected in the *Fair Work (Building Industry) Act 2012*.

7.2 In particular, it recommended that the special provisions relating to the definition of unlawful industrial action, additional penalty provisions and higher monetary penalties in the *BCII Act*, be repealed.

Industrial Action

7.3 This aspect of the *Fair Work (Building Industry) Act 2012* was thoroughly dealt with during the Wilcox Consultation process. Three formal debates involving a range of interested parties were convened at the Law Schools of the Universities of Western Australia, Melbourne and Sydney. On each occasion employers were invited to tell the inquiry how, given the terms of the *Fair Work Bill*, they would be disadvantaged by having a single set of remedies and penalties available to them under those arrangements as opposed to the continuation of the *BCII Act* provisions. The *Report* concluded:-

> *'Although there is clearly a technical difference between the circumstances under which industrial action is unlawful under the BCII Act ...and the Fair Work Bill...I found it difficult to find a scenario under which this would make a practical difference. Accordingly, at each of the forums, I invited the help of the employers' representatives who were present. They each undertook to consult with others and let me know if they could imagine such a scenario. None of them have done so. This confirms my view that the difference has no*

[58] http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/

practical importance."[59]

7.4 The Report also noted that under the *Fair Work Bill*, statutory compensation was available under both s 417 and s 421 (in combination with s 545).

7.5 Ultimately the *Report* concluded:-

'..no reasoned case was put to me for retention of either of the first two differences in the rules applying to building workers, on the one hand, and the remainder of the workforce, on the other. I see no such case.....the retention of these differences would serve only to complicate the law."[60]

Coercion and Discrimination

7.6 The proposed section 52 of the BCIIP Bill relates to coercion in the allocation of duties to particular persons. This situation is already dealt with by s. 355 of the FW Act. The MBA conceded as much in relation to the equivalent provision, s. 43 of the BCII Act, during the Wilcox Inquiry.[61] The Explanatory Memorandum acknowledges that the FW Act prohibitions are in similar terms.[62] The section is unnecessary.

7.7 The proposed section 53 refers to coercion in relation to superannuation. Again, Wilcox concluded that the equivalent provision of the BCII Act, s. 46, was already covered by the provisions of s. 343 of the FW Act.[63] This remains the case.

7.8 The proposed section 54, which is in similar terms to s. 44 of the BCII Act, is covered by the provisions of ss. 340 and 343 of the FW Act. Wilcox analysed the

[59] Final Report paragraph 4.32.

[60] Final Report, 4.63.
[61] Final Report 4.74
[62] Para 142.
[63] Final report 4.80

provisions and expressly reached that conclusion.[64] Again, the Explanatory Memorandum acknowledges that the FW Act prohibitions are in similar terms.[65]

7.9 The proposed section 55 is in similar terms to what was contained in the BCII Act. As was found by Wilcox[66] the FW Act prohibition in s 354 covers this situation. Once again the Explanatory Memorandum acknowledges the repetition.[67]

7.10 **The *Wilcox Report* disposed of the arguments about the need to retain additional penalty provisions from the *BCII Act* once and for all. It concluded that each of the provisions is comprehensively dealt with in the *Fair Work Bill* (now the *FW Act*) and that there was no need to carry any of them forward.**

Fines/Penalties

7.11 The issue of penalties was also analysed in some detail.

7.12 The separate penalty regime for the construction industry operated in a one-sided way since it was introduced in 2005. The rationale for the different penalties was drawn from the *Cole Royal Commission*. However the *Royal Commission* also recommended that the maximum penalties for ***employers*** who breach awards and agreements by underpaying employees their lawful entitlements should be increased to the same level as those for industrial action. That recommendation was ignored by the Howard Government. The result has been that **workers have been exposed to higher penalties but employers have not.**

7.13 The *Wilcox Report* dealt with the argument that the industry is unique in its vulnerability to industrial action.

[64] Final report 4.75 to 4.78
[65] Para 156.
[66] At 4.79
[67] At 158.

'....it is necessary to remember there are many other industries in which industrial action may cause great loss to an employer, and even the national economy, and/or considerable public inconvenience. One has only to think of the major export industries, most components of the transport industry, the gas and electricity industries, the telecommunication industry and emergency services such as police. ambulances and hospitals. There is no less need to regulate industrial action in those industries than in the building and construction industry. Recognising the serious consequences of industrial action in virtually any industry, the Fair Work Bill proposes a number of severe constraints upon its occurrence.'[68]

7.14 The *Report* also noted that the Parliament had recently chosen what it regarded as the appropriate level of penalties in industrial matters and the *Fair Work Bill* embodied that decision. It concluded:-

> *'I do not see how (the history of the building and construction industry) can justify....the contravener....being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and happened to be brought to justice.* ***To do that would depart from the principle...of equality before the law.'***[69] (emphasis added)

7.15 However the *Report* also recommended the continuation of different treatment for the industry in some key respects, most notably the retention of coercive powers, for a limited period, for use by this inspectorate during its investigations. The 2013 Bills retain the coercive powers and remove the safeguards introduced by the 2012 Act. These measures are strongly opposed.

[68] Ibid paragraph 4.52.

[69] Ibid paragraph 4.63.

Coercive Powers

7.16 There is no good reason why there should be any differences between the regulatory arrangements that apply to the construction industry and those in other industries. As a matter of fundamental principle, and as a matter of fairness, the starting point for our lawmakers should be that Australian employees (and employers) be subject to the same national industrial laws.

7.17 The industrial jurisdiction deals with matters that do not warrant the introduction of coercive powers in the same way as other areas of the law might. For example industrial issues do not generally raise matters of national security, fraud on the public revenue, serious corruption or criminality or public safety. The public interest considerations that might weigh in favour of the use of coercive powers in these other areas are not present in the industrial context. To the contrary, the public interest very much favours keeping these powers out of the industrial arena to ensure that the exercise of industrial rights, like the right to associate, organise and take collective action is not tainted with the quasi-criminal overtones and general opprobrium reserved for these other matters.

7.18 It should also be kept in mind that the coercive powers are not used to interrogate persons under suspicion of a crime but simply against any person who may be able to assist with an investigation.

7.19 The national industrial regulator, the FWO, has operated effectively without these kinds of coercive powers. They are simply not necessary for the enforcement of industrial laws.

ABCC – Location and Structure

7.20 The *Wilcox Inquiry* specifically considered the arguments about the structure and location of any specialist agency. Ultimately the Inquiry rejected the model which is now set out under the *Fair Work (Building Industry) Act*

2012, i.e. a separate and autonomous statutory agency working in parallel with, but independently of, the FWO.

7.21 Wilcox recommended that the proposed Specialist Division be located ***within*** the office of the FWO but with operational autonomy.[70]

7.22 **The 2013 Bills should be withdrawn and replaced with legislation that abolishes the FWBC and transfers its operations into the office of the FWO.**

Intervention

7.23 The *Wilcox Report* recommended against retaining a statutory right of intervention in court or FWC proceedings.[71]

> *'In order to guard against the case being hijacked, it is better to give the court or FWA discretion to allow intervention. In that way terms may be imposed.'*[72]

The current Bills do not reflect this conclusion.

7.24 The ABCC's history in intervening in proceedings is a matter of public record. It was considered by Wilcox. Almost invariably the ABCC/FWBC has intervened to support (often well-resourced and experienced) employer litigants. There is no public interest in having a Government agency that simply avails itself of a statutory right of intervention to take a partisan position in the resolution of industrial disputes.

7.25 **The 2013 Bills should be amended so that the issue of intervention by a regulator is left to the discretion of the relevant court or tribunal.**

[70] Recommendation *1 Final Report page 6.*
[71] Paragraph 9.15 page 99.
[72] Ibid.

8. ILO Criticisms

8.1 The *BCII Act* was on no less than eight separate occasions, found by the ILO's *Committee of Experts on the Application of Conventions and Recommendations* and the *Committee on Freedom of Association* to be contrary to core International Labour Conventions to which Australia is signatory.

8.2 As early as 2005 the Committee on Freedom of Association noted:

> *'As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision.'*

8.3 In February 2010 the Committee of Experts said:-

> *'The Committee considers that the prosecution of workers does not constitute part of the primary duties of inspectors and may not only seriously interfere with the effective discharge of their primary duties – which should be centred on the protection of workers under Article 3 of the Convention – but also prejudice the authority and impartiality necessary in the relations between inspectors and employers and workers. This is even more so when the laws on the basis of which the workers are prosecuted have been repeatedly found by this Committee to be contrary to other international labour standards, notably Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98).'*

8.4 In February 2011 the Committee reiterated its previous conclusions:-

> *'Noting with concern that the manner in which the ABCC carries out its*

activities seems to have led to the exclusion of workers in the building and construction industry from the protection that the labour inspection system ought to secure for these workers under the applicable laws, the Committee urges the Government to ensure that the priorities of the ABCC (or the Fair Work Building Industry Inspectorate) are effectively reoriented so that labour inspectors in the building and construction industry may focus on their main functions in full conformity with Article 3(1) and (2) of the Convention.'

8.5 It is important to have regard to international obligations that have been voluntarily assumed in deciding the fate of the new laws. A reversion to the provisions of the BCII Act will inevitably bring Australia back into conflict with the most fundamental of internationally accepted labour standards.

9. Conclusion

9.1 If the 2013 Bills are approved in their current form the coercive powers would continue to exist and the penalty for failure to comply with these powers would remain six months imprisonment. Whilst such laws continue to exist, the spectre of criminal penalties hangs over people working in this industry. These coercive powers have no place in the industrial jurisdiction.

9.2 The proposed separate and industry-specific labour inspectorate, armed with these intrusive and unprecedented coercive powers, represents the continuation of flawed policy. The ABCC/FWBC has politicised the enforcement aspect of industrial relations and abandoned the fundamental purpose for which labour inspectorates are established - the protection and enforcement of workers' rights in the workplace. Vast amounts of public resources have been and continue to be used to support employers in industrial disputes.

9.3 The BCII Act represented the last and most extreme vestige of the *WorkChoices* era. The 2013 Bills are a continuation of that approach. Future arrangements for the industry must be consistent with binding international labour standards and must also promote the fundamental principle of equality before the law. Since the proposed Bills are inconsistent with these concepts, the Committee should recommend the rejection of the Bills.

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Appendix 1

Canberra Times, Canberra
18 Nov 2013, by Nick Mckenzie And Richard Baker

General News, page 3 - Size: 195.63 cm²
Capital City Daily - Circulation: 26,153 (MTWTFS-)

ID 223610263 BRIEF CONU_COMP

Leighton linked to 'corrupt' fees for Iraq deals

By Nick McKenzie and Richard Baker

Damning evidence has emerged in a court case linking construction firm Leighton Holdings to allegedly corrupt payments of "not less than $25 million in marketing fees" to a Monaco firm to help win Iraq government projects, even though the projects required no marketing.

Leighton's own lawyers recently labelled these payment agreements as "vague and uncertain", while corporate corruption expert Dr Kath Hall, Associate Professor at the ANU College of Law, said they were risky and compared them to the dealings of AWB Limited in Iraq over a decade ago.

Files from the British High Court of Justice case reveal that the fees were contained in deals, known as Memorandum of Agreements (MOAs), struck between Leighton's offshore business and another company, Unaoil, in the last half of 2010 and in early 2011 and aimed at securing oil pipeline contracts in the south of Iraq.

Unaoil operates out of Monaco but is incorporated in the British Virgin Islands, a tax haven with an opaque banking system.

The Unaoil deal is one of two linked to the Iraq projects in 2010 – the second involving UAE company Oceanking – that Leighton insiders now concede should have never been struck because they involved payments for services that were undefined and vague.

Leighton only referred the deals to police in November 2011, after external lawyers discovered company files outlining allegations of bribery in Iraq.

The two deals were overseen by former Leighton International director David Savage and former top executive Russell Waugh.

Unaoil has alleged in its court case that the MOAs required the Australian firm to pay pay Unaoil "a minimum price for construction and marketing of $US55 million" in the event that the Iraqi government awarded Leighton the second pipeline contract.

"Furthermore, the parties agreed that Unaoil shall be paid an additional marketing fee of 5 per cent of any amount that Leighton receive on the [Iraq] Project above $US500 million."

"For the avoidance of doubt, the marketing fee paid to Unaoil shall not be less than $US25 million."

In documents lodged in court in April this year, Leighton's barrister Sean Brannigan, QC, rejected Unaoil's demands, stating that the MOA between Leighton and Unaoil was "so vague and uncertain that it cannot be given contractual force".

As federal police bribery investigators continue to investigate Leighton's Iraq dealings, several figures closely associated with Leighton said the MOAs should never have been drawn up. Most corporate anti-corruption programs warn that "marketing fees" may be used as a vehicle to pay bribes in overseas business deals.

Former Leighton chief executive Walk King, who departed Leighton at the start of 2011, was also on the board that oversaw Leighton Offshore's initial Iraq contract and initial MOAs with subcontractors.

Mr King said that he had no knowledge of or involvement in the "so-called second contract" in Iraq, which is the subject of the British legal dispute between Leighton and Unaoil.

In a statement on Sunday, Leighton Holdings said its directors and the boards of its subsidiaries executed their responsibilities with "due care" at all times and contracts with subcontractors in Iraq were a management responsibility.

"The Iraq project and the subcontracts entered into by that project were within the authority level of the relevant management. The subcontracts did not require board review or approval."

Advertiser (Adelaide), Adelaide
07 Nov 2013, by Drew Cratchley

Business News, page 57 - Size: 248.87 cm²
Capital City Daily - Circulation: 155,635 (MTWTFS-)

ID 221962497 BRIEF CONU_COMP

Leighton vows to fight class action on corruption claims

DREW CRATCHLEY
SYDNEY

CONSTRUCTION giant Leighton has seen more detail of a claim being made in a class action related to allegations of corruption in the company, and says it will vigorously defend the action.

Melbourne solicitor Mark Elliott is seeking damages in the Victorian Supreme Court on behalf of 10,000 shareholders after more than $957 million was wiped off the market value of Leighton shares in two days in October.

The share price fall occurred after media reports of widespread corruption in Leighton's international business, which were related to claims of kickbacks allegedly being paid for contracts.

Leighton had previously informed the market it had referred possible breaches of its code of ethics to the Australian Federal Police.

Mr Elliott has accused the construction giant of breaching the corporate continuous disclosure laws.

Leighton received a statement of claim from Mr Elliott yesterday outlining further details of the class action.

"Leighton strongly denies Mr Elliott's claim that Leighton has failed to meet its disclosure obligations," the company said in a statement.

It added: "Mr Elliott's claim will be vigorously defended." Leighton said it had already responded to the allegations at the heart of the claim.

Statements on October 3 and 7 said Leighton co-operated with police and had fulfilled its obligations to shareholders.

Leighton has also previously vowed to fight a separate class action that was filed by shareholders seeking to recover losses stemming from the company's massive profit downgrade in 2011..

And Leighton chairman Bob Humphris has rejected a call from the Australian Shareholders Association to step aside because of the governance issues.

"Leighton needs a new independent chair not associated with past controversies to steer it forward." ASA chairman Ian Curry said. But Mr Humphris said there had been no evidence to date of a crime or bribery – and he was determined to continue in the role.

Leighton was not the only company to attract criticism from the ASA.

All up, the organisation called for six chairmen to go.

Rick Crabb, of Paladin Energy, headed a company that had gone for 19 years without a dividend – and had lost $US1.3 billion.

Fairfax Media's Roger Corbett had been on the board since 2003, a period during which shareholders had suffered significant losses over that period. He should go at the end of term in 2014. Harry Boon headed the Tatts Group but had brought baggage of the "disasters" of Paperlinx and Hastie Group, plus remuneration excesses at Toll Holdings.

The ASA said Mr Boon should no longer chair Tatts Group, especially now that it had relocated to Brisbane from Melbourne – where Mr Boon is living.

John Prescott, of Aurizon Holdings, was criticised for "ongoing remuneration excesses including changes of the rules, board discretion and accounting treatments which have benefited executives".

Finally, the ASA criticised Travers Duncan of White Energy, who had been named by ICAC in relation to the Mt Penny coal tenement.

Age, Melbourne
11 Nov 2013, by Matthew Drummond

Business News, page 26 - Size: 133.47 cm²
Capital City Daily - Circulation: 142,050 (MTWTF--)

ID 222372433 **BRIEF** CONU_COMP

Leighton 'did not deny' bribe allegations

Matthew Drummond

Leighton Holdings has not denied serious allegations of misconduct made in Fairfax Media newspapers, lawyers for a shareholder class action against the construction giant told a judge on Friday.

Norman O'Bryan, SC, a barrister representing shareholders suing the company, told the Victorian Supreme Court Leighton did not deny the substance of allegations and underlying facts reported in Fairfax newspapers when the company responded to them in a stock exchange announcement on October 3.

"This release is more instructive for what it does not say than what it does," Mr O'Bryan told the court.

"What it does not say is that anything identified in the Fairfax Media articles is false."

Mr O'Bryan's appearance was part of the first hearing into a lawsuit on behalf of Leighton shareholders that alleges a sharemarket announcement by Leighton in February last year, in which it said it had reported a "possible breach of its code of ethics to the Australian Federal Police", misled investors about the true scale of bribery and corruption problems in its overseas operations.

Fairfax Media newspapers have subsequently published more detailed allegations of bribery, misuse of company property and internal cover-ups.

Lawyers for the shareholders are seeking documents, including advice from Leighton's lawyers at law firm Allens.

Leighton's barrister, Charles Scerri, QC, urged the court not to order documents be handed over.

"We take the old-fashioned view that the issues should be defined by the pleadings not what's in the newspapers," he said.

Judge James Judd sided with Leighton and said he would not make any orders but said both sides should be able to agree on non-controversial documents that could be handed over. The case will return to court on February 14.

'The issues should be defined by pleadings not ... newspapers.'
Charles Scerri, QC

Australian Financial Review, Australia
07 Nov 2013, by Matthew Drummond

General News, page 12 - Size: 140.29 cm²
National - Circulation: 66,220 (MTWTFS)

ID 221969989 BRIEF CONU_COMP

Leighton may be forced to defend allegations

Matthew Drummond

Leighton Holdings may be forced to explain in detail its version of the allegations that it paid a multimillion-dollar bribe in Iraq and covered up warnings of internal fraud.

Lawyers launching a class action on behalf of shareholders of the construction company filed an 11-page writ in the Victorian Supreme Court on Monday.

The document sets out the key allegations made by a Fairfax Media investigation into Leighton's offshore businesses, including that former chief executive **David Stewart** was warned in November, 2010, that a $42 million bribe was paid to Iraqi officials to win a major contract.

Lawyers for shareholders and Leighton are due to appear in the Supreme Court on Thursday morning.

"We'll be asking for a defence and four weeks is a reasonable period for that to be provided," said Mark Elliott, the solicitor behind the class action.

"We want discovery of everything that we can get from Leighton Offshore."

At the centre of the shareholder class action is the claim that Leighton knew about fraud and corruption problems in its offshore business as far back as November 2010 and should have told investors earlier.

The company did not announce anything until February, 2012, when it said it had informed the Australian Federal Police of a possible breach of its code of ethics. The writ claims this was misleading. A spokeswoman for Leighton said she was unable to comment on the new writ as it had not yet been provided to the company.

Leighton had earlier promised to defend itself against the shareholder class action.

If the court orders Leighton to file a defence to the writ, the company will have to admit to the allegations of bribery and corruption, or deny them and explain why they are wrong.

So far the company has defended its conduct by saying the AFP was called in as soon as the board became aware of the allegation Leighton had bribed Iraqi officials, and that a former employee has been sued to recover $5.6 million allegedly misappropriated by a black-market barge-building racket in Indonesia.

We want discovery of everything that we can get from Leighton Offshore.
Mark Elliott, solicitor

Mr Elliott said the company would not be able to use the AFP's investigation as a reason not to file a detailed defence. About $1 billion was wiped off Leighton's market value following the revelations, providing one measure of how big the shareholder class action could be worth.

Sydney Morning Herald, Sydney
26 Oct 2013, by Adele Ferguson

Business News, page 9 - Size: 427.33 cm²
Capital City Daily - Circulation: 233,335 (MTWTFS-)

ID 220100659 BRIEF CONU_COMP

Boards must rise to challenge of stamping out corrupt practices

Adele Ferguson

When headlines "Claims Corruption Rife at Leighton", "Bribe Claims Hit Board", "Going Rogue" and "Ex Leighton exec quits as bribe scandal intensifies" were plastered on the front pages of Fairfax Media newspapers earlier this month it wiped 13 per cent off the construction group's share price and left the investment community jittery about bribery and corruption risks in other companies.

Leighton has denied the allegations and said it has spent a lot of time improving its processes, including banning facilitation payments. Despite this, the share price continues to languish as the stories roll out anew and investors consider the potential knock-on effects.

Citi analyst Elaine Prior has articulated the risks to companies in a series of reports that identifies companies in the ASX top 100 potentially at risk of bribery and corruption, based on the location and nature of operations in countries where corruption is a perceived risk, using the Transparency International's Corruption Perception Index rating.

She says while many companies disclose "generic" information on their policies such as policy statements, record keeping, stance on facilitation payments and whistleblower facility, few companies in her study provided much detail on how the policies were implemented and monitored in practice.

"In future, we suspect that investors may seek more information on companies' bribery risk assessment approach, how companies know that their people are following their stated bribery and corruption policies, what training is provided, and what internal compliance review processes are in place, rather than simply seeking codes of conduct and policy documents."

Given the impact on Leighton of the bribery scandal and the regulatory crackdown sweeping the world, she is probably right. Even a sniff of a corruption scandal will force investors to take seriously the risks or face the prospect of a sharemarket sell-off.

Since Australia first introduced anti-bribery laws 12 years ago 28 cases have been referred to the Australian Federal Police. But there have been too few scalps. Reserve Bank subsidiary Securency was one of the most high profile cases and the one that resulted in some arrests.

This has put pressure on the government and the AFP to start using the legislation more effectively to stamp out corruption and bribery. In the case of Leighton, the AFP has been investigating the company for almost two years yet it has not interviewed some of the key players alleged to be involved in the web of corruption. This is unfair to everyone.

Prior says companies are increasingly assessing their contractors and agents for potential bribery and corruption risk.

She says this could be particularly relevant for companies that provide services to mining companies, who may become subject to their clients' due diligence processes relating to bribery and corruption.

Prior says companies that conduct due diligence on agents or partners include Alacer, Alumina, BHP, BlueScope Steel, Flight Centre, Macquarie Group, News Corp, Rio Tinto, Wesfarmers, Woodside Petroleum and WorleyParsons.

In a second report, *Bribery and Corruption in the Spotlight*, Prior draws attention to the fact that some countries are adopting stronger regulation and that will have a knock-on effect on businesses as regulatory enforcement cranks up.

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Sydney Morning Herald, Sydney
26 Oct 2013, by Adele Ferguson

Business News, page 9 - Size: 427.33 cm²
Capital City Daily - Circulation: 233,335 (MTWTFS-)

She notes that companies with British connections face tougher regulation following a beefing up of the UK Bribery Act.

Prior says companies that associate with corrupt activities can be excluded from future contracts. This means companies will increasingly be forced to conduct due diligence on their contractors, partners and agents.

"Companies implicated in bribery or corruption may face loss of contracts, or loss of the opportunity to tender for contracts," she says. "When allegations or investigations occur, this may divert substantial management/board efforts away from more productive activities, to the detriment of the company. These impacts are in addition to legal fees and financial penalties."

As seen in the Leighton scandal, regardless of the outcome, there has been an impact on individuals, with a number of former Leighton staff falling on their swords. This is the best indication yet that companies are increasingly sensitive to "perceived or possible links with corrupt conduct".

Allegations include a $43 million kickback relating to a contract in Iraq, allegations relating to an Indonesian barge contract and the resignations of former employees. These include David Stewart, who resigned as chief executive of Laing O'Rourke, David Savage, who quit the board of British engineering group Keller plc, and Russell Waugh, who left a senior position at UGL.

"While we are in no position to judge potential legal outcomes, it appears that the various organisations were keen to distance themselves from these contentious issues," the report said.

It has also prompted class-action lawyers to sniff around to see if there is a case to answer in relation to potential continuous disclosure breaches given the fall in the share price.

Leighton informed the market early last year that the AFP was investigating a possible breach of the law relating to payments that may have been made to facilitate work in Iraq. At the time the share price fell but not significantly as there was no mention of how big the potential bribery payment was.

There is no question investors have been spooked by the talk of corruption and bribery. For this reason they will start pressuring for more information about their policies.

At the same time as Australian companies increase their footprint in developing countries, the risks become greater, making it a greater issue for boards.

Risks: Leighton Holdings. Photo: Bloomberg

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> "Companies are increasingly assessing their contractors.

Australian Financial Review, Australia
25 Oct 2013, by Nick Mckenzie And Richard Baker

General News, page 29 - Size: 270.58 cm²
National - Circulation: 66,220 (MTWTFS)

ID 219889204 BRIEF CONU_COMP

Police probe UAE resident had impeccable contacts with Iraqi officials

Businessman involved in $750m deal

Nick McKenzie and Richard Baker

An Australian Federal Police bribery probe is investigating multimillion-dollar consultancy fees paid by **Leighton Holdings** to a wealthy United Arab Emirates businessman in return for help securing a $750 million contract in Iraq.

The AFP was examining "project support" payments made to UAE resident **Ramjee Iyer** and linked to an April 2010, Leighton contract.

The contract requested Mr Iyer's firm gathered "by whatever means possible ... any data and information" that would assist Leighton in "winning and executing" the Iraq project, which Leighton won in late 2010.

Sources familiar with Mr Iyer's operations had told Fairfax Media he was hired due to his impeccable contacts with Iraqi officials, the Iraqi trade bank and local and international security forces.

Mr Iyer's company, **Oceanking Survey Services**, was also used by **Leighton International** to work on the Iraq oil pipeline project.

Mr Iyer was the second overseas agent with suspected ties to Iraqi officials under scrutiny by the federal police over allegations that Leighton made inappropriate payments in order to win contracts.

Earlier this month, Fairfax Media revealed how internal Leighton Holdings documents detailed allegations the company paid multimillion-dollar kickbacks to a firm in Monaco, **Unaoil**, to help secure the Iraq project.

Australian law prohibits paying inducements or benefits to foreign officials or their representatives in order to obtain a business advantage.

Unaoil recently denied earlier reports in Fairfax Media it had boasted to Leighton executives of its ties to Iraq's oil minister and mining officials.

A source who had dealings with Unaoil told Fairfax Media the company had repeatedly made such claims and demanded excessive payments.

Earlier this month, Fairfax Media also reported how widespread cover-ups and corruption had infected Leighton's international business. Three top Leighton executives linked to the alleged misconduct, resigned from corporate posts after the reports.

Leighton Holdings continued to insist that it handled internal corruption matters appropriately.

Confidential company files revealed that the firm stalled for almost 12 months in reporting to police the alleged bribery in Iraq.

Separate company files reveal that now-former executives running Leighton's overseas operations covered up or mishandled serious corruption allegations in Asia.

Mr Iyer did not respond to calls and emails from Fairfax Media.

Ramjee Iyer's consultancy fees from Leighton Holdings are part of an AFP probe

Australian Financial Review, Australia
18 Oct 2013, by Jenny Wiggins

General News, page 5 - Size: 183.91 cm²
National - Circulation: 66,220 (MTWTFS)

ID 218700931 BRIEF CONU_COMP

Governance **Experts question company's actions**

Leighton board defends review

Jenny Wiggins

Leighton Holdings' board has come under fire from corporate governance experts for failing to adopt global best practice as it meets formally for the first time since **Fairfax Media** alleged former executives were aware of kickback payments.

"There is clear global best practice on [corporate governance] and Leighton isn't following it," said **Dr Kath Hall**, associate professor at ANU College of Law and a Fellow at Harvard University's Edmond J Safra Center for Ethics.

Leighton's board has defended the company following the allegations, arguing the group's existing corporate governance practices are robust. But Ms Hall said there were "serious question marks" about the internal review undertaken by Leighton into the kickbacks after it reported them to the Australian Federal Police in late 2011 because it did not disclose detailed information about how the review was conducted and what it found.

Leighton has not provided any information about the extent of the review or how it was conducted, saying only it was done with the assistance of "independent, external resources" which it declined to name.

Ms Hall said the review should have been global, in the same way that US retailer **Wal Mart** has spent some $200 million on an international anti-corruption program after uncovering bribery payment in its Mexican operations.

"Companies need to be on the front foot of knowing what's going on and any company that's not you can't help but feel suspicious," she said, adding Leighton should also have a "responsible officer" who could oversee corporate governance.

Former Leighton general counsel **Richard Willcock**, hired last year to improve corporate governance, left in April after less than a year. Leighton said its board was ultimately responsible for corporate governance, with a range of senior executives including chief risk officer **Mike Rollo** also being involved.

Former City of Melbourne CEO **Elizabeth Proust**, who sits on several boards, said it would take time for Leighton to change its corporate culture. "The problem with these issues, whether they are general reputational ones as I was dealing with [at the City of Melbourne] or allegations of corrupt practices, is that you don't change anything overnight."

But institutional investors said they would not buy Leighton stock until they were sure the company would not lose contracts due to reputational damage.

"The critical question is how many contracts will they lose and what do they have to do for their clients to come back?" **Dr Simon Marais**, managing director at **Allan Gray**, which does not currently own Leighton stock. One Leighton client, UK oil and gas group BG, which owns natural gas group QGC, said it expected Leighton to "immediately" notify QGC of any improper relationship between any of its representatives and any public official.

Oil and gas producer **Woodside Petroleum**, which operates in Myanmar and Israel, revealed on Thursday it has beefed up its anti-bribery and corruption processes with new policies and control programs including hiring an anti-bribery and corruption lawyer.

WITH ANGELA MACDONALD-SMITH

Australian Financial Review, Australia
12 Oct 2013, by Matthew Drummond

Perspective, page 17 - Size: 887.35 cm²
National - Circulation: 66,220 (MTWTFS)

ID 217789472 BRIEF CONU_COMP

Fall from grace

Leighton The construction company called for balance in the media coverage of alleged corruption, writes **Matthew Drummond**.

Almost without exception, said **David Crawford** at the *Financial Review* JPMorgan Chanticleer lunch in Melbourne on Thursday, where there is graft and corruption in a company there are people on the proverbial shop floor who know what is going on.

The observation by Crawford, chairman of rival construction firm Lend Lease,came in response to a timely question posed at the packed business lunch in the art deco Mural Hall above Myer in the Melbourne CBD. In light of the allegations of bribery and corruption riddled through Leighton Holdings' international business, what can a company board do to stop crooked managers who are covering their tracks?

The construction giant has been engulfed by detailed allegations that it paid bribes to win work oversees and that management in its Sydney headquarters, including former CEOs **Wal King and David Stewart**, were warned and failed to act.

Crawford's prescription was concise: companies need to set the right culture from the very top and have systems to protect whistleblowers at the very bottom.

"If you have the culture where they know they can report it and should report it and won't be punished for reporting it, you'll go a long way to ensuring that this is limited," he said.

Since the Leighton scandal broke on October 3, three of the key players have resigned from their current positions; former Leighton chief **David Stewart**, the former chief of Leighton International **David Savage** and former executive **Russell Waugh** who has issued a statement denying any wrongdoing. The Australian Securities and Investments Commission (ASIC) chairman **Greg Medcraft** has given a long defence of his organisation's inaction, saying before ASIC looks into potential breaches of directors' duties the Australian Federal Police must be allowed to conduct their criminal investigation into bribery. But he also revealed that ASIC will lend staff who will look at possible breaches of directors' duties to the AFP's team.

Leighton shares have rebounded but are still 9 per cent below where they had been trading. One entrepreneurial shareholder class action has already been filed in court.

Leighton Holdings and its former chief King have issued carefully worded defences. Chairman **Bob Humphris** on Friday wrote to shareholders and complained that media reports had been "inaccurate, biased and unbalanced".

The company says it will not "correct all the inaccuracies" as it is not appropriate to descend to a debate over matters of fact and error when there is an AFP investigation ongoing. It takes the accusations "seriously and is deeply concerned about the suggestions of impropriety".

It also says it has over recent years taken key steps to strengthen corporate governance and risk management.

Wal King has let his lawyers do the talking. They have demanded apologies and retractions from Fairfax Media for a series of stories, but King has declined to answer any

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Australian Financial Review, Australia
12 Oct 2013, by Matthew Drummond

Perspective, page 17 - Size: 887.35 cm²
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questions, in part due to confidentiality obligations to his former employer and in part because it has threatened to sue.

In the unfurling and multiheaded hydra that is the scandal that has surrounded Leighton, it is instructive to return to the start of the story, when one of those lonely whistleblowers dared to speak out.

In 2009, **Alan Fenwick**, a British-born electrician, was responsible for supervising the wiring and electrics on the barges that Leighton built to lay underwater pipelines for oil and gas. He has been described by a former colleague as a "take-no-shit sort of a guy in an understated way". For several years he harboured concerns about rumours of bribery, kickbacks and the leaking of quotes to subcontractors and eventually, in February 2009, he complained about the conduct of a superior, Gavin Hodge.

Hodge was interviewed under an internal investigation. Although he was found to have misused company assets he kept his job,while Fenwick was ostracised by other employees.

In November 2009, after Fenwick complained again about corruption, he was told his contract would not be renewed. So he gave it one last shot and emailed his superiors urging them to investigate who in his project team had been given a payoff. He demanded a meeting with Leighton's ethics committee at head office in Sydney. For good measure he copied his email to head of Leighton International Savage and chief executive King.

This is the moment, November 2009, when the upper echelons of Leighton were warned that something was amiss. In a strict legal sense the company, by virtue of King's position as CEO, was also aware of the allegations of impropriety. But it would take several more investigations – one of which found the company had engaged in a cover-up – and 17 months before Hodge was finally dismissed. By then Fenwick the whistleblower was long gone, as tends to happen with those who speak out. He left Leighton in October 2010.

In his letter to shareholders sent on Friday, Humphris reiterated that the company was suing Hodge to recover $5.6 million.

"The attempt by some media, or their sources, to characterise this issue as a foreign bribery matter is misguided and incorrect," he said.

The company has indeed acted against Hodge. But Leighton shareholders may well ask, should it have acted earlier?

In those 17 months, from when Fenwick's email hit King's email inbox until Hodge was dismissed, the company won a major contract in Iraq. Acting chief executive Stewart would be told soon after that it had been won thanks to Leighton inflating the $87 million paid to a subcontractor by over 50 per cent to hide a kickback.

Savage, then running most of Leighton's overseas operations, would use his company email account to hatch a plan with other Leighton executives to form a rival construction firm that would go on to directly bid for work in competition with Leighton. Had the company moved decisively, it would have immediately interviewed Malaysian businessman **Packianathan Srikumar** who was a consultant to Leighton on various projects overseas and who was alleged by Fenwick to have hived 10 per cent off contracts and funnelled the money back to Leighton executives. Instead Srikumar would be free to join forces with Savage and help him win work for his business from under Leighton's nose.

Most damning of all and for reasons yet to be explained, Stewart took his note with its evidence of kickbacks – a criminal offence – and filed it away, rather than call in the police. A year would pass before they would be called, in November 2011.

During that year of inaction, Savage resigned and set up his rival business. Stewart started trawling through internal files suggesting his company had paid bribes or engaged in corruption in the Middle East, Malaysia, India and Indonesia and that staff have engaged in cover-ups. A review of contracts left in abeyance following Savage's departure in March 2011 suggested kickbacks had been paid by Leighton in the hope of winning a multimillion-dollar dam project in Malaysia.

"We looked at the documentation and said, what the f— is this?" a former executive would later tell the police.

"It was fairly blatant that we would pay these other corporate vehicles in expectation of winning the contract by Leighton Malaysia. It could not have been more explicit."

Fairfax Media's investigation, over six months and trawling through hundreds of documents, has rocked one of Australia's most noteworthy companies to its core. And after claims of corruption at two other companies, Securency and **AWB**, Australian business risks being tarnished further.

Last year, the Organisation for Economic Co-operation and Development criticised Australia's "extremely low enforcement" of laws aimed at preventing companies from facilitating corruption. It found that prosecutors and federal police were under-resourced, lacked experience and closed investigations before making thorough inquiries. Since that report, the police have been forced to re-evaluate two investigations regarding bribery of foreign officials, one involving **OZ Minerals** and the other involving **Cochlear**.

Hindsight is a fine thing and it was easy for those on the stage at the business lunch in the Myer Mural Hall in Melbourne on Thursday to offer their generalised views on how companies should deal with bribery and corruption. Crawford added that companies must have additional vigilance when in jurisdictions where bribery and corruption are prevalent.

Next to him sat **Malcolm Broomhead**, chairman of **Asciano** and a **BHP Billiton** director who said: "What's really important is that the company reacts immediately and with zero tolerance." AustralianSuper chair Heather Ridout revealed that it was through questioning of management by the board of Sims Metal Management, of which she is a director, that that company uncovered a fraud in its British operations.

These suggestions amount to best practice, but even if only half of what they suggest is practical it is a long way from what is alleged to have happened at Leighton Holdings.

iSENTIA
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Australian Financial Review, Australia
12 Oct 2013, by Matthew Drummond

Perspective, page 17 - Size: 887.35 cm²
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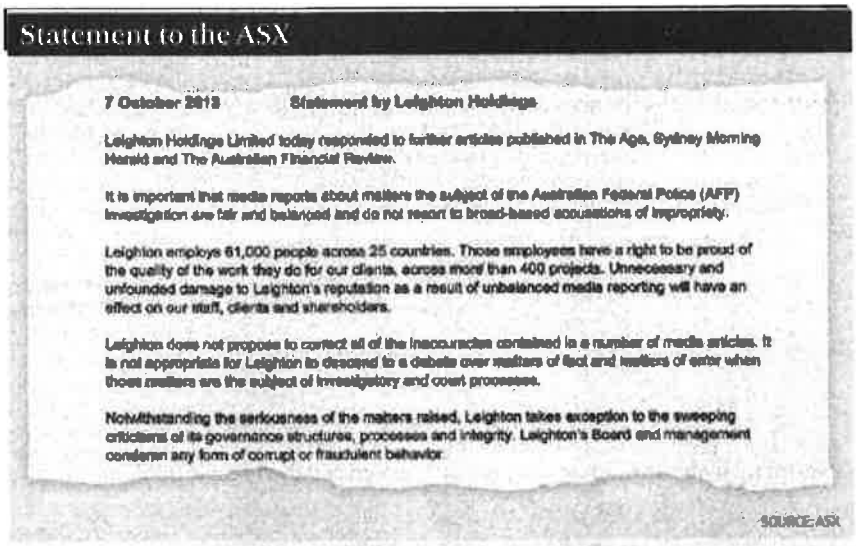
From top: former Leighton chief executives David Stewart and Wal King, chairman Bob Humphris and former executive Russell Waugh.
PHOTOS: ROB HOMER



Statement to the ASX

7 October 2013 Statement by Leighton Holdings

Leighton Holdings Limited today responded to further articles published in The Age, Sydney Morning Herald and The Australian Financial Review.

It is important that media reports about matters the subject of the Australian Federal Police (AFP) investigation are fair and balanced and do not resort to broad-based accusations of impropriety.

Leighton employs 61,000 people across 25 countries. Those employees have a right to be proud of the quality of the work they do for our clients, across more than 400 projects. Unnecessary and unfounded damage to Leighton's reputation as a result of unbalanced media reporting will have an effect on our staff, clients and shareholders.

Leighton does not propose to correct all of the inaccuracies contained in a number of media articles. It is not appropriate for Leighton to descend to a debate over matters of fact and matters of error when those matters are the subject of investigatory and court processes.

Notwithstanding the seriousness of the matters raised, Leighton takes exception to the sweeping criticisms of its governance structures, processes and integrity. Leighton's Board and management condemn any form of corrupt or fraudulent behavior.

SOURCE: ASX

The Australian, Australia
11 Oct 2013, by Damon Kitney & Bridget Carter

Business News, page 20 - Size: 654.08 cm²
National - Circulation: 116,655 (MTWTF)

ID 217580279 BRIEF CONU_COMP

Unaoil joins Leighton in denying Iraq allegations

The Monaco-based firm says no basis to Fairfax's reports

DAMON KITNEY
BRIDGET CARTER
CONSTRUCTION

THE company at the centre of the Leighton Holdings bribery allegations has denied any involvement in corruption in Iraq or having links to the Middle Eastern nation's Oil Minister and Prime Minister.

Unaoil, which is based in Monaco, was alleged in reports by Fairfax Media last week to have been paid kickbacks by Leighton Holdings so that it would secure an oil pipeline contract from the Iraqi government.

Unaoil has denied claims it was involved in corruption and had links with high-ranking Iraqi officials.

According to the publisher, Unaoil, which is run by an Iranian family, had close ties to Iraq's Oil Minister and Prime Minister.

But in a statement last night the company said: "Unaoil takes great offence from, and categorically denies, any allegations that we engaged in improper conduct in relation to our work with Leighton on the ICOEEP (Iraq Crude Oil Export Expansion Project)."

It added that it had been cleared of any wrongdoing following an external investigation.

Fairfax Media reported last week that it had obtained hundreds of documents, including a handwritten note allegedly written by Leighton Holdings' acting chief executive David Stewart in November 2010 that in turn alleged former chief executive Wal King had approved $42 million in kickbacks to Unaoil.

Unaoil is the latest to hit back at Fairfax as former executives and board members of Leighton yesterday all moved to vigorously defend allegations against them.

Explosive reports last week suggested bribery and corruption was rife throughout the company's international arm.

Former executive Russell Waugh issued a statement yesterday in response to allegations that he knew about kickbacks to secure contracts when he managed the company's offshore oil and gas business in the Middle East between 2009 and 2010, saying the allegations were "baseless" and that he left the company on good terms.

He categorically rejected any suggestion he engaged in corrupt conduct in the Middle East, saying his own investigations — and later independent inquiries — found no evidence of corrupt activity.

"As a senior executive, I followed the protocols laid down by Leighton International in relation to their anti-corruption and anti-fraud procedures," Mr Waugh said yesterday.

The former executive departed Leighton in 2011 after spending at least six years in the executive ranks of the company's international arm.

But questions have arisen over his future at UGL, where he is the chief executive of engineering.

Also yesterday, Leighton Holdings chairman Robert Humphris wrote to senior executives of Fairfax Media, including chairman Roger Corbett and chief executive Greg Hywood, asking Fairfax to stop running stories alleging bribery and corruption within the company, claiming it was seeking to damage the reputation of Leighton by treating allegations as fact.

He sent the letter to the Australian Press Council's chairman Julian Disney.

Mr Humphris and fellow Leighton director Robert Seidler are also believed to have briefed Bruce McClintock QC with a view to starting defamation proceedings, as former chief executive Mr King also defends claims through lawyers.

Mr King's defence yesterday spread to separate historic allegations made in a Fairfax Media article about the Sydney Star Casino, where it said Mr King was deemed to be "not of good repute, having regard to honesty and integrity" by a NSW regulatory inquiry surrounding attempts by Leighton to win a tender for the casino in a joint move with US gambling giant Showboat.

In a statement released yesterday, Mr King said the article was misleadingly incomplete because it did not report the final conclusions of the NSW Casino Control Authority.

The authority in 2003 issued a statement saying it was satisfied that Mr King was a suitable person to be associated with the management of the Sydney Star Casino, adding in a separate letter he was a fit and proper person.

Mr King has demanded an apology from Fairfax Media over claims that he approved corrupt activity.

Mr King's former chief financial officer at Leighton Holdings, Scott Charlton, yesterday questioned the role played by the construction and mining giant's controlling shareholder Hochtief in the breakdown in governance at the company that led to the alleged Iraq bribery scandal.

Now chief executive of Transurban, Mr Charlton was Leighton's chief financial officer from 2007 to 2009. He said he did not think Leighton had a cultural problem but added that in his opinion it did not have the best corporate governance model, with Germany's Hochtief owning almost 55 per cent.

"The issue of corporate governance is an interesting question when you had an interesting dynamic with the one single major shareholder and a battle going on for control of that shareholder," Mr Charlton said.

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The Australian, Australia
11 Oct 2013, by Damon Kitney & Bridget Carter

Business News, page 20 - Size: 654.08 cm²
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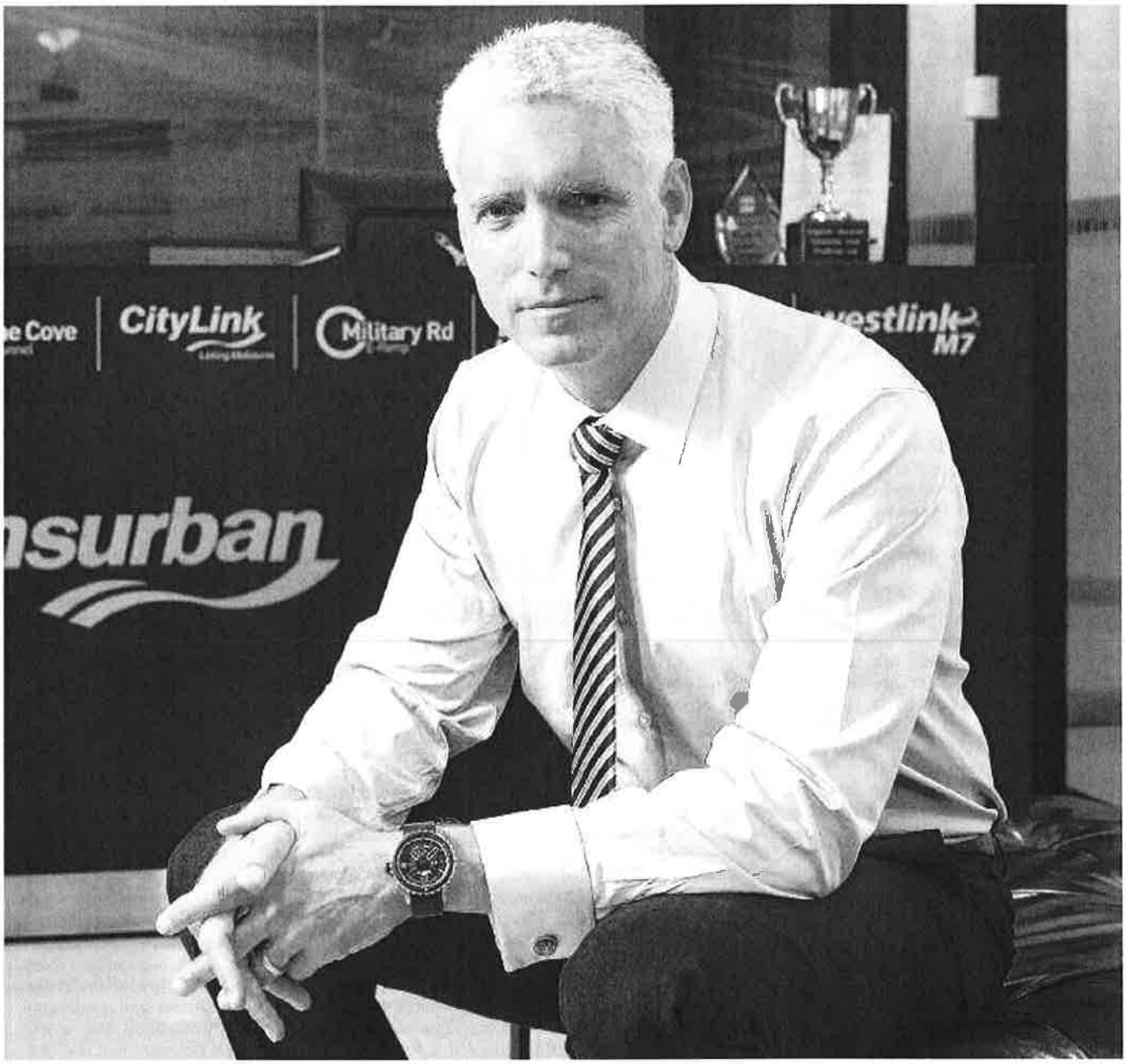

AARON FRANCIS

Former Leighton chief financial officer Scott Charlton, who has questioned the role played by controlling shareholder Hochtief

Australian Financial Review, Australia
11 Oct 2013, by Jenny Wiggins

General News, page 11 - Size: 199.56 cm²
National - Circulation: 66,220 (MTWTFS)

ID 217587410 BRIEF CONU_COMP

Waugh rejects kick-back claims

Jenny Wiggins, Matthew Drummond and Mathew Dunckley

Russell Waugh, one of several former **Leighton Holdings** executives accused of being aware of corporate kickbacks, has denied any knowledge of corruption.

Mr Waugh is now the head of engineering at services contractor **UGL**, which is reviewing his position amid concerns allegations made against him over his conduct at Leighton are damaging UGL's reputation.

Some UGL tenders for oil and gas and engineering contracts have been put on hold by clients while Mr Waugh's role at the company is resolved, sources said.

Mr Waugh – who has been criticised over his handling of an investigation into an alleged black market racket in which $500,000 of steel owned by Leighton was used to build a ship in Indonesia in the late 2000s – denied suggestions he was "directly or indirectly involved in corrupt activities". He declined to answer whether his role in buying steel that was used for a barge not owned by Leighton was investigated by the company, as recommended by a lawyer who was asked by former chief **David Stewart** to give advice on the affair.

In his advice, the lawyer **Malcolm Davis** noted Mr Waugh signed orders for steel that were unsuitable for a Leighton barge being built in Indonesia. The steel was used for a barge owned by an Indian company. Mr Davis said Mr Waugh's investigation was inadequate and suggested Mr Waugh be investigated.

A Fairfax Media investigation reported allegations Mr Waugh, who was a general manger for Leighton International's Offshore oil and gas business between January 2008 and May 2010, was aware of a $43 million kickback to secure a contract in Iraq.

Mr Waugh denied having anything to do with the alleged kickback, but declined to explain why Mr Stewart made notes of a conversation in late 2010 in which he said he was told by David Savage that Mr Waugh negotiated an $87 million payment to UAE-based firm Unaoil which was inflated by half to include a kickback. Unaoil has denied any wrongdoing and further denies having links to Iraqi officials.

Mr Waugh said Leighton International submitted a formal tender in a process run by "a reputable, London-based firm" that was subject to strict British anti-corruption regulations. "I categorically refute any allegation I engaged in any corrupt conduct," he said. "I followed the protocols laid down by Leighton International in relation to their anti-corruption and anti-fraud procedures."

Separately, former Leighton chief financial officer **Scott Charlton** said the battle over the ownership and direction of Leighton Holdings might have contributed to an environment where bribery could occur. Mr Charlton, now chief executive of toll roads group **Transurban**, said the prolonged battle between German-based majority shareholder **Hochtief** and the Australian management – as well as that between Hochtief and Spanish company ACS, which was trying to acquire it – could have hurt governance.

"It's an interesting corporate governance model with one major shareholder who says they are not controlling but yet they really are. You could probably go and look up management text books but they probably wouldn't suggest that's the best corporate governance [approach]."

I refute any allegation I engaged in any corrupt conduct.
Russell Waugh, UGL

Age, Melbourne
04 Oct 2013, by Adele Ferguson

General News, page 4 - Size: 202.35 cm²
Capital City Daily - Circulation: 144,277 (MTWTF--)

ID 216465107 BRIEF CONU_COMP

Signature of former boss on alleged $40m kickback document

Adele Ferguson

The signature of former Leighton Holdings senior executive David Savage appears on a preliminary tender document that includes an alleged $40 million kickback to win a lucrative project in Iraq.

Documents obtained by Fairfax Media reveal that the agency fee – which the Australian Federal Police suspect was a kickback – was signed off by both Leighton International boss David Savage and chairman John Faulkner back in March 2010, well before the tender was pitched to the board.

The Leighton International board discussed the Iraq project at a board meeting in Mumbai in August and was sent a briefing document on October 3, 2010, ahead of a meeting the next day. The briefing document did not include the suspicious "agency and security services fee". It was hidden in another line item. A month before the deal was officially presented to the Leighton board, the $40 million "agency and security support services fee" was removed from the tender sheet. A new category of costs was created, "an onshore and security" payment, which was then used in a presentation document sent to the board.

A former director of Leighton International – who was at the October Leighton International board meeting – said he was told there were security concerns working in Iraq that justified a high payment. Wal King – who at the time was chief executive of Leighton, and Bob Humphris, who is now chairman of Leighton Holdings, were at that meeting. He said there was no discussion at the board meeting about an "agency" payment or other potentially illegal payments.

The director, who did not wish to be named, said if he had been privy to the tender document that showed a figure of $40 million for "agency and security support services" he would have questioned it. "It was a big number that would have raised questions," he said.

Fairfax Media revealed on Wednesday a memo written on November 23, 2010, by Leighton Group's acting chief executive David Stewart had revealed during a meeting with Savage he had the opportunity to negotiate a $US500 million extension to the contract in Iraq. Savage allegedly said it would require a $50 million to $60 million payment to a third-party subcontractor who would do the onshore work. According to the memo, Stewart asked what was the real value of the work. "He [Savage] said less than 50 per cent of the payment."

"I asked then how we won the current $700 million contract and he says it was won by an $87 [million] payment to a NSC [nominated subcontractor] on the same terms."

The following month the full Leighton board met and Stewart hosted the meeting, as outgoing CEO Wal King decided not to attend as he had been precluded from most executive decisions at that time. Mr King said on Thursday he had no knowledge of any misconduct at the time.

Australian Financial Review, Australia
05 Oct 2013, by Nick McKenzie and Richard Baker

General News, page 1 - Size: 717.61 cm²
National - Circulation: 66,220 (MTWTFS)

ID 216649791 BRIEF CONU_COMP

▶ **Secret rival Malaysian firm, Stonehouse, named after top executive's Tasmanian getaway**

Leighton: bagman's inside job

AFR Fairfax Exclusive

Nick McKenzie and Richard Baker

Two top Leighton Holdings executives secretly created a rival company with a suspected corrupt "bagman" while they were meant to be working for the construction group.

Confidential company emails reveal that David Savage covertly launched "Project T" under the cover of his job as Leighton's top international executive in late 2010.

Project T sought to lure several Leighton senior figures, including the chairman of its Dubai-based joint venture Habtoor Leighton Group, Riad al Sadik, and a suspected corrupt Leighton global consultant Packianathan Srikumar, to a private firm operating in the same market as Leighton and which could conceivably compete with it to win work.

The role of Mr Savage and others in Project T may break Australian laws that require senior company officers to work in the best interests of Leighton and its shareholders while employed by the Australian firm.

Project T was formed and discussed on Leighton's internal email system, on company time and involved other top Leighton staff, including then executive Eric Wardle.

It appears Mr Savage wanted his new venture to win work on resource projects and offshore, shallow water projects – the same type of work he had been helping Leighton win.

At the time Mr Savage launched Project T, he and longtime Leighton International consultant Mr Srikumar were named in internal Leighton memos as being allegedly involved in serious corruption and bribery.

On Friday law firm Maurice Blackburn signalled it may widen its shareholder class action against Leighton to include the allegations of rife corruption and misconduct at the building giant.

Greens Deputy Leader Adam Bandt called for a federal funding boycott of any projects featuring Leighton or its subsidiaries until a parliamentary inquiry into the affair is completed.

As *The Australian Financial Review* revealed on Thursday, a Leighton file reveals Mr Savage allegedly disclosed to acting chief executive David Stewart on November 23, 2010, that Leighton's international business paid a $40 million bribe to win a $750 million project in Iraq.

In November 2010, an internal investigation was probing Mr Srikumar's suspected role in kickbacks and fraud on a Leighton project in Indonesia.

Mr Savage was secretly working on Project T in the last few months of 2010 and in early 2011.

A confidential Project T proposal states that Mr Savage envisaged Mr Srikumar providing $US2 million cap-

Continued p8

From page 1

Leighton: the inside job

ital along with "direct entrepreneurial access to clients" in the oil and gas industries.

Mr Sadik was expected to contribute $US2 million and win work "through his connections in general and particularly in the Middle East".

These were the same connections Mr Savage spruiked in 2007, when, as head of Leighton International, he convinced the Australian company to pay Mr Sadik $377 million to buy into his firm Al Habtoor.

Investors now view the merger as disastrous due to Leighton Habtoor's poor performance.

Malaysian company documents reveal Project T led to the formation of Malaysian firm Stonehouse Constructions, which was named after a holiday house Mr Savage owns in Tasmania. Mr Savage was named director of Stonehouse on March 31, the same day he left Leighton.

Mr Srikumar and a representative of Mr Sadik were appointed shortly afterwards and are understood to have invested several million dollars each.

Another director is Malaysian businessman Asgari Stephens, a former chairman of Leighton International's ethics committee.

Weekend Fin p43

Mr Savage was busy secretly working on Project T in the last few months of 2010 and in early 2011.

On April 14, two weeks after Mr Savage left Leighton and took over Stonehouse, Leighton reported an 11 per cent write-down of the book value of its stake in Habtoor Leighton.

Files held in Leighton's Hong Kong office reveal Stonehouse used Leighton's track record to qualify to tender for a project in Malaysia.

The revelation that former high-ranking Leighton executives were secretly plotting to establish a rival company comes after Fairfax Media reported on company documents that showed a suspected $42 million bribe in Iraq and internal investigations that raised concern about Leighton Holdings' exposure to corruption allegations.

The reports prompted a drop in Leighton's share price and pressure on Australia's corporate regulator, the Australian Securities and Investments Commission, over its appetite for investigating potential corporate breaches.

In trading on Friday, Leighton lost a further 4.5 per cent as its shares fell 80¢ to $16.74. Before the story broke, Leighton shares had traded as high as $19.88 on Wednesday.

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Australian Financial Review, Australia
05 Oct 2013, by Nick McKenzie and Richard Baker

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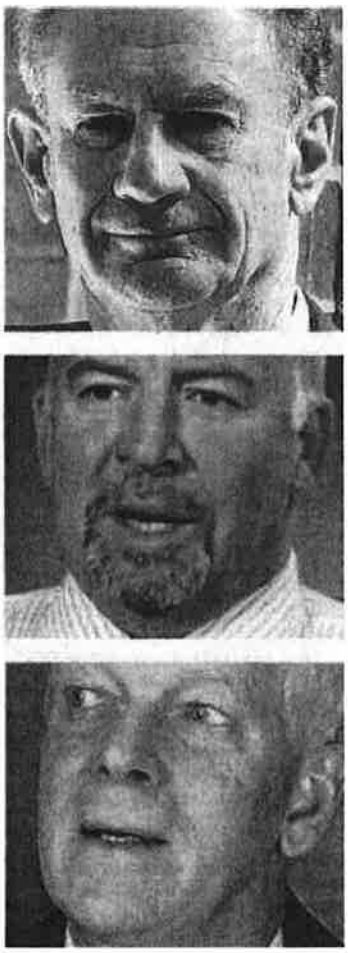
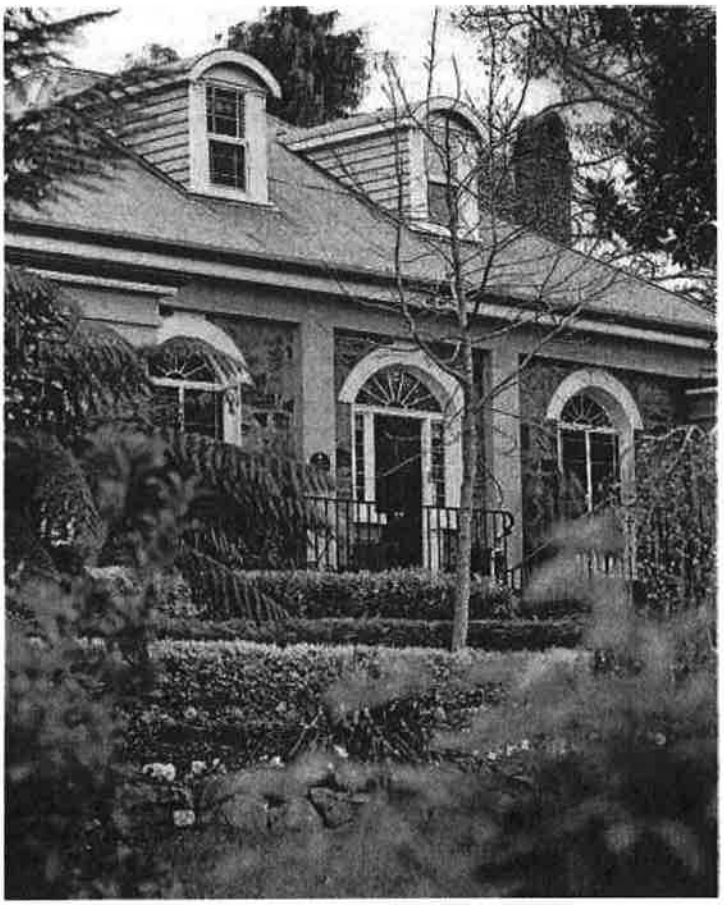
Habtoor Leighton Group's chairman Riad al Sadik and former managing director Laurie Voyer pictured in 2011





Former executives ... CEO Wal King (top), head of Leighton International David Savage and CEO David Stewart. Savage's 'Stonehouse' retreat in Tasmania.