

SENATE EDUCATION, EMPLOYMENT AND
WORKPLACE RELATIONS COMMITTEE

INQUIRY INTO THE

***BUILDING AND CONSTRUCTION INDUSTRY
IMPROVEMENT AMENDMENT
(TRANSITION TO FAIR WORK) BILL 2009***

JOINT SUBMISSION

ON BEHALF OF THE

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING AND KINDRED INDUSTRIES

UNION,

AUSTRALIAN WORKERS UNION,

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY, INFORMATION, POSTAL,

PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA

AND

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

JULY 2009

1 INTRODUCTION

- 1.1 This submission is made on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU), the Australian Workers Union (AWU), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) and Construction, Forestry, Mining and Energy Union (CFMEU) [the Combined Construction Unions - CCU].
- 1.2 The CCU opposes the maintenance of a separate and additional set of industrial laws for the Australian construction industry as set out in the *Building and Construction Industry Improvement Act 2005* (Cth) [the *BCII Act*]. The unions believe that the *BCII Act* should be repealed in its entirety. That position was put by the CCU in our submission to this Committee in its inquiry into the *Building and Construction Industry (Restoring Workplace Rights) Bill 2008* [the 2008 inquiry] and to the inquiry commissioned by the Federal Government and conducted by the Hon. Murray Wilcox QC in 2008- 2009. We refer the Committee to those submissions¹ and rely on them for the purpose of the present inquiry.
- 1.3 The *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* (Cth) [the *Bill*] retains the *BCII Act* as separate legislation but amends it in a number of important respects. The proposed amendments are broadly consistent with the report delivered to the Government on 31 March 2009 by the Hon. Murray Wilcox QC [the *Wilcox Report*]. The *Wilcox Report* made a number of specific recommendations which, if adopted, would bring the industrial rights of those in the construction industry into line with all others in the federal jurisdiction. However the *Report* also recommended different treatment for the industry in some key areas. This included the creation of a specialist government inspectorate for the construction industry and the retention of coercive powers for use by this inspectorate in the course of its investigations. Both of these measures are strongly opposed by the CCU.
- 1.4 Since the 2008 inquiry and the delivery of the *Wilcox Report*, the *Fair Work Act 2009* (Cth) [*Fair Work Act*] has come into effect. The *Fair Work Act* provides a comprehensive and detailed system of regulation, including a new regime of good faith bargaining, rules relating to the taking of industrial action, an enforceable safety net and effective remedies against *all* parties for breaches of the law. It also creates a new industrial inspectorate, the Fair Work Ombudsman [FWO]. The FWO is a very well-resourced agency with broad investigatory powers to enable it to carry out its work. By comparison with its predecessors, it has significant potential to ensure that enforcement in the new system will be undertaken in an effective and impartial way and in doing so, to garner widespread public confidence and support.
- 1.5 By contrast, the proposed separate and industry-specific inspectorate, armed with intrusive coercive powers which are unprecedented in industrial law, represents the continuation of flawed public policy that has seen the politicisation of the enforcement

¹ http://www.aph.gov.au/Senate/committee/eet_ctte/building_and_construction/submissions/sub13.pdf
<http://www.workplace.gov.au/NR/rdonlyres/66C5D987-A1FF-424D-A5D6-DABAB35C19C9/0/CFMEUsubmission.pdf>

aspect of industrial relations and, in any particular industrial contest, vast amounts of public resources being used to the benefit of employers only.

- 1.6 Neither a specialist inspectorate nor coercive powers can be justified. The regulation of the construction industry should be returned to the general laws applying to everyone else in the federal system.

2 FRAMING AN ACCURATE DEBATE ABOUT THE CONSTRUCTION INDUSTRY LAWS

- 2.1 In order to have a meaningful public debate about the *Bill* it is important to be clear about the nature of the existing laws and the laws as they would be if the *Bill* were passed.

- 2.2 The *BCII Act* **does not and has never** generally dealt with **criminal** conduct. It is concerned with the regulation of certain forms of **industrial** behaviour. Alleged breaches of the *BCII Act* can result in **civil** proceedings² and where breaches are proved, civil not criminal, penalties. The same could be said of the *Act* if the amendments made by this *Bill* were passed. 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. Arguments about the need to retain the laws because 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.

- 2.3 A lack of understanding about the nature of the laws is widespread in the community. The public commentary surrounding the *Bill* perpetuates the misconceptions surrounding the laws. In some cases it is difficult to discern whether the commentary is simply inaccurate or intentionally misleading. 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.*'³ 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.*'⁴ On 9 June 2009, *ABC News* reported that the Australian Building and Construction Commissioner [ABCC] was '*set up by the previous government to crack down on violent behaviour.*'⁵ Many employer organisations have made similar public comments, a number of which are repeated in submissions to this inquiry.

- 2.4 Of most concern however are the ongoing references by lawmakers to the *BCII Act* and the *Bill* as antidotes to criminal behaviour. This problem extends right back to the time when the *BCII Act* was first brought before the Parliament.

² There are two criminal offences created by the *Act*. The first is refusing to provide information/evidence/documents when required under the coercive powers, discussed below. The second is the disclosure of 'protected information' by ABCC officials/staff.

³ Andrew Bolt, *Herald Sun* Friday 19 June 2009 page 38.

⁴ 15 June, 2009, page 16.

⁵ <http://www.abc.net.au/news/stories/2009/06/09/2592647.htm>

2.5 In the Senate debate over the introduction of the original *BCII Bill*, Western Australian Senator (and lawyer) Senator Johnston raised the spectre of criminality to support the passage of the legislation. Senator Johnston was a member of the Senate Committee that conducted an extensive inquiry into the 2003 *Bill*. He should have been aware that the *Bill* had nothing to do with eradicating criminality from the industry. He said:-

*This industry is in desperate need of reform. It is in desperate need of a code of practice with real criminal teeth. Nigel Hadgkiss, may I say, is a great man of esteem – a crime fighter. He is used to fighting organised crime. That is what is needed in this industry – a fighter of organised crime. This legislation will go some of the way to returning this industry to lawfulness.*⁶

2.6 In its pre-election policy announcements, the ALP was also apparently unable to appreciate just what work the *BCII Act* and the ABCC do. In its *'Forward with Fairness Policy Implementation Plan'* where the limited rationale for the continuation of the ABCC is set out, the ALP in Opposition stated *'A future Rudd Labor Government will not tolerate intimidation or violence by any party in the building and construction industry.'*⁷ At the recent ACTU Congress, in the context of the discussion about the specialist Fair Work body that would replace the ABCC, the Deputy Prime Minister spoke of *'criminal damage to vehicles resulting in arrests, threats of physical violence and intimidation of individuals, including damage to a private residence'*⁸ and promised that, as part of its commitment to 'fairness and decency at work', the Rudd Labor Government would do everything necessary to ensure such conduct did not recur.

2.7 In the Second Reading speech for the *Bill* there were references to pockets of the industry where *'violence and intimidation'* occur and to the need to comply with laws relating to the payment of wages and sham sub-contracting as well those outlawing *'violence and intimidation.'*

2.8 The target of the *BCII Act*, and the ABCC, has always been unlawful industrial action. This is dealt with by way of civil sanctions. In the debate about any 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 to this Committee in the 2008 inquiry:-

'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

⁶ Senate Hansard 5 September, 2005 pg 12

⁷ At page 24

⁸ 3 June 2009.

*should not be bestowed on a body dealing with contraventions of the civil law and potentially minor breaches of industrial instruments.*⁹

2.9 No-one has suggested that the current criminal law is inadequate in dealing with criminal behaviour whether it occurs in the workplace or elsewhere. The Committee is not being called on to consider criminal sanctions or measures to assist in bringing criminal behaviour to account. Consequently, references to the spectre of criminality in the course of this debate should be assiduously avoided. Particularly in its discussion about coercive powers, the report of this Committee must deal with the question of their desirability and necessity in an *industrial* context.

2.10 Whether the *BCII Act* is repealed as we suggest, or amended in accordance with the Bill, the focus of investigations by the FWO or the Director will remain the same. That is, the FWO or the Director will be responsible for examining alleged (civil) industrial breaches. In that case there is no justification for the ongoing availability of coercive powers.

3. RETENTION OF COERCIVE POWERS

3.1 Coercive powers have no place in industrial law.

3.2 The industrial jurisdiction deals with matters that do not warrant the use 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. Consequently, the public interest considerations that might weigh in favour of coercive powers in aid of enhanced investigatory measures or strict enforcement in other areas are not present in the industrial context. To the contrary, the public interest very much favours keeping such powers out of the industrial arena to ensure that the exercise of industrial rights such as the right to freely associate, organise and take industrial action is not tainted with the quasi-criminal overtones and general opprobrium reserved for criminal matters.

3.3 All previous government bodies charged with ensuring compliance with industrial laws up to and including the FWO, have performed their functions without coercive powers. As far as we understand there has been no suggestion that these types of powers are necessary to ensure industrial compliance more generally. The *Fair Work Act* provides the inspectors of the FWO with a wide range of powers which are similar to those which have applied up to now for all other industries. These powers are adequate to allow the inspectors to carry out their duties effectively.

3.4 Up until 31 March 2009 the ABCC had exercised coercive powers by issuing s 52 notices on at least 175 occasions. The use of the coercive powers has now resulted in the second prosecution for allegedly failing to comply with a notice under s 52 of the *BCII Act*. Before the conclusion of this inquiry, the worker in question faces the prospect of

⁹ Submission 6 'The Investigatory Powers of the Australian Building and Construction Commission (2008) 21 Australian Journal of Labour Law 246 at pages 274-275.

six months imprisonment for an alleged failure to attend a compulsory interview over an issue on a worksite at Flinders University in South Australia.

The 'Willing Witness' Argument

- 3.5 Following the release of the *Wilcox Report* in March 2009, the ABCC wrote to the Deputy Prime Minister to provide his views on the *Report* to 'assist with ... consideration of the report.'¹⁰ In that letter the ABCC advanced the argument that coercive powers were necessary to cover the situation where a person wants to provide evidence voluntarily but is fearful of the consequences of being seen to be cooperating with the investigation. The ABCC said that one-third of all compulsory interviews were not in fact compulsory at all but fell into this category where witnesses wanted to be seen to be providing information on an involuntary basis.
- 3.6 The ABCC provided no evidence for the assertion that such fear exists or even if it does, that it is well-founded. We would strongly dispute both claims. But putting these major assumptions aside, there are a number of serious flaws with the argument itself.
- 3.7 First, there would be nothing to stop somebody from taking information to a regulatory authority on a confidential basis if no coercive power existed. Many agencies, including the FWO, operate in this way.
- 3.8 Second, receipt of information or evidence does not always lead to court proceedings in any event. As the ABCC itself has noted, even much of the evidence obtained *compulsorily* has been in relation to matters where no proceedings have been initiated. In its most recent report, the ABCC said one-quarter of all compulsory examinations have been conducted in respect of matters that have been finalised without any court proceedings being taken.¹¹ For those matters, the question of whether someone has volunteered information just does not arise since the issues are never agitated in the public domain.
- 3.9 Where no coercive powers exist and proceedings have been commenced, it would still be open to a prosecuting authority to 'protect' a witness who wants to give (and/or has already given) evidence voluntarily but not be seen to be doing so (and whose evidence is essential to the prosecutor's case), by subpoenaing that person as a witness in the proceedings. To any outside observer the person giving evidence under subpoena is in no different position to someone who has been compelled to do so as part of a coercive interview. They are obliged to testify and required to do so truthfully.

'Switching Off' Coercive Powers

- 3.10 Whilst we unreservedly oppose the continuation of any form of coercive powers, we also submit that the scheme in the *Bill* by which the powers are retained creates a number of major difficulties and anomalies. In making the following comments we

¹⁰ Letter ABCC to Deputy Prime Minister 27 April, 2009.

¹¹ Report on Exercise of Compliance Powers 1 October 2005 to 30 September 2008, page 8.

should not be taken as departing from our 'in principle' opposition to the existence of these powers.

3.11 Given the conclusions of the *Wilcox Report* that the vast majority of the construction industry is *not* subject to major industrial misconduct, it would be far more logical if the *Bill* were based on a presumption that the necessity for coercive powers was the exception rather than the rule. In other words, instead of subjecting the entire industry to the possible use of these powers with the capacity to switch them off on a case by case basis, the alternative would be for the powers to be 'switched off' generally but be available to be 'switched on' only in truly exceptional circumstances and only subject to the other processes and safeguards contained in the *Bill*.

3.12 Further, the way in which the *Bill* deals with the timing of 'switch off' applications and the projects in respect of which they can be made is anomalous and unwieldy. Under the proposed clause 38, applications to the Independent Assessor can only be made where the building work on a project begins on or after the date of commencement of the amendments. This means that large projects commencing just prior to these amendments with a potential life of many years would be unable to be excluded from the application of the coercive powers even where the record of compliance was exemplary. This arbitrary exclusion will mean that for a very long period after the amendments there will be a parallel series of construction projects in respect of which the coercive powers will continue to operate in an unqualified way. There will be no capacity to have the powers 'switched off' purely on the basis of a commencement date. The notion of when a project began may also open up an area of dispute. This is unworkable and unfair.

3.13 Proposed Clause 38 of the amended *Act* should therefore be deleted and the following provision be inserted in substitution:-

'This subdivision applies in relation to a building project whether or not the building work on the project begins on or after the commencement of this subdivision.'

3.14 The *Bill* should also clarify that applications can be made to the Independent Assessor in respect of multiple projects. This would also be consistent with proposed clause 40(3). Therefore:-

- (i) In proposed Clause 39 of the amended *Act* the words '*project*' where appearing in the heading should be deleted and the words '*projects*' be inserted in substitution.
- (ii) In subclause (2) after the word '*project*' where appearing in the second and fourth line, the words '*or projects*' should be added.
- (iii) In subclause (3) delete the first paragraph and insert in lieu: -
'The Independent Assessor must not make a determination under subsection (1) unless the Independent Assessor is satisfied, in relation to the project or projects in question, that:'

3.15 As presently drafted the *Bill* does not provide the original applicant for a ‘switch off’ determination the opportunity to make submissions about an application by the Director to the Independent Assessor for a reconsideration of the Independent Assessor’s determination. Since the interests of the original applicant are potentially affected by any reconsideration by the Independent Assessor, they should, as a matter of natural justice, be given an opportunity to make submissions, particularly given the Director has, under proposed s 41(1)(b), such an opportunity when the original application is made. Therefore we suggest in proposed subclause 43(3) a new paragraph (a) & (b) be inserted as follows: -

- (a) provide a copy of the request to the applicant for the original determination.*
- (b) give the applicant for the original determination a reasonable opportunity to make a submission in relation to the request.*

The existing sub-clauses should then be re-numbered.

Procedural ‘Safeguards’

Administrative Appeals Tribunal Application

3.16 The proposed amendments relating to the requirement to obtain approval from the Administrative Appeals Tribunal [AAT] before an examination notice is issued do not accurately reflect the recommendations in the *Wilcox Report*. In order to implement Wilcox’s recommendation 4(i)(c) it is necessary to amend proposed clause 47 as follows:-

47 (1)

.....

*(e) That it is likely to be **important** to the progress of the investigation that the information, documents or evidence be obtained*

*(f) that having regard to the nature and likely **seriousness of the suspected contravention** and the likely **impact upon the person** proposed to be issued with the notice, it is reasonable and appropriate to issue the examination notice.’ (emphasis added)*

These amendments raise the threshold of the safeguards to the level thought necessary by Wilcox and expressly require the AAT to have regard to both the seriousness of the alleged contravention and the impact on the person to be examined. The ABCC implies that these are matters already taken into account in decisions about whether to exercise the powers. It says the ‘thrust’ of the legislation and the ‘judicious’ approach of the ABCC mean such measures are unnecessary.¹² We disagree. These are matters which should be spelt out in the legislation.

¹² Letter page 4.

3.17 The statutory intention that examination notices are only to be issued as a matter of last resort should be made abundantly clear. The test in s 47 should expressly state that all other methods have been attempted and were either not successful or not appropriate to the circumstances before a notice issues.

3.18 We are also of the view that the person to whom the examination notice is to be directed should have an opportunity to be heard by the AAT on the question of whether the requirements for the issue of a notice have been satisfied. An opportunity to be heard at this stage of the process may overcome the need for a compulsory examination at all. For example, a potential interviewee may be able to establish that given their involvement in and/or knowledge of particular events, any information or evidence that they might have is unlikely to be important to the progress of the investigation. They might be able to demonstrate that other methods of obtaining information have not been exhausted or that given their state of health and/or the alleged seriousness of the alleged contravention, an interview is not warranted.

3.19 Any concerns that might exist about putting a potential interviewee on notice that an interview is contemplated could be allayed by an order by the AAT that the person not alter or destroy any documents or other evidence at least until such time as the application is determined. In any case, a potential interviewee would be on notice that the Director may compulsorily seek information because the Director would have to exhaust other means of obtaining information first, including by inviting the person to give the information/evidence voluntarily.

Form and Content of Examination Notice

3.20 Proposed clause 48(c) should be amended to make it clear that the nature of the documents required must be spelt out. There must be a reasonable degree of specificity about the documents that are sought so the process does not become a 'fishing expedition.' The sub-clause should read:-

(c) if the notice requires a person to produce documents to the Director – must specify the documents that are required to be produced, the time by which and the manner in which, the documents are to be produced.'

Other Safeguards

3.20 A number of other 'safeguards' on the use of coercive powers are introduced by the *Bill* along the lines recommended by Wilcox. Whilst we oppose the availability of the powers, for so long as they continue to exist the CCU support the additional measures that are proposed. These are: -

- (i) *Examinees may be represented by a lawyer of their choice [s 51(3)].* This amendment overrules the decision in *Bonan v. Hadgkiss* [2006] FCA 1334 (12 October 2006)¹³ where the Court held that a direction that an examinee be denied the lawyer of his choosing during an interrogation was found to be

¹³ and see also [2007] FCAFC 113 (27 July 2007)

impliedly within the power of the examiner. That case relied on such authorities as *National Crime Authority v A, B and D*¹⁴ which was a case involving the potential prejudice to the investigation by the NCA of very serious criminal offences. This approach is plainly not apposite to industrial matters.

- (ii) *Legal professional privilege and public interest immunity are to be recognised [s 52(2)].* Legal professional privilege is accepted as applying to current interrogations in any event although this is only expressed to be the case in the ABCC's '*Guidelines in Relation to the Exercise of Compliance Powers in the Building and Construction industry*'¹⁵. These protections should be made clear in the body of the legislation itself.
- (iii) *Persons examined will be reimbursed for reasonable expenses, including legal expenses [s 58].* This measure is supported.
- (iv) *All examinations will be undertaken by the Director of the Inspectorate (or an SES officer) [s 51(2)].* According to the most recent ABCC figures 45% of all examinees attended an examination without any legal representation at all. In all cases examinations were conducted by experienced legal counsel. This put the examinee at a clear disadvantage. Although the other amendments permitting choice of representation and payment of reasonable legal expenses may go some way to alleviate the imbalance, it is also important that the Director pay sufficiently close regard to the investigation that has prompted the use of the powers to be in a position to conduct the examination in person.
- (v) *Confidentiality undertakings cannot be sought from an examinee [s 51(6)].* The secrecy which has attached to the exercise of the coercive powers is highly objectionable. The 'closed' interview process and the ABCC's 'non-disclosure directions' cast a pall over Australian industrial relations and taint it with quasi-criminal overtones. The public interest in having all aspects of industrial relations played out in a public arena overseen by open and independent tribunals far outweighs any perceived benefit to a government agency in its investigation process in being able to impose confidentiality obligations.
- (vi) *All examinations are to be videotaped and a copy provided to the Commonwealth Ombudsman who will provide annual reports to Parliament on the exercise of the powers [s 54A].* The ABCC has criticised this measure as potentially 'cumbersome and expensive'.¹⁶ We believe that these steps would be an important, inexpensive and efficient hand-brake on any potential abuses occurring during the interview process.

¹⁴ (1988) 18 FCR 439

¹⁵ See paragraph 33 and following.

¹⁶ Letter to DPM

4. FAIR WORK BUILDING INDUSTRY INSPECTORATE

4.1 The retention of a separate government enforcement agency for the construction industry has been consistently opposed by the CCU. As was pointed out in the submission by the CCU to the *Wilcox Inquiry*, separate regulation should be discontinued because the notion that the industry should be singled out for this form of ‘special’ treatment represents flawed policy – all citizens should enjoy the same rights - and because our experience of the *BCII Act* and the ABCC has shown that these arrangements can be so easily abused and converted into a crude anti-union exercise. It remains our view that the construction industry should have the same regulatory /enforcement arrangements as all other industries under the *Fair Work Act*.

Structure and Location

4.2 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 in the *Bill*, namely, a separate and autonomous statutory agency working in parallel with, but independently of, the FWO. Wilcox recommended that the proposed Specialist Division be located **within** the office of the FWO but with operational autonomy¹⁷. He recommended that the *Fair Work Act* be amended to include any provisions relating to the Specialist Division. The ‘Forward with Fairness’ policy also provides that any specialist division should be located *within* the parameters of a single general inspectorate or regulatory agency.¹⁸ There was no suggestion that this would occur other than by administrative arrangement.

4.3 The Report also recommended that the Specialist Division implement policies, programmes and priorities **determined** (rather than recommended¹⁹) by, an advisory board.

4.4 Whilst the Wilcox recommendations (and the Government’s public commitment to a specialist Inspectorate) do not reflect our preferred position, in the absence of any compelling reasons, the Government should not depart from these two key findings of the *Report* which it commissioned. At the very least the Committee should recommend amendments to the *Bill* to reflect these findings.

Advisory Board

4.5 We note that the ABCC suggests that an Advisory Board could restrict the capacity of the Inspectorate to ‘deal appropriately’ with issues as they arise. The ABCC claims that its work is largely complaint-driven and that a prescriptive set of policies and programs ‘may conflict with the management of issues arising ‘in the field’’.²⁰

¹⁷ Recommendation 1 *Final Report* page 6.

¹⁸ ‘Forward with Fairness’ - April 2007, page 17 and *Policy Implementation Plan* - August 2007 page 24.

¹⁹ Schedule 1 Item 49 (proposed s 24) of the *Bill*.

²⁰ Letter ABCC to DPM op. cit. page 1.

4.6 We dispute that the ABCC has been largely complaint-driven. It has clearly adopted a set of policies and priorities which favour employers and focus on allegations of union misconduct. The clearest example is the internal policy position it has adopted, reflected in its ‘understanding’ with the former Workplace Ombudsman, that it [the ABCC] does not deal with allegations of employers not paying wages and entitlements in accordance with applicable awards and agreements. That immediately skews the work of the ABCC towards employee and union conduct even though its clear statutory obligation is to investigate and prosecute alleged breaches by *all* building industry participants.²¹ It ensures that one set of complainants are given absolute priority and another ignored. With this self-imposed focus and a reputation as being simply a tax-payer funded legal service for employers, it is essential that the proposed amendments rectify the obvious bias in the way the ABCC operates.

4.7 At least two employer organisations explicitly support the notion of both the ABCC and its successor as prosecution agencies that only pursue matters against unions and employees and not employer breaches, such as the underpayment of wages and entitlements. The AIG assert that the inspectorate should not have its resources ‘diverted’ to underpayment claims²² and that the skills of the ABCC inspectors are ‘not suited’ to this work.²³ Master Builders Australia complain that the Bill is largely ‘tailored to the expanded role for the Inspectorate of ensuring compliance with safety net contractual entitlements’. They say that the ABCC ‘has been focussed on restoring the rule of law in the industry’ [as though the rule of law should apply to employees only] and that this ‘new’ function would be a ‘diversion of resources from policing the obligation to act lawfully.’²⁴ These extraordinary submissions show just how far these organisations have come during the ‘WorkChoices’ era. Even after the repeal of ‘WorkChoices’ their sense of entitlement from the state still extends to advocating that the general public rather than their members, should continue to take responsibility for their own industrial issues, and to supporting different enforcement regimes for employers as opposed to employees and unions.

4.8 An Advisory Board, constituted by apolitical public servants and industry representatives, would introduce much-needed accountability and balance into the work of this agency.

4.9 We also note with interest the ABCC’s assertion that ‘*the proposed structure involves a significant risk that the perception of independence will be diminished*’ and that ‘*this could adversely affect the confidence of the industry’s participants in the regulator.*’²⁵ In our view the ABCC enjoys neither a perception of independence nor the confidence of industry participants. The proposed structure would in fact tend to have the opposite effect and enhance the reputation of the regulator. Wilcox was clearly of the same view.

²¹ Section 10 BCII Act. See also s 14(2)(b) which obliges the ABCC to provide ‘details of assistance provided...to building employees...in connection with the recovery of unpaid entitlements.’

²² AIG Submission page 4

²³ Ibid Table page 13.

²⁴ MBA Submission paragraph 5.4.1.

²⁵ Letter ABCC to DPM op. cit. page 1.

4.10 By its own conduct the ABCC has undermined any notion that it is in any sense independent and apolitical. We refer the Committee to our Submissions²⁶ made to the *Wilcox Inquiry* which demonstrated beyond any doubt that:-

- (i) The ABCC'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 was consciously overlooked by the ABCC in spite of their statutory mandate
- (iii) The ABCC had no proper regard to the public interest in determining which matters to litigate and on whose behalf litigation should be brought.
- (iv) The ABCC 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.

4.11 More recently the ABCC has abandoned the notion of public service neutrality by weighing into the political debate about the future regulation of the industry in the national media, and it did so with colourful language about whether proposed legislative changes would turn a 'virile stallion' into a 'tame gelding'.²⁷

Annual Report

4.12 Proposed section 14 of the amended *BCII Act – Annual Report* – should be strengthened to include a positive obligation on the Director to report on measures taken in response to decisions of the Advisory Board. A new subclause (d) should be added to s 14(2) as follows:-

(d) details of the measures taken by the Director in response to directions and decisions of the Advisory Board.

PENALTIES AND ADDITIONAL CIVIL PENALTY PROVISIONS

5.1 The *Bill* repeals the additional penalty provisions in the *BCII Act* and separate regime of penalties to that applying under the *Fair Work Act*, as recommended by the *Wilcox Report*. Those conclusions are fortified by the fact that since the *Report* was handed down, the provisions of the *Fair Work Bill* which were being considered by Wilcox have now passed into law in the form of the *Fair Work Act*.

5.2 We endorse the conclusions set out in this part of the *Wilcox Report* and therefore the provisions of the *Bill* that carry them into effect.

²⁶ See Chapter 9 of Submissions

²⁷ The Australian 19 June 2009.

Industrial Action, Compensation Orders and Penalties

- 5.3 This aspect of the *Bill* was thoroughly dealt with during the Wilcox Consultation process. Three formal debates involving a range of interested parties were convened as part of that process at the Law Schools of the Universities of Western Australia, Melbourne and Sydney. On each occasion Mr Wilcox invited employers to tell him 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 additional *BCII Act* provisions.
- 5.4 In his *Final Report*, Wilcox identified three differences between the rules for building workers under the *BCII Act* and those for others under the *Workplace Relations Act* 1996. They were
- (i) The width of circumstances under which industrial action attracts penalties
 - (ii) Exposure to statutory compensation orders; and
 - (iii) Higher penalties²⁸

As to the first issue 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 practical importance.'*²⁹

- 5.5 We note that in their submission to this inquiry the AIG support the repeal of Chapter 6 of the *BCII Act* as proposed by the *Bill* on the basis that the *Fair Work Act* contains equivalent provisions.³⁰
- 5.6 The report also noted that under the *Fair Work Bill*, statutory compensation was available under both s 417³¹ and s 421 (in combination with s 545)³². 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.'*³³

²⁸ *Final Report* paragraph 4.8

²⁹ Para 4.32

³⁰ AIG Submission page 16.

³¹ Para 4.29

³² Para 4.56

³³ Para 4.50

- 5.7 The issue of penalties was also analysed in some detail. The *Report* dealt with the argument, now sought to be re-agitated by the ABCC, that the industry is unique in its vulnerability to industrial action.

'...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.'*³⁴

- 5.8 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:-

*'The history of the building and construction industry may provide a case for the retention of special investigative measures, to increase the chance of a contravener in that industry being brought to justice. However, I do not see how it can justify that the contravener then being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and happened to be brought to justice. **To do that would depart from the principle..of equality before the law.**'*³⁵ (emphasis added)

- 5.9 We would also emphasise that the separate penalty regime has 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* in fact also recommended³⁶ 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 previous Government. The result has been that employees have been exposed to higher penalties but employers have not.

Penalty Provisions

- 5.10 The *Wilcox Report* disposes of the arguments about the necessity of retaining any additional penalty provisions from the *BCII Act*. It concludes that each of the provisions is comprehensively dealt with in the *Fair Work Bill* (now the *Act*) and that there is no need to carry any of them forward. We agree with that conclusion.

³⁴ Para 4.52 and 4.53

³⁵ Para 4.63

³⁶ *Final Report of the Royal Commission into the Building and Construction Industry – Volume 1 Summary of Findings and Recommendations Recommendation 165 page 141.*

6. DISCLOSURE OF INFORMATION

- 6.1 The *Bill* loosens the current restrictions on the disclosure of information obtained by the ABCC/Inspectorate and its inspectors/staff in the course of the performance of their duties.
- 6.2 The restrictions that currently apply under s 65 of the *BCII Act* to *all* protected information would, if the *Bill* is passed, only apply to information obtained in the course of a compulsory interview. The disclosure of all other information would be governed by the new proposed sections 64 and 64A. These latter two sections generally facilitate and authorise disclosure. They do not expressly limit disclosure by the Director in the circumstances not covered by sub-sections (2) to (6) or impose any sanction on the Director in the event that information is disclosed other than in accordance with those sections. Even though section 64(1) refers to information acquired by inspectors and other staff, it does not impose any express limitation on what inspectors or staff may do with information acquired in the course of their employment.
- 6.3 The Explanatory Memorandum contemplates a wider range of disclosure would be permitted under the *Bill* than is presently the case, such as where the Inspectorate believes non-compliance has occurred.³⁷ We maintain that disclosure relating to non-compliance should be confined to circumstances where a court has ruled on the question of compliance or where non-compliance has been admitted by a party and the matter is in the public domain.
- 6.4 Whilst we accept that there will be circumstances in which disclosure is necessary, for official reporting purposes for example, we oppose the watering down of restrictions on disclosure of information obtained by any Inspectorate. This information should only be used for the purposes for which it was originally obtained and not for other purposes. That principle is recognised in the restrictions that are placed on 'right of entry' permit holders who obtain information in the course of an investigation into a suspected breach.³⁸
- 6.5 Even under the existing provisions, information has been selectively disclosed to media outlets for political purposes. This undermines the independence of the government agency involved.
- 6.6 The current provisions should be strengthened not diluted or, at the least, they should be retained in their present form.

7. INTERVENTION

- 7.1 The *Wilcox Report* recommended against retaining a statutory right of intervention in court or FWA proceedings.³⁹

³⁷ Paragraph 221.

³⁸ Section 504 FWA

³⁹ Para 9.15 page 99

*'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.'*⁴⁰

Items 85 and 86 of the *Bill* do not reflect this recommendation.

7.2 The ABCC's history in intervening in proceedings is a matter of public record. It was considered by Wilcox. The ABCC has almost invariably 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.

7.3 The *Bill* should be amended to reflect the terms of the *Wilcox Report* on this point and the issue of intervention left to the discretion of the relevant court or tribunal.

8. CONCLUSION

8.1 The CCU urges the Committee to recommend that the *Bill* be amended to provide for the immediate repeal of the *BCII Act*. This would enable the new *Fair Work Act* to comprehensively regulate the industry, it would remove one of the most obnoxious vestiges of the WorkChoices era and it would restore the fundamental principle of equality before the law.

⁴⁰ *ibid*