SENATE STANDING COMMITTEE ON EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS

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

ACCI SUBMISSION

JULY 2009

LEADING AUSTRALIAN BUSINESS

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PART I - OVERVIEW

"These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform … [a]t the heart of the findings is lawlessness."

– Royal Commissioner, the Honourable Terence Rhoderic Hudson Cole RFD QC (Page 6, *Final Report of the Royal Commission into the Building and Construction Industry*, Volume 1)

"We have a weak trade union leadership nationally … We ought to have more militant action"

– Kevin Reynolds, upon being reappointed as CFMEU Secretary (*Australian Financial Review*, 20 November 2008).

To achieve cultural change in the industry, specific legislation targeted at all participants in the industry is necessary

– Royal Commission Report, Vol 11, p.7

Unions ignore orders of the Australian Industrial Relations Commission, and the Federal Court, with impunity

– Royal Commission Report, Vol 1, p.63

However, the ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain. It would be unfortunate if the inclusion of the ABCC into the OFWO led to a reversal of the progress that has been made.

– Wilcox J Final Report. p.14.

INTRODUCTION

1. This submission is set out in two parts.

   a. **Part I** outlines ACCI's position with respect to the broad policy decisions which will see the abolishment of the Australian Building and Construction Commission (ABCC) and repeal of important provisions under the Building and Construction Industry

Improvement Amendment (Transition to Fair Work) Bill 2009 (the Bill).

b. **Part II** outlines ACCI's position with respect to the detail of the Bill.

2. Attachments: There are a number of attached documents to this two part submission which are listed as follows:

a. **Attachment A** – are a number of recent media reports on the industry.

b. **Attachment B** – is an extract of findings from the Cole Royal Commission.

c. **Attachment C** – is an extract from the ARC Report into Coercive Information Powers.

d. **Attachment D** – is a list of s.127 cases involving building unions.

e. **Attachment E** – is a compilation of case summaries on prosecutions by the ABCC and Building Industry Taskforce.

f. **Attachment F** – is a copy of the ACCI response to Wilcox J recommendations.

3. This submission is without prejudice to the views expressed by ACCI members who may be involved in this Senate Inquiry.

ACCI SUPPORTS ONGOING ROLE OF ABCC

4. ACCI has for many years maintained support for the findings of the Cole Royal Commission into the building and construction industry (the Royal Commission), and the creation and operation of the office of the Australian Building and Construction Commission (ABCC) and associated agencies (ie. Federal Safety Commissioner), and legislation giving effect to the findings of that Royal Commission (ie. the *Building and Construction Industry Improvement Act 2005*, BCII Act).

5. As set out in this submission we maintain that position. ACCI's primary position is that the ABCC be retained as a stand-alone agency, with its existing capacities and responsibilities, and with its supporting legislation and associated instruments essentially unchanged.

ACCI POLICY POSITION ON THE BILL

6. On 17 June 2009, when the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the Bill) was introduced into Parliament, ACCI stated its position in the following media release.

ACCI Media Release

REPLACEMENT BUILDING COP NOT TOUGH ENOUGH

Statement by Mr Greg Evans, Acting Chief Executive

The Australian Chamber of Commerce and Industry (ACCI), Australia's largest and most representative business organisation, has expressed disappointment over key elements of the Government's legislation which will abolish the highly effective Australian Building and Construction Commission (ABCC) from 1 February 2010.

The business community is concerned that the Government's proposals are risky, particularly given the success of the ABCC and its predecessor in dealing with some of the worst excesses of behaviour in the building and construction industry. We are concerned the changes send the wrong message to the industry and the community, particularly when the economy can least afford to jeopardise the economic dividends that have been delivered, and at a time of major infrastructure spending.

It appears that under the Government's proposals there are significant changes to the current framework including the removal of industry specific unlawful industrial action and penalty provisions that have proven vital in securing a change in behaviour of all building industry participants.

Whilst business welcomes retention of coercive powers, we do not agree with proposals to water down the powers for particular building projects. Being able to "switch off" coercive powers is akin to a large corporate asking the ACCC, ATO or ASIC to be free from scrutiny or to be relieved from having executives forced to answer questions because they have been a "good" corporate citizen.

Other regulators with similar coercive powers don't have these types of restrictions and we fear the added measures may slow down and impact investigations into unlawful conduct.

ACCI and its building and construction industry members will continue to work with the Government to ensure the promise for a "strong cop on the beat" is realised.

7. We set out in Part I a number of broad policy recommendations, with specific detailed recommendations on the Bill set out in other sections of this submission.

ACCI RECOMMENDATIONS

Recommendation 1

The ABCC not be abolished in favour of a new specialist agency, called the Office of the Fair Work Building Industry Inspectorate (the inspectorate).

Recommendation 2

There be no change to the BCII Act, save necessary consequential changes to continue to properly cross reference to the new Fair Work Act 2009 (FW Act)

Recommendation 3

If the ABCC is to be subsumed into a new agency, the Director of the agency should operate as separately and autonomously as the existing Australian Building and Construction Commissioner currently does.

Recommendation 4

The new agency should be headed by an independent statutory appointee (responsible to the Minister), independent of the direction of an advisory board.

Recommendation 5

The new agency should be established through strictly confined amendments to the BCII Act, and should continue to be governed by the objects and particular industrial relations provisions of that Act, and not the more general FW Act.

Recommendation 6

Any new agency should continue to reflect the general and specific conclusions of the Royal Commission, including those which specifically gave rise to the creation of the ABCC structure and operations. The new body should not in any way overturn the findings of the Royal Commission.

Recommendation 7

Any replacement structure must be capable of delivering the current level of investigation, monitoring, compliance and prosecution, and thereby be capable of continuing to give effect to the findings of the Cole Royal Commission.

Recommendation 8

Any replacement for the Australian Building and Construction Commission retain and continue to exercise the existing "coercive" investigatory powers unchanged.

There should not be any additional "safeguard" measures as no case has been made out to justify these additional measures.

Recommendation 9

The existing or replaced coercive powers should not automatically sunset after a period of time. It should require Parliament to repeal or amend the specific provision. To do otherwise would be to prejudge the outcome of any inquiry into the coercive powers.

Recommendation 10

If there is to be some additional oversight or monitoring of the discharge of specific functions by the new body, it should be by way of the Commonwealth Ombudsman, and / or reporting to the Minister for Employment and Workplace Relations.

Recommendation 11

The existing Code and Guidelines should remain in place without alteration, derogation or any diminution of their effective operation.

Recommendation 12

The existing penalty provisions of the BCII Act continue to be part of the powers and responsibilities of any new agency. There has been no case made out to justify the repeal of these important and targeted penalty provisions.

Recommendation 13

The existing provisions in the BCII Act, such as s.38 (unlawful industrial action) continue to be part of the powers and responsibilities of the agency. Overall powers and parameters for s.38 should not be changed, and there should be no change in the circumstances in which such actions are pursued, nor in the criteria against which they are determined.

Recommendation 14

The existing provision s.67 of the BCIIA which allows the ABCC to publish non-compliance details, where it is in the public interest, should be retained.

Recommendation 15

The existing provision s.49(1) of the BCIIA which provides orders for contravention of civil penalty provision should be retained. These are preferable to the provisions in the FW Act.

Recommendation 16

There should continue to be available to the Court discretion to grant costs for matters related to the BCIIA. This is generally not available under FW Act.

Recommendation 17

Should Recommendations 1 to 16 not be adopted, further specific amendments be made to the Bill as per ACCI and ACCI member submissions to ensure that it is workable and does not prejudice the proven success of the existing framework.

8. Part I outlines why the above recommendations are important and why they should be adopted by the Committee. The first paragraph in the summary of recommendations in the Final Report by the Royal Commission is insightful:

> The findings demonstrate an urgent need for structural and cultural reform.[1]

LONG WAY TO LASTING CULTURAL CHANGE

9. The evidence indicates that even at these early stages of a long term significant cultural reform process, there have been improvements in terms of increased productivity, and decreased periods of unlawful conduct. We consider this evidence to be clear-cut.

10. An immediate concern for industry (and the wider community) is that a positive cultural shift in the industry towards compliance, lawful conduct, and away from the serious illegality found in the Royal Commission, may be reversed. This is not an unreasonable or speculative concern:

    a. The Cole Royal Commission found not only negative behaviours and illegalities, but also more fundamental underlying cultures which gave rise to lawlessness and unacceptable conduct in the industry.

    b. Cultures take time to change and measures which will change both cultures and behaviours need time to be allowed to secure the changes they were designed to achieve. The ongoing work of the ABCC demonstrates cultural change in the industry is far from complete.

    c. In the absence of fundamental changes in underlying cultures and motivations, behavioural and legal controls are required to ensure

[1] Final Report of the Royal Commission into the Building and Construction Industry (Volume 1), February 2003, p.3.

poor attitudes and motivations do not translate into unlawful, unacceptable and damaging behaviours.

d. It is well recognised in our legal system that enforcement and sanctions have a crucial role to play in eliminating lawlessness in the immediate term, and changing propensity to lawlessness longer term.

11. Whilst the ABCC and BCII Act have both contributed to reducing the extent of unlawful behaviour, it has not had time to do its work to make any real or lasting cultural change.

12. This is illustrated by a number of recent articles in the media. (**Attachment A**).

13. What is far from clear is to the extent that a replacement agency will be able to continue the reform agenda, and continue to jointly deliver both immediate changes in behaviours, and longer term changes in cultures, attitudes, norms and assumptions.

14. If there is to be a new agency, this is the standard it must meet; which is the standard set by the ABCC in its day to day work.

MANY STAKEHOLDERS

15. The views of construction unions, construction and industry employers and representatives are important in this inquiry, but so too are the general views of employers and business across Australia.

16. This inquiry and any subsequent recommendations made, has significant implications not only for construction industry participants, but for the wider Australian community and economy.

17. The community is a key stakeholder in this debate, as individuals and business:

a. Fund via taxation, major public projects;

b. Invest in construction projects, including the derived individual products of major construction works, such as individual retail premises, apartments, etc;

c. Pay for the use and enjoyment of construction projects, including any higher costs that are passed onto the consumer as a result of unlawful conduct in the industry.

d. Rely on built infrastructure for investment and social utility.

18. The employers of Australia, across all industries and all States and Territories, consider the maintenance of existing regulation of industrial relations enforcement in the Australian building and construction industry to be essential.

19. The Government's 2007 *Forward With Fairness* policy statements propose for a different approach, which is in essence the following:

> As previously indicated, Labor will maintain the existing arrangements for the building and construction industry, with the ABCC continuing until January 31, 2010. Following that date, responsibilities will transfer to the specialist division of the inspectorate of Fair Work Australia.[2]

20. This was reiterated on 17 September 2008 by the Deputy Prime Minister:

> I can guarantee we'll deliver on our election commitment, which is that the ABCC will stay until 31 January 2010, with all of its powers and all of its budget. I can confirm we'll deliver on our election commitment that on 1 February 2010 it will be replaced by a specialist inspectorate within Fair Work Australia and, of course, His Honour Murray Wilcox, is undertaking a review for the Government to make a recommendation about that transition.[3]

21. ACCI's primary position remains that change is unnecessary, and that as a consequence, the Wilcox J review was not required. We maintain there should be no transfer of the powers and functions of the ABCC into a specialist division of FWA or stand alone new agency.

22. We note that the WA State Government may react to any such moves by establishing its own agency to deal with this sector in the event that the ABCC is abolished, or is functions and effectiveness not sufficiently maintained in practice.

23. This indicates the level of urgency and need for an effective and special enforcement body for an industry with unique challenges and needs. What Australia's employers, and now some state governments, clearly fear is that any replacement arrangements will be less effective than the ABCC, and will not only see an unacceptable reversion to illegality and

[2] ALP (2007) Forward With Fairness Implementation Plan, p.24 - www.alp.org.au/download/070828_dp_forward_with_fairness___policy_implementation_plan.pdf
[3] Transcript, National Press Club, 1pm Wednesday, 17 September 2008

unacceptable behaviour (and impact on the community through lawlessness, extended deadlines and greater cost of the built environment), but also an entrenchment and rejuvenation of negative cultures.

> ***WA: Govt promises to reinstate building industry taskforce (AAP)***
>
> *24 November 2008*
>
> Australia's only Liberal government may reinstate its Building Industry Task Force to clamp down on militant unionism, West Australian commerce minister Troy Buswell has warned.
>
> The federal government plans to abolish the Australian Building and Construction Commission (ABCC) from 201, replacing it with a new industrial umpire, Fair Work Australia.
>
> Mr Buswell says the Gallop Labor government did exactly the same thing when it did away with former Liberal Premier Richard Court's Building and Industry Taskforce (BITF).
>
> "If that proves to be the case, our government will not stand by and allow unions to return to ruling the industry in this state," Mr Buswell said in a statement overnight.
>
> "If we see any sign of the ABCC being turned into a tame-cat compliance unit within a Government department, then we will act to bring back a version of the BITF in WA."
>
> Mr Buswell's comments come days after powerful West Australian unionist Kevin Reynolds and his offsider Joe MacDonald were re-elected to lead the WA branch of the Construction Mining and Energy Union (CFMEU).
>
> "Kevin Reynolds might think his re-election is a mandate for that, but Mr Reynolds needs to think again," Mr Buswell said….

OUTLINE OF ACCI POSITION

24. ACCI will address specific employer concerns in later sections of this submission, however, the Senate Committee should have an appreciation for the history and contemporary changes that has taken place in the industry in response to regulatory reform.

    a. CULTURE: Behaviours and underlying cultures in the Australian building and construction industry, established by the Royal Commission and evidenced by ongoing developments in this

industry, support the maintenance of the ABCC (and its extant budget, resources, Act and responsibilities). In the absence of its retention, employers support a properly independent specialist agency exercising powers and responsibilities as close as possible to those of the existing ABCC.

b. RECOMMENDATIONS: The Royal Commission not only made findings on behaviours and conduct, but also specific recommendations to remediate these concerns and change industry cultures over time. The Australian Parliament should continue to give effect to the findings and specific recommendations of such a Royal Commission, unless there are cogent and substantial reasons to disturb those recommendations.

c. EFFECTIVE BODY: The ABCC is doing a sound and effective job, and is changing behaviours in the Australian construction industry. The basis for its establishment in the wake of the Royal Commission findings has been borne out in practice and remains valid.

   i) This is a very important consideration for any replacement body. The Senate Committee should seriously consider whether a new agency will be as effective as the ABCC in ensuing the rule of law is observed in the Australian construction industry. The industry, employers, employees and the wider community are certainly entitled to expect that it will be. This is a large litmus test indicator for the changes that are sought by the Government in the Bill.

   ii) Whilst ACCI strongly maintains that the existing body should be retained, we have also strived in this submission to identify parameters for the best possible outcomes within the broad intentions of Government policy. If the new agency is to be created, how best should its terms and structures be framed? ACCI calls for the least possible change to current institutions, without risking positive gains already achieved.

d. ECONOMIC BENEFITS: The activities of the ABCC are delivering real economic and industrial benefits to both the construction industry, other industries and to the wider economy and society.

i) This is evidenced in the various Econtech reports published by the ABCC[4], and in the feedback of other industries reliant on construction.

ii) No valid basis has been advanced to doubt the findings of the Econtech reports, which come from one of Australia's foremost economic consultancies.

e. The ABCC is observing the highest levels of probity and sound administration in its compliance and operational activities.

WILCOX J INQUIRY

25. ACCI participated in the Wilcox J inquiry by providing detailed submission and making oral submissions.

26. It is of little surprise that the main interests in this area which support the complete removal of the ABCC, its powers and underpinning legislation, are those subject who are to the regulation of the ABCC and those bodies whose conduct gave rise to unfavourable findings from the Royal Commission (the construction unions).

27. Parliament, and the general community, are often sceptical of those regulated calling for the outright abolition of their regulator. They should be on this occasion.

28. The regulated often dislike their regulator, and often hone in on particular powers and measures regulators use to do their regulatory work, as key points of criticism. Whilst not the most rigorous of points, such criticism can be a sign of an effective regulator.

29. The Government did consciously and deliberately seek submissions from stakeholders and the community before embarking on major policy change. This meant that there was some onus on parties to produce cogent evidence to buttress their arguments. It is our submission that evidence presented to the Wilcox J inquiry did not appear to assist the cause for those who agitate for the removal of the ABCC or its powers. ACCI maintains that those who wish to remove the current powers or structure of the ABCC carry a high burden.

[4] 2007, 2008 and 2009 KPMG/Econtech reports, *Economic Analysis of Building and Construction Industry Productivity* (series). <http://www.abcc.gov.au/abcc/PerformanceReports/Productivityandindustryreports/>

30. The ABCC and its predecessor bodies are the direct result and creation of an independent Royal Commission – this cannot be ignored. They simply cannot be whitewashed by unions labelling the entire institutional structure as a so called exercise in "union bashing". As set out shortly, it is not legitimate to indulge in post Royal Commission questioning of its legitimacy or integrity.

31. ACCI believes that employers should not have to prove why the ABCC is required – this was already achieved by the Royal Commission and the failed previous attempts at various points in time, at stemming unlawful behaviour in the industry. It must be for opponents of the process to show why there should be changes in this area.

32. Australia's employers considered that properly assessed the outcomes of the Wilcox J review should be:

    a. Either the retention of the ABCC; or

    b. A second best approach, which is the creation of a separate agency which exercises the full range of established powers and responsibilities of the ABCC.

33. ACCI was disappointed that Wilcox J made a number of adverse recommendations despite finding that *"there is still a level of industrial unlawfulness in the building and construction industry … that it would be inadvisable not to empower the BCD to undertake compulsory interrogation"*. Whilst the Government has not adopted all of the recommendations in the Wilcox J report, the ones it has adopted would make significant changes to the current arrangements.

34. ACCI's response to the Wilcox J recommendations is attached (**Attachment F**). An extract of that response to the Government states unequivocally our support for the ABCC and underpinning legislation:

> ACCI supports the retention of the ABCC in its current form. This also includes the Federal Safety Commissioner, Building Construction and Industry Improvement Act 2005 (BCIIA), and associated legislation. It was the result of a robust and extensive Royal Commission into the industry. To disturb the existing framework in either a minor or substantive way opens up the possibility for the return to past unlawful practices that Commissioner Cole found in his final report.[5]

[5] Final Report of the Royal Commission into the Building and Construction Industry – Summary of Findings and Recommendations, Volume 1, pp.5-6.

We reiterate our primary thesis that the ABCC has made significant achievements in a short amount of time, with evidence of increased productivity, increased community benefits, decreased periods of unlawful conduct and a demonstrated change of behaviour in many instances.

POLICY RATIONALE

35. The Committee should consider the Bill on its merits, despite the fact that its foundation is built upon an inquiry into the transition from the ABCC to another agency.

36. There should be strong policy reasons for adopting the course of action proposed by the Bill. Unfortunately there does not appear to be any policy reasons offered in the second reading speech accompanying the introduction of the Bill or explanatory memorandum as to why these changes are being made.

37. It appears that the Government's primary policy foundation underpinning these reforms is that it was an election commitment.

38. The Senate Committee should closely consider the Court cases to date, the recommendations made by major employers and their representatives, as well as submissions by the current ABC Commissioner on the Wilcox J report.

PRODUCIVITY

Introduction

39. Productivity improvements in this industry should be a key consideration before regulatory change is adopted.

Listen to the Industry

40. The work of the ABCC and the importance of its powers and responsibilities continuing to be exercised effectively is not demonstrated primarily by the Econtech/KPMG (Econtech) report series. The Econtech reports are an independent validation of what the industry has consistently communicated for some years; that the ABCC and its work have led to a more productive, reliable and efficient Australian construction industry.

41. Feedback from throughout the industry is that the work of the ABCC has made construction more productive, cost effective and reliable – and this is reinforced by subsequent independent economic research.

42. Thus any econometric reductionism, or commentary by some parties, has to be assessed not only against Econtech's eminence and rigour, but also against the common sense test, given that the industry is clearly providing feedback on the importance and contribution of the ABCC and its work.

43. In short Econtech is only confirming what the industry has been telling all interested for years; that the ABCC is contributing to real gains and efficiencies in the industry.

Latest Econtech/KPMG Report

44. On 6 May 2009, the third Econtech/KPMG report, *Economic Analysis of Building and Construction Industry Productivity*,[6] into the impact of industrial relations reforms in the construction industry was released. The report is an update of the analysis previously undertaken by Econtech in 2007 and 2008.

45. Importantly, the report's economic modelling estimates a number of positive economic impacts due to the ABCC's activities and industrial relations reforms:

    a. GDP is 1.5% higher than it otherwise would be.

    b. CPI is 1.2% lower than it otherwise would be.

    c. Improved consumer living standards are reflected in an annual economic welfare gain of $5.1 billion.

46. Econtech also interviewed representative from four major construction companies. These interviews reported further benefits including:

    a. A significant reduction in the number of days lost to industrial action.

    b. Improved management of occupational health and safety issues and a reduction in their misuse for industrial purposes.

    c. Productivity gains from improved rostering flexibility.

[6] Accessed here: < http://www.abcc.gov.au/NR/rdonlyres/D171CC1C-9A54-4DAF-A3BA5C126855F6BE/0/EcontechProductivityReportMay2009.pdf >

47. These results should be carefully considered by the Committee when it looks at the changes that are sought by the Bill, particularly the removal of the existing s.38 provisions governing unlawful industrial action.

48. As signalled above the value and legitimacy of the Econtech and other research is consistent with feedback from the industry generally. Given the story told by the research matches what the industry has been saying, the legitimacy of this material should stand.

49. Whilst some parties may doubt the robustness of the research, it is not suitable or legitimate to cast doubt on independent economic research, by an eminent research organisation without attribution.

50. Economics is a rigorous discipline, and particularly in relation to econometrics and modelling, there is an accepted analytical basis to validate and invalidate research, debate assumptions and settings and critique findings.

51. A proper approach to duelling economic conclusions exists, and where one party advances economic research and the other mere contention and conjecture, it is clear which position should stand.

52. There is also a complexity to this material and to modelling which should be taken into account. The only legitimate basis ACCI could see for doubting the work of an econometrician is evaluation or replication of research by another skilled and qualified econometrician.

53. Therefore, to reject such information would be to commission independent economic analysis (and even then to allow Econtech to respond). In the absence of such analysis, we do not consider the Econtech report to legitimately be able to be subjected to doubts such as those advanced to date.

54. Again, however, the ultimate test is the common sense test. Econtech's conclusions really do no more than validate what the industry has consistently maintained – the work of the ABCC and the powers and responsibilities it exercises are materially improving productivity, efficiency, reliability and cost effectiveness in the Australian construction industry.

Industry Overview

55. Whilst construction industry employers and their representatives will be able to provide a more detailed picture of the industry, it is necessary to provide a snapshot of the Australian building and construction industry and its role in the Australian economy.

    a. The importance of the capacity to economically, reliably, and expeditiously construct the built environment – particularly commercial, industry and public infrastructure – is a vital determinant of our national and regional capacity for economic growth and for attracting new investment.

    b. The economic benefits of an efficient, productive, reliable and efficient construction industry go well beyond the direct measured benefits identified (value of construction work and direct employment). By way of example:

        i) A decision to construct a new factory or head office in Australia (often determined by cost and reliability of construction) delivers enduring jobs and growth in non-construction industries.

        ii) The cost, timelines and reliability of infrastructure construction determines (for example) the extent to which opening up substantial resource opportunities are economic. For example the timeliness and cost of delivering a new port or road will affect whether a mine or development will proceed, and whether new non-construction jobs will be created.

    c. The direct role or mandate of the ABCC may only lie in non-residential construction. However, it would be inappropriate to proceed on the basis that there is no interrelationship. This is an issue for direct industry feedback, however it would be logical for example that inflated wages in one part of the industry would force the other to make wage adjustments to retain skills and scope to employ. There is a real risk in this process of increased costs for both residential and non-residential construction.

56. We would request that this inquiry proceed with a proper understanding of the magnitude and importance of the work of the ABCC, not only

within the industry but also for the wider economy. Direct industry participants, including many ACCI member organisations are well placed to communicate this to the inquiry.

57. ACCI did not accept the material on p.7 of the Wilcox J Discussion Paper which states as follows:

> *The Cole Commission reported that in 2001-02, the industry's total production amounted to $59.7 billion. The industry contributed 5.5 per cent of Australia's gross domestic product and provided 7.5 per cent of Australian jobs.*
>
> *Unsurprisingly, given the "resources boom", more recent estimates contain much higher figures. The Australian Bureau of Statistics ("ABS") estimated the total value of construction work in 2006-07 to be $71.2 billion.*

58. ACCI indicated to Wilcox J that this under serves the work of the ABCC and fails to properly engage with its utility and effectiveness.

59. The growth in the Australian construction industry is not solely a function of the mining boom. The work of the ABCC, and changes in behaviours and the beginning of changes in culture, are generating real benefits – and translating into the growth of the industry. This needs to be properly engaged with (a) prior to any changes being considered, and (b) to properly inform the creation of the proposed replacement arrangements.

60. The comment about the mining boom could only be sustained if proper micro-economic work showed that improvements in industry productivity and growth were explicable by mining industry work.

61. On 10 June, ACCI indicated that there were "serious risks associated with weakening the industry's separate regulatory arrangements, particularly in the context of the Government's $22 billion expenditure on national infrastructure projects." We should also add that this is only the announced actual expenditure, it must be considered that the total infrastructure projects have been estimated to be around $250 billion.[7] It

[7] *The Australian*, July 2 2009, p.1 "Infrastructure" special lift-out.

also should be considered within that the $22 billion is to be toped up by approximately $45 billion out of the private sector.[8]

62. We maintain the importance to the integrity and delivery of the Government's infrastructure plans if regulatory change is made which weakens the ability of the inspectorate to prosecute and maintain law and order in the industry.

[8] Ibid, at 2.

THE ROYAL COMMISSION

URGENCY – INTERIM TASKFORCE

63. On 20 August 2002 and before the completion of the inquiry, a First Report was tabled in federal Parliament.[9] The Royal Commission felt a sense of immediate urgency to make a number of preliminary recommendations based on the findings of unlawful behaviour in the industry, which Cole noted was *"not in dispute"*, nor *"restricted to any one category of participant within the building and construction industry."*[10] Therefore the sense of urgency applied to both conduct occasioned by unions and employers.

64. As such, the Royal Commission made a number of recommendations, including continuing investigations and the setting of up an interim body pending the establishment of a permanent body.

a. Investigations must continue:

> The Royal Commission has a finite life. That means that its inquiries and investigations must shortly cease. It has collected a wealth of information including a great number of probes for investigations and related material. Not all investigations are complete. Constraints of time and resources will prevent such incomplete matters being further addressed by the Commission.
>
> It is important that the uncompleted work of the Commission, in respect of which I will not be in a position to make findings in my final report, not be stockpiled for delayed further investigation and analysis by a future body which may be created by future legislative change. Continuity of the investigative function in respect of past events is necessary.[11]

65. Possible Reprisals:

> There are two further material factors. First, many persons gave evidence to the Commission, both publicly and privately, in circumstances where they feared retribution at the conclusion of the Royal Commission. It is important that there be a continuing body during the winding down and after the termination of the Royal Commission, and prior to any legislative establishment of a new national agency, which can monitor the building and

[9] First Report, Royal Commission into the Building and Construction Industry, 5 August 2003. <http://www.royalcombci.gov.au/hearings/reports.asp>.
[10] First Report, Royal Commission into the Building and Construction Industry, 5 August 2003, p.3.
[11] First Report, Royal Commission into the Building and Construction Industry, 5 August 2003, pp.3-4.

construction industry and act swiftly to deter and, if possible, ensure such retribution does not take place, or if it does, to penalise any such conduct.[12]

66. Interim Taskforce Body:

> Second, between September and November 2002, when the investigative tasks of the Commission will be winding down or concluded, the expiration of pattern bargaining agreements and the negotiation of a new wave of agreements is likely to result in heightened industrial activity. It is important that there be a body ready to monitor, and capable of monitoring, any such activity to ensure that it occurs within the law and to facilitate compliance and, if appropriate, prosecution, if it does not.
>
> The evidence before me makes plain that the Office of Employment Advocate is insufficiently funded and staffed to undertake the tasks referred to. It does not have the specialist capacity or experience necessary to monitor the building and construction industry, nor was it designed to give the necessary concentrated focus on the building and construction industry.
>
> These factors mandate establishment of an interim taskforce, established administratively, to continue incomplete investigations, and monitor conduct and enforce industrial, criminal and civil laws pending the consideration by government, and if appropriate, the Parliament, of the legislative changes I will recommend.
>
> I accordingly recommend the establishment of an interim body to monitor conduct, to investigate and, if appropriate, facilitate proceedings to ensure adherence to industrial, criminal and civil laws pending the delivery and consideration of my final report and establishment of any permanent agency. The interim body should have power to receive material from this Commission, complete investigations and instigate or facilitate any necessary proceedings.
>
> The body should be staffed by a multi-disciplinary group comprising lawyers, building and construction industry investigators, police investigators, financial analysts and general analysts. The body should have all skills necessary to continue with the investigative work of the Commission and be sufficiently resourced to be able to respond promptly to complaints received, and to investigate matters on its own initiative. It should have a presence in at least Melbourne, Sydney, Brisbane and Perth. If possible, the interim body should be operative by 1 September 2002.[13]

67. The significance of such recommendation before the finalisation of the inquiry indicated the level and sense of urgency in the sector. Once again, it is important to appreciate the Royal Commission recommendations were not targeted solely to unions, but to all participants in the industry.

[12] First Report, Royal Commission into the Building and Construction Industry, 5 August 2003, p.4
[13] First Report, Royal Commission into the Building and Construction Industry, 5 August 2003, pp.4-5.

68. These findings and recommendations give a sense of the negative cultures and behaviours that threaten to again emerge if the creation of a new agency involves a weakening of the functions and processes of the ABCC.

69. As recent as 17 July 2009 (the day of closing submissions to this inquiry), there have been media reports that construction union leaders believe they are immune from the rule of law. Once cannot discount that some union leaders are already detecting the fact that there will soon be a watered down regulatory environment from February 2010.

Unionist threat to stimulus projects[14]

… after stopping work at a major Multiplex site in Perth on Wednesday, citing safety concerns, the firebrand Construction Forestry Mining and Energy Union assistant secretary said no project was immune from the union crackdown.

Mr McDonald told The Australian he was unconcerned about possible fines under the federal Building and Construction Industry Improvement Act.

INDEPENDENCE

70. ACCI felt it necessary to provide the Wilcox J inquiry with a brief précis on the level of independence with which the Royal Commission undertook its task. This was necessary because:

a. Some unions and commentators wished to cast doubts upon the conduct of the Commission, its processes, findings and recommendations; [15]

b. If the integrity of Commissioner Cole's ultimate recommendations and findings were not upheld, this would allow protagonists to attack the credibility of the ABCC and underpinning legislation.

71. On the opening day of the Royal Commission in Melbourne, 10 October 2001, Commissioner Cole stated:

> The establishment of this Royal Commission has been the subject of political discussion and controversy, and media comment. It is important, at this first opportunity, that I make entirely clear the role and independence of this commission.

[14] *The Australian*, 17 July 2009 http://www.theaustralian.news.com.au/story/0,25197,25793969-5013404,00.html
[15] CFMEU Statement 31 July 2001 (See generally CFMEU Media Releases on Cole Royal Commission) http://www.cfmeu.asn.au/construction/campaigns/20010817_royalcomm.html; CFMEU letter (dated 12 September 2001) to Commissioner Cole for a reference to a specific allegation of bias.

Under the Australian Constitution, the governance of Australia and its citizens is achieved by three arms of government: the Legislature (comprising the Parliament), the Executive, and the Judiciary. One function of the Executive arm of Government is to make recommendations to the government of the day for legislative reform to be placed before the Parliament. One method of the Executive informing itself regarding possible legislative amendment is to establish a Royal Commission to report to it on matters of importance. Thus, this Royal Commission has been appointed by the Executive, being the Governor-General acting on the advice of the Executive Council, and it is required to report to the Executive via a report to the Governor-General. It is apparent from what I have said that the Royal Commission is not exercising any judicial power. It does not determine rights between parties or convict individuals or corporations of criminal offences. Its findings have no judicial effect, nor do they have any legislative effects. It is wrong to speak of the Commission as a judicial inquiry.

A Royal Commission is entirely independent of the Executive. That is subject only to it being provided by the Executive with such funds as are necessary to enable it to perform its tasks. It receives no instruction from the Executive arm of Government. The Commission remains subject, in some limited respects, to the jurisdiction of the courts.

The reason why it is common to appoint as Royal Commissioners persons with judicial experience is because of their perceived capacity for independence.

Such independence is critical if there is to be respect for the conduct of the Commission, and the integrity of its report. This Commission will, at all times, maintain its independence from the Government of the day, from those who are authorised to appear before it, and from parties with whom it will consult.

There are a number of specific matters touching upon the independence of the Commission, which have been raised in the Parliament and in the media, which I should address.

First, there has been Parliamentary debate and media speculation regarding the reason for the establishment of this Commission. Some have said it is a necessary inquiry because of current activities in the building and construction industry. Others have said that its establishment has been for the purpose of seeking to obtain political advantage prior to the forthcoming election.

I wish to make entirely plain that political considerations, whether relating to the establishment of the Commission or otherwise, will play no part whatsoever in the conduct of, the deliberations of, or the findings of this Commission. Whatever be the reason for the establishment of this Commission, such is irrelevant to any matter I will address. My function is to perform that task given me by the Letters Patent.

…

I refer to these events to make one matter clear. Just as the independence of the Commission means it does not receive instructions from the Executive Government, it also means it does not accept direction from the unions. The rule of law requires that when a legally constituted body, such as a court or a Royal Commission, determines it will sit, it must be permitted to do so. Some

may regard administrative inconvenience flowing from probable disruption as a sufficient reason to bend that rule of law. I do not. Demonstration and protest will not deter this Commission from sitting. Timing of sittings will be determined by me in accordance with the Commission's timetable, unrelated to influence or pressure.

…

Apart from these matters, a vast number of documents have been and will be received in response to requests for information which have been sent to almost 6500 organisations throughout Australia. The information which the Commission receives in response to those requests must be categorised, analysed and understood by those assisting me. I have also written personally to 150 leaders of employer and employee bodies, industry groups and departments of state seeking meetings and consultation on matters of policy, perceived problems affecting workplace practices, and proposals change and improvements in such practices. The discussions with influential participants in the industry will form the basis for research papers and further consultation. The work of the Commission has commenced, but I am not able at this time to nominate the date of the first public hearing.

Third, a union leader, without dissent from others, has stated that there are union "concerns as to whether or not the Secretary of the Commission can be impartial," because that Secretary, Mr Colin Thatcher, previously worked for the Business Council of Australia and for conservative governments in Western Australia and Queensland on industrial issues. There need be no such concern. I have seen nothing which would cause me to doubt the professionalism or integrity of Mr Thatcher. It is important to understand the role of the Secretary of this Commission. Mr Thatcher, in his role as Secretary, is appointed to ensure that this Commission receives the administrative and organisational support that it requires. He will not play any part in determining the witnesses called or material placed before the Commission, and certainly no part in my deliberations preliminary to my report.

Fourth, it is customary for Royal Commissioners to be consulted regarding the Letters Patent. The Prime Minister's statement the announcing my appointment stated I had been so consulted. That statement was correct. However, recognising that the creation and subject matter of this Royal Commission was likely to be a topic of some controversy, I made clear at both the Ministerial and official level that I would play no part whatsoever in determining the substance of the Letters Patent. I made clear my view that the substance was a matter for government.

Fifth, this Commission has been described in the Parliament and in the media as "a Royal Commission into unions". That is not so. It is an inquiry into aspects of the building and construction industry. The Commission is to inquire into workplace practices and conduct, financial transactions undertaken by employer or employee organisations, and management of industry funds, whether conducted by employers or employees or their organisations. Workplace practices and conduct necessarily involve a consideration of the activities of the employers and employer associations, as well of employees and unions. Any consideration of inappropriate financial transactions between employers, employees or unions necessarily involves consideration of more than one party.

I trust that I have made clear the inviolate independence of my Commission.

72. ACCI wishes to once again reiterate that:

a. To not properly give effect to Commissioner Cole's recommendations would be to fail to meet the specific remedial prescriptions of a Royal Commissioner.

b. This would be a serious probity and failure of governance issue, as well as a very poor policy outcome.

c. The Royal Commission recommendations and conclusions remain the key criteria any replacement legislation and enforcement body must meet. They remain the ongoing remedial prescriptions upon which the Australian system must deliver. The efficacy of any new enforcement structure for the construction industry (as well as its structure and operation) will be judged against the outcomes the Royal Commission foreshadowed.

ROYAL COMMISSION FINDINGS / RECOMMENDATIONS

73. Employers did not agree with every recommendation that the Royal Commissioner made in his final report. There were recommendations which were fully supported, partially supported or opposed. Nevertheless, the totality of the evidence before the Royal Commission, the findings made and the ultimate recommendations are a powerful catalyst for recommending that the current institutional framework remain.

74. Changes to the ABCC structure could potentially cease to give effect to the findings of the Cole Royal Commission. This is a course which, whilst theoretically open to any government or Parliament, is not embarked upon lightly.

75. To cease to give effect to the specific remedial recommendations of a Royal Commission would be a very significant departure from established policy and would represent a departure from accepted governmental practice around the common law world.

76. **Attachment B** to this submission is Commissioner Cole's summary of the findings of the Royal Commission.

IMPORTANCE OF RETAINING EXISTING FRAMEWORK

PURPOSE OF THE BCII ACT

77. All elements of the BCII Act are important. This includes:

a. The powers by which the ABCC Commissioners, Deputy Commissioners and inspectors have at their disposal;

b. All civil and criminal penalty provisions of the Act;

c. The Federal Safety Commissioner;

78. To repeal or water down any provision of the BCII Act would have a negative impact upon the sector. ACCI does not have a crystal ball, but based on the extensive history of retreating on such reforms, the odds are in favour of this occurring.

79. For example, this was no more succinctly stated by Commissioner Cole where he states:

> **Royal Commission Report – Volume 11, page 7**
>
> To achieve cultural change in the industry, specific legislation targeted at all participants in the industry is necessary. Over the past decade there have been a number of attempts to reform and improve the building and construction industry. Appendix A contains is a summary of those attempts. The work of this Commission has shown that, despite improvements in some areas as a result of previous reform attempts, there remain substantial impediments to the building and construction industry operating in a productive, efficient, harmonious and safe manner where the rights of individual Australians and, in particular, small business to operate are respected.
>
> There is no point in attempting to reform the culture in the industry by revisiting particular reforms. A comprehensive package of reforms implemented on a long term basis is required.
>
> There must be a determination within government and by participants in the industry to effect the necessary change.

THE STORY SO FAR

80. The ABCC and its predecessor body, the Building Industry Taskforce has conducted a large number of prosecutions and enforcement proceedings.

81. According to the ABCC's most recent statistics for the period 1 October 2005 – 30 May 2009:

    a. **9077** matters have been received via the 1800 hotline or independently.

    b. **1209** upgraded to preliminary investigation

    c. **69** current investigations

    d. **25** matters currently before the Court

    e. **111** interventions in the AIRC and court

THE PLAYERS

82. The ABCC statistics indicate that **71%** of trade unions are the subject of investigations. However, it is worth noting that when it comes to enforcement proceedings before the Courts, the ABCC and its predecessor has also taken Court action against a range of employers, Government, union and employee participants:

    a. employers (25%)

    b. unions (51%),

    c. Government (1.5%),

    d. unions/employees and employers (2%),

    e. unions/employers (6%) and

    f. employees (1.5%).

NATURE OF PROCEEDINGS

83. From 1 October 2005 to 16 June 2009, there have been **73** proceedings, the breakdown of which is enlightening:

a. **14** freedom of association provisions

b. **21** unlawful industrial action

c. **10** right of entry

d. **17** coercion

e. **10** strike pay

f. **1** discrimination

TARGETTED LAWS FOR THIS INDUSTRY

84. The Committee should note that the Bill will remove important provisions dealing with unlawful industrial action (s.38) which is currently a civil pecuniary penalty provision. This accounts for the majority of the ABCC's enforcement work according to the above figures.

85. The Bill appears to remove such targeted and specific provisions in the BCIIA based upon the recommendations of Wilcox J in his final report. It must be recalled, that the Cole Royal Commission did not make its recommendations lightly.

86. With respect, the 15 page commentary contained in the Wilcox J final report which summarises the reasons for repealing most provisions in the BCIIA, and that of an extensive Royal Commission into the industry cannot compare (see media release below).

Media Release – Cole Royal Commission (18 October 2002)

The Royal Commissioner Terence Cole QC said*: "That completes the public sittings of this Commission. I am informed that we have sat for 171 public sitting days and in addition we have taken evidence in confidential session on other days. Some 16,000 pages of transcript have been accumulated and the Commission has heard from 765 witnesses.*

"A total of 1900 exhibits including confidential exhibits have been tendered to me and the Commission has received some 29 general submissions from interested parties throughout the building and construction industry. In addition it has received 105 responses to the 11 discussion papers previously issued."

Commissioner Cole said 7.2 million pages of documentation had been received, of which after analysis 1.6 million were placed on the Commission computer system and in all 162,000 documents were tendered during the hearings.

> During the life of the Commission 1,489 summonses and 1,677 notices to produce were issued.

87. The Cole Royal Commission recommended targeted and specific measures for all participants in the industry. In short, there was evidence of systemic unlawfulness in the industry, that the industrial relations system was not working, and urgent and remedial action was required.

88. This led Commissioner Cole to recommend over 200 specific reform measures. The rationale was contained in 23 separate volumes which is available to anyone to inspect and draw their own conclusions upon. This is the genesis to the BCIIA and should be the starting point for the Committee's inquiry.

89. Once again, and with respect to His Honour former Justice Wilcox, the extensive nature of the Cole Royal Commission does not compare to the 6 month Wilcox J inquiry into a replacement structure for the industry.

90. ACCI responded to Wilcox J's specific recommendations on penalties and specific industrial law provisions as follows:

> We believe that this should be translated into either a separate Act (preferred), or into the Fair Work Act 2009 (FW Act).
>
> A separate Act would provide a signal that there is a *"strong cop on the beat"*.[16] It would also ensure that *"the principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue"*.[17]
>
> The current objectives in s.3 should remain, as should:
>
> - All provisions in the BCIIA that govern unlawful conduct (ie. Part 2, 3, 4, Chapter 6 and 7).
>
> - Particularly, ss.36- 49 and s.52(6)'s penalty provision.
>
> These are all essential to ensuring that building industry participants adhere to the rule of law and comply with industrial relations rules.
>
> ACCI does not support the FW Act applying to the industry. Essentially, this is what occurred prior to the Cole Royal Commission, and is essentially why Cole recommended a specialist enforcer and regime to deal with the industry. Should building industry participants be subject to the FW Act, as other employers, employees and unions are, we fear that unions would ignore orders of FWA and the Courts, just as Cole observed in his report under the Workplace Relations Act 1996.[18] Cole also stated that: *"Section 127 of the [WR Act] has proved to be ineffectual in preventing unlawful industrial action*

[16] ALP, Forward with Fairness – Policy Implementation Plan, p.24.
[17] Ibid.
[18] Volume 1, p.63.

taking place in the building and construction industry".[19] [this is now section s.418 of the FW Act]

Cole recommended in his report that the existing penalty regime at the time was inadequate, and specifically recommended that penalties for individuals and body corporates be substantially increased.[20]

Cole recommended that *"a comprehensive package of reforms implemented on a long term basis is required*".[21]

ACCI does not agree with a number of statements in the Wilcox J report, particularly, 1.17 – 1.19 and 4.62. Parliament did not decide on the content of the BCIIA or its replacement when it considered the FW Act. The two issues are separate and were not on the table during the Parliamentary process.

There is a very real difference between the unlawful industrial provisions under the FW Act and those under the BCIIA. They are more real than semantic as suggested by Wilcox J. Under s.38 of the BCIIA, unlawful industrial action as defined, is unlawful *per se* and subject to penalties. Under the WR Act or FW Act, unions engaged in unlawful industrial action (outside of the nominal expiry date of an agreement) would only be subject to a penalty, if it breached an order of Commission or the Courts. This is a very real motivator for unions not to engage in industrial action as defined under the BCIIA.

ACCI also disagrees with the analysis contained in 4.64 to 4.70. We support the current provisions regarding the onus of proof in s.36(1)(g) of the BCIIA. This was specifically included in the BCIIA because unions often rely on OHS grounds (whether legitimately or not) to avoid liability of unlawful industrial action.

ACCI also strongly supports provisions in the BCIIA that allows the ABCC Commissioner the right to intervene in proceedings. This has been another powerful motivator for all building construction participants.

Government should exercise extreme caution before it considers removing the provisions in the BCIIA as Wilcox J has recommended.

91. ACCI maintains the position that the specific provisions in the BCIIA are essential to maintaining the rule of law in the industry, particularly s.38 which governs unlawful industrial action.

92. Indeed, the foundation for recommending s.38 arose from Commissioner Coles observations that the mechanism to stop unlawful industrial action was not working and only actual pecuniary penalties were required.

93. Commissioner Cole states:[22]

"Increased penalties for engaging in unprotected industrial action

[19] Ibid.
[20] Ibid, at pp.35, 38,86, and 96.
[21] Ibid, at p.7.
[22] Volume 5, p.73.

> 262 Under the Workplace Relations Act 1996 (C'wth), industrial action which satisfies the requirements of ss170ML, 170MO (notice of intended action) and 170MP (negotiation preceding the industrial action) and does not fall within s170MM (secondary boycotts) is protected in the sense that those involved are immune from suit in any State or Territory.
>
> 263 What the Act does not stipulate is that industrial action which falls outside the provisions outlined above is unlawful conduct. If the industrial action is not 'protected', s127 empowers the AIRC to issue an order to stop or prevent industrial action that is 'happening, or is threatened, impending or probable' and that is taken or threatened in the course of an 'industrial dispute'. Industrial dispute is defined in s4(1), and includes industrial action taken in the course of negotiations for a certified agreement, or in relation to work regulated by an award or certified agreement.
>
> 264 If the AIRC makes such an order, the person or organisation against whom the order is made must comply with it. If the person does not comply then:
>
> • he or she is exposed to penalties under s178 in the Federal Court or a court of 'competent jurisdiction' (defined as District, County, Local or Magistrates' Court);
> • the Federal Court may, on application, grant an injunction against the person under s127, which if not obeyed places that person in contempt of court and exposes them to the possibility of large fines or imprisonment, or both.
>
> 265 Accordingly, penalties or other liabilities arising from unprotected industrial action cannot be imposed unless orders are obtained from the AIRC and the Federal Court and those orders are not complied with. <u>This process is cumbersome, time consuming and costly. While it is being pursued the target of the industrial action and, possibly, others as well, are all suffering economic loss that is, in practice, irrecoverable. Rarely is legal action taken against those persons who engage in 'unprotected' industrial action, even though such action is unlawful.</u> (emphasis added)"

94. Commissioner Cole ultimately recommends the following to ensure cultural change is established:

> 266 I recommend that the industry-specific legislation provide that unprotected industrial action which is taken in support of any claims made in respect of a proposed agreement constitutes 'unlawful industrial conduct'. Such conduct should be proscribed and the section proscribing it should be classified as a penalty provision. Victims would be entitled to compensation in the manner foreshadowed in the volume of my Report which deals with cultural change.

95. Wilcox J in his final report considers the equivalent to former s.127 of the WR Act, (now provided under s.418 of the FW Act) but does not provide any underpinning policy rationale for why removing the existing provisions dealing with unlawful industrial action will not revert back to what Commissioner Cole described above. Indeed, the only apparent

justification appears to centre on the ACTU's submissions on the principle of "equality before the law".[23]

96. In actual reality, the FW Act itself treats some employers and employees in particular industries different from others. Take as an example, the provisions that deal with the TCF industry in the FW Act. There are specific provisions that depart from the rule of law for employers and employees, with respect to awards and right of entry obligations. These are targeted to specific industries because there is a demonstrated problem of compliance and of possible exploitation. Employers, those that comply with the law, in those industries may legitimately ask why they are being signalled out and why a union does not have to give the requisite notice to enter their worksites. However, it is obvious that Parliament recognised that targeted measures were desired and so created those specific measures.

97. Whilst the starting proposition may be that Parliament should treat everyone equally when constructing laws, the very fact that there is regulatory intervention in many areas of public and private life that targets particular sectors is not uncommon.

98. What signal does this provide to all building industry participants that they can go back to the old days of ignoring orders to stop industrial action? We would submit it sends all the wrong signals and fear that the removal of s.38 will increase industrial disputation as occurred prior to the BCIIA.

RECENT UNION' CONTEMPT CASE

99. A recent case illustrates that there is still a level of unlawfulness that requires strong penalties. It also illustrates why lowering the existing penalty maxima to that under the FW Act would be a fundamental error.

100. In *Bovis Lend Lease P/L vs CFMEU (No 2)* [2009] FCA 650, the Federal Court ordered the CFMEU to pay a $75,000 penalty, plus costs, for wilfully disobeying a Court order which amounted to a contempt on the administration of justice.

101. On 19 and 23 of February 2009, officials and members of the CFMEU obstructed and interfered with the passage of vehicles wishing to lawfully

[23] Wilcox J, final report, p.28

enter the New Royal Children's Hospital Site, in breach of an order made on that same day by Justice Marshall.

102. Justice Tracey stated (at para 13) that the submissions made by the CFMEU on the nature of the contempt, *"reflects the cavalier attitude taken by the CFMEU to the Order and the Court …"*.

103. His Honour went on to describe the nature of the contempt as follows:

> … The immediate purpose of the Order was to ensure that access to the Site by persons and vehicles should not be impeded. The Order was ignored. CFMEU officials and members were responsible on two occasions for obstructing the passage of vehicles which could otherwise have entered the Site. It was purely fortuitous (if it be the case) that the impugned conduct did not disrupt work on the Site.
>
> … (at para 15) The CFMEU was determined not to obey the Order and did not make a reasonable attempt to comply with the Order.
>
> … (at para 26) In *Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd* (2003) 196 ALR 350 Tamberlin and Goldberg JJ considered (at 358 [40]), that the fact that contempt had been committed by a large representative body was a relevant consideration in assessing an appropriate penalty:
>
> > *"Generally, it can be said that the adverse impact on the important public interest in the effective administration of justice which results from defiance of a court order or from a failure by a powerful institution or body to comply in a timely manner with an order will generally be more significant than a failure to comply with an order made against a private individual litigant engaged in a personal dispute which does not impact on the community to the same extent. This is a relevant consideration in the present case where the contempt is committed by a large representative body."*
>
> I respectfully agree. The CFMEU is a large organisation and it deployed considerable resources in order to maintain the obstruction to an important public hospital development.
>
> … (at para 27) **Means of the CFMEU**
> The Applicant next referred to the substantial means of the CFMEU. It tendered evidence which showed that as at 31 December 2007, the CFMEU Construction and General Division – National Office had net assets of $8,239,524.00 and the Construction and General Division Victorian Divisional Branch recorded net assets of $39,795,785.00. This was not disputed by the CFMEU; nor did it seek to tender any evidence which demonstrated its current financial position.
>
> … (at para 40) The penalty must be imposed at a meaningful level so as to deter the CFMEU, and others who, save for the risk of a high penalty, may otherwise engage in contravening conduct …

104. The Court ultimately imposed a $75,000 penalty because of the union's "public defiance", as outlined in para 37:

> When presented with copies of the orders by representatives of the Applicant, a number of the CFMEU's officials either refused to accept them or allowed them to fall to the ground despite being advised of the nature of the documents. Statements were also made by some of the officials to the effect that they would act on advice from the union office rather than have regard to the terms of the orders which they were told required them to desist from obstructive action. This conduct occurred outside the Site gates and in the presence of employees of the Applicant. They constituted public acts of defiance even though they were not publicised to the wider community.

105. The case highlights the utter disregard for the rule of law, where the union in question publicly defies the Court Order the very day it is handed down. It is also clear that the construction union in question is well resourced and able to pay large pecuniary penalties. These factors must be borne in mind by the Committee when it considers the removal of the current penalty provisions in the BCIIA to those of the FW Act.

106. The FW Act has a maximum penalty of $33,000 for a body corporate and $6,600 for individuals, compared to $110,000 for a body corporate or $22,000 for an individual under the BCIIA. The fact that these are maximum penalty provisions cannot be understated. A Court will consider the range of a penalty and other factors before imposing it upon a transgressor.

107. At p.27 of the Wilcox J report, the following comments are made:

> … Some people might have preferred the Fair Work Bill to have set higher penalties than it does. I understand that. Nevertheless, these penalties have recently been adopted by the Parliament as suitable, across the board, for all industries. That being so, I would need very powerful reasons, special to the building and construction industry, in order to justify a recommendation for different penalties in this one particular industry.
>
> The history of the building and construction industry may provide a case for the retention of special investigatory measures, to increase the change of a contravener in that industry being brought to justice. However, I do not see how it can justify that contravenor 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.

108. Firstly, the Fair Work Bill was a reform measure that the Government undertook to implement in accordance with its pre-election policy *Forward with Fairness*.

109. Whilst ACCI cannot speak on behalf of others participating in inquiries into the *Fair Work* legislative package, we were not aware that the Fair Work Bill would influence the outcome of any changes to the BCIIA.

110. Had employers been on notice that the Fair Work legislation would be a critical and influential factor for Wilcox J inquiry, then we would have made appropriate submissions on those matters before the Senate Inquiry and to the Wilcox J inquiry.

111. Secondly, and with the greatest respect, the comments in the Wilcox J final report appear to fly in the face of the voluminous oral and written evidence, and materials that were before Commissioner Cole, which led him to make a number of recommendations on penalty levels and unlawful industrial action provisions.

112. In all of the Royal Commission volumes, one can find repeated references to cases and examples where the existing penalty regime was not adequate enough to deter unions taking unprotected industrial action. For example, Commissioner Cole noted the following with respect to former s.127 orders:[24]

> 267 Although the AIRC is required to hear and determine applications for orders under s127 as quickly as practicable, many days often elapse between the making of an application and a decision by the AIRC as to whether or not to grant it. That experience obtains elsewhere in Australia under State industrial legislation.
>
> 268 Even if the AIRC is satisfied that unlawful industrial action is taking place, it still has a discretion to decline to grant an order. If an order is made, and notwithstanding it is said by s127(5) to be binding, it is not enforceable against those responsible for the industrial action in the absence of a Federal Court injunction. Further delays occur while the application is made to the Federal Court and is then heard and determined. In the meantime industrial action can, and usually does, continue causing economic loss to the victim. If the Court exercises its discretion and grants an injunction, the applicant is still left to bear the economic losses and the costs of the proceedings in both the AIRC and the Federal Court. It is hardly surprising, in these circumstances, that 'commercial decisions' are made to concede all or some of the demands made by those taking the unlawful industrial action, particularly where, as was disclosed in the evidence before me in relation to a major project, liquidated damages for delay in achieving completion may amount to $250 000 a day.

[24] Volume 11, Final Report, pp.64-65 and p.66

…

> 275 A clear message needs to be conveyed to all participants in the building and construction industry that unlawful industrial action which disrupts the performance of work is not an acceptable way of resolving disputes on building and construction sites, particularly in circumstances where certified agreements or awards are in place with dispute resolution mechanisms which prescribe processes for resolving disputes without recourse to such action.

113. Commissioner Cole in his final report recommended increased penalties in the order of $100,000 (body corporate) and $20,000 (individuals) for contraventions in the industry, noting: [25]

> The extent to which freedom of association laws are disregarded or flouted in the building and construction industry strongly suggests that the current penalties are ineffective as a deterrent.
>
> Building and construction projects frequently have values of tens of hundreds of millions of dollars. The incidence of liquidated damages clauses and other commercial factors have led to an environment in which short term expediency too often prevails over adherence to the rule of law.

114. It should not be interpreted that high penalties are only important to deter conduct of unions and employees. High penalties are also important for deterring unlawful conduct by employers, who are complicit in unlawful conduct as well.

115. Where the maximum is reduced, it is inevitable that the Courts will only hand down a proportion of the maximum (as it current does) which means that unions are more likely to wear a fine for breaching the law.

116. The *Bovis Lend Lease v CFMEU* case mentioned earlier also illustrates the reality that some union's possess "deep pockets" and may be content to pay for their illegal transgressions. This will do nothing to deter future unlawful conduct occurring and the "cavalier" attitude referred to by the Federal Court and we fear will be even more pronounced in such circumstances in the future should the Bill repeal these provisions.

117. The current ABC Commissioner, Mr John Lloyd in a publicly available letter to the Deputy Prime Minister, dated 27 April 2009, indicated that, in his opinion, "*I consider that high and distinct penalty levels for the building and construction industry are justified*".

118. Commissioner Lloyd goes on to assert the following:

[25] Volume 1, Final Report of the Royal Commission into the Building and Construction Industry, p.96.

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

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

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

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

...

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

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

119. The matters raised by Commission Lloyd should be seriously considered by all members of the Committee. There is nothing to doubt the independence and integrity of Commissioner Lloyd.

120. The other reason for justifying higher penalties is that it does exert a positive influence on the conduct of unions and employees so far as the Court has the ability to suspend part of the penalties it may order.

121. For example, in *Hadkiss v Aldin* the Court ordered a total of $883,200 in penalties, but suspended for 6 months $594,300. This ensured that the project could continue without any unlawful conduct or industrial disputation, which would risk the full penalty being imposed by the Court. Mr Richter QC is quoted as stating "*…for the last 20 months none of them have participated in any unlawful action, just as a result of being sued for a pecuniary penalty. That's pretty significant in the life of this project, given its history*".

122. Similarly, in the matter involving the *Morwell Police & Law Courts*, the Court suspended penalties imposed on the individual but not on the union. This ensured that the individual concerned would not engage in further unlawful behaviour.

123. We maintain the position that there are good public policy reasons why existing penalty provisions and different industrial law provisions should continue to exist. Once again, ACCI submits that equality before the law is not an absolute principle and should not be the dominant justification for removing these targeted, appropriate and effective provisions.

PROSECUTIONS

124. **Attachment E** is a summary of the cases prosecuted by the ABCC and the preceding taskforce. Most cases have been taken against construction unions, or in relation to conduct which would have been sought or supported by unions (such as strike pay or actions to ensure subcontractors were party to union agreements). They illustrate the serious nature of transgressions against the law.

125. They also illustrate in a very cogent way, why any dilution of the current penalties and provisions for this industry is not warranted.

WESTGATE BRIDGE PROJECT

126. Most Victorians were acutely aware of recent events in connection with the West Gate Bridge Project in Melbourne which saw alleged acts of industrial disputation and allegations of criminal conduct between 6 February and 6 May 2009. These incidents alone should be a sufficient justification for retaining the existing framework.

127. The community should be concerned that this level of conduct is occurring, regardless of the legality or illegality of those involved. However, it cannot be seen as isolated to only Victoria or other particular areas in Australia.

128. The incident suggests that unions may once again be more comfortable with the reality that the ABCC will be abolished from 1 February 2009 its powers extensively curtailed and unlawful conduct provisions repealed. Despite reports that one of the contractors has withdrawn legal proceedings against the unions involved in that matter, the ABCC has nonetheless forged ahead to enforce the rule of law.

129. This is an another example of why a "strong cop", such as the existing ABCC, has been powerful in ensuring that unlawful conduct is prosecuted by a regulator and not left to individual employers or contractors in the industry.

130. Whilst these are to be tested in Court and the outcome to be determined in due course, they indicate that the Government's rhetoric to retain a *"strong cop on the beat"* as compared to its actual proposals to repeal s.38 and reduce the penalty provisions for coercive/undue pressure are, with respect, unsustainable.

COSTS

131. Unfortunately, it appears that the ability to obtain costs under the BCIIA are repealed, as a consequence of the FW Act applying. The FW Act is generally a no cost jurisdiction (see 570 of the FW Act).

132. Commissioner Cole in his final report recommended that in proceedings brought under the [BCIIA], costs should normally follow the event, noting:[26]

> Consistently with the principle that persons who cause loss by unlawful industrial action should pay for it, and consistently with the creation of a civil cause of action maintainable in the appropriate Australian courts, costs should ordinarily follow the event and be obtainable in accordance with the normal rules of court.

133. It is possible that the costs that a respondent is ordered to pay could and does exceed the actual penalty that is imposed by the Court.

[26] Volume 1, Final Report of the Royal Commission into the Building and Construction Industry, p.173.

134. Any removal of the ability to allow parties to obtain costs orders must be re-examined. The imposition of orders on wrongdoers to pay costs is a significant deterrent for preventing unlawful conduct. ACCI could not find any reference in the Wilcox J report on the issue of costs and believes that it was not addressed by Wilcox J or other parties in that inquiry. There should be clear reasons why cost provisions should be removed from the BCIIA.

ORDERS

135. Under Part 1 of Chapter 7 of the BCIIA, there is the ability for the Court to not only order pecuniary penalties, but impose other orders that has been effective in deterring unlawful conduct.

136. For example, s.49(1) of the BCIIA provides:

> **49 Penalties etc. for contravention of civil penalty provision**
>
> (1) An appropriate court, on application by an eligible person, may make one or more of the following orders in relation to a person (the defendant) who has contravened a civil penalty provision:
>
> (a) an order imposing a pecuniary penalty on the defendant;
> (b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
> (c) any other order that the court considers appropriate.
>
> (3) The orders that may be made under paragraph (1)(c) include:
>
> (a) injunctions (including interim injunctions); and
> (b) any other orders that the court considers necessary to stop the conduct or remedy its effects, including orders for the sequestration of assets.
>
> (4) If the contravention is a contravention of section 38, then the power of the court to grant an injunction restraining a person (the ***defendant***) from engaging in conduct may be exercised:
>
> (a) whether or not it appears to the court that the defendant intends to engage again, or to continue to engage, in conduct of that kind; and
> (b) whether or not the defendant has previously engaged in conduct of that kind; and
> (c) whether or not there is an imminent danger of substantial damage to any person if the defendant engages in conduct of that kind.
>
> (5) A pecuniary penalty is payable to the Commonwealth, or to some other person if the court so directs. It may be recovered as a debt.
>
> (6) Each of the following is an ***eligible person*** for the purposes of this section:

(a) the ABC Commissioner;
(b) an ABC Inspector;
(c) a person affected by the contravention;
(d) a person prescribed by the regulations for the purposes of this paragraph.

137. Apart from s.545 of the FW Act, there are no exact equivalent provisions in the FW Act. There is also no justification offered by way of explanatory materials or second reading speeches to indicate why these have been removed, apart from the Government accepting a recommendation from the Wilcox J report that *"the provisions of the FW Act governing the conduct of employers, employees and industrial associations and penalties for contraventions of the FW Act apply unchanged to building industry participants"*. As ACCI indicated earlier in this submission, we do think there are cogent reasons for removing distinct provisions for building industry participants.

138. The ability for the Court to order the sequestration of assets is also important where the transgressor is a large and well resourced union or employer.

139. Furthermore, the ability for a *"person affected by the contravention"* or a person who has suffered compensatory damages, is also important where a party, including an innocent third party, has suffered considerable operational and financial loss due to unlawful conduct of a building participant.

NON-COMPLIANCE NOTICES

140. The Bill also repeals s.67 of the BCIIA which allows the ABCC to publish non-compliance details, where it is in the public interest. The section provides:

ABC Commissioner to publicise non-compliance

If the ABC Commissioner considers that it is in the public interest to do so, the ABC Commissioner may publish details of:

(a) non-compliance with the Building Code, including the names of the persons who have failed to comply; and
(b) non-compliance by a building industry participant with this Act, including the names of the participants who have failed to comply; and

(c) non-compliance by a building industry participant with the Independent Contractors Act 2006, the FW Act or the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, including the names of the participants who have failed to comply.

141. Commissioner Lloyd, in his letter to the Government states why this is an important tool within the ABCC's mandate to enforce the rule of law, stating:

> 47. The report at **Pn9.13** sees no need to retain the provision enabling the ABC Commissioner to publish a non-compliance report.
>
> 48. The power to publish a report about findings of non-compliance with the relevant legislation has proved useful. The industry is characterised by numerous disputes of short duration involving unlawful conduct. Court litigation, with extensive evidentiary requirements and time delays, has limitations in being the sole means to hold people accountable for their conduct. Court proceedings are not appropriate in many of these cases. However, if unchallenged such disputes can entrench a lack of respect for the law.
>
> 49. The s67 report option therefore has been useful in highlighting unlawful conduct that does not warrant a formal court proceeding.

142. Therefore, it is important that this provision remain available and not be repealed.

CONCLUSION

143. It is clear that the ABCC has been active and has had a positive effect in attempting to establish cultural and behavioural change in the sector. Employers' and the community's expectations are that any replacement body will continue to deliver these positive reforms.

144. There have clearly been precisely the breaches of the law which the Royal Commission was designed to address, and which the Commission ultimately found. The work of the ABCC and the investigations and matters it pursues on a continuous basis is a clear validation of the need for its ongoing operation or maintenance of its proven approaches in a new structure. The need for the ABCC, or ongoing enforcement reflecting existing precepts and approaches is being proven on a day to day basis.

145. Put another way, any replacement structure must be capable of delivering the current level of investigation, monitoring, compliance and prosecution, and thereby be capable of continuing to give effect to the findings of the Cole Royal Commission.

POWERS TO OBTAIN INFORMATION

"In the absence of the compliance powers many ABCC investigations would be thwarted due to the unwillingness of witnesses to cooperate. The fear of the consequences of being seen to cooperate with the ABCC is evident in parts of the industry. This is to be regretted."

- ABCC Report on the Exercise of Compliance Powers (p.6)

S.52 POWERS

146. The Royal Commission made an important recommendation. Recommendation 184 stated that the ABCC should be given *"powers equivalent to those conferred upon the ACCC by ss.155 and 166 of the Trade Practices Act 1974"* with the addition of immunity provisions contained in s.6DD of the *Royal Commissions Act 1902.* It made this recommendation based on the following:

Final Report – Volume 1, p.159

In view of the functions of the Australian Building and Construction Commission, and the problems for Australian Building and Construction Commission investigations posed by the closed culture of the industry, the Australian Building and Construction Commission will not be able adequately to perform its functions unless it has the power to enter upon premises, inspect any relevant premises or documents found on premises, take copies of documents or of an extract from documents, summon witnesses and documents and be able to require a person to provide a written statement specifying answers to questions posed by it. As lay witnesses and informants will often be complicit in unlawful conduct, necessary information will not be forthcoming unless there is a wide form of use immunity.

147. The ABCC's s.52 coercive powers are neither unique, nor new. In fact, they have existed at the Commonwealth level since the early 1900's, under various enactments, in areas of public regulation concerning competition law, customers and taxation.

148. The *Australian Industries Preservation Act 1906* (now repealed), the predecessor to the *Trade Practices Act 1974* (TPA), contained a coercive power that is now found under s.155 of the TPA, akin to s.52 of the BCIIA.

149. In *Melbourne Home of Ford Pty Ltd v Trade Practices Commission and Bannerman*[27] Franki and Northrop JJ referred to the High Court case of *Huddart, Parker & Co. Pty. Ltd. v. Moorehead*[28] when they commented upon the history of s.15B of the *Australian Industries Preservation Act 1906*:

> That section provided that if the Comptroller-General believed that an offence had been committed against Pt. II of the Act, or if a complaint was made to him in writing that such an offence had been committed, and he so believed, he may, by writing under his hand, require any persons whom he believed to be capable of giving any information in relation to the alleged offence to answer questions and produce documents in relation to the alleged offence, and it imposed a penalty on any person failing to do so. In reliance on s. 15B, the Comptroller-General had called upon Huddart, Parker & Co. Pty. Ltd. and its manager, Mr. Appleton, to answer certain questions. Each refused to answer the questions and each was convicted of an offence under s. 15B. One of the grounds upon which the order nisi to review was obtained was that s. 15B was unconstitutional and invalid. The High Court rejected that ground. (at p473)

150. Furthermore, the Court reiterated the importance of the Commonwealth having such coercive powers at their disposal, citing O'Connor J in *Huddart Parker*:

> The right to ask questions, which, as was pointed out by this Court in *Clough v. Leahy* [1904] HCA 38; (1904) 2 CLR 139 , the Executive Government has in common with every other citizen, is of little value unless it has behind it the authority to enforce answers and to compel the discovery and production of documents. It is to make the power of inquiry effective for the purposes of Customs administration, for instance, that sec. 234 of the *Customs Act 1901* authorizes the recovery of penalties against those who fail to answer questions or produce documents when requested so to do by Customs officers acting under the authority of secs. 38, 195, 196, and 214" (1909) 8 CLR, at p 377 . (at p473)

151. This statement is equally apt with respect to the ABCC's powers.

152. The Attorney-General has also commented upon the utility of these enforcement tools, whilst commenting on a report on coercive powers generally: "*This new report highlights the significance of coercive powers as administrative and regulatory tools for government.*"[29]

27 Paragraph 20, [1979] FCA 15; (1979) 36 FLR 450 (28 March 1979).
28 [1909] HCA 36; (1909) 8 CLR 330
29 Media Release, (June 2008) 'Coercive Powers Report Tabled', Attorney-General, Hon. Robert McClelland MP.

OTHER FEDERAL AGENCIES WITH SIMILAR POWERS

153. There appears to be an (mis)apprehension in some quarters that only the ABCC has such powers. This is absolutely false. The Administrative Review Council's recent report, titled *"The Coercive Information-gathering Powers of Government Agencies"*[30], shows six (6) other agencies have coercive information gathering powers, including the:

a. The Australian Taxation Office (ATO);

b. The Australian Prudential Regulation Authority (APRA);

c. The Australian Securities and Investments Commission (ASIC);

d. The Australian Competition and Consumer Commission (ACCC);

e. Centrelink; and

f. Medicare Australia.

154. **Attachment C** sets out a summary of the main Commonwealth agencies with such coercive powers under the Administrative Review Council, *'The Coercive Information Gathering Powers of Government Agencies"*, Report no.48, May 2008.

155. It shows there is nothing remarkable in an agency charged with an important task having such powers.

STATE BODIES

156. It is also true that in addition to a number of Commonwealth regulatory agencies, many State and Territory enforcement agencies have coercive powers, in the areas of Occupational Health and Safety and environment protection, to name only two major areas. Clearly these are far from extraordinary powers.

157. Not to be trite, but to only highlight how embedded and extensive coercive information gathering powers are in our laws, s.45ZJ of the *Environment Protection Act 1970* (Victoria) exposes a person to a pecuniary penalty if they fail to put information in writing about a relevant matter when requested by a "litter enforcement officer".

[30] Administrative Review Council, 'The Coercive Information Gathering Powers of Government Agencies", Report no.48, May 2008.

FISHING EXPEDITIONS

158. Williams and McGarrity criticize the ABCC's coercive powers upon the basis that "*it could be used to undertake a 'fishing expedition'*".[31]

159. However, the FW Ombudsman's powers have more potential to be used for a fishing expedition, similar to the scope that ss.263 and 264 of the *Income Tax Assessment Act 1936* provide to the ATO. These powers, it could argued, have more potency or teeth than s.155 of the *Trade Practices Act 1974* (TPA) or s.52 of the BCII Act.

160. There is no requirement for the FWO to use this power on the basis on any reasonable belief a breach has or will occur. There is no oversight or checking mechanism and the employer must provide the documents even if it would incriminate them. There is a clear distinction between the FWO and the powers of the ABCC in this regard.

THRESHOLDS, CHECKS AND BALANCES

161. Because s.52 appears to be similar to s.155 of the TPA, it is worth noting some of the essential elements of s.155 which would be highly relevant to s.52 of the BCII Act:

    a. Just like s.52 of the BCII Act, s.155(7) specifically abrogates the privilege against self-incrimination. However, a major difference between the two provisions, is that a person under the TPA provisions can still be liable for a civil penalty. Under s.53(2) of the BCII Act the use/derivative use indemnity covers both criminal and civil proceedings. Indeed, it appears to encapsulate a broader concept by the use of the word "proceedings".

    b. The Chairperson or Deputy Chairperson of the ACCC must have "reason to believe" a person is capable of providing information. This is similar to the threshold test under s.52(1) which provides that the "*… the ABC Commissioner believes on reasonable grounds …*".

    c. In *TNT Australia Pty Ltd v Fels*[32], the applicant obtained a discovery order against the ACCC to ascertain whether the Chairperson really did have a reason to believe it was capable of providing

[31] Williams G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission', (2008) 21 *Australian Journal of Labour Law* 256.
[32] (1992) ATPR 41-190

information. There is no suggestion that a person could not rely upon the same arguments under s.52 of the BCII Act.

d. The Court has previously held in a number of cases that the power conferred on the ACCC by s.155 is not an arbitrary power and it must be exercised for the purpose for which it was granted. The power to issue a notice must be used in good faith, not for a collateral purpose, but to perform ACCC functions under the Act.[33]

e. The ACCC does not have to show that there is a reason to believe that the information, documents or evidence will establish or tend to establish a contravention (or even that they establish a prima facie case), merely that they relate to a matter that may constitute a contravention.[34]

162. The ABCC has published policy guidelines on the use of s.52 powers which appear to be modelled on those of the ACCC's use of coercive powers.[35] Despite the extent of coercive powers amongst other agencies, there do not appear to be comparable guidelines publicly available. In other words, the ABCC appears to be at the forefront of best practice in operationalising a well known and far from extraordinary set of powers.

163. ACCI supports the continued updating and publishing of such guidelines on the use of coercive powers.

164. Once again, Commissioner Lloyd has indicated his personal opinion about the existing s.52 powers in his letter to the Government:

[33] *Riley Mackay Pty Ltd v Bannerman* (1977), 31 FLR 129; and *Kotan Holdings Pty Ltd & Ors v Trade Practices Commission* (1991), ATPR 41-134.
[34] *WA Pines Pty Ltd v Bannerman* (1980), 30 ALR 559 at 561.
[35] ABCC (2005) *Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry;* ACCC (March 2008) *Section 155 of the Trade Practices Act: A guide to the Australian Competition and Consumer Commission's power to obtain information, documents and evidence under s.155 of the Trade Practices Act 1974.*

Chapter 5 –Coercive Interrogation

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

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

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

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

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

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

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

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

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

165. The Committee should note that Commissioner Lloyd has stated that *"the power is only invoked after all avenues of gathering information on a voluntary basis have been exhausted"*. Therefore, this is not a power that is used ad

hoc, or loosely. There are a number of steps which must occur before hand which are part of the investigation process. Contrast this level of consideration to the unknown steps other regulators take, whereby they also have these coercive powers at their disposal. It is interesting to note that there are not calls for those agencies to have additional "safeguards" attached to them for fear of misuse. Nor did it appear that the Administrative Review Council, in its report on such powers, recommend there should be in the form of measures that would be introduced by this Bill.

166. Commissioner Lloyd then provides an opinion on the "safeguards" recommended by Wilcox J as follows:

Chapter 6 – Safeguards

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

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

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

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

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

167. These comments should also be considered in the context of the ability to "switch off" the coercive powers.

168. It is important to reiterate that there has not been one official complaint to the Commonwealth Ombudsman about misuse or abuse of the coercive investigation powers. There is therefore no evidence of past, current or impending misuse to justify any additional "safeguards" that the Bill would introduce.

ACCC VS ABCC USE OF COERCIVE POWERS

169. According to the **Australian Consumer and Competition Commission's** (ACCC) annual report for 2007/8, the competition regulator issued:[36]

- 482 notices under s. 155 (to compulsorily acquire information)
- 184 notices under s. 155(1)(a) (to provide information in writing)
- 171 notices under s. 155(1)(b) (to provide documents)
- 163 notices under s. 155(1)(c) (to appear in person).

170. This is in contradistinction to the **ABCC's** use of the power over **3 years** where it issued only a fraction of the ACCC in the same period, with **146** notices to attend to answer questions (142) or give documents (4).[37]

171. Indeed, the ABCC, whilst not legally required to produce a report on the exercise of its coercive powers, makes a number of powerful conclusions in its recent reports on the use of the coercive power.

[36] ACCC Annual Report 2007-08, p.185
[37] ABCC, Report on the Exercise of Compliance Powers by the ABCC (1 October 2005 to 30 September 2008).

ABCC Compliance Reports – Conclusions

Report for period 1 October – 31 March 2008

33. Compliance powers provide the ABCC with an effective means of obtaining information from witnesses who are reluctant to cooperate, or to be seen to cooperate, with the ABCC. Without the use of compliance powers in respect of 85 witnesses to date, the investigations would have stalled due to this lack of cooperation.

34. In some cases, the evidence that has been obtained in examinations has supported the institution of important prosecutions by the ABCC. It is doubtful that the three prosecutions detailed above could have been pursued without the evidence obtained as a result of the exercise of this power.

35. In other cases, evidence provided in examinations has aided the ABCC in a decision not to prosecute building industry participants.

36. In all cases, the information obtained in examinations has shed light on matters under investigation and enabled the ABCC to further investigate alleged unlawful conduct in the building and construction industry.

Report for period 1 October – 30 September 2008

39. The ABCC continues to use its compliance powers in order to obtain information from witnesses who are unwilling to cooperate with ABC Inspectors in regard to investigations.

40. The number of witnesses that have been required to attend examinations has increased in 2008. In the absence of the compliance powers many ABCC investigations would be thwarted due to the unwillingness of witnesses to cooperate. The fear of the consequences of being seen to cooperate with the ABCC is evident in parts of the industry. This is to be regretted.

41. The use of compliance powers is an effective tool in establishing the facts in relation to incidents within the building industry and determining which cases do or do not warrant prosecution. (emphasis added)

172. As is clear from the above concluding comments, the powers are a necessary tool for the regulator. What has not been said by any other commentator to date, nor will probably be submitted by other parties to this inquiry, is that the ABCC is the only Commonwealth regulator out of the 7 other regulators to self-publish a report on its own activities. It does this, one can assume, to ensure that all of its activities are transparent and public. The ABCC should be credited for this effort; it further shows its powers, as currently set out in the BCIIA, can and should be retained without additional safeguards.

REVIEW OF DECISIONS

Commonwealth Ombudsman

173. A person aggrieved by the ABCC may make a complaint to the Commonwealth Ombudsman. Whilst this does not provide a formal avenue of review or appeal from decisions of the ABCC concerning use of the coercive power, it nonetheless provides an avenue of redress for aggrieved persons.

174. Despite union agitation against the ABCC having and using coercive powers, there has not been one substantiated complaint to the Commonwealth Ombudsman.

175. ACCI supports the current capacity of the Commonwealth Ombudsman to investigate and report on matters concerning the ABCC once again, it has not been proven that any additional mechanisms are required.

PENALTIES / SANCTIONS FOR NON-COMPLIANCE

Penalties

176. A person who does not comply with s.52 is potentially liable to criminal punishment. This can take the form of either a term of imprisonment no longer than 6 months or a monetary penalty.[38]

177. This is not out of step with other similar offence provisions under other Commonwealth laws. Indeed, this could be described as the lower end of the spectrum, as terms of imprisonment for non-compliance with notices under the TPA and ASIC Act 2001 can result in imprisonment terms between 12 to 24 months.

Commonwealth DPP Discretion

178. The prosecution of an individual (who could be any member of the public, not just union officials or members) for non-compliance with a s.52 notice is within the domain of the **independent** Commonwealth Director of Public Prosecutions (CDPP).

[38] Whilst not explicit in the BCII Act 2005, Williams and McGarrity suggest that s.4B of the *Crimes Act 1914* is available. That provision allows a financial penalty to be imposed instead or in addition to a term of imprisonment. See Williams G and McGarrity N, 'The Investigatory Powers of the Australian Building and Construction Commission', (2008) 21 Australian Journal of Labour Law 263.

179. This provides a safeguard against any possible "bias" to prosecute particular persons. Indeed, in a most recent development, it was reported that the CDPP has withdrawn a matter before the Court, which would have only been the first prosecution of a person who had failed to comply with a s.52 notice.

DPP scraps charge against official[39]

SENIOR union official has escaped a possible six-month jail term after a charge of refusing to co-operate with Australia's building industry watchdog was dropped yesterday.

A day after the Rudd Government unveiled its legislation to abolish John Howard's Work Choices laws, the commonwealth Director of Public Prosecutions withdrew its charge against Noel Washington.

Mr Washington, vice-president of the Construction Forestry Mining and Energy Union, had faced prosecution after refusing to co-operate with the Australian Building and Construction Commission. He would not answer questions about workers he had addressed at three Melbourne building sites.

The DPP gave no reason for abandoning the prosecution, but sources suggested the timing was remarkable given the introduction of Labor's legislation.

180. This illustrates that the ABCC does not, on its own accord, pursue extraneous prosecutions of particular individuals or entities. It is another reason why the system appears to have the appropriate checks and balances against any alleged capricious enforcement culture.

ACCC RECENT CASES

181. Following the above, it is worth noting that a number of recent cases against persons who failed to comply with the ACCC's s.155 powers resulted in what some would describe as harsh penalties:

Case Note – 6 Months Imprisonment

On 20 March 2008, the Federal Court in *Australian Competition & Consumer Commission v Rana*[40] handed down sentence which comprised of an aggregate term of imprisonment of six months. His Honour Justice North commenting:

69 There is also the need for the sentence to reflect general deterrence. The sentence must communicate to the community that the Court views compliance with s 155 of the Act as a serious obligation and that it regards s 155 as a most important tool for the protection of the public against unfair and unconscionable conduct. The circumstances of this case call for a period of imprisonment.

[39] The Australian, Thursday 27 March 2008.
[40] [2008] FCA 374

Case Note - Fine and Community Service Order

In 2007, Justice Lindgren of the Federal Court imposed a fine of $2016 and a community service order of 200 hours against the defendant in *Australian Competition and Consumer Commission v Neville*[41]. The Court declined to order a period of imprisonment given the defendant was 63 years old with no prior convictions.

ASIC'S POWER – S.19

182. There has not been any suggestion that the Australian Securities and Investment Commission's powers under s.19 of the *Australian Securities and Investment Commission Act 2001* are somehow antagonistic to the community and the rule of law.

183. ASIC's coercive powers are far more potent against an individual who does not comply with a notice to attend, as ASIC can apply to the Court to enforce any order of non compliance. Such refusal to comply with the original ASIC order can result in terms of imprisonment for contempt of the Court as occurred in *Australian Securities Commission v Errol John White*[42].

184. Under s.63 of the ASIC Act 2001 a person who intentionally or recklessly fails to comply with a requirement made under s.19 can be liable to substantial pecuniary fines and/or 2 years imprisonment.

CONCLUSION

185. The ABCC's existing powers are known concepts, being reasonably exercised. There is no basis for any changes. They should be retained unaltered by any new agency.

[41] (2007) ATPR 42-195
[42] [1998] FCA 850 (16 July 1998)

"SAFEGUARDS"

186. It is worth examining p.32 of the Wilcox J Discussion Paper where it raises a model from the Victorian OPI as a possible consideration for the specialist division for FWA. A variation of this model has ultimately been adopted in the Bill where authorisation to examine must be granted by a Presidential member of the Administrative Appeals Tribunal (AAT).

187. The Victorian Office of Police Integrity (OPI) is set up to police the police. It is solely about Victorian police corruption.

188. There are very good reasons for an external monitor (ie. the Special Investigations Monitor) for the OPI, given the adverse consequences upon persons who may be subject to investigations, and the centrality of its remit to pubic order and the legitimacy of law enforcement.

The Role of OPI [43]

The Office of Police Integrity (OPI) was established in November 2004 by the Victorian Government to ensure that the highest ethical and professional standards are maintained within the Victoria Police at all times. Its role is also to ensure that police corruption and serious misconduct is detected, investigated and prevented and to ensure that members of Victoria Police have regard to the human rights set out in the Charter of Human Rights and Responsibilities.

The Director is able to conduct own motion investigations into any matter relevant to achieving the objects of the office, including but not limited to:

- an investigation into the conduct of a member of the Victoria Police;

- an investigation into police corruption or serious misconduct generally, and;

- an investigation into any of the policies, practices or procedures of the Victoria Police or of a member of the Victoria Police, or of the failure of those policies, practices or procedures.

189. The OPI investigates some of the most serious allegations in our community, including[44]:

a. Corruption;

b. Fraud;

c. Green-lighting;

[43] http://www.opi.vic.gov.au/index.php?p=2
[44] OPI Fact Sheet – *Information for Victorian Police*

d. Misappropriation;

e. Misuse of public office;

f. Perjury;

g. Drug use by police; or

h. Sexual assault/rape.

190. Indeed, ACCI understands the OPI has investigated actions allegedly relating to the most serious crime in our community – that of murder. This is not comparable, and is in a league above and beyond, the work of ASIC, the ATO, ACCI, ABCC etc.

191. The seriousness of the matters the OPI deals with, and the fact that it has as its raison d'etre the investigation of significant corruption by public officials, dictates that:

a. It may legitimately be subjected to a special or additional process of continuous monitoring by the SIM.

b. Continuous monitoring by the SIM represents a sound use of public resources as even the possibility of difficulties or insecure convictions in this area has such serious consequences.

c. The additional bureaucracy and checks on OPI functions are justified by the risk of problems and the fundamental need for OPI functions to be absolutely unassailable.

192. The analogy does not stand as apposite to the ABCC. The matters investigated are very important, but are not inherently of the criminal magnitude and threat to the state that police corruption would be.

193. Another dimension which distinguishes the Victorian OPI from the matter at hand in this inquiry is the nature of the employment of the persons appearing before the OPI and the consequences of investigations. Adverse findings lead to the sacking of public officials, career ruination and incarceration.

194. ACCI also understands that the Victorian Police Commissioner has at her disposal no confidence provisions which allow her to dismiss or suspend a member of Victoria police in the context of an OPI matter. In such a situation, oversight such as that of the SIM becomes even more important.

195. Police officials or other persons involved in criminal conduct can also be liable to the most significant of penalties: severe imprisonment. This is not the sanction under consideration in the work of the ABCC.

196. The OPI also has extensive powers at its disposal, including covert investigative techniques and can obtain warrants to use surveillance devices or intercept electronic telecommunications.

197. Therefore, the suggestion that the ABCC should have a similar oversight body / external monitoring does not appear appropriate or apposite. Oversight of this nature appears to be reserved for bodies investigating serious allegations of corruption or insidious criminal conduct that cannot be investigated without coercive powers (ie. ASIO, ACC, OPI etc).

198. As a final point, the anti-corruption body models from States like WA, NSW and Queensland would have been known to Royal Commissioner Cole. If this model were applicable or able to legitimately be extrapolated into the building and construction industry, this would likely have been canvassed in the Royal Commission report.

EXTERNAL MONITORING

NO CASE TO ANSWER

199. ACCI does not agree that the ABCC or successor division, body or Director (who exercises powers akin to existing s.52) requires direct external monitoring or oversight. Such a question should only arise if there is evidence of misuse or malfeasance such that external monitoring would be justified. There is not. Indeed after some years of operation, it is legitimate to conclude the ABCC positively does not need additional monitoring.

200. ACCI therefore did not agree with the remarks made at paragraph 128 of the Wilcox J Discussion Paper that if the Specialist Division has coercive powers, *"it seems essential to subject it to external monitoring"*.

201. Quite simply, and to put it in criminal law parlance if the ABCC is accused of wrongdoing, the defence would be well placed to make a *no case to answer* submission to the Court.

202. There has not been any evidence to date that:

a. The Building Industry Taskforce (BIT) or the ABCC has abused, misused, or inappropriately used its coercive powers. The Commonwealth Ombudsman's report into the BIT's use of such powers did not find any allegation or finding of misuse.

b. Any person who was required to attend before the BIT or ABCC has had cause to make an allegation to the Commonwealth Ombudsman for malfeasance.

NO OTHER AGENCY IS SUBJECT TO OVERSIGHT / MONITORING

203. The ACCC can prosecute serious criminal offences and it does not have an oversight body, nor does it have to make any reports to Parliament or a relevant Minister about using its coercive powers. These are far greater and more potent powers than those vested in the ABCC and yet are not under question.

204. According to the Administrative Review Council's recent report, titled "*The Coercive Information-gathering Powers of Government Agencies*"[45], the following six Australian agencies also appear to have coercive information gathering powers – and on ACCI's analysis, not one of the them has any specialist external monitoring or oversight:

    a. The Australian Taxation Office (ATO);

    b. The Australian Prudential Regulation Authority (APRA);

    c. The Australian Securities and Investments Commission (ASIC);

    d. The Australian Competition and Consumer Commission (ACCC);

    e. Centrelink;

    f. Medicare Australia.

205. Therefore, it fails to be established why the ABCC or successor body requires such atypical rigorous oversight, akin to am anti-corruption watchdog.

ACCI OPTIONS FOR OVERSIGHT / MONITORING

206. ACCI did, in the Wilcox J inquiry, make a number of recommendations which is supported and considered appropriate if there were to be additional safeguards added to the current s.52 arrangements, as follows:

Option 1 – Commonwealth Ombudsman

207. ACCI supports Recommendation 197 of the Royal Commission, which recommends that the ABCC is subject to the jurisdiction of the Commonwealth Ombudsman.

208. ACCI does not object to the Commonwealth Ombudsman having the specific task of making a report each year on the ABCC or Specialist Division's use of coercive powers. This is what occurred under repealed s.88AI of the *Workplace Relations Act 1996.*

[45] Administrative Review Council, 'The Coercive Information Gathering Powers of Government Agencies", Report no.48, May 2008.

Option 2 – Minister for Employment and Workplace Relations

209. ACCI supports Recommendation 196 of the Royal Commission, which recommends that a report prepared by the ABCC be submitted to the responsible Minister and tabled in Parliament.

OTHER ISSUES

210. There are two issues which are not specifically the focus of this current inquiry, but which are worth examining in further detail, as it was raised by ACCI in the Wilcox J inquiry.

THE CODE AND GUIDELINES

211. Whilst not directly subject to this inquiry, ACCI member organisations work with the code and guidelines on a daily basis and it is appropriate that they address the detailed considerations.

212. We note that the Guidelines were not part of the remit for the Wilcox J inquiry.

Support Code and Guidelines

213. ACCI supports the National Code of Practice for the Construction Industry (the Code). We support the Code having legislative force.

214. ACCI also supports the current Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (Guidelines).

215. Feedback to ACCI is that these instruments are playing an important role, as part of a battery of measures, in advancing compliance and observance of the rule of law in the industry and meeting the deficits in conduct and practices found in the Cole Royal Commission.

ILO Comment

216. Para 48 on p.48 of the Wilcox J Discussion Paper, quotes the following from the ILO.

> …the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organisations should have the right to organize their activities and to formulate their programmes.

217. ACCI is far from convinced that the ILO authority would demand entirely *laissez faire* bargaining and no restrictions on content. It is quite

conceivable that a union agenda and proposed rights might themselves breach FOA, and it would in all probability be legitimate under ILO C87 to preclude discriminatory terms (at very least).

218. In addition, the notion of prohibited content is to change under the proposed Fair Work Act, albeit with various content still not allowed to be included in agreements (and importantly not able to form the basis for future protected strike action).

219. The existing approaches in the Code and Guidelines appear valid and to still have work to do in meeting the Cole Royal Commission recommendations and the requirements for the future of the industry.

Revised Guidelines

220. ACCI members directly involved in working with the Code and Guidelines will address these matters, however it is worth stating that ACCI prefers the continuation of the existing guidelines which appeared to have had a strong and positive contribution to maintaining cultural reform.

BCII ACT AND THE ILO

221. At pp.8-9 the Wilcox J Discussion Paper addresses some recitation of the history of various union complaints against the ABCC and its empowering legislation. ACCI would make a couple of points in response to this.

222. There are many dimensions to the international debate over Australia's legal obligations. ACCI would agree in principle with comments made by the Royal Commission on this issue.

Royal Commission Final Report - Volume 11, pp.54-55

Whether Australian domestic law concerning the right to engage in industrial action accords with Australia's international obligations is a debated question. Article 8(1)(d) of the *International Covenant on Economic, Social and Cultural Rights* recognises '[t]he right to strike, provided that it is exercised in conformity with the laws of the particular country'.137 Supervisory bodies of the International Labour Organisation (ILO) have consistently said that a right to strike is to be implied from the *Freedom of Association and Protection of the Right to Organise Convention* (1948, No 87)138 and the *Right to Organise and Collective Bargaining Convention* (1949, No 98).139 Australia is a party to each Convention. The ILO's Committee of Experts on the Application of Conventions and Recommendations and its Committee on Freedom of Association have each criticised restrictions on the right to strike in

Australia. Those criticisms have consistently been rejected by the Commonwealth Government.

Whatever the precise intersection between Australian domestic law and Australia's international obligations, the starting point for a consideration of the extent to which there is a right to engage in industrial action under Australian law must be the presumption that everybody is free to do anything, subject only to the provisions of the law. One must turn to Australian law to discover what industrial action is unlawful.

As Goldberg and Finkelstein JJ observed in *Australian Industry Group v Automotive Food, Metals, Engineering, Printing and Kindred Industries Union:*

It is widely believed that workers have an unconstrained right to take industrial action in support of claims against employers. Nothing could be further from the truth. The common law has long imposed constraints on labour's ability to take concerted action against capital. Not only are there actions available under contracts of employment, the so called intentional torts (conspiracy, procuring breach of contract and interference with business relations among others) took their modern form to provide additional remedies against industrial action taken by organised labour.

223. It is also worth noting that clearly the Royal Commissioner was aware of, and had taken into account, Australia's ILO obligations in the recommendations he made, including for the structure and operations of the ABCC.

224. The consistency between various elements of Australian industrial relations law and ILO precepts remains a debated question – as indeed some would argue it has for decades under the former conciliation and arbitration system.

225. In relation to the BCII Act, there have been observations by the Committee for Freedom of Association (CFA), however there have been no final conclusions on the BCII Act. There is scope for the ILO CFA to issue a definitive report in relation to a particular complaint, but this has not occurred in relation to the matter at hand. It is also relevant to note that the CFA consensus "decisions" (which have not been reached in this matter) are not legal findings, but recommendations to being about improvements in the application of ILO Conventions.

226. ACCI understands there is an ongoing dialogue between the Australian government and the ILO CFA, which encompasses two issues:

a. The extent to which the ILO CFA has correctly understood the operation of the legislation, and the manner in which the ABCC applies particular provisions.

b. The CFA s interpretation of Convention 87 – noting that there are debates within the Committee on the interpretation of any implied right to strike.

227. We understand that the current status of the complaints regarding the BCII Act legislation (which are tied to provisions of the Workplace Relations Act 1996 which may be shortly repealed), is that the CFA wishes to be kept informed of developments, seeks additional information, and a report back from government.

228. This is a very common occurrence, and a process of ongoing dialogue across multiple CFA sessions is often used to address such considerations.

229. Nothing adverse can be drawn from a dialogue which is part completed. Concerns of a part processed nature have been expressed by the CFA – and the process is not complete.

230. The CFA's comments also rely on a report from / interaction with the ILO Committee of Experts, which had been prepared without the benefit of a proper or necessarily full response from the Australian Government. Government representatives comments at the June 2007 proceedings of the Governing Body make this clear.

> At its 2006 session, the Committee had asked Government to report to the Committee of Experts on the provisions of Australia's workplace relations reform legislation and its impact in law and in practice on its obligations under Conventions Nos 87 and 98.
>
> Responding to that request had been a mammoth task, given the magnitude of the legislative reforms in question, some of the largest in Australian history.
>
> The Government had made every effort to meet the very short timetable set by the Committee and kept the ILO fully informed of progress regarding the development of the report and the possibility of a delay in submitting it.
>
> On three occasions, between August and November 2006, the Government had written to the Office, and Government officials had met senior ILO officials in November 2006, again emphasizing the possibility of a slight delay in reporting.
>
> Remarkably, a detailed report had been provided in December 2006. However, it was regrettable that the Committee of Experts' observation did not take the information provided by the Government into account.
>
> This Government did not believe that it had been necessary or appropriate for the Committee of Experts to make observations on Australia's laws. The Committee of Experts had been prepared to defer the consideration of cases

> where relevant documents or reports had been received late and could not be examined with necessary care, due to lack of time.

231. ACCI as Australia's long standing employer representative to the ILO of course supports conformity of Australian labour law and regulation with our international obligations.

232. However, ACCI equally supports the capacity of the Australian government to advocate and properly pursue a response to complaints from either unions or employers.

233. ACCI supports our government being able to pursue a dialogue with the ILO, and as a member state of the ILO properly advocate its interpretation of the instruments which it has ratified.

234. Furthermore, ACCI therefore does not support the shaping of, or purported remediation of our laws in response to part complete processes.

PART II – DETAILED RESPONSE

INTRODUCTION

235. Whilst ACCI does not support the Bill, the purpose of Part II is to provide the Committee with a detailed response to particular proposals. This should be read in conjunction with Part I.

It will be for ACCI members who have detailed practical engagement with the implications of the changes sought in this Bill to provide relevant industry feedback.

236. Once again, and to be clear, this is without prejudice to the views of ACCI members who will make their own submissions in relation to the content of the Bill.

OBJECTS

237. Schedule 1, item 2 would insert new objectives for the new agency. To compare and contrast existing s.3 of the BCIIA, it is important that the objects refer to matters such as:

a. The Australian economy (s.3(1)).

b. Promoting respect for the rule of law (s.3(2)(b)).

c. Ensuring that building industry participants are accountable for their unlawful conduct (s.3(2)(d).

d. Encouraging the pursuit of high levels of employment in the building industry (s.3(2)(g).

NEW INSPECTORATE

238. Schedule 1 of the Bill would insert new Chapter 2, Part 1 – Fair Work Building Industry Inspectorate and create the office of Director.

239. Schedule 1 of the Bill will also insert new Part 2 – Fair Work Building Industry Inspectorate.

240. ACCI supports the current ABCC structure, which at its essence creates a statutory office of ABC Commissioner, with other appointments consisting of Deputy Commissioners and inspectors.

241. Therefore, ACCI would also support a structure within new agency that is:

a. Truly independent;

b. Comprising a number of statutory Commissioners, reflecting the existing ABCC senior structure;

c. Not subject to an unnecessary additional supervisory body / apparatus; and

d. Is subject to external oversight or 'safeguards' only to the same extent as other bodies such as the ACCC, ASIC or ATO have.

242. ACCI's response to the Wilcox J report opposed the advisory board (see **Attachment F**). We do not oppose the Fair Work Building Industry Inspectorate Advisory Board, so long as it does not set or determine policies, priorities or programs that must be followed by the Director.

INDEPENDENT ASSESSOR

243. Schedule 1 of the Bill would create the new office of Independent Assessor – Special Building Industry Powers (Assessor).

244. ACCI opposes the creation of this office and the powers which are exercised by the Assessor for reasons articulated in Part I and considers it unnecessary.

245. The regulations will provide further detail on the powers of the Assessor, and it will be important for the Committee to know what is intended by way of regulations.

Building Project

246. Proposed s.39 does not define "building projects". This will create uncertainty for all participants if it is not further defined. It may mean different things to different people. For example, it may be unclear what the boundaries are of the Government's infrastructure "projects". The beginning and ending of a project are not only physically difficult to

ascertain, but may cause difficulty when the Assessor is determining matters under Subdivision B (ie. switching off coercive powers).

Proposed s.39 (Switching Off)

247. ACCI is concerned that the effect of this provision is to enable a "determination" which would in effect disallow a provision in Statute from applying.

248. There are a number of issues with this.

249. Firstly, there was no recommendation by Wilcox J in his report about such a provision. There is no policy rationale in the explanatory memorandum that would warrant the conclusion that it should be introduced, in addition to the proposed "safeguards".

250. Secondly, There are serious legal questions as to whether this is may constitute an impermissible delegation of power from Parliament. We trust that the Commonwealth has received cogent and robust legal advice that would withstand a challenge in the High Court on whether the exercise of such powers is indeed lawful under the Bill.

251. The provision is known as a kind of "extra-statutory concession" power, which would allow the Executive (or officer) to change the application of the law. ACCI notes that the Government is currently consulting with the public on whether the Commissioner of Taxation should have such a power.

252. In the Treasury Discussion Paper *"An 'extra-statutory concession' power for the Commissioner of Taxation"*,[46] there are number of issues traversed which are relevant to this debate and proposed s.39.

253. It appears that such powers are rare and, indeed, the UK House of Lords recently ruled in 2005 that its revenue authority's practices of altering the application of their laws were unlawful. It is relevant to note that the only Commonwealth statutes that provides for such delegation of power appears to be the *Corporations Act 2001* (s.741), the *Superannuation industry (Supervision Act) 1993* (part 29) and *A New Tax System (Goods and Services Tax) Act 1999* (section 29-25).

[46] Released on 12 May 2009
<http://www.treasury.gov.au/documents/1534/PDF/Extra_Statutory_Concessions.pdf >

254. Despite the existence of such provisions, and whilst ACCI is not aware of any judicial challenge to the constitutionality of these provisions, there is a chance that it such delegations are impermissible within the meaning of the High Court's decision in *Victorian Stevedoring and General Contracting Co v Dignan* (1931) CLR 73. The Treasury Discussion Paper states that in relation to that case *"A delegation that was too broad might not reasonably fall within one of the heads of power"* and similarly, *"a delegation that was too far removed from parliamentary supervision might amount to an impermissible abdication of power"*.[47]

255. Section 741 of the Corporations Act 2001 states that a declaration made under that provision that varies the application of certain laws (akin to what is proposed under the Bill) must be published in the Gazette. However, it is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and therefore is subject to disallowance by either House of Parliament within 30 sitting days of being tabled. Whilst a declaration that applies to a specific person is not disallowable, the Discussion Paper notes that *"[m]aking such a declaration is therefore an exercise of administrative discretion and is reviewable by the Administrative Appeal Tribunal"*.

256. This should be contrasted to what is proposed in the Bill. The Bill specifically states that the declaration that is made by the Assessor is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Therefore, it is not subject to parliamentary oversight or scrutiny. It is also not a decision which can be reviewed by the AAT.

257. If the provision is to remain (contrary to ACCI submissions), then these matters should be aligned with other Commonwealth laws.

258. Thirdly, whilst we support the public interest test, there are a range of factors that are to be prescribed by the regulations. These matters will be vitally important for the Senate and parties to know about if it is to consider this provision in its proper context.

Interested Persons

259. Under proposed s.40, an "interested person" may apply to switch off these powers. These persons are not defined by the Bill, and it may see non building specific participants involved in applying to switch off these important powers. We would not want to see applications made by

[47] Ibid, at p.8

aggrieved persons in the community or "interest groups" for various projects without a sufficient and direct commercial connection to a project.

260. Conceivably, and as drafted, virtually anyone can make an application without having anything to do with a particular project.

261. Secondly, we don't support s.40(5) which would allow multiple applications to be made where the "interested person becomes aware of new information". This may allow persons to make frivolous applications. It would also allow, as an example, all 500 employees, at a site to each make an application, sequentially or at concurrently, which would require consideration by the Assessor.

Natural Justice

262. Proposed s.41 provides that the Assessor must provide a copy of the application to the Director and give a reasonable opportunity to make submissions.

263. Firstly, there is no mention of how the Assessor will carry out these administrative functions. Will it be *in camera* or will it be in open Court? Will there be an opportunity for the actual building industry participants, such as the employer or contractors, to make submissions? If so, how will they know an application has been made?

264. Secondly, will the Assessor be required to reduce its decision in writing and make it available? Proposed s.42 only specifies that the determination be published in the Gazette. The Assessor should make available reasons for its decision.

Appeals

265. According to proposed s.43, if the Assessor has made a determination to switch off the powers, the only avenue an employer or affected person has to appeal such a determination, is to petition the Director to appeal the decision by way of a reconsideration.

266. This should be amended to allow the Director and any person affected by a determination to reconsider the matter. The Minister should also have the power to overturn a decision of the Assessor where appropriate.

267. As stated above, the decision should be subject to review by the AAT and be a disallowable instrument.

EXAMINATION NOTICES

268. Schedule 1 of the Bill would create new Division 3 – Examination Notices. ACCI does not support these provisions for reasons articulated in Part I.

269. We fear that the introduction of these provisions may slow down investigations into unlawful conduct in the building and construction industry.

270. Notwithstanding our primary position, we make the following points.

Sunset Clause

271. Whilst we do not oppose a review of the coercive powers after 5 years, we do oppose proposed s.46 which is a sunset provision. This pre-empts the outcome of any review, and any repeal of the powers should be by Parliament as constituted at the time.

Regulations

272. We note that proposed s.47 allows regulations to prescribe matters for the Presidential member of the AAT to be satisfied of before issuing the examination notice. Once again, these regulations will be vital for the Committee and interested participants to this inquiry to know in advance.

Form of Notice

273. Proposed s.48 would require the examination to take place in accordance with the examination notice. There should be additional provisions which provide that any defect or irregularity in the form should not affect the legality or lawfulness of any subsequent examination or Court proceedings (including any enforcement proceedings commenced by the Director). There is ample precedent for such clauses in Commonwealth legislation.[48]

Oversight

274. We note the comments made by Commissioner Lloyd regarding the videotaping of interviews.

275. Once again, we reiterate our comments directly proceeding about ensuring that failure to observe strictly the requirement of proposed s.54A

[48] For example, *Surveillance Devices Act 2004*, s.65

does not invalidate or affect the lawfulness of any interview or subsequent enforcement proceedings.

Examinee's Expenses

276. Whilst ACCI does not have an objection in principle to an examinee paid an allowance by the Commonwealth, if they incur costs associated with attending an examination, however, there is no justification for the payment of legal expenses.

UNPROTECTED INDUSTRIAL ACTION

277. Schedule 1, item 51 of the Bill would repeal existing Chapters 6 and 7 of the BCIIA.

278. As stated in Part I, ACCI believes that s.38 of the BCII Act has been particularly effective in limiting wild cat, unprotected and unlawful industrial action. The introduction of this provision was on the back of a finding of the Royal Commission that found former s.127 orders impotent against probable or actual unprotected industrial action.

279. In other words, something beyond the industrial norm is required in this industry. As the Royal Commission noted in its final report:

> **Royal Commission Final Report, Volume 1 p.63.**
>
> Unions ignore orders of the Australian Industrial Relations Commission, and the Federal Court, with impunity. Section 127 of the *Workplace Relations Act 1996 (C'wth)* has proved to be ineffectual in preventing unlawful industrial action taking place in the building and construction industry.

280. An audit by ACCI of s.127 orders issued by the Australian Industrial Relations Commission in recent years (year 2000 - 2006) shows numerous 127 orders against or involving construction industry unions – and we suspect construction unions were subject to more s.127 applications than other unions (**Attachment D**).

281. In addition it appears from the cases examined, that orders were made in 75% of cases brought against construction unions.

282. This understates the number of periods of unlawful industrial action that were not brought as an s.127 application to the AIRC.

283. However, a search of former s.496 orders (equivalent to s.127 provisions) seems to suggest a noticeable reduction in applications sought. This suggests that the effect of s.38 is working and making unions think twice before engaging in unlawful industrial action.

284. Therefore, ACCI cannot support any repeal or watering down of s.38 given the apparent positive effect it has generated thus far.

CONCLUSION

285. As indicated in Part I, ACCI does not support this Bill, however, should the Bill progress further, the Committee should consider and recommend amendments as outlined by ACCI and its members.

286. ACCI urges the Committee to consider ACCI members' detailed submissions and responses to the Bill.

287. Should the Government release exposure draft regulations that impact upon the Bill, ACCI or its members may be required to provide a supplementary submission to the Committee.

ATTACHMENT A: RECENT MEDIA REPORTS

Banned unionist leads unlawful walkout[49]

One of Western Australia's most powerful unions is facing the prospect of hefty fines for an unauthorised strike on Perth's biggest building site.

The assistant secretary of the Construction, Forestry, Mining and Energy Union (CFMEU), Joe McDonald, led 100 workers off the Westralia Square site yesterday over safety concerns.

The action comes a week after Mr McDonald said he would continue to trespass on building sites, even if it meant going to jail. He was fined $10,000 for unlawfully entering three building sites two years ago.

Multiplex says the unlawful strike is being investigated by Australian Building and Construction Commission.

But Mr McDonald says the list of problems at the site is substantial.

"I've got a list of complaints of this job and we are taking them into our lawyer now," he said.

"It's quite a substantial list of problems the blokes are being forced to work under, health and safety problems on the biggest site in Perth.

"We'll see who is being unlawful or who is being unreasonable when our lawyers get a hold of this list of problems that's on this job."

The union faces fines of up to $110,000 and individual workers up to $22,000 each.

But Joe McDonald says he is not worried.

"I'm worried about health and safety on building sites, that's what I'm worried about," he said.

"It has always been my concern and I'm telling you there is a list here as long as your arm on the problems on this job."

Bridge union 'unaware' of incident[50]

IN a violent escalation of the West Gate Bridge industrial dispute, a brick wrapped in a threatening note was allegedly thrown through the window of the suburban Melbourne home of a VicRoads employee on Thursday afternoon.

The note was addressed to "John Holland Scab". It reads: "We know where you live ... we know what you drive.

[49] ABC online, 16 July 2009 <http://www.abc.net.au/news/stories/2009/07/16/2627345.htm>
[50] The Australian, 25 April 2009.

"Stop the scabs. We know what you do. We will win this. We always do. We have your photo. We know what you do. Put a stop to all this now we will be watching you."

VicRoads confirmed yesterday there had been an incident concerning one of its employees on Thursday. Police are understood to be investigating.

The threat is a clear sign that mediation between construction giant John Holland and the Construction Forestry Mining and Energy Union and the Australian Manufacturing Workers Union has broken down, less than a week after the parties began talks.

Speaking on Melbourne's 3AW radio yesterday morning, John Holland group manager of human resources and operations Stephen Sasse said the unions had not been prepared to compromise. "I can confirm that we withdrew from the mediation process on Wednesday evening; essentially we found that the unions were simply not prepared to move on any of their claims," Mr Sasse said.

The six-week dispute has held up strengthening work on the West Gate Bridge, with all construction, except for the establishment of anti-suicide barriers, grinding to a halt.

Mr Sasse said the unions had demanded the reinstatement of 38 CFMEU and AMWU workers sacked before Christmas because they refused to accept John Holland's terms of employment.

"We certainly don't want to expose our staff and our supervision to people who may well be found to have made threats against them or their families," Mr Sasse said.

A spokesman for the CFMEU would not comment on the status of the mediation but said: "The CFMEU is not aware of this incident. The union does not condone such behaviour."

Speaking at the Melbourne Press Club last week, the new Chief Commissioner of Victoria Police, Simon Overland, said authorities were concerned bikies might have been present at the West Gate Bridge protest.

Following news of this latest alleged threat, Opposition industrial relations spokesman Robert Clark called on Premier John Brumby to condemn violent and illegal conduct by unions and to expel unions with a record of violence and intimidation.

"Victorians would be disgusted that an innocent VicRoads employee and his family have been subject to violence, intimidation and threats simply because he is doing his job on behalf of the community, yet John Brumby still refuses to take action to end this lawless conduct," Mr Clark said.

"John Brumby needs to take tough action against union intimidation and thuggery to stop Victoria sinking back into an industrial dark age of union militancy and disruption."

The Premier did not comment on the matter yesterday but a spokesman for Roads and Ports Minister Tim Pallas said: "We urge all parties to come to a resolution. If any person has any evidence of criminal activity, they should contact police."

Building watchdog may be a `gelding'[51]

[51] The Australian, 19 June 2009, pp 1 and 4.

THE head of the nation's building industry watchdog has warned that Labor's changes to his powers could turn a ``virile stallion'' into a ``tame gelding''.

John Lloyd, the Australian Building and Construction Commissioner, singled out the dramatic reduction in penalties applying to workers and the extra conditions he must meet before using his coercive powers under the government's changes. Mr Lloyd told The Australian that unions and workers on building sites were boasting that they would be ``back in town'' when the watchdog was replaced next February.

Mr Lloyd, who is unlikely to be reappointed by Labor to the watchdog's replacement body, said the Australian Building and Construction Commission was conducting a record 71 investigations into unlawful conduct.

While the ABCC had succeeded in improving conduct, he acknowledged it had failed to introduce a widespread and sustained change in industry culture.

Mr Lloyd yesterday gave his first comments on Labor's changes, which have been criticised by employers for reducing the penalties applying to striking workers and making the process for approving the use of coercive powers overly bureaucratic.

Business has attacked Labor's decision to allow the coercive powers to be switched off on projects.

Workplace Relations Minister Julia Gillard has also come in for criticism for issuing a ministerial directive to impose restraints on the use of the coercive powers from August, five months earlier than promised at the federal election.

``The bill obviously makes a few changes,'' Mr Lloyd said.

``They involve a reduction in the penalties to one-third of what they are now and, also, in discharging the role, the bill introduces more procedures, processes and transactions.

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``One thing that puzzles me is the provisions that people who attend the (compulsory interrogation) hearings are entitled to be compensated for their expenses. These are people who, of course, refused to provide information voluntarily, and then when they do it compulsorily, they're compensated.''

Mr Lloyd said people were questioning if Labor's changes amounted to a weakening of its powers. While he was prepared to point out the ``impact'' of the bill before parliament, he said it would be inappropriate for him to comment on the effect the changes would have on the industry.

``The future will tell if the virile stallion has been turned into a tame gelding,'' he said.

Building contractors have told The Australian that union delegates and employees working on construction sites had been boasting that they would be ``back in town'' once the ABCC was abolished next year.

``We hear that people do say, ``we are back in town, we'll be back in town after February 2010, the ABCC is on the way out','' Mr Lloyd said. ``We hear that a lot, and we are at pains to stress and communicate to the industry that it is business as usual, and there is no change, and the government has promised a `tough cop on the beat'.''

He said the ABCC was conducting 71 investigations into unlawful conduct, the ``highest

that we have ever had''. There were 26 proceedings before the West Australian and Victorian courts. (emphasis added).

"Election may end 34-year reign of CFMEU boss Kevin Reynolds"[52]

In the film, McDonald is caught swearing and threatening Q-Con boss Lindsay Albonico after repeated requests for him to leave:

"This f..king thieving parasite dog's days are numbered," McDonald says, playing up to the camera. "He'll be working at Hungry Jack's when I'm still a union official."

"Unions and watchdog ABCC at war"[53]

HOSTILITIES between the building industry watchdog and unions are set to reignite, with a unionist due to face court on charges of assaulting and threatening to kill two construction commission inspectors.

Brian George Shearer is scheduled to appear in Melbourne Magistrates Court this month on two charges of unlawful assault, two of making threats to kill and two of threatening to cause harm to a public official.

The offences allegedly occurred at a construction site at the Melbourne suburb of Mill Park on December 6, 2006.

Police are expected to allege that Mr Shearer assaulted and threatened Australian Building and Construction Commission inspectors Graham Burgoyne and Terry Duffy.

Mr Shearer is expected to plead not guilty to the charges, which are due to be heard on September 22. If convicted, Mr Shearer faces a maximum penalty of 10 years' jail.

Mr Shearer is believed to be represented by prominent criminal lawyer Rob Stary.

The ABCC and the national secretary of the union's construction division, Dave Noonan, said it would be inappropriate to comment, given the matter was before the courts. Mr Noonan and commission chief John Lloyd yesterday continued to exchange barbs over claims by two inspectors that they were subjected to abuse and intimidation on a Brookfield Multiplex building site in Melbourne last month.

Mr Lloyd has alleged the inspectors, one of whom was female, were subject to intimidation and unacceptable abuse from building workers who barricaded them in a cafe and tried to block them from leaving a carpark.

Building workers have described the clash as "just a bit of banter", denying ABCC claims that they called the female inspector a "filthy black dog c..t".

Mr Noonan has accused Mr Lloyd of trying to smear and demonise building workers.

[52] The Australian, November 01, 2008
[53] The Australian, September 03, 2008.

But Mr Lloyd, in a statement yesterday, rejected any suggestion that the ABCC "released the contents of its correspondence with Multiplex or any other party on this matter".

"Claims made by Mr Noonan that the ABCC leaked this correspondence are both unfounded and totally false," Mr Lloyd said.

Mr Noonan stood by his claim. "Someone leaked it. I don't believe Brookfield Multiplex leaked it. Mr Lloyd knows where the copies went so who does he think leaked it?

"The ABCC is not an independent agency. They're a participant in the political process as they showed during the last federal election campaign."

A spokeswoman for the ABCC said yesterday that its inspectors had "noted a recent increase in negative behaviour displayed toward them when investigating matters on building sites, especially in Victoria".

"The ABCC is not prepared to discuss other similar incidents that are not in the public domain at this time," she said.

Mr Lloyd said ABCC staff had the right to work "without being intimidated or abused".

"Builder braces for battle with unions"[54]

HOSTILITIES between the building industry watchdog and unions are set to reignite, with a unionist due to face court on charges of assaulting and threatening to kill two construction commission inspectors.

WEST Australian construction boss Gerry Hanssen is adamant that productivity on building sites will decline and small construction firms will go out of business under Labor's new industrial relations laws.

The builder said the Rudd Government's Fair Work Bill would create ``a hell of a battle'' between unions and employers and that unions would do everything they could to try to walk over bosses.

``It will be worse under Labor,'' Mr Hanssen said. ``The unions support the Labor Government, of course, and their expectation of the Labor Government is they're going to back the unions. It's a natural expectation.''

He said his business, Hanssen Pty Ltd, would survive because he had the money and determination to fight militant unions such as the Construction Forestry Mining and Energy Union in the courts.

But he was concerned about smaller builders, who would struggle if the CFMEU gained a greater stranglehold over the industry.

``I'm not worried about me, I'm worried for the industry,'' he said.

[54] The Australian, November 26, 2008.

``If they (the union) misbehave, I can sue them in court. Very few employers are willing to do that and it is unfair to impose that on an employer when the union's got so much clout. It shouldn't have to be done but unfortunately that's the way they operate."

Mr Hanssen said that if the CFMEU were allowed to get away with abusing its power, small businesses could fail, as his previous building company did in 1992.

He blames constant union demands for allowances such as strike pay as the reason behind the business's failure and is now determined to escape the control of the CFMEU.

``I vowed that I will never do another deal with the CFMEU for the rest of my life as long as people like Kevin Reynolds, Joe McDonald and the like run the CFMEU,'' he said.

Mr Hanssen fears Labor's reinstatement of right-of-entry provisions for unions could lead to abuse by union officials.

He said that under the new laws, union officials could use their right of entry to create daily ``hassles'' for builders by complaining about operations at construction sites. This would lead to construction delays and a shift from productivity to turf wars.

``That right of entry to small business is really a big issue,'' Mr Hanssen said. ``The hassle is a big cost factor, hassling the worker so he can't be productive, and does what the shop steward says.

``The foreman is no longer in charge of the place; the shop stewards are in charge."

Mr Hanssen oversees about 500 workers, most of whom are employed by subcontractors. All are employed on individual agreements and he estimates 10 to 20 per cent are union members. He said workers should not be forced on to collective agreements and that individual contracts should be allowed as long as award conditions were met.

``People should have the choice,'' he said. ``They shouldn't be prescribed to work on a common agreement; EBAs (enterprise bargaining agreements) should definitely not be compulsory.''

"Leader taunts watchdog on rallies"[55]

MILITANT construction union boss Kevin Reynolds yesterday taunted the Australian Building and Construction Commission over its ``toothless'' response to large-scale industrial action, saying it only chased individuals as easy targets.

The powerful West Australian secretary of the Construction Forestry Mining and Energy Union said he doubted the commission would take any action against workers attending a national stoppage next week, because it was ``too hard''.

``If they want to try and prosecute 100,000 workers or more around Australia, let them try,'' Mr Reynolds said.

[55] The Australian, 26 November 2008.

``(But) there have been major rallies before and they've never come after the individuals or the unions. They had 20,000 in a rally in Melbourne in the not-too-distant past and no one went after them. It's too difficult.''

Mr Reynolds urged workers to attend the rallies on Tuesday -- which will coincide with Victorian CFMEU official Noel Washington appearing in court for refusing to answer questions from the commission.

He denied the stoppage would aggravate the nation's economic problems and accused his critics of whipping up hysteria.

The CFMEU only took necessary industrial action, he said.

Premier Colin Barnett said Mr Reynolds was jeopardising the economy by creating a perception of industrial unrest that would scare off investors.

``There could not be a worse time than right now for the unions to engage in this bravado,'' Mr Barnett said. ``Kevin Reynolds is reflecting the worst of Australian industrial relations and he's going back 30 years.

``The economy is going through a very tough time. The last thing that Western Australia would want to do is create a feeling that there is going to be industrial unrest. That will just drive away investment, drive away orders.''

The state's peak business group, the West Australian Chamber of Commerce and Industry, also condemned the stoppage and said there was no place for old-style militancy.

WACCI chief economist John Nicolaou said the rally would damage the state's reputation and it underlined why a powerful construction industry watchdog was needed.

``The ABCC plays an important role in stamping out unlawful and improper behaviour,'' Mr Nicolaou said. ``The threat of rolling strikes and stoppages sends the wrong message to potential investors and overseas trading partners.''

There had been a reduction of more than 90 per cent in time lost because of industrial disputes on constructions sites since the commission was introduced in 2005, he said.

UnionsWA, which has endorsed the stoppage, denied there would be any extensive disruption. Assistant secretary Simone McGurk said the commission had outrageous powers against individuals.

``You can't refuse to answer questions, there's no right to representation and you can be charged if you even tell others you've been questioned,'' Ms McGurk said.

ATTACHMENT B: ROYAL COMMISSION FINDINGS

FINDINGS REGARDING CONDUCT AND PRACTICES [56]

In the building and construction industry throughout Australia, there is:

(a) widespread disregard of, or breach of, the enterprise bargaining provisions of the Workplace Relations Act 1996 (C'wth);

(b) widespread disregard of, or breach of, the freedom of association provisions of the Workplace Relations Act 1996 (C'wth);

(c) widespread departure from proper standards of occupational health and safety;

(d) widespread requirement by head contractors for subcontractors to have union-endorsed enterprise bargaining agreements (EBAs) before being permitted to commence work on major projects in State capital central business districts and major regional centres;

(e) widespread requirement for employees of subcontractors to become members of unions in association with their employer obtaining a union-endorsed enterprise bargaining agreement;

(f) widespread requirement to employ union-nominated persons in critical positions on building projects;

(g) widespread disregard of the terms of enterprise bargaining agreements once entered into;

(h) widespread application of, and surrender to, inappropriate industrial pressure;

(i) widespread use of occupational health and safety as an industrial tool;

(j) widespread making of, and receipt of, inappropriate payments;

(k) unlawful strikes and threats of unlawful strikes;

(l) threatening and intimidatory conduct;

[56] Final Report of the Royal Commission into the Building and Construction Industry - Summary of Findings and Recommendations, Volume 1, pp.5-6

(m) underpayment of employees' entitlements;

(n) disregard of contractual obligations;

(o) disregard of National and State codes of practice in the building and construction industry;

(p) disregard of, or breach of, the strike pay provisions of the Workplace Relations Act 1996 (C'wth);

(q) disregard of, or breach of, the right of entry provisions of the Workplace Relations Act 1996 (C'wth);

(r) disregard of Australian Industrial Relations Commission (AIRC) and court orders;

(s) disregard by senior union officials of unlawful or inappropriate acts by inferior union officials;

(t) reluctance of employers to use legal remedies available to them;

(u) absence of adequate security of payment for subcontractors;

(v) avoidance and evasion of taxation obligations;

(w) inflexibility in workplace arrangements;

(x) endeavours by unions, particularly the Construction, Forestry, Mining and Energy Union (CFMEU), to regulate the industry; and

(y) disregard of the rule of law.

These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy.

They mark the industry as singular.

They indicate an urgent need for structural and cultural reform.

ATTACHMENT C: COERCIVE POWERS

Source: **Administrative Review Council – The Coercive Information Gathering Powers of Government Agencies – Report No.48, May 2008**

Table A.1 **Coercive information-gathering powers: A summary of the legislation as at December 2007**

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Australian Competition and Consumer Commission									
Trade Practices Act 1974, s 155(1)									
Provide information, produce documents, give evidence	Reason to believe a person has information, documents or evidence relating to contravention of Act, designated telecommunications matter, decision under ss 91B(4), 91C(4) (authorisations), s 93 decision (exclusive dealings), s 93AC, s 93AC, s 95AS or s 95AZM (merger clearance)	A person	Notice may not be given merely because privilege against self-incrimination has been invoked in other contexts (ss 155(2A)). Cabinet documents excluded (ss 155(7A))	ACCC, chairperson, deputy chairperson (to hear evidence only subject to statutory trigger); member of commission can issue notice; SES or acting SES can hear evidence	Specify time and manner for giving information, time and place for giving evidence	Not specified	Not available but use immunity available for other criminal proceedings (ss 155(7))	Available under s 155(7B); *Daniels v ACCC* (2002) 213 CLR 543	Not specified
Trade Practices Act 1974, s 65Q(1)									
Provide information, produce documents, give evidence	Reason to believe that a corporation is capable of providing information relating to goods it supplies that are intended to be used or of a kind likely to be used by a consumer and that will or may cause injury to a person	Corporation supplying the goods (information must be signed by an officer of the corporation)	Requirements in relation to documents must be 'reasonable'; information must be provided in a 'reasonable time'; and appearance for examination must be at a 'reasonable time'	Minister or officer authorised by the Minister	Specify manner and a reasonable time for giving information, reasonable requirements for producing documents, reasonable time and place for giving evidence	Reasonable time for giving information	Use immunity available for any other proceedings (s 65Q(11)). No specific abrogation of privilege against self-incrimination	Not specified. Section 65Q(9) states failure to comply with notice is a strict liability offence	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Trade Practices Act 1974, s 95ZK									
Provide information, produce documents	Reason to believe a person is capable of providing information	A person	Information must be relevant to an inquiry about the person, the supply of goods or services by the person being investigated/ monitored, a locality notice (proposal to fix prices at a particular location)	Chairperson or inquiry chair	Specify time and manner for giving information, documents to be provided	At least 14 days	Available (s 95ZK(6))	Reasonable excuse defence (s 95ZK(5))	Not specified
Trade Practices Act 1974, s 95S									
Give evidence, produce documents	Not specified: provision under Part VIIA (Price surveillance)	A person	It is a summons to appear at a price inquiry	Inquiry chair. The chair may exercise the power on another person's application	Specify documents to be provided	Not specified	Available (s 95U(3)-(4))	Reasonable excuse defence (s 95U(5))	Not specified
Trade Practices Act 1974, s 151BK									
Provide information	Satisfied that a carrier or carriage provider has a substantial degree of power in a telecommunications market	A carrier or carriage provider who has a substantial degree of power in a telecommuni-cations market	Information must relate to charges for goods or services. ACCC can require person to notify about changes or additions to charges	ACCC	Specify time period, form and information required. Must specify reason and be a written notice (s 151BM)	Either within 7 days before altering a charge (ss 151 BK(4) and (6)) or within period specified in direction of imposing, varying or ceasing a charge (ss 151 BK(5))	Not specified	Not specified	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Australian Prudential Regulation Authority									
Banking Act 1959, s 13									
Provide information, including books, accounts and documents	APRA to protect depositors of authorised deposit institutions (s 12); provision under Division 2 (Protection of depositors)	Authorised deposit institution	Information must relate to financial stability	APRA	Specify information required and time for providing it	Not specified. ADI to provide information 'immediately' if considered likely to be unable to meet its obligations (ss 13(3))	Not specified	Not specified	Not specified
Banking Act 1959, s 13B									
Produce books, accounts or documents, provide information, provide facilities	Investigation of affairs of ADI under ss 13 or 13A (Protect depositors of ADIs).	Authorised deposit institution	Can require ADI to give information. Access to records is by force of section. APRA can determine this provision does not apply to an ADI (s 11)	Investigator appointed by APRA under ss 13, 13A	Need not be in writing	Not specified, but each day of failure to comply gives rise to a continuing offence (ss 13B(1B))	Not specified	Not specified	Not reviewable decisions for the purposes of Part VI
Banking Act 1959, s 16B									
Provide information, produce books, accounts or documents	APRA considers information will help it carry out its functions under the Act	Auditor or former auditor of ADI or non-operating holding company. If ADI is a subsidiary of a foreign company, another subsidiary of the foreign company	APRA can determine this provision does not apply to an ADI (s 11)	APRA	Not specified	Not specified	Not available. Use immunity available for criminal proceedings if claimed before the fact (s 52F)	Not specified	Not reviewable decisions for the purposes of Part VI

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Banking Act 1959, s 61									
Produce books, accounts or documents, provide information, provide facilities	If satisfied that a report is necessary	ADI, non-operating holding company or a subsidiary of either	In relation to investigation of specified prudential matters. Access to records and information is by force of section. APRA can make s 11 exemption	Investigator	Need not be in writing. Appointment is in writing and specifies prudential matters under investigation	Not specified, but each day of failure to comply gives rise to a continuing offence (s 61(5))	Not specified	Not specified	Not reviewable decisions for the purposes of Part VI
Banking Act 1959, s 62									
Provide information, including books, accounts and documents	Not specified: this is a general provision allowing APRA to conduct investigations	Various: ADI, non-operating holding company, subsidiary of either, any other person who carries on a banking business in Australia	Must not require information concerning individual customers of an ADI unless it relates to the prudential matters of an ADI. APRA can make s 11 exemption	APRA	Need not be in writing	Not specified, but each day of failure to comply gives rise to a continuing offence (s 62(1C))	Not available. Use immunity available for criminal proceedings if claimed before the fact (s 52F)	Not specified	Not reviewable decisions for the purposes of Part VI
Insurance Act 1973, s 115									
Provide information, produce books, accounts or documents	Purposes of Act or Part 2 of *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* and to consider an application to carry on insurance business	An officer of general insurer, holding company, subsidiaries, corporation applying for authorisation	Not specified	APRA or a person authorised by APRA	Not specified; need not be in writing	Not specified	Not specified	Not specified	Not reviewable decisions for the purposes of Part IV
Insurance Act 1973, s 49									
Provide information, produce books, accounts or documents	APRA considers information will help it carry out its functions under the Act	An auditor, actuary, former auditor or former actuary of general insurer, holding company or subsidiary	Not specified	APRA	Not specified	Not specified	Not available. Use immunity available for criminal proceedings if claimed before the fact (s 38F)	Not specified	Not reviewable decisions for the purposes of Part IV

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Insurance Act 1973, s 55									
Produce books, provide assistance, answer questions	Investigating affairs of a general insurer, holding company or subsidiary, or exercising monitoring functions under s 38	A prescribed person in relation to the general insurer, holding company or subsidiary (defined in s 50)	If APRA or inspector is investigating the affairs of the body corporate or its associate or for purposes of APRA's monitoring functions under s 38	APRA or inspector	For giving of assistance, only 'all reasonable assistance' is required	Not specified	Not available. Use immunity available for criminal proceedings if claimed before answering question in examination (ss 56(2))	Not specified	Not reviewable decisions for the purposes of Part IV
Insurance Act 1973, s 81									
Produce books, provide assistance, answer questions	Investigating a designated security trust fund (set up by Lloyd's—see ss 68 and 69)	A prescribed person in relation to a designated security trust fund (refers to s 50, with an additional category)	Only if APRA is investigating affairs of a designated security trust fund	APRA or inspector	For giving of assistance, only 'all reasonable assistance' is required	Not specified	Not available. Use immunity available for criminal proceedings (s 82)	Not specified	Not reviewable decisions for the purposes of Part IV
Australian Prudential Regulation Authority and Australian Securities and Investments Commission									
Life Insurance Act 1995, s 131									
Provide information, produce documents	Purposes of the Act, monitor compliance (s 130)	A life company	Only any matter relating to the business of the company or its subsidiary	Regulator	Specify time for providing information	7 days to 1 month	Not specified	Not specified	Internal review by regulator and merits review by AAT (s 236)
Life Insurance Act 1995, s 132									
Produce records	Purposes of the Act, monitor compliance (s 130)	A life company	Only any records relating to the affairs of the company	Regulator	Specify reasonable time and place for producing records, authorised officer (if any)	Reasonable time for producing records	Not specified	Not specified	Internal review by regulator and merits review by AAT (s 236)
Life Insurance Act 1995, s 141									
Produce records	Investigation of business of a company	A 'relevant person' in relation to a company (director, secretary, employee, actuary, auditor, shareholder or agent)	Only any records relating to the business of the company	Regulator	Specify reasonable time and place for producing records, authorised officer (if any)	Reasonable time for producing records	Not available. Use immunity available for criminal proceedings (s 156F)	Not specified	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Life Insurance Act 1995, s 142									
Provide assistance, answer questions	When investigating the business of a company	A 'relevant person' in relation to a company (director, secretary, employee, actuary, auditor, shareholder or agent)	Only needs to give 'all reasonable assistance'	Regulator	Specify authorised person for asking questions	Not specified	Not available. Use immunity available for criminal proceedings (s 156F)	Not specified	Not specified
Retirement Savings Accounts Act 1997, s 100									
Produce books	Investigation of the affairs of a retirement savings account provider	A 'relevant person' in relation to RSA provider. Others if reasonable grounds to believe they have books relating to affairs	Not specified	Inspector	Not specified	Not specified	Not available. Use immunity available for criminal proceedings if claimed before the fact (s 117)	Available for lawyers unless client consents or the communication is with a body corporate under administration or winding up (s 118)	Not provided (not a reviewable decision: s 16)
Retirement Savings Accounts Act 1997, s 101									
Provide assistance, answer questions	Investigation of the affairs of an RSA provider? Not explicitly mentioned	A 'relevant person' in relation to the RSA provider. Others if reasonable grounds to suspect or believe they have information relevant to investigation	Only needs to give 'all reasonable assistance'	Inspector	Not specified	Not specified	Available for statements for criminal proceedings if claimed before making the statement (s 120(2)). Use immunity available for statements and information for criminal proceedings if claimed before the fact (s 117(3))	Available for statements if person objects to statement's admission (s 120(5)). Also available for lawyers in relation to information unless the communication is with a body corporate under administration or winding up (s 118)	Not provided (not a reviewable decision: s 16)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Retirement Savings Accounts Act 1997, s 92									
Provide information	For the purposes of the Act, to monitor the RSA provider (s 91)	An RSA provider	Only information in relation to the provision of RSAs	Regulator or authorised person	Specify period in which to provide information, the year and the matters that need to be reported on	'Within a specified period'	Not available. Use immunity available for criminal proceedings if claimed before the fact (s 117)	Available for lawyers unless client consents or the communication is with a body corporate under administration or winding up (s 118)	Not provided (not a reviewable decision: s 16)
Retirement Savings Accounts Act 1997, s 93									
Produce books. Can require books produced in English	For the purposes of the Act, to monitor the RSA provider (s 91)	A 'relevant person' in relation to the RSA provider (including a responsible officer of the RSA provider and an auditor of RSA)	Only books relating to the affairs of the RSA provider to the extent that they relate to the provision of RSAs	Regulator or authorised person	Notice to specify reasonable time and reasonable place	Reasonable time for producing books	Not available. Use immunity available for criminal proceedings if claimed before the fact (s 117)	Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 118)	Not provided (not a reviewable decision: s 16)
Superannuation Industry (Supervision) Act 1993, s 254(2)									
Provide information	For the purposes of the Act	Trustee of a superannuation entity	Must specify an income year of the entity	Regulator or authorised person	Specify period in which to provide information, the year and the matters that need to be reported on	'Within a specified period'	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)	Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 288)	Not provided (not a reviewable decision: s 10)
Superannuation Industry (Supervision) Act 1993, s 255									
Produce books. Can require books produced in English	For the purposes of the Act	A 'relevant person' in relation to the superannuation entity	Only any books relating to the affairs of the superannuation entity	Regulator or authorised person	Specify reasonable time and reasonable place	Reasonable time for producing books	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)	Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 288)	Not provided (not a reviewable decision: s 10)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Superannuation Industry (Supervision) Act 1993, s 264(2)									
Provide information	Appears that conduct by trustee or investment manager is likely to adversely affect the values or the interests of beneficiaries	A 'relevant person' in relation to the superannuation entity	Only any information or matters relating to the affairs of the entity	Regulator	Specify information required or matters to be reported on and time for providing same. Must be written notice	'Within a stated period'	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)	Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 288)	Not provided (not a reviewable decision: s 10)
Superannuation Industry (Supervision) Act 1993, s 269									
Produce books	For purposes of an investigation of the affairs of a superannuation entity	A 'relevant person' in relation to the superannuation entity. Others if reasonable grounds to believe they have books relating to the affairs	Not specified	Inspector	Must be written notice	Not specified	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)	Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 288)	Not provided (not a reviewable decision: s 10)
Superannuation Industry (Supervision) Act 1993, s 270									
Provide assistance, answer questions	Investigation of the affairs of a superannuation entity	A 'relevant person' in relation to the superannuation entity or others where there are reasonable grounds to suspect or believe they have information relevant to the investigation	Only needs to give 'all reasonable assistance'	Inspector	Must be written notice	Not specified	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)	For statements if person objects to their admission (s 290(5)); for information unless client consents or communication is with a body corporate under administration or winding up (s 288)	Not provided (not a reviewable decision: s 10)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Australian Securities and Investments Commission									
ASIC Act 2001, s 19									
Provide assistance, answer questions	Suspects or believes on reasonable grounds a person can give information relevant to an investigation under Division 1	A person	Only needs to give 'all reasonable assistance'. Can be used only for purposes outlined in s 28	ASIC	Must state the general nature of the matter being investigated and set out right to lawyer and privilege against self-incrimination. Requires written notice	Not specified	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)	For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Reasonable excuse (s 63). Case law uncertain regarding clients	Not specified
ASIC Act 2001, s 30									
Produce books	Exercise of powers under corporations law, compliance, contraventions, investigations (s 28)	A body corporate that is not an exempt public authority, the responsible entity of a registered scheme, or an 'eligible person' in respect of these	Only for the production of books relating to the affairs of the body. Can be used only for purposes outlined in s 28	ASIC member or staff member authorised under s 34	Specify member or staff member, place, time and books to be produced. Requires written notice	At a 'specified time'	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)	For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Case law uncertain regarding clients. Reasonable excuse (s 63)	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
ASIC Act 2001, s 31									
Produce books	Exercise of powers under corporations law, compliance, contraventions, investigations (s 28)	Operators of financial markets and clearing and settlement facilities, board members of operators, people who carry on financial services businesses, and any other person who, in ASIC's opinion, deals with financial products	Only for the production of specified types of books concerning financial products (business affairs, dealings, audits, etc). Can be used only for purposes outlined in s 28	ASIC member or staff member authorised under s 34	Specify member or staff member, place, time and books to be produced. Requires written notice	At a 'specified time'	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)	For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Reasonable excuse (s 63). Case law uncertain regarding clients	Not specified
ASIC Act 2001, s 32A									
Produce books	Exercise of powers under corporations law, compliance, contraventions, investigations (s 28). Under Division 2, Part 2 (Unconscionable conduct and consumer protection—financial services)	A person who supplies or supplied financial services or an 'eligible person' in relation to that person	Only for the production of specified books relating to the supply of financial services or the financial service	ASIC member or staff member authorised under s 34	Specify member or staff member, place, time and books to be produced	At a 'specified time'	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)	For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Reasonable excuse (s 63). Case law uncertain regarding clients	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
ASIC Act 2001, s 33									
Produce books	Exercise of powers under corporations law, compliance, contraventions, investigations (s 28)	A person	Only for the production of specified books in relation to the affairs of a body corporate or registered scheme or by matters covered by ss 31 and 32A	ASIC member or staff member authorised under s 34	Specify member or staff member, place, time and books to be produced	At a 'specified time'	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)	For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Reasonable excuse (s 63). Case law uncertain regarding clients	Not specified
ASIC Act 2001, s 41									
Provide information	Exercise of powers under corporations law, compliance, contraventions, investigations (s 40)	Operators of financial markets and clearing and settlement facilities and any person who carries on a financial services business	Only for information in relation to an acquisition or disposal of financial products	ASIC	Need not be in writing	Not specified	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)	For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Case law uncertain regarding clients. Reasonable excuse defence (s 63)	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
ASIC Act 2001, s 43									
Provide information	For a range of circumstances relating to possible contraventions of corporations law	Any person if ASIC believes on reasonable grounds they can give information	Only for determining whether to exercise a power, investigating possible contravention, applying for (civil) declarations and orders	ASIC	Need not be in writing	Not specified	Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)	For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Case law uncertain regarding clients. Reasonable excuse defence (s 63)	Not specified
Corporations Act 2001, s 912C									
Provide information	Not specified. Part 7.6 concerns licensing of financial services	A financial services licensee. If several licensees, one or all licensees	Information must be about the licensee's financial services	ASIC	Require written notice. Can ask for periodic statements or on specific events	Within time specified if reasonable period	Not specified	Nor specified	Not specified
Corporations Act 2001, s 672A									
Provide information	Obtain information about ownership or beneficial ownership of listed companies and managed investment schemes	A member of the company or scheme or a person having a relevant interest in voting shares in the company or scheme	Only full details of the person's relevant interest, name, addresses and information about others with relevant interests	ASIC, listed company or responsible entity for a listed managed investment scheme	Require written notice	Disclosure must be made within 2 days of notice being given	Not specified. Not available to companies in relation to 'proceedings' (s 1316A)	Not specified	Can apply for exemption (s 673)
Insurance Contracts Act 1984, s 11C									
Provide documents	For any purpose connected with general administration of 'relevant legislation'	Insurer	Only documents relating to insurance cover provided, not documents relating to particular person	ASIC	Require written notice. Specify documents required	At least 30 days	Privilege is a 'reasonable excuse' (ss 11C(2) and (4))	Reasonable excuse defence (s 11C(2))	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Insurance Contracts Act 1984, s 11D									
Provide information	For any purpose connected with general administration of 'relevant legislation'	Insurer	Only information relating to insurer's organisational structure and administrative arrangements, statistics about the nature and volume of insurance business, copies of training guides and manuals. Not documents dealing with a particular person	ASIC	Require written notice	At least 30 days	Privilege is a 'reasonable excuse' (ss 11D(3) and (5))	Reasonable excuse defence (s 11D(3))	Not specified
Australian Taxation Office									
Fringe Benefits Tax Assessment Act 1986, s 128									
Provide information, answer questions, produce documents	For the purposes of the Act	A person (including an employee of a Commonwealth, state or territory government department or any public authority)	None specified. Commissioner has power to require production of 'any' document and ask 'questions'	Commissioner	Require written notice. Specify time and place for giving evidence	Not specified	Not specified	Not specified	Case law says Administrative Decisions (Judicial Review) Act review is not excluded
Income Tax Assessment Act 1936, s 264									
Provide information, answer questions, produce books, documents and other papers	Not specified. Commissioner has general administration of the Act (s 8)	A person (including any officer employed by any department of a government or by any public authority)	Can only require a person to give evidence concerning their or any other person's income or assessment. No such limit on giving 'information'	Commissioner	Require written notice. Specify time and place for giving evidence	Not specified	Old case law implies no privilege	Not specified	Case law says ADJR Act review is not excluded
Petroleum Resource Rent Tax Assessment Act 1987, s 108									
Provide information, answer questions, produce documents	For the purposes of the Act	A person	Not specified	Commissioner or certifying Minister	Require written notice	Not specified	Not specified	Not specified	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Product Grants and Benefits Administration Act 2000, s 42									
Provide information, answer questions, produce documents	Reason to believe a person has information or is capable of giving evidence relevant to the operation of the Act or an 'entitlement Act'	A person	Not specified. Act concerns grants and benefits administered by the Commissioner (s 3)	Commissioner	Require written notice. Specify manner and form of providing information or time and place for giving evidence	Not specified	Not available. Use immunity for any evidence or information is available for other criminal proceedings (s 43)	Not specified	Not specified
Superannuation Contributions Tax (Assessment and Collection) Act 1997, s 39									
Provide information, answer questions, produce documents	For the purposes of the Act	A person	Not specified. Commissioner has power to require production of 'any' document and ask 'questions'	Commissioner	Written notice to specify reasonable time and place for giving evidence or reasonable manner for providing information	A reasonable period to provide information	Not specified	Not specified	Not specified
Superannuation Contributions Tax (Members of Constitutionally Protected Funds) Assessment and Collection Act 1997, s 33									
Provide information, answer questions, produce documents	For the purposes of the Act	A person	Not specified. Commissioner has power to require production of 'any' document and ask 'questions'	Commissioner	Written notice to specify reasonable time and place for giving evidence or reasonable manner for providing information	A reasonable period to provide information	Not specified	Not specified	Not specified
Superannuation Guarantee (Administration) Act 1992, s 77									
Provide information, answer questions, produce documents	For the purposes of the Act	A person	Not specified. Commissioner has power to require production of 'any' document and ask 'questions'	Commissioner	Written notice to specify reasonable time and place for giving evidence or reasonable manner for providing information	A reasonable period to provide information	Not specified	Not specified	Case law says ADJR Act review is not excluded
Superannuation Industry (Supervision) Act 1993									
Any books relating to the affairs of the entity	For the purposes of the parts of the Act administered by the ATO	A person	Only for provisions administered by the Commissioner of Taxation	Commissioner	Written notice to specify reasonable time and place for producing books	Not specified	Not specified	Not specified	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Taxation Administration Act 1953, s 14I									
Provide information, answer questions, produce documents	For the purposes of Part IV of the Act (Exchange control: taxation certificates)	A person	Not specified	Commissioner	Written notice. For examinations notice to specify time and place	Not specified	Not specified	Not specified	Not specified; not a reviewable decision under s 14Y
Taxation Administration Act 1953, s 353–10 (Schedule 1)									
Provide information, answer questions, produce documents	For matters relevant to administration and operation of Schedule 1 (Collection and recovery of income tax and other liabilities) other than Division 340 (Release from liabilities)	A person	Only information relating to the application of indirect tax laws to person or any other entity or for purposes of Schedule 1	Commissioner	Written notice	Not specified	Not specified	Not specified	Not specified
Termination Payments Tax (Assessment and Collection) Act 1997, s 27									
Provide information, answer questions, produce documents	For the purposes of the Act	A person	Not specified. Commissioner has power to require production of 'any' document and ask 'questions'	Commissioner	Written notice to specify reasonable time and place for giving evidence or reasonable manner for providing information	A reasonable period to provide information	Not specified	Not specified	Not specified

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Centrelink									
A New Tax System (Family Assistance) (Administration) Act 1999, s 154									
Provide information, produce documents	Secretary considers information or document may be relevant to determining whether a person is entitled to be paid family assistance	A person	Only information or document relevant to determine the person or other person's eligibility for family assistance and/or child care benefit and the amount of entitlement	Secretary	Written notice to specify time, manner and officer (to provide information or document) or time and place (for giving evidence) (s 158)	At least 14 days (s 158)	Reasonable excuse defence (s 159). No specific abrogation of the privilege	Reasonable excuse defence (s 159). No specific abrogation of the privilege	Not reviewable by Social Security Appeals Tribunal (s 111). Secretary may review decision on own initiative, other than in exceptional cases where the Secretary exercised those powers himself or herself (ss 104, 105)
A New Tax System (Family Assistance) (Administration) Act 1999, s 155									
Provide information, produce documents	Determine financial situation of a debtor to Commonwealth under Act and be informed of debtor's change of address	A person who owes a debt under or as a result of the Act	Information must be relevant to the person's financial situation or change of address	Secretary	Written notice to specify time, manner and officer (to provide information or document) or time and place (for giving evidence) (s 158)	At least 14 days (s 158)	Reasonable excuse defence (s 159). No specific abrogation of the privilege	Reasonable excuse defence (s 159). No specific abrogation of the privilege	Not reviewable by SSAT (s 111). Secretary may review decision on own initiative other than in exceptional cases where the Secretary exercised those powers himself or herself (ss 104, 105)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
A New Tax System (Family Assistance) (Administration) Act 1999, s156									
Provide information, produce documents	Believes person may have information or document that would help locate a debtor to the Commonwealth under Act or is relevant to debtor's financial situation	A person	Information must be relevant to the financial situation or location of a debtor	Secretary	Written notice to specify time, manner and officer (to provide information or document) or time and place (for giving evidence) (s 158)	At least 14 days (s 158)	Reasonable excuse defence (s 159). No specific abrogation of the privilege	Reasonable excuse defence (s 159). No specific abrogation of the privilege	Not reviewable by SSAT (s 111). Secretary may review decision on own initiative other than in exceptional cases where the Secretary exercised those powers himself or herself (ss 104, 105)
A New Tax System (Family Assistance) (Administration) Act 1999, s 157									
Provide information	For the purposes of determining eligibility for family assistance, including when assistance wrongfully given	A person	Information must be about a class of persons and must include only specified types of data (e.g. name, address, marital status, education, employment). All information determined to be not relevant must be destroyed after 13 weeks	Secretary	Written notice to specify time, manner and officer (to provide information or document) or time and place (for giving evidence) (s 158)	At least 14 days (s 158)	Reasonable excuse defence (s 159). No specific abrogation of the privilege	Reasonable excuse defence (s 159). No specific abrogation of the privilege	Not reviewable by SSAT (s 111). Secretary may review the decision on own initiative other than in exceptional cases where the Secretary exercised those powers himself or herself (ss 104, 105)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
A New Tax System (Family Assistance) (Administration) Act 1999, s 25									
Provide information	Where anything happens, or a claimant becomes aware that anything is likely to happen, that causes the claimant to cease to be eligible for a family tax benefit or becomes eligible for a lesser rate	A person	Information must relate to an event or change of circumstances	Secretary	Secretary must approve a manner of notification that a claimant is to use and must notify the claimant of the approved manner of notification	As soon as practicable after the claimant becomes aware that the event or change has happened or is likely to happen	Not specified	Not specified	Merits review available: Secretary (s 105), SSAT (s 111), AAT (s 142)
A New Tax System (Family Assistance) (Administration) Act 1999, s 56C									
Provide information	Where anything happens, or a claimant becomes aware that anything is likely to happen, that causes the claimant to cease to be conditionally entitled to a child care benefit	A person	Information must relate to an event or change of circumstances	Secretary	Secretary must approve a manner of notification that a claimant is to use and must notify the claimant of the approved manner of notification	As soon as practicable after the claimant becomes aware that the event or change has happened or is likely to happen	Not specified	Not specified	Merits review available: Secretary (s 105), SSAT (s 111), AAT (s 142)
A New Tax System (Family Assistance) (Administration) Act 1999, s 219K									
Enter premises	To inspect records	An approved child care service or former operator of an approved child care provider	Authorised officer is not authorised to enter premises or remain on premises without consent and must produce an identity card if requested	An authorised officer	Not specified	Not specified	Not specified	Not specified	Merits review available: Secretary (s 105), SSAT (s 111), AAT (s 142)
A New Tax System (Family Assistance) (Administration) Act 1999, s 219L									
Produce records	An approved child care service must keep records outlined in s 219F(1)	An approved child care service or former operator of an approved child care provider	The occupier, or another person who apparently represents the occupier, must assist the officer with all reasonable facilities and assistance	An authorised officer	Not specified	Not specified	Not specified	Not specified	Merits review available: Secretary (s 105), SSAT (s 111), AAT (s 142)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
A New Tax System (Family Assistance) (Administration) Act 1999, s 219N									
Provide report	Where the child care service provides care to a child the service must provide to the Secretary a report	An approved child care service	Report is to be in the form and manner approved by the Secretary	Secretary	Not specified	Report must be provided to the Secretary some time during the next reporting period	Not specified	Not specified	Merits review available: Secretary (s 105), SSAT (s 111), AAT (s 142)
A New Tax System (Family Assistance) (Administration) Act 1999, ss 26A and 57A									
Provide information	Claimant determined to be entitled to a payment but has not nominated a bank account	A person	Information must be the person's bank account details	Secretary	Need not be in writing	28 days	Not specified	Not specified	Merits review available: Secretary (s 105), SSAT (s 111), AAT (s 142)
A New Tax System (Family Assistance) (Administration) Act 1999, s 57F									
Provide information	Claimant determined to be conditionally eligible for child care benefit by fee reduction	A person	Information must be specified in a data verification form accompanying notice	Secretary	Require written notice. Specify time required for form to be returned	Not specified	Not specified	Not specified	Merits review available: Secretary (s 105), SSAT (s 111), AAT (s 142)
A New Tax System (Family Assistance) (Administration) Act 1999, s 219TJ									
Provide information	Where an event or change of circumstances is likely to affect the ability of the nominee to act as a nominee	A nominee of a person	Information must relate to an event or change of circumstances	Secretary	Require written notice. Specify manner and time for providing information	At least 14 days except for any proposal by nominee to leave Australia	Not specified	Not specified	Merits review available: Secretary (s 105), SSAT (s 111), AAT (s 142)
A New Tax System (Family Assistance) (Administration) Act 1999, s 219TK									
Provide statement	For matter relating to nominee's disposal of money paid to nominee on behalf of a person	A payment nominee	Statement must be about a matter relating to disposal of money paid to nominee on behalf of a person	Secretary	Require written notice. Specify manner and time for giving statement	At least 14 days	Reasonable excuse defence (s 219TK(8)). No specific abrogation of the privilege	Reasonable excuse defence (s 219TK(8)). No specific abrogation of the privilege	Merits review available: Secretary (s 105), SSAT (s 111), AAT (s 142)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Farm Household Support Act 1992, s 54									
Provide information, produce documents	Secretary considers information may be relevant to questions relating to entitlement and rates of payment for farm household support	A person	Information must be relevant to entitlement and rates of payment for farm household support, exceptional circumstances support, dairy exit payment	Secretary	Specify time, manner and officer for providing information and specify notice given under this section	At least 14 days	Reasonable excuse defence (s 54(7A)). No specific abrogation of the privilege	Reasonable excuse defence (s 54(7A)). No specific abrogation of the privilege	Merits review available: Secretary (s 126 SS (Admin) Act 1999), SSAT (s 142 SS (Admin) Act 1999), AAT (s 179 SS (Admin) Act 1999)
Social Security (Administration) Act 1999, s 192									
Provide information, produce documents	Secretary considers information may be relevant to question relating to entitlement and rates of payment for social security	A person	Information must be relevant to questions relating to entitlement and rates of payment for social security, including allowances	Secretary	Specify time, manner and officer for providing information and specify that notice is given under s 196. The notice may require the person to provide the information by appearing before a specified officer to answer questions	At least 14 days (s 196)	Reasonable excuse defence (s 197). No specific abrogation of the privilege	Reasonable excuse defence (s 197). No specific abrogation of the privilege	Not reviewable by SSAT (s 144). Secretary may review decision on own initiative if satisfied of sufficient reason (s 126)
Social Security (Administration) Act 1999, s 193									
Provide information, produce documents	To determine financial circumstances of debtor to Commonwealth and be informed of debtor's change of address	A person who owes a debt under social security law or the *Farm Household Support Act 1992*	Information relevant to financial situation or change of address	Secretary	Specify time, manner and officer for providing information and specify that notice is given under s 196. The notice may require the person to provide the information by appearing before a specified officer to answer questions	At least 14 days (s 196)	Reasonable excuse defence (s 197). No specific abrogation of the privilege	Reasonable excuse defence (s 197). No specific abrogation of the privilege	Not reviewable by SSAT (s 144). Secretary may review decision on own initiative if satisfied of sufficient reason (s 126)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Social Security (Administration) Act 1999, s 194									
Provide information, produce documents	Secretary believes person may have information or document that would help locate debtor to the Commonwealth or is relevant to the debtor's financial situation	A person	Information must be relevant to the location or financial situation of the person	Secretary	Specify time, manner and officer for giving information and specify that notice is given under s 196. The notice may require the person to give the information by appearing before a specified officer to answer questions	At least 14 days (s 196)	Reasonable excuse defence (s 197). No specific abrogation of the privilege	Reasonable excuse defence (s 197). No specific abrogation of the privilege	Not reviewable by SSAT (s 144). Secretary may review decision on own initiative if satisfied of sufficient reason (s 126)
Social Security (Administration) Act 1999, s 195									
Provide information	To determine entitlements to social security payments, including when payments are wrongfully made	A person	Information must be about a class of persons and must include only specified types of data (e.g. name, address, marital status, education, employment). All information determined to be not relevant must be destroyed after 13 weeks	Secretary	Specify time, manner and officer for giving information and specify that notice is given under s 196. The notice may require the person to give the information by appearing before a specified officer to answer questions	At least 14 days (s 196)	Reasonable excuse defence (s 197). No specific abrogation of the privilege	Reasonable excuse defence (s 197). No specific abrogation of the privilege	Not reviewable by SSAT (s 144). Secretary may review decision on own initiative if satisfied of sufficient reason (s 126)
Social Security (Administration) Act 1999, ss 63 and 64									
Provide information, answer questions, attend for examination	Secretary is of the opinion that a person should provide various types of information	A person who is receiving or has made a claim for a social security payment	Information must relate to certain types of information. Section 64 allows for medical examinations	Secretary	Must inform person of the effect of the section	Not specified	Reasonable excuse defence (s 74)	Only required to take reasonable steps to comply	Merits review available: Secretary (s 126), SSAT (s 142), AAT (s 179)
Social Security (Administration) Act 1999, s 70									
Provide information	To be informed of care receiver's change of circumstances	A care receiver or a parent of a care receiver	Information must be about a specified event or change in circumstances	Secretary	Notice to specify time and manner for giving information	At least 14 days after the event or change in circumstances (s 72)	Reasonable excuse defence (s 74). No specific abrogation of the privilege	Reasonable excuse defence (s 74). No specific abrogation of the privilege	Secretary (s 126), SSAT and AAT review not available (s 144(kk))

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Social Security (Administration) Act 1999, ss 67, 68 and 69									
Provide information	Where an event, change of circumstances or matter might affect or have affected payment or qualification for a concession card	A person who is a claimant, recipient or former recipient of a social security payment or concession card	For events and circumstances (but not matters): must be one that might affect or has affected payment or eligibility for payment. For a former recipient, not required to comply if event or change occurred more than 13 weeks before the giving of notice (s 69)	Secretary	Specify time and manner of providing information	At least 7 days for some types of information and at least 14 days for other types (s 72)	Reasonable excuse defence (s 74). No specific abrogation of the privilege	Reasonable excuse defence (s 74). No specific abrogation of the privilege	Secretary (s 126), SSAT and AAT review not available (s 144(k))
Social Security Act 1991, s 92F									
Provide information	In the course of an application for registration as member of the pension bonus scheme	A person who has applied for registration	Section defines what information can be sought but the definition is not exhaustive	Secretary	Specify period for providing information	At least 14 days	Not specified	Not specified	Merits review available: Secretary (s 126 SS (Admin) Act 1999), SSAT (s 142 SS (Admin) Act 1999), AAT (s 179 SS (Admin) Act 1999)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Social Security Act 1991, s 1061ZJ									
Provide a copy of tax assessment	Not specified. Division 2 of Part 2A concerns qualification for senior health card	A person who holds a seniors health card	Applies only to notice of assessment or amended assessment	Secretary	Not specified	Within 13 weeks of receipt of tax assessment notice	Not specified	Not specified	Merits review available: Secretary (s 126 SS (Admin) Act 1999), SSAT (s 142 SS (Admin) Act 1999), AAT (s 179 SS (Admin) Act 1999)
Social Security Act 1991, s 1061ZZBR									
Provide information	Where an event or change of circumstance might affect the payment of financial supplement. (s 1061ZZBS)	A person who is a 'category 2' student receiving financial supplement	Only information relating to event or change that may affect the payment of financial supplement (s 1061ZZBS)	Secretary	Requires written notice. Specify time and manner of providing information and specify it is a 'recipient notification notice' (s 1061ZZBT)	14 days or 15 to 28 days in special circumstances (s 1061 ZZBV)	Reasonable excuse defence (s 1061ZZ BW). No specific abrogation of the privilege	Reasonable excuse defence (s 1061ZZ BW). No specific abrogation of the privilege	Merits review available: Secretary (s 126 SS (Admin) Act 1999), SSAT (s 142 SS (Admin) Act 1999), AAT (s 179 SS (Admin) Act 1999)
Social Security Act 1991, s 1061ZZBY									
Provide statement	Where a matter might affect the payment of financial supplement	A person who is a 'category 2' student receiving financial supplement	Only information relating to a matter that may affect payment of financial supplement	Secretary	Requires written notice. Specify time and manner of providing information and specify it is a 'recipient statement notice' (s 1061ZZBZ)	At least 14 days (s 1061 ZZCB)	Reasonable excuse defence (s 1061ZZ CD). No specific abrogation of the privilege	Reasonable excuse defence (s 1061ZZ CD). No specific abrogation of the privilege	Merits review available: Secretary (s 126 SS (Admin) Act 1999), SSAT (s 142 SS (Admin) Act 1999), AAT (s 179 SS (Admin) Act 1999)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Social Security Act 1991, s 1209H									
Provide information	Reason to believe Commissioner of Taxation has information relevant to Part 3.18 or relationship between an individual and a trust is relevant to Part 3.18	Issued to the Commissioner of Taxation	Information must be relevant to Part 3.18 of the Act (Means test treatment of private companies and trusts). Use of information is limited by s 1209H(5)	Secretary	Notice must be in writing	Not specified	Not specified	Not specified	Not specified
Student Assistance Act 1973, s 343									
Provide information, produce documents	Secretary considers information may be relevant to student assistance entitlement and rate of payment	A person	Not specified	Secretary	Specify time, manner and officer for providing information or time and place for giving evidence (s 347)	At least 14 days (s 347)	Reasonable excuse defence (s 347). No specific abrogation of the privilege	Reasonable excuse defence (s 347). No specific abrogation of the privilege	Not reviewable by SSAT (s 313). Review by Secretary if satisfied of sufficient reason to review (s 303)
Student Assistance Act 1973, s 344									
Provide information, produce documents	Determine financial circumstances of debtor to the Commonwealth, be informed of debtor's change of address	A person who owes a debt in relation to a student assistance benefit	Information must be relevant to financial situation or change of address	Secretary	Specify time, manner and officer for providing information or time and place for giving evidence (s 347)	At least 14 days (s 347)	Reasonable excuse defence (s 347). No specific abrogation of the privilege	Reasonable excuse defence (s 347). No specific abrogation of the privilege	Merits review available: Secretary (s 303), SSAT (s 309), AAT (s 324)
Student Assistance Act 1973, s 345									
Provide information, produce documents	Secretary believes person may have information or document relating to debtor to the Commonwealth	A person	Information must be relevant to financial situation or location of a debtor	Secretary	Specify time, manner and officer for providing information or time and place for giving evidence (s 347)	At least 14 days (s 347)	Reasonable excuse defence (s 347). No specific abrogation of the privilege	Reasonable excuse defence (s 347). No specific abrogation of the privilege	Not reviewable by SSAT (s 313). Review by Secretary if satisfied of sufficient reason to review (s 303)

Type of power	Reasons for use	Power used against	Limitations	Who has the power	Contents of notice	Notice period	Privilege against self-incrimination	Legal professional privilege	Review rights
Medicare									
Medicare Australia Act 1973, s 8P									
Provide information, produce documents	Reasonable grounds for believing an offence has been or is being committed and that information or document is relevant	A person	Not required to produce records containing a patient's clinical details (s 8P(3) subject to exceptions (s 8P(4))	An authorised officer	Specify time, manner and officer for providing information or time and place for giving evidence (s 8Q)	At least 14 days (s 8Q)	Not available. Use immunity for evidence or information in criminal proceedings (s 8S)	Reasonable excuse defence (s 8R). No specific abrogation of the privilege	Not specified

ATTACHMENT D: S.127 ORDERS

Case Name	Order Made Yes/ No
Leighton Kumagai Joint Venture v Construction, Forestry, Mining and Energy Union - PR972196 [2006] AIRC 280 (9 May 2006) Leighton Kumagai Joint Venture v Construction, Forestry, Mining and Energy Union - PR966077 [2005] AIRC 1035 (6 December 2005) [62%	appeal by the CFMEU from decision and order made on 6 Dec 2005 did not warrant the grant of leave. Yes
Construction, Forestry, Mining and Energy Union v Euroform (Australia) Pty Ltd and Southgate Formwork (Aust) Pty Ltd - PR969024 [2006] AIRC 164 (16 March 2006)	Yes order given, appeal by the CFMEU did not warrant the grant of leave
Thiess Pty Ltd v Construction, Forestry, Mining and Energy Union - PR967890 [2006] AIRC 49 (25 January 2006)	Yes
Oaky Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union - PR965255 [2005] AIRC 988 (16 November 2005)	Yes
Oaky Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union - PR962610 [2005] AIRC 798 (14 September 2005)	Yes
Anglo Coal (Capcoal Management) Pty Ltd v Construction, Forestry, Mining and Energy Union and another - PR962434 [2005] AIRC 783 (9 September 2005)	Yes
Downer Energy Systems Pty Ltd and others v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and another - PR960315 [2005] AIRC 634 (18 July 2005)	Yes
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union and others - PR958684 [2005] AIRC 503 (7 June 2005)	Yes
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union and others - PR958512 [2005] AIRC 484 (1 June 2005)	Yes
Westpoint Constructions Pty Ltd v Construction, Forestry, Mining and Energy Union - PR958019 [2005] AIRC 423 (13 May 2005)	Yes
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union - PR957617 [2005] AIRC 360 (27 April 2005)	Yes

Case Name	Order Made Yes/ No
Thiess Hochtief Joint Venture - re Application to stop or prevent industrial action - PR956687 [2005] AIRC 244 (21 March 2005)	Yes
Thiess Hochtief Joint Venture - re Interim .127(3) orders - PR956375 [2005] AIRC 203 (9 March 2005)	No
Endeavour Coal Pty Limited - re Industrial action at West Cliff Colliery - PR956092 [2005] AIRC 165 (25 February 2005)	Yes
Centennial Mandalong Pty Limited - re Industrial action at Cooranbong Colliery - PR956103 [2005] AIRC 164 (25 February 2005)	Yes
Westpoint Constructions Pty Ltd v Construction, Forestry, Mining and Energy Union and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union - PR955285 [2005] AIRC 62 (25 January 2005)	Yes
North Goonyella Coal Mines Ltd v Construction, Forestry, Mining and Energy Union - PR955194 [2005] AIRC 57 (21 January 2005)	Yes
Anglo Coal (Moranbah North Management) Pty Ltd v Construction, Forestry, Mining and Energy Union - PR954946 [2005] AIRC 25 (12 January 2005)	Yes
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union - PR954897 [2005] AIRC 18 (11 January 2005)	Yes
Barclay Mowlem Construction Limited - re Industrial action at the Thornlie Railway Station and Bridges Project - PR954545 [2004] AIRC 1306 (20 December 2004)	Yes
Thiess Hochtief Joint Venture (THJV) v Construction, Forestry, Mining and Energy Union - PR953907 [2004] AIRC 1219 (2 December 2004)	Yes
Grocon Constructors Pty Ltd and another - re Application to stop or prevent industrial action - PR953205 [2004] AIRC 1120 (12 November 2004)	Yes
Orica Australia Pty Ltd v Construction, Forestry, Mining and Energy Union - PR953118 [2004] AIRC 1110 (10 November 2004)	Yes
Lothways - TBS Pty Ltd v CFMEU - PR952769 [2004] AIRC 1058 (28 October 2004)	Yes
Grocon Constructors Pty Ltd and Grocon Developments Pty Ltd v Construction, Forestry, Mining and Energy Union - PR9526178 [2004] AIRC 1027 (21 October 2004)	Yes

Case Name	Order Made Yes/ No
Grocon Constructors Pty Ltd v Construction, Forestry, Mining and Energy Union - PR952441 [2004] AIRC 993 (12 October 2004) Grocon Constructors Pty Ltd - re Application to stop or prevent industrial action - PR950125 [2004] AIRC 736 (28 July 2004)	Appeal from decision and order made on 28 July 2004 by the CFMEU did not warrant the grant of leave Yes
Centennial Newstan Pty Limited - re Industrial action at Awaba Colliery - PR952187 [2004] AIRC 955 (28 September 2004)	Yes
Oaky Creek Coal Pty Ltd and Construction, Forestry, Mining and Energy Union - re Industrial action at Oaky North Underground Coal Mine - PR951176 [2004] AIRC 824 (20 August 2004)	Yes
Grocon Constructors Pty Ltd - re Alleged industrial action at the RACV project site - PR950827 [2004] AIRC 794 (13 August 2004)	Yes
United KG Pty Ltd and AMWU, CEPU,Total Corrosion Control Pty Ltd and AMWU - re Industrial action at the Alcoa World Alumina Australia Pinjarra Refinery at Pinjarra - PR950353 [2004] AIRC 759 (2 August 2004)	Yes
Grocon Constructors Pty Ltd - re Application to extend an order to stop or prevent industrial action - PR950193 [2004] AIRC 735 (28 July 2004)	Application to extend an existing order, application was refused
Cleary Bros (Bombo) Pty Ltd and Construction, Forestry, Mining and Energy Union - re Industrial action - PR947808 [2004] AIRC 567 (9 June 2004)	Yes
Endeavour Coal Pty Ltd - re Industrial action at West Cliff Colliery - PR947825 [2004] AIRC 568 (9 June 2004)	Yes
Thiess Pty Ltd v Construction, Forestry, Mining and Energy Union - PR946734 [2004] AIRC 464 (14 May 2004)	Yes
Oaky Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union - PR945636 [2004] AIRC 351 (8 April 2004)	Yes
Grocon Constructors Pty Ltd - re Application to stop or prevent industrial action - PR944890 [2004] AIRC 256 (22 March 2004)	Yes

Case Name	Order Made Yes/ No
Anglo Coal (Moranbah North Management) Pty Ltd v Construction, Forestry, Mining and Energy Union - PR943309 [2004] AIRC 94 (4 February 2004)	Yes
Boral Formwork Scaffolding v Construction, Forestry, Mining and Energy Union - PR943282 [2004] AIRC 96 (4 February 2004)	Yes
Anglo Coal (Capcoal Management) Pty Ltd v Construction, Forestry, Mining and Energy Union and others - PR942776 [2004] AIRC 49 (16 January 2004)	Yes
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union - PR941573 [2003] AIRC 1508 (4 December 2003)	Yes
Warkworth Mining Limited v Construction, Forestry, Mining and Energy Union - PR939934 [2003] AIRC 1334 (28 October 2003)	Yes
The Master Builders Association of New South Wales, Victoria and the Australian Capital Territory v The Construction, Forestry, Mining and Energy Union and Others re National Building and Construction Industry Award 2000 - PR939102 [2003] AIRC 1251 (8 October 2003)	No
Construction, Forestry, Mining and Energy Union re The Coal Mining Industry (Production and Engineering) Consolidated Award 1997 - re Appeal - PR938334 [2003] AIRC 1191 (24 September 2003) Thiess Pty Ltd v Construction, Forestry, Mining and Energy Union re Thiess Collinsville Agreement 2001 - PR930706 [2003] AIRC 451 (29 April 2003)	order made 29 Apr 2003 upheld (appeal dismissed) Yes
North Goonyella Coal Mines Pty Ltd v Construction, Forestry, Mining and Energy Union - PR937387 [2003] AIRC 1096 (3 September 2003)	Yes
Oaky Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union - PR937218 [2003] AIRC 1068 (29 August 2003)	No
BHP Coal Pty Ltd and Anglo Coal Pty Ltd and others v Construction, Forestry, Mining and Energy Union - PR936131 [2003] AIRC 965 (12 August 2003)	Yes
BHP Coal Pty Ltd, Anglo Coal Pty Ltd and others v Construction, Forestry, Mining and Energy Union and others - PR935755 [2003] AIRC 938 (5 August 2003)	Yes

Case Name	Order Made Yes/ No
Consolidated Constructions Pty Ltd - re Application for order to stop industrial action - PR934964 [2003] AIRC 851 (18 July 2003)	Yes
John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union and others - PR933518 [2003] AIRC 714 (25 June 2003)	No
Anglo Coal (Capcoal Management) Pty Limited v Construction, Forestry, Mining and Energy Union - PR931978 [2003] AIRC 549 (23 May 2003)	No
Carlton and United Breweries Ltd v Construction, Forestry, Mining and Energy Union - PR930894 [2003] AIRC 461 (1 May 2003)	No
John Holland Pty Ltd v CFMEU - PR927312 [2003] AIRC 100 (4 February 2003)	No
Thiess Pty Ltd v Construction, Forestry, Mining and Energy Union - PR926866 [2003] AIRC 56 (20 January 2003)	Yes
Capricorn Coal Management Pty Ltd v Construction, Forestry, Mining and Energy Union - PR925819 [2002] AIRC 1548 (16 December 2002)	Yes
United Collieries Pty Ltd v Construction, Forestry, Mining and Energy Union - PR925399 [2002] AIRC 1494 (6 December 2002)	Yes
Bulga Coal Management Pty Limited - re Application for order to stop or prevent industrial action - PR925243 [2002] AIRC 1467 (2 December 2002)	Yes
Mirvac Constructions - re s.127(2) application to stop or prevent industrial action - PR924788 [2002] AIRC 1410 (19 November 2002)	No
Grocon Constructors Pty Ltd - re Industrial action affecting the company's Melbourne projects - PR924597 [2002] AIRC 1370 (12 November 2002)	Yes
Eptec Victoria Pty Ltd - re Industrial action - PR924304 [2002] AIRC 1347 (6 November 2002)	Yes
Pentroth Pty Ltd re National Building and Construction Industry Award 2000 - re Industrial action - PR923667 [2002] AIRC 1241 (15 October 2002)	Yes
Capricorn Coal Management Pty Ltd v Construction, Forestry, Mining and Energy Union - PR923622 [2002] AIRC 1230 (14 October 2002)	Yes

Case Name	Order Made Yes/ No
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union - PR923156 [2002] AIRC 1177 (1 October 2002)	No
North Goonyella Coal Mines Pty Ltd v Construction, Forestry, Mining and Energy Union - PR922945 [2002] AIRC 1170 (27 September 2002)	Yes
Master Builders Association of New South Wales v Construction, Forestry, Mining and Energy Union and others re National Building and Construction Industry Award 2000 - PR921925 [2002] AIRC 1039 (29 August 2002)	No
John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union - PR920608 [2002] AIRC 869 (26 July 2002)	No
Capricorn Coal Pty Ltd v Construction, Forestry, Mining and Energy Union - PR919661 [2002] AIRC 742 (2 July 2002)	Yes
Hay Point Services Pty Ltd v CFMEU and others - PR917506 [2002] AIRC 521 (7 May 2002)	Yes
Becon Constructions Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia and Construction, Forestry, Mining and Energy Union; Saizeriya Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia and Construction, Forestry, Mining and Energy Union - PR909039 [2001] AIRC 939 (17 September 2001)	Yes
H W Thompson Pty Ltd v Construction, Forestry, Mining and Energy Union - PR908721 [2001] AIRC 906 (6 September 2001)	No
Holden Limited - re Order to stop or prevent industrial action - PR908469 [2001] AIRC 885 (31 August 2001)	No
BHP Steel (AIS) Pty Ltd - re Application to stop or prevent industrial action - PR906630 [2001] AIRC 711 (17 July 2001)	Yes
Built Environs Pty Ltd - re Application by Built Environs Pty Ltd for an order to stop or prevent industrial action by the CEPU and CFMEU - PR905184 [2001] AIRC 568 (13 June 2001)	Yes

Case Name	Order Made Yes/ No
Construction, Forestry, Mining and Energy Union re Coal Mining Industry (Production and Engineering) Consolidated Award 1997 - re Appeal against an order to stop or prevent industrial action made under section 127 of the Workplace Relations Act 1996 - PR903906 [2001] AIRC 427 (3 May 2001) Allied Mining Australia Pty Ltd - re Industrial action - PR901005 [2001] AIRC 95 (8 February 2001)	Yes, leave to appeal was refused
South Blackwater Coal Ltd v BHP Coal Pty Ltd - PR900672 [2001] AIRC 68 (25 January 2001)	Yes
Peabody Moura Service Company Pty Ltd - re industrial action - T0025 [2000] AIRC 262 (31 August 2000)	Yes
South Blackwater Coal Ltd v CFMEU and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia - S9023 [2000] AIRC 172 (9 August 2000)	Yes
North Goonyella Coal Mines Limited v CFMEU - S8507 [2000] AIRC 101 (24 July 2000)	Yes
BHP Coal Pty Ltd v CFMEU - T3264 [2000] AIRC 526 (8 November 2000)	No
Callide Coalfields Pty Ltd v CFMEU - T3231 [2000] AIRC 527 (8 November 2000)	Yes
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia - T1143 [2000] AIRC 343 (26 September 2000)	Yes CFMEU Appeal Unsuccessful
BHP Coal Pty Ltd - re industrial action - T0166 [2000] AIRC 269 (1 September 2000)	Yes
Moranbah North Coal (Management) Pty Ltd; Callide Coalfields Pty Ltd - re industrial action - T0028 [2000] AIRC 258 (31 August 2000)	No
South Blackwater Coal Ltd v CFMEU and Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia - S9023 [2000] AIRC 172 (9 August 2000)	Yes

ATTACHMENT E: CASE SUMMARIES

DECISIONS

Case name	*Alfred v Primmer, CFMEU & Ors*
Decision date	2 March 2009
Court	Federal Magistrates
Basis / Facts	➢ Background: In November 2005, the Department of Commerce NSW awarded a contract for the upgrade of Kiama High School, Kiama NSW. The head contractor subcontracted the painting work to an independent contractor (IC). On 14 September 2006, CFMEU organiser Peter Primmer demanded that the head contractor not engage the IC because the IC was currently involved in a court action over unpaid wages. The proceeding had been commenced in April 2006 and was formally discontinued by the CFMEU (NSW) on 26 September 2006. In October 2006 Primmer entered the Kiama site and allegedly advised or encouraged the head contractor's foreman to stop the IC from continuing to work as the IC was involved in court proceedings. Primmer also allegedly threatened to stop the project if the IC continued to work. Court decision: On 3 November 2008 Federal Magistrate Cameron handed down declarations that the respondents breached section 800(1)(a) of the *Workplace Relations Act 1996.*
Penalty	A penalty hearing took place on 2 March 2009. Cameron FM imposed penalties totalling $23,500. A penalty of $3,500 was imposed on Mr Primmer and $10,000 each was imposed on the CFMEU and CFMEU (NSW).
Site	Kiama High School

Case name	*Alfred v Quirk*
Decision date	16 December 2008
Court	AIRC
Basis / Facts	➢ Background: The ABCC applied to the AIRC to have CFMEU official Andrew Quirk's permit revoked. The application was made under section 770 of the Workplace Relations Act 1996 (WR Act) for alleged abuse of Part 15 of the WR Act, in breach of section 770 (1) of the WR Act. It was alleged that Mr Quirk abused the right of entry system on 3 and 4 October 2007 at a Hansen Yuncken worksite in Castle Hill by: • failing to give a minimum 24 hours notice; • failing to hold discussions with employees and erecting posters promoting union membership instead; • failing to show his permit on request; • failing to hold discussions with employees in the designated area; and • acting aggressively and abusively towards employees. ➢ Court Decision: On 1 December 2008 Senior Deputy President Lacy found that CFMEU official Andrew Quirk abused the right of entry conferred by section 760 of the *Workplace Relations Act 1996* during the course of a visit to the Castle Hill building site of Hansen & Yuncken on 4 October 2007.
Penalty	On 16 December SDP Lacy ordered that Mr Quirk's right of entry permit be suspended for one month. The order does not take effect unless Mr Quirk, within the period ending three months from the date of the order is proved to have again abused his rights and responsibilities under Part 15 of the WR Act. Mr Quirk must also lodge a verified certificate with the ABCC stating that he has had his rights and responsibilities under Part 15 explained to him
Site	Hansen Yuncken site Castle Hill

Case name	*Alfred v Wakelin, O'Connor, CFMEU, AWU and AWU (NSW)*
Decision date	26 March 2009
Court	Federal Court
Basis / Facts	➢ Background: The owner of the Cowal gold mine at Lake Cowal in NSW engaged a head contactor to carry out a construction project at the mine. The head contractor employed up to 300 workers on the site. For three days from 15 to 17 October 2005, unlawful industrial action was allegedly engaged in by O'Connor, the AWU and AWU (NSW) over food and hygiene standards at the kitchen and mess at the camp. On 10 November 2005 at 10.30am, workers attended an authorised stop work meeting. The meeting exceeded the authorised time and the head contractor instructed the employees to return to work. Despite this, the employees who had attended the meeting did not return to work until 6.30am on 11 November 2005. It was alleged that both the CFMEU and AWU were involved. ➢ Court Decision: On 17 September 2008 it was found that the AWU, AWU (NSW) and their delegate Joseph O'Connor contravened the *Building and Construction Industry Improvement Act 2005*, the *Workplace Relations Act 1996* and the relevant certified agreement by engaging in unlawful industrial action.
Penalty	On 25 September 2008, Jagot J. imposed a penalty of $1,100 on Robert Wakelin and $8,000 on the CFMEU in respect of the unlawful industrial action on 10 November 2005. On 26 March 2009 Jagot J handed down the following penalties in respect of the contraventions: • Mr Joseph O'Connor: Contravened s.38 of the BCII Act and ss.170MN and 178 WR Act. October stoppage: $6,500; November stoppage: $2,500 - **Total $9,000** • AWU Federal: Contravened s.38 of the BCII Act and ss.170MN and 178 WR Act. October stoppage: $20,000; November stoppage: $8,000 - **Total $28,000** • AWU - NSW: Contravened s.38 of the BCII Act. October stoppage: $12,500; November stoppage: $5,500 - **Total $18,000**
Site	Lake Cowal gold mine

Case name	A & L Silvestri Pty Ltd & Hadgkiss v CFMEU, CFMEU NSW, Lane, Primmer and Kelly
Decision date	11 April 2008
Court	Federal
Basis / Facts	➢ Background: The ABCC instituted proceedings alleging that in October 2003, the Federal CFMEU, the NSW branch of the CFMEU and three organisers, Michael Lane, Peter Primmer and David Kelly, took unprotected industrial action and threatened further industrial disruption against a head contractor and an earthmoving subcontractor on a Wollongong site because they did not have industrial agreements with the CFMEU. The ABCC also alleged that the unions and the officials also threatened to shut down the site if the subcontractor was not removed. ➢ Court decision: Liability: CMFEU and CFMEU NSW contravened s. 170 NC, s 45 D and induced a breach of the conduct between LGB and Silvestry P/L.
Penalty	CFMEU $5,500, Lane $1,800 in penalties. CFMEU and CFMEU NSW $32,554.77 in damages. CFMEU and CFMEU (NSW) branch ordered to pay A&L Silvestri's costs of proving damages claimed
Site	Wollongong building site

Case name	*Hadgkiss v CFMEU, CFMEU (NSW branch), Casper and Lane*
Decision date	26 March 2007, 5 March 2008, 14 July 2008, 27 July 2008, 26 February 2009
Court	Federal
Basis / Facts	➢ Background: The ABCC alleged that during January and February 2004, the Federal CFMEU, the NSW Branch of the CFMEU and two officers, Edmond Casper and Michael Lane, breached the *Workplace Relations Act 1996* (WR Act) when they made false and misleading statements to several plasterers that they were obliged to join a union to work on building sites at Fairy Meadow or Wollongong. The ABCC also alleged that the officers threatened the contractor, who had hired the plasterers, to coerce it into making a union certified agreement. As a result the plasterers were asked to leave one site and did not obtain alternative work for some time. Over 16 days from 17 July to 11 December 2006, this matter was heard in the Federal Court, with Justice Graham reserving his decision. On 9 February 2007, the court found that the officials had breached the former WR Act by making false and misleading statements. The decision on penalties and other orders was reserved until 26 March 2007. ➢ Court decision: On 26 March 2007, Justice Graham ordered that declarations be made and penalties imposed in relation to the false and misleading statements made by Casper and Lane to workers that they were obliged to join the union in order to work on the building sites. These were breaches of s298SC(c) of the WR Act, which guarantee freedom of association to employees and independent contractors Justice Graham made the following orders: • CFMEU delegate, Casper to pay a penalty of $1,250 • CFMEU official Lane to pay a total penalty of $2,000 • The Federal CFMEU to pay a total penalty of $10,000 • The CFMEU NSW State branch to pay a total penalty of $10,000 The judge also ordered that both the State and Federal CFMEU destroy all copies of the CFMEU Code of Conduct for Union Delegates that contains the following words, or words to the effect: "*To ensure that all workers on site are financial members of the relevant union"* Finally the judge ordered each of the unions to publish, at its own expense, on or before 20 April 2007, a full page advertisement correcting their false and

misleading statements in the local newspaper, the *Illawarra Mercury*.

The advertisements are to advise the public:

• that workers have a choice about joining a union; and
• that workers do not have to be a member of a union to work on a site.

These advertisements also need to communicate that they arose from a finding by the Federal Court that a union delegate and a representative had made false and misleading statements to workers at local building sites.

Both the ABCC and the unions have appealed various parts of the judge's decision and the imposition of these penalties are stayed until the CFMEU appeal is decided.

ABCC Appeal to the Full Court of the Federal Court - 5 March 2008

On 5 March 2008, the Full Court of the Federal Court upheld parts A and B of the ABCC's appeal as outlined below. The appeal of part C was dismissed.

A. On 17 February 2004, Mr Lane made a false and misleading statement to the Pro Finish foreman about the obligation of four plasterers to join the union;
B. On 18 February 2004, Casper advised, encouraged or incited Innovation Interiors Pty Ltd to refuse to make use of the services of five plasterers because they were not members of the union; and
C. On 17 February 2004, Mr Lane threatened to take industrial or other action with the intention to coerce the foreman of Pro Finish and Pro Finish to make an EBA with the union.

On 14 July 2008, Justice Graham of the Federal Court imposed additional penalties on the CFMEU, CFMEU (NSW Branch) and Mr Lane for making a false and misleading statement. The statement was made to a Pro Finish foreman about the obligation of four plasterers to join the union.

The CFMEU and CFMEU (NSW Branch) were each penalised an additional $5,000, taking the total penalty imposed against them to $15,000 each. Mr Lane was penalised an additional $2,000, the maximum penalty at the time of the contravention. He had already been ordered to pay $2,000 by Graham J in the earlier judgment.

Justice Graham dismissed claims by the ABCC that Mr Casper had coerced Innovation Interiors to refuse to use the services of five plasterers because they were not union members.

Appeal by the CFMEU, CFMEU (NSW), Casper and Lane

The CFMEU, CFMEU (NSW), Casper and Lane also appealed to the Full Court of the Federal Court.

On 26 February 2009 the Full Court unanimously dismissed the CFMEU's

	appeal against the severity of a $1,250 penalty imposed on Mr Edmond Casper. The union previously withdrew its appeal against the $34,000 imposed on the CFMEU, CFMEU (NSW) and Mr Michael Lane. The Full Court overturned Justice Graham's earlier orders to destroy copies of the CFMEU delegate's code of conduct and publish a full page advertisement in the Illawarra Mercury.
Penalty	CFMEU $15,000, CFMEU (NSW) $15,000, Lane $4000, Casper $1250, corrective advertising, document destruction
Site	Northgate and City Beach Apartments

Case name	*Hadgkiss v En Won Lee*
Decision date	Proceedings discontinued 10 Dec 2007
Court	AIRC
Basis	➢ Background: The ABCC commenced proceedings against CFMEU official En Won Lee, seeking revocation of his entry permit due to alleged conduct at the Conrod Straight building site at Mt Panorama, Bathurst. It is alleged that on 16 May 2007 Mr Lee abused the rights conferred by his permit by, amongst other things, acting in an improper manner and compromising occupational health and safety. ➢ Status: The proceedings have been formally discontinued because Mr Lee resigned from the CFMEU, effective 23 November 2007, and surrendered his permit on 7 December 2007.
Penalty	
Site	Conrod Straight, Mt Panorama, Bathurst

Case name	*Cahill v CFMEU, Setka and Tadic*
Decision date	11 April 2008
Court	Federal
Basis / Facts	➢ Background: The ABCC alleges that from the period 11 May to 18 May 2004 workers at the Herald Weekly Times site engaged in industrial action. The industrial action involved an initial 48 hour stoppage by employees after a concrete spill on site. Further, on 13 May 2004 under the direction of CFMEU union officials, John Setka and Alex Tadic, employees failed or refused to return to work in order to coerce the contractor to pay workers for the 48 hour stoppage and the following period of industrial action. ➢ Court decision: The respondents have admitted to contraventions of s187AB of the pre-reform WR Act and signed an agreed statement of facts. On 11 April a penalty of $4,000 was imposed on the CFMEU.
Penalty	CFMEU $4,000
Site	Herald Weekly Times site

Case name	*Carr v AMWU, Mulipola, Eiffe, Thomas and Mansour*
Decision date	4 November 2005
Court	Federal
Basis / Facts	➢ Background: In June 2003, the AMWU and four AMWU organisers, Ale Mulipola, Fergal Eiffe, Ian Thomas and Steve Mansour engaged in various acts on two construction sites with intent to coerce a contractor to make a certified agreement with the AMWU. The coercive conduct took place in June 2003 at two building sites at the corner of Queensberry and Swanston Streets, Carlton and the corner of Victoria Parade and Powlett Street, East Melbourne. ➢ Court decision: The Federal Court penalised the AMWU $25,000 and union organisers Ale Mulipola, Fergal Eiffe, Ian Thomas, and Steve Mansour $1,000, $600, $400 and $400 respectively for coercing a subcontractor, Engineering Directions, to make a certified agreement with the AMWU. These actions contravene section 170NC of the Workplace Relations Act 1996. Finkelstein J ordered that $20,000 of the penalty be paid to the victim company, Engineering Directions, as compensation for its losses.
Penalty	AMWU $25,000, Mulipola $1000, Eiffe $600, Thomas $400, Mansour $400
Site	

Case name	*Cozadinos v CFMEU & Johnston*
Decision date	7 May 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: In 2007, Wycombe Constructions Pty Ltd was the head contractor on the Deakin University Medical School Refurbishment Project in Waurn Ponds. Wycombe employed two labourers including CFMEU shop steward Craig Johnston. The other labourer would generally unload deliveries of building materials to the site for Wycombe subcontractor, Big Contractors Pty Ltd. Big was engaged by Wycombe to perform metal, carpentry and plastering work. Big did not employ its own labourer at the site. From early 2007, Mr Johnston had allegedly pressured directors of Big to employ a particular labourer on the site. On 19 March 2007, Peer Industries Pty delivered a load of building materials for Big. The Wycombe site manager instructed the second labourer to unload the materials. Allegedly, Mr Johnston told the labourer not to unload the materials. Mr Johnston and the other labourer also failed or refused to follow instructions from Wycombe's Construction Manager to unload the materials. Subsequently, the Peer Industries truck left the site without being unloaded. ➢ Court decision: On 7 May 2009 Burchardt FM imposed a penalty of $7,000 on Mr Johnston and $5,000 on the CFMEU for engaging in unlawful industrial action. The penalty imposed on Johnston has been formally revised to $4,600.
Penalty	CFMEU $5000, Johnston $4600
Site	Deakin University Medical School refurbishment project, Waurn Ponds

Case name	*Cozadinos v Dempster & Henry*
Date filed	27 March 2009
Court	Federal Magistrates' Court of Victoria
Basis / Facts	➢ Background: Merkon Constructions was engaged to manage the refurbishment of the World Trade Centre site at Siddley Street, Melbourne. Merkon hired AAA Passive Fire Services to carry out the fire spraying of beams at the site. On 27 July 2007, two employees of AAA Passive met with Merkon's employee representative Mr Michael Dempster for the purpose of being inducted on the site. On 27 July 2007, Michael Dempster took action against the two employees of AAA Passive with intent to coerce them to become members of the CFMEU and made false and misleading representations about their obligation to be or become members of the CFMEU. On 3 August 2007, two employees of AAA Passive attended the site and met with Merkon's "site peggy", Mr Richard Henry, for the purpose of being inducted. One of these employees was not a member of the CFMEU. On 3 August 2007, Richard Henry made false and misleading representations that the AAA employee had an obligation to be or become a member of the CFMEU. On 12 November 2008, the court ordered by consent that: • The parties file an agreed statement of facts by 14 November 2008. • The proceeding be listed for determination of the question of penalty only on 27 March 2009 at 10am. • The Court also vacated the directions hearing listed on 14 November. An agreed statement of facts has now been filed ➢ Court decision: On 27 March 2009 the Federal Magistrates Court handed down penalties of $1,000 each on Mr Dempster and Mr Henry for contravening the freedom of association provision of the *Workplace Relations Act 1996*.
Penalty	Dempster $1000, Henry $1000
Site	World Trade Centre

Case name	*Cruse v CFMEU & McLoughlin*
Decision date	9 April 2009
Court	Federal Magistrates Court Melbourne
Basis / Facts	➢ Background: The ABCC alleges that at about 10.30am on 25 September 2006, CFMEU official Adrian McLoughlin attended the Yarra Arts site and called the Yarra Arts employees to a meeting. It is alleged that following the meeting the majority of employees left the Yarra Arts site for the remainder of the day ➢ Court decision: On 9 April 2009 the Federal Magistrates' Court in Melbourne imposed penalties totalling $38,500 on the CFMEU and Mr McLoughlin. Both respondents admitted to contravening s.38 of the BCII Act by taking unlawful industrial action.
Penalty	On 9 April 2009 a penalty of $11,000 half suspended for two years was imposed on Mr McLoughlin. A penalty of $27,500 was imposed on the CFMEU.
Site	Yarra Arts, Southbank

Case name	*Cruse v CFMEU & Stewart*
Decision date	14 November 2007
Court	Federal Magistrates Court
Basis / Facts	➢ Background: The ABCC took action in the Federal Magistrates Court at Melbourne against the CFMEU and a CFMEU official Mr Colin Stewart regarding alleged unlawful industrial action involving 288 workers at the Roche Mineral Sands Separation Plant between 23 and 28 September 2005. The ABCC further alleged that the CFMEU contravened the relevant certified agreement by failing to comply with the settlement of issues procedure in the agreement. The parties filed identical statements of agreed facts on 11 October 2007. ➢ Court decision: The Federal Magistrate Court handed down its judgement on penalty on 14 November 2007 for breaches of s.38 of the BCII Act.
Penalty	CFEMU $35, 000 ; Steward $7, 000 ($3, 500 suspended)
Site	Roche Mining Sands Separation Plant

Case name	*Cruse v CFMEU, Bannister, Hoffman & Fry*
Decision date	22 August 2008
Court	Federal Court
Basis / Facts	➢ Background: The ABCC instituted proceedings against the CFMEU and CFMEU delegates Sam Fry, Robert Bannister and Barry Hoffman. The proceedings relate to conduct at the Roche Mining (JR) Pty Ltd (RMJR), Mineral Sands Separation Plant (MSP) site in Hamilton, Victoria. It is alleged that in August 2005, Mr Fry told a building contractor that he must be a member of the CFMEU and have an enterprise agreement with the CFMEU to perform work at the MSP site. It is further alleged that in July 2006, Mr Bannister and Mr Hoffman organised industrial action against RMJR with intent to coerce RMJR to terminate the contract of the building contractor. ➢ Court decision: On 22 August 2008, Federal Court Justice Marshall found that the CFMEU and CFMEU delegate Sam Fry: o contravened s.298SC(c) of the *Workplace Relations Act 1996* (WR Act) by making false and misleading statements regarding a Hamilton building contractor's obligation to join the union; and o contravened s.170NC of the WR Act by demanding that the building contractor enter into a certified agreement with the CFMEU. Justice Marshall ruled CFMEU delegates Robert Bannister and Barry Hoffman and the CFMEU did not contravene ss.43(1)(b), (c) and (d) of the *Building and Construction Industry Improvement Act 2005* (BCII Act) which relate to coercion. On 5 November 2008, in the Federal Court in Melbourne Marshall J. imposed a penalty of $4,000 on the CFMEU.
Penalty	CFMEU $4,000
Site	Roche Mining, Mineral Sands Separation Plant

Case name	*Cruse v Multiplex Constructions (Vic) Pty Ltd, CFMEU, Thorson and Costello*
Decision date	5 November 2008
Court	Federal Court
Basis / Facts	➢ Background: On 1 August 2003, a fatality occurred on a farm in Shepparton, nearly 200 kilometres from the Melbourne CBD. The union policy at the time was to stop work while the safety committee conducted safety audits on all building sites after a serious accident. This conduct is no longer union policy. On 5 August 2003, the CFMEU conducted a safety audit at Multiplex's Concept Blue Apartments Project at 336 Russell St, Melbourne. As a result of the audit and on 6 August 2003, a CFMEU shop steward, Grant Thorson organised unlawful industrial action on the Concept Blue site. Mr Thorson organised the industrial action with the intent to coerce Multiplex Limited to pay its employees strike pay for industrial action on those days. Multiplex, the CFMEU, Thorson and Costello all admitted the contraventions alleged by the applicant. ➢ Court decision: Court imposed penalty of $4,000 on Multiplex on 11 October 2005. On 17 December 2007, Justice North dismissed the case against CFMEU, Thorson and Costello. An ABCC appeal against Justice North's decision was successful on 5 November 2008. Goldberg and Jessup JJ imposed $2,500 in fines on the CFMEU.
Penalty	Multiplex $4,000, CFMEU $2,500
Site	Concept Blue Apartments

Case name	*Draffin v CFMEU, Allen, Benstead, Oliver & Walton Constructions (Under Appeal)*
Decision date	17 March 2009
Court	Federal Court
Basis / Facts	➢ Background: The alleged conduct relates to actions against a company that was engaged by Walton Constructions to perform traffic management at the Brunswick police station, Melbourne in November 2005. There are several allegations involved in this matter: • that the CFMEU and its officials coerced Walton Constructions not to engage, designate or allocate duties to the company as a building contractor • that the CFMEU and its officials coerced or unduly pressured the company to make a pre-reform certified agreement with the CFMEU • that the CFMEU, its officials and Walton Constructions discriminated against the company on the ground that its employees were covered by AWAs • that the CFMEU and its official encouraged Walton Constructions to breach the pre-reform WR Act by ceasing to use the company to provide traffic management services at the site, and • that Walton Constructions unlawfully terminated the company's engagement for the reason that it was bound by AWAs ➢ Court decision: On 10 December 2007 Walton Constructions admitted to breaching s45 of the *Building and Construction Industry Improvement Act 2005* (BCII Act) by discriminating against the building contractor and to breaching s.298K of the *Workplace Relations Act 1996* (WR Act) by terminating the building contractor's engagement. Walton Constructions was penalised a total of $50,000, half suspended for 12 months. On 17 March 2009 the Federal Court imposed penalties totalling $24,750 on the CFMEU and CFMEU officials Bill Oliver, Steve Allen and Gerard Benstead. The respondents admitted that they intended to coerce Walton Constructions Pty Ltd, not to engage Monjon Pty Ltd to provide traffic management services on a Brunswick building site in Victoria in November 2005. The respondents also admitted to having contravened the WR Act by encouraging Walton Constructions to terminate Monjon's contract. All respondents contravened the BCII Act by discriminating against Monjon on the basis that its employees were covered by a particular kind of industrial

	agreement. On 17 March 2009 a total of $20,750 in penalties were handed down to the CFMEU, and $2,000 each (suspended) to Benstead and Oliver. $50,000 in penalties (half suspended) were handed down to Walton Constructions on 10 December 2007. An ABCC appeal has been filed against judgment and penalties imposed on CFMEU respondents. A callover before Justice Gray was held on 28 April 2009. The CFMEU cross-appealed. The appeal will be heard on 3 August 2009 by Goldberg, Jacobson and Tracey JJ
Penalty	CFMEU $20,750; Benstead $2,000 (suspended); Oliver $2,000 (suspended)
Site	Brunswick Police Station, Melbourne

Case name	*Duffy v CFMEU*
Decision date	31 March 2009
Court	Federal
Basis / Facts	➢ Background: The ABCC alleges that unlawful industrial action occurred on the site on 20 October 2005 when CFMEU organisers Mr Robert Mates and Mr Danny Berardi directed that there be a stoppage at the site of earthworks and site amenities works. As a result, the site was closed for the day. On 21 October 2005 it is alleged that Mr Berardi told the head contractor that the bans on amenities works would be lifted but the ban on any productive work would remain. The continuing of the work ban was linked to demands made by Mr Mates, Berardi and Tadic that the site operated under a mixed metals agreement and that there be shop stewards on site. On 24 October 2005 it is alleged that Mr Mates and Mr Tadic threatened to take action against the head contractor, with intent to coerce it to engage a person nominated by the CFMEU. ➢ Court decision: Justice Marshall found that the CFMEU had contravened s.38 of the *Building and Construction Industry Improvement Act 2005* by taking unlawful industrial action. On 31 March 2009 Marshall J imposed penalties of $5,500 on the CFMEU for their contravention of s. 38 of the BCII Act.
Penalty	CFMEU $5,500
Site	University Hill estate

Case name	*Furlong v AWU and Ors*
Decision date	19 April 2007
Court	Federal Magistrates
Basis / Facts	➢ Background: The ABCC instituted proceedings on 20 October 2006 against the AWU and four of its officials in relation to industrial action by 192 employees on the Roche Mining Murray Basin Development Project in Western Victoria on 28 March 2006. The industrial action was in response to a dispute over the proper interpretation of an allowance in the 'Roche Mining AWU Murray Basin Development Project Construction Project Sites Agreement'. The unlawful industrial action occurred when workers took strike action after a mass meeting convened by the AWU over a camp allowance. The union and its officials failed to ensure that the work continued normally while the camp allowance dispute was dealt with in accordance with the dispute resolution procedures previously agreed between Roche Mining and the AWU. ➢ Court decision: AWU penalised $40,000 ($20,000 suspended), four AWU officials penalised $4000 each. The judgement, handed down by Federal Magistrate Burchardt, also requires the union to abide by the *Building and Construction Industry Improvement Act 2005* (BCII Act) and the *Workplace Relations Act 1996* (WR Act) for six months. If the AWU contravene either Act in this period, the suspended part of the penalty can be imposed by a Court. Three AWU shop stewards admitted to contravening both section 38 of the BCII Act and the dispute resolution provisions of the applicable workplace agreement. A fourth AWU organiser admitted to contravening section 38 of the BCII Act. The AWU has also demonstrated its willingness to contribute to industry reform by providing training to its officials and delegates in relation to the rights and responsibilities of the union.
Penalty	AWU $40,000 ($20,000 suspended for 6 months), Individuals $4000 each
Site	Murray Basin Development Project

Case name	*Furlong v Maxim Electrical Services (Aust) Pty Ltd & Others*
Decision date	14 June 2006, 29 November 2006
Court	Federal
Basis / Facts	➢ Background: This matter arose out of industrial action that occurred on 5 & 6 August 2003 after a death in the industry in Shepparton. The CEPU admitted it breached s187AB of the Workplace Relations Act 1996 (Cth) ("WR Act") by engaging in industrial action on the 6 August 2003 with intent to coerce Maxim Electrical Services (Vic) Pty Ltd ("Maxim") and Walter J Pratt Pty Ltd ("Pratt") to pay employees for the period for which they engaged in industrial action on 5 August 2003. The CEPU further admitted it failed to comply with the disputes resolution procedure of the Maxim Electrical Services Pty Ltd Enterprise Agreement 2000-2003 ("Maxim (Vic) Agreement"). ➢ Court decision: Marshall J. ordered that a penalty of $1750 be imposed on the CEPU for breach of s187AB of the WR Act. His Honour made a declaration that the CEPU had breached the Maxim (Vic) Agreement.
Penalty	CEPU $1750, Maxim $1750
Site	Concept Blue site

Case name	*Martino v Adrian McLoughlin*
Decision date	29 August 2007
Court	AIRC
Basis / Facts	➢ Background: The ABCC has instituted proceedings against CFMEU official, Adrian McLoughlin, seeking the revocation of his permit due to his alleged unlawful conduct at four different building sites between June 2006 and December 2006. ➢ Court decision: The AIRC found Mr McLoughlin: • persistently failed to produce his right of entry permit when requested; • failed to comply with reasonable Occupational Health and Safety requirements and • disrupted work by convening a union meeting during work hours when it could have been held during meal or other breaks. This was the first time the ABCC made application under section 770 of the WR Act that gives the AIRC the power to make orders for abuse of the system.
Penalty	Permit suspended for 2 months
Site	

Case name	*Martino v CEPU and Mooney*
Decision date	7 May 2007
Court	Industrial Magistrates
Basis / Facts	Background: The union and its official admitted to breaching section 170NC of the Workplace Relations Act 1996. CEPU organiser Peter Mooney attended the Tasmania-Victoria Consortium Bass Link Project at Loy Yang in Victoria on 8 November 2004 and demanded that four apprentices leave the site because their employer did not have an agreement with the CEPU. Later in the day, Mr Mooney told two of the apprentices that the employer would not sign a certified agreement and as soon as it did, the apprentices would be permitted back on site. Within a few days, Mr Mooney also told the employer that the apprentices would not be permitted on site until the employer signed a certified agreement with the CEPU.
Penalty	CEPU $13,000, Mooney $2400
Site	Bass Link Project

Case name	*Martino v CFMEU and Maher*
Decision date	10 May 2006
Court	Melbourne Magistrates' Court
Basis / Facts	➢ Background: On 26 October 2004, a shop steward (Mr. Maher) for the CFMEU employed by Jelena Pty Ltd prevented a subcontractor (Civiltest) from entering the Allegro Apartments site at Footscray, Melbourne, to perform soil testing services. The relevant certified agreement between the head contractor (Buildcorp) and the CFMEU provided for Mr Maher to conduct compulsory site inductions covering matters such as safety, superannuation and industry funds, but not certified agreements. It was alleged that Mr Maher made representations to Civiltest to the effect that he would persuade Buildcorp to prohibit Civiltest from working on the site until Civiltest agreed to enter into a certified agreement with the CFMEU. It was further alleged that the CFMEU was a party to his conduct as Maher was acting as the CFMEU's agent when he engaged in the contravening acts. Significantly, it was alleged that the intent of Mr Maher (and the CFMEU) was to prevent Civiltest from performing the contracted work unless it entered into a certified agreement with the CFMEU. The ABCC commenced investigating the conduct of the CFMEU and Mr Maher in October 2005. In April 2006, a Statement of Agreed Facts was made and filed with the Melbourne Magistrates' Court. The CFMEU and Mr Maher agreed to having contravened section 170NC of the WR Act (pre-Workchoices). The contravention carried a maximum penalty of $33,000 for the CFMEU and $6,600 for Mr Maher. ➢ Court decision: Penalty of $13 500 imposed on the CFMEU and a penalty of $450 imposed on Mr Maher. In determining the appropriate penalty to apply, Magistrate Hawkins particularly noted several matters that she considered relevant to penalty: • the CFMEU's prior contraventions, although no prior contraventions were alleged against Mr Maher; • the findings of the Cole Royal Commission relating to the unlawfulness of the CFMEU's policy of 'no EBA, no start'. Her Honour observed that in light of that finding, the CFMEU ought to have known that the conduct was prohibited; • One express purpose of section 170NC was to prevent 'pattern bargaining' in the construction industry, a purpose that would be

	frustrated by the type of conduct that took place in this case. Her Honour also accepted that the national union, and not merely the Victorian branch of the CFMEU, was liable for the conduct. On that basis, Her Honour noted that the CFMEU was a large national union with significant financial reserves. Her Honour ordered a penalty against the CFMEU of $15,000 discounted by 10% because the CFMEU did not contest the charges, and a total penalty of $450 against Mr Maher which also included a discount.
Penalty	CFMEU $13,500, Maher $450
Site	Allegro Apartments

Case name	*Ponzio v B&P Caelli Construction Pty Ltd*
Decision date	14 May 2007
Court	Full Court
Basis / Facts	➢ Background: On 5 August 2003, following the death of a Shepparton construction worker the previous week, the CFMEU conducted a safety audit at 336 Russell St, Melbourne. This resulted in industrial action on site against B&P Caelli Construction Pty Ltd (Caelli). Approximately three weeks later, further action occurred against Caelli on another site. On 24 December 2004, the Building Industry Taskforce commenced proceedings against Caelli for paying strike pay and against the CFMEU and two officials, Mr Crnac and Mr Spernovasilis, for demanding strike pay. This prosecution was subsumed by the ABCC upon its inception in October 2005. Caelli admitted to the contraventions, signed an agreed statement of facts and agreed to a penalty of $6,000 to be wholly suspended for 12 months. The CFMEU also admitted a contravention by it and its two officials. It signed an agreed statement of facts, but no agreement could be reached as to penalty. On 11 September 2006, the application was dismissed in the Federal Court. The ABCC filed an appeal in the Full Court of the Federal Court on 29 September 2006. ➢ Court decision: The ABCC has won an appeal in the Federal Court overturning an earlier decision to dismiss an ABCC application in the matter of *Ponzio v Caelli Construction Pty Ltd, CFMEU, Crnac, Spernovasilis*. A Federal Court full bench imposed a penalty of $5,000 on the CFMEU for organising industrial action with intent to coerce the payment of strike pay and for demanding the payment of strike pay. The court imposed a penalty of $6,000, suspended for 12 months, on B & P Caelli Constructions Ptd Ltd for paying strike pay.
Penalty	CFMEU $5,000 ; B & P Caelli Construction Pty Ltd $6,000 (suspended)
Site	

Case name	*Ponzio v Maxim Electrical Services (Vic) Pty Ltd*
Decision date	17 May 2006
Court	Federal
Basis / Facts	➢ Background: This matter arose out of industrial action that occurred on 5 August 2003 after a death in the industry in Shepparton. Maxim Electrical Services (Vic) Pty Ltd ("Maxim") admitted it breached s.187AA of the WR Act by making a payment of $2,901.80 to 27 employees in relation to a period in which the employees engaged in industrial action. The industrial action constituted a failure by the employees, who attended for work, to perform any work between 7.30 am and 1.30 pm on 5 August 2003. ➢ Court decision: Justice Ryan imposed a penalty of $900. His Honour considered the following factors to be relevant: • The work was completed on time and on budget; • Maxim had incurred costs as a result of this proceeding including legal costs; and • Maxim had no prior convictions. Maxim had submitted that although it knew the payment of strike pay was unlawful, in this case as the employees were in the sheds because the safety committee was conducting a safety walk, the Maxim officials believed that Maxim was required by law to pay the employees. His Honour said he considered the liability imposed by the Act as strict in the sense that oversight or lack of awareness that a particular stoppage amounts to industrial action does not constitute a defence.
Penalty	Maxim $900
Site	Concept Blue Site

Case name	*Stuart v CFMEU, Parker & Corbett*
Decision date	19 September 2008
Court	Federal Court
Basis / Facts	➢ Background: In August 2004, discussions were held between the CFMEU and construction contractor, Hooker Cockram Projects Ltd, concerning the employment of apprentices on the site. By October 2005, no apprentices were employed on the site and the ABCC alleges that Parker and Corbett accused Hooker Cockram of breaching their agreement and caused an overtime ban to be imposed on the site until an apprentice was employed. It is also alleged that Corbett threatened the company that if any worker was on site after normal closing time, there would be a picket the next day and the site would be closed for a week. The ban was lifted on 12 October after Hooker Cockram and the State of Victoria promised to resolve the issue. An apprentice commenced on the site on 21 October 2005. This matter is before the Federal Court of Australia in Melbourne. ➢ Court decision: On 19 September 2008 the Federal Court at Melbourne penalised the CFMEU and one of its officials, John Parker a total of $63,000 for breaches of s38 and s43 of the BCII Act. Both admitted to contravening the BCII Act by: threatening to take industrial action with the intent to coerce a builder to employ an apprentice in contravention of s43; and engaging in unlawful industrial action in contravention of s38. The penalties imposed upon Mr Parker were fully suspended on the condition that he does not contravene a provision of the BCII Act or the Workplace Relations Act 1996 for a period of twelve months.
Penalty	CFMEU $55,000, Parker $8,000 (fully suspended)
Site	Morwell Police and Law Courts Complex site

Case name	*Stuart v CFMEU, Parker & Corbett*
Decision date	17 February 2009
Court	Federal Court
Basis / Facts	➢ Background: L.U. Simon Builders was engaged to manage a building project at the Aquavista building site at 401 Docklands Drive, Docklands in Victoria. On 13 September 2006, L.U. Simon entered into a contract with Axiom Design to supply and install a glass barrier and steel handrail to the level 15 mezzanine stairs at the Aquavista site. Some time after 13 September 2006, Axiom subcontracted the work out to Mr Peter Vanderkley. Mr Vanderkley's business had two employees. On 6, 9 and 22 March 2007, L.U. Simon refused Mr Vanderkley and his employee entry to the site. The reason, or part of the reason, for refusal on each occasion was that Mr Vanderkley did not have a workplace agreement with the CFMEU. On 22 March 2007, L.U. Simon varied Axiom's contract so that it no longer required them to install the barrier and handrail. L.U. Simon is alleged to have: • discriminated against Mr Vanderkley on the grounds that he did not have a particular kind of industrial instrument, being a workplace agreement, in contravention of s.45(1)(a)(i) of the *Building and Construction Industry Improvement Act 2005* (BCII Act), and • discriminated against Mr Vanderkley for a prohibited reason, because he did not have a workplace agreement with a particular person, being the CFMEU, in contravention of s.45(1)(a)(ii) of the BCII Act ➢ Court decision: The penalty hearing in this matter took place on 17 February 2009. Justice Marshall found that L.U. Simon Builders Pty Ltd contravened s.45 of the BCII Act and ordered it to pay penalties totalling $55,000.
Penalty	L.U. Simon Builiders $55,000
Site	Aquavista site, Docklands

Case name	*(Stuart-Mahoney v CFMEU and Dean (Under Appeal)*
Decision Date	27 October 2008
Court	Federal Magistrates Court
Basis / Facts	➢ Background: The ABCC alleges that on 12 September 2006, Mr Jason Deans, a CFMEU shop steward, told a carpenter, a labourer and an excavator operator on the CSL Parkville Morgan Facility construction site in Parkville Victoria that they needed to be financial members of the CFMEU before they could begin work. The ABCC alleges Mr Dean: • made false and misleading statements about the obligation of each of the workers to join the union; • took action that directly prejudiced the employment of two of the workers; and • threatened to take action against the excavator operator with intent to coerce him to become a member of the union. The ABCC further alleges that the CFMEU is liable for Mr Deans' conduct. ➢ Court decision: On 4 August 2008, the court decided Mr Deans and the CFMEU contravened the following provisions of the Workplace Relations Act 1996 (WR Act): - s 789 of the WR Act - taking action against Gauci with intent to coerce him to become a member of the CFMEU - s 790 of the WR Act – making a false or misleading representation to Gauci that he had to be a member of the CFMEU before he would be permitted to work on site - s 797(3)(f) of the WR Act – directly injuring Galea in his employment by requiring him to settle outstanding membership fees which led to a delay for him to begin work The court also decided that false or misleading representations about the obligation to join an industrial association are not a breach of s.790 of the WR Act where persons such as Galea are already members of the industrial association. On Monday, 27 October 2008 Federal Magistrate Burchardt ordered the CFMEU to pay penalties totalling $49,550 and CFMEU shop steward Mr Jason Deans to pay $12,000 ($6,000 suspended) for breaches of the *Workplace Relations Act 1996*. The CFMEU was also ordered to pay $190.74 compensation to a labour hire carpenter for wages lost.

Penalty	CFMEU $49,950, Deans $12,000 ($6,000 suspended). CFMEU ordered to pay $190.74 compensation to carpenter for wages lost.
Site	CSL Parkville

Case name	*Stuart v Pitt, Mates & CFMEU*
Decision date	5 June 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: On or about 14 May 2007, Wayne Martin of Martin's Earthmoving was contracted to perform earth works on the Austin Hospital site in Heidelberg Victoria. On 15 May 2007, Mr Martin attended the Austin Hospital site and was inducted onto the site. Mr Martin stated that he was not a union member. On completing the induction, Mr Martin began working on the site. CFMEU organisers Brendan Pitt and Robert Mates approached Mr Martin and allegedly asked if he was considering being a member of the CFMEU. Mr Martin replied that he had considered it but did not want to join the union Mr Pitt and Mr Mates then allegedly told Mr Martin that in order to keep working on the site he needed to pay up the union membership fees immediately. Mr Martin was allegedly told that if he didn't he could not continue working on site and had to leave immediately. It is alleged that Mr Pitt and Mr Mates then said that if Mr Martin paid up the union dues he could work on any building site. The conversation between Mr Pitt, Mr Mates and Mr Martin was interrupted by Kane Constructions' site management. Kane Constructions then required Mr Pitt and Mr Mates leave the site. They left shortly after this request. In these proceedings the ABCC alleges that Mr Pitt, Mr Mates and the CFMEU, by the conduct of its organisers, made false and misleading statements to Mr Martin in contravention of s.790 of the Workplace Relations Act 1996. ➢ Court decision: On 5 June 2009, Federal O'Sullivan gave judgment dismissing the case
Penalty	
Site	Kane Constructions Austin Hospital site at Heidelberg

Case name	*Washington, Setka, Mier & Balta v Hadgkiss*
Decision date	29 January 2008
Court	Federal Court
Basis / Facts	➢ Background: On 19 November 2007, CFMEU Victorian senior vice president Noel Washington, CFMEU organiser John Setka, ETU official David Mier and CEPU official Ivan Balta filed an application with the Federal Court. The application seeks to stop the ABCC from conducting an investigation because the applicants allege it is being conducted for an improper purpose. ➢ Court decision: On 29 January 2008 the application was dismissed and the applicants were ordered to pay the ABCC's costs
Penalty	Applicants ordered to pay the ABCC's costs
Site	

Case name	*Williams v CFMEU & Mates*
Decision date	28 May 2009
Court	Federal Court
Basis / Facts	➢ Background: On Friday, 28 July 2006 Mr Mates allegedly demanded that Kane Constructions Pty Ltd employ another Occupational Health and Safety representative. Mr Mates allegedly threatened a work stoppage, or other action to stop work on site, if this demand was not met. The following Monday (31 July 2006) Mr Mates allegedly organised a stoppage of work at the site when his demand was not met. The workers ceased work at the site after the meeting and did not return until 2 August 2006 ➢ Court decision: On 13 March 2009 Justice Jessup handed down reasons for judgement finding that on 31 July 2006 Mr Mates procured a stoppage of work on the site as a means of having Kane Constructions employ or engage a labourer. His Honour found that this conduct was illegitimate and was therefore in contravention of s.43 of the Building and *Construction Industry Improvement Act 2005*. His Honour did not find that Mr Mates had engaged in unlawful industrial action himself. Justice Jessup handed down his decision on penalties on 27 May 2009. Penalties totalling $100,000 were imposed on the CFMEU and $15,000 on Mr Robert Mates for contravening s.43 of the BCII Act. The respondents were ordered to pay half of the ABCC's costs.
Penalty	CFMEU $100,000; Mates $15,000
Site	Warehouse in Alphington

Case name	*Lovewell v O'Carroll, PGEU Qld Branch & CEPU*
Decision date	8 October 2008
Court	Federal Court
Basis / Facts	➢ Background: This matter was filed in the Federal Court at Brisbane on 24 December 2007. The matter was discontinued on the basis that the applicant would pay the respondents' costs in the sum of $16,000 on 8 October 2008
Penalty	
Site	Southport Central Project

Case name	*Hadgkiss v Sunland Constructions, Eshraghi, CFMEU, CFMEU (Qld) & Oskam*
Decision date	26 March 2007, 25 October 2006
Court	Federal Court
Basis / Facts	➢ Background: The ABCC commenced proceedings against Sunland Constructions, its manager Saied Eshrajhi, the Federal and Queensland branches of the CFMEU and union delegate, Daniel Oskam alleging that between September and December 2004, the CFMEU and Mr Oskam made false and misleading statements that three employees were obliged to join the CFMEU. Further, the ABCC alleged that Sunland Constructions and its manager, Saied Eshraghi, made false and misleading statements about one complainant's obligation to join the CFMEU and that Sunland unlawfully dismissed one complainant because he resigned from the CFMEU ➢ Court decision: The Federal Court in Brisbane ordered the CFMEU and the CFMEU Queensland to pay penalties of $6,000 and $3,000 respectively for making false and misleading statements to three employees at a Gold Coast spray paint shop about their obligation to join the union. The unions were found to have contravened the freedom of association provisions of the pre-reform *Workplace Relations Act 1996*. Danny Oskam, the union delegate who told the workers they could not work for Sunland Constructions Pty Ltd unless they joined the unions, was ordered to pay a penalty of $300. Keifel J also made compensation orders against both unions requiring them to pay two of the employees $200 each and the other employee the sum of $50. These amounts represent a refund for union membership fees that they had been forced to pay
Penalty	Sunland $15,000; Eshraghi $1,000; CFMEU $6,000; CFMEU (Qld) $3,000; Oskam $300; CFMEU and CFMEU (Qld) to pay $450 compensation
Site	Sunland Joinery, Gaven Qld

Case name	*Thompson v Thomas, Bland & BLFQ*
Decision date	15 June 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: J. Hutchinson Pty Ltd was the head contractor for the building project known as the North Lakes Community Health Precinct in northern Brisbane. Hutchinson engaged a subcontractor to perform pre-cast panel fabrication and installation work for the project. It is alleged that on 7 January 2008 an employee of Hutchinson and delegate of the BLFQ, Gregory Thomas, made false and misleading statements to the subcontractor about the obligation of employees at the site to be members of the BLFQ. One week later BLFQ organiser Eddie Bland visited the site and also allegedly made false and misleading statements about the obligation of employees to be members of the BLFQ. This resulted in the subcontractor paying the union membership fees for 3 of its employees. It is further alleged that on 11 February 2008 Mr Thomas made a further false and misleading statement about the obligation of other employees of the subcontractor to join the BLFQ. On 13 February 2008 Mr Thomas threatened to take action against the subcontractor, namely to deny crane access, with the intent to coerce its employees to become BLFQ members ➢ Court decision: Case dismissed
Penalty	
Site	North Lakes Community Health Precinct, Brisbane

Case name	*Radisich v Buchan, Heath, Molina and CFMEU*
Decision date	17 November 2008
Court	AIRC
Basis / Facts	➢ Background: The ABCC has applied to the Australian Industrial Relations Commission to: • revoke or suspend the Federal right of entry permits of three CFMEU organisers - Walter Molina, Michael Buchan and Doug Heath • require the CFMEU to take all reasonable steps to ensure that CFMEU WA Assistant Secretary Joe McDonald does not purport to exercise right of entry under the Workplace Relations Act 1996 (WR Act) • impose a condition on all permits that are held by its organisers, or issued to its organisers in the future, that the permit holder not enter or remain on site in the company of, or in concert with, Mr McDonald • prevent the Union from applying to the AIRC for the issue of a permit to Mr McDonald for three years. The application was made under s.770 of the WR Act for alleged abuse of Part 15 of the WR Act. Part 15 entitles permit holders to enter a site to hold discussions with actual and potential members or to investigate suspected breaches of industrial laws, industrial instruments and OHS laws. The ABCC alleges that Mr Molina abused the right of entry system by his conduct at the Armadale Shopping Centre site, which he attended with Mr McDonald, on 14 February 2007. The ABCC alleges Mr Buchan abused the right of entry system by his conduct at the Parliament Place site, which he attended with Mr McDonald and another CFMEU official, on 22 February 2007. The ABCC alleges Mr Buchan and Mr Heath abused the right of entry system by their conduct at Q-Con's Condor Towers site on 24 and 27 April 2007. Mr McDonald was also in attendance on 24 April 2007. ➢ Court decision: The AIRC ordered: • The CFMEU give a written direction to Mr Joe McDonald that he must not purport to rely on any right of entry under the *Workplace Relations Act 1996* (WR Act) in order to facilitate access to construction sites. Mr McDonald does not hold a right of entry permit under the Act.

	• The CFMEU will not apply to the Registrar for the issue of a permit to Mr McDonald for a period of two years. • The following condition be imposed on all current permits and all permits issued over the next two years in respect of the CFMEU WA branch: the permit holder is not permitted to enter or remain on construction sites in the company of, or in concert with, Mr McDonald except where Mr McDonald has been invited in advance by an owner. • The permit held by Mr Michael Buchan be suspended for three months. A further two month suspension to apply to a permit held by Mr Buchan if he breaches any provision of Part 15 of the WR Act during the next 12 months. • The permit held by Mr Walter Molina be suspended for two months. A further one month suspension apply to a permit held by Mr Molina if he breaches any provision of Part 15 of the WR Act during the next 12 months. • The CFMEU will not apply to the Registrar for the issue of a permit to Mr Doug Heath for a period of two months. Mr Heath's consent to the order does not constitute any admission that he abused any right conferred by Part 15 of the WR Act
Penalty	Buchan's permit suspended for 3 months; Molina's permit suspended for 2 months; McDonald not allowed to apply for a permit for 2 years
Site	Armadale Shopping Centre, Parliament Place, Q-Con Towers

Case name	*Radisich v CFMEU and Buchan*
Decision date	25 May 2009
Court	AIRC
Basis / Facts	➢ Background: On 18 November 2008, AIRC Senior Deputy President Lacy ordered that the following condition be imposed on all current permits and all permits to be issued within 2 years in respect of the WA divisional branch of the CFMEU: *"The permit holder is not permitted to enter or remain on premises being construction sites in the company of, or in concert with, Joseph McDonald except where McDonald has been invited in advance on to those premises by an owner and has complied with the requirements of the direction in order 5* An appeal pursuant to s.147 of the *Workplace Relations Act 1996* has been instituted by the ABCC against: **a)** a decision made by Deputy Registrar Jenkins of the AIRC on 25 February 2009, to issue federal right of entry permit to Michael Buchan, an official of the CFMEUW, without imposing a the limiting conditions ordered by SDP Lacy on 18 November 2008. **b)** further or in the alternative, the refusal or failure of Deputy Registrar Jenkins to make a decision under s.741 of the WR Act to impose such a condition upon the Permit. ➢ Court decision: SDP Lacy ruled Mr Buchan's right of entry permit be remitted back to the Registrar for the insertion of the condition that restricts Mr Buchan from using his entry permit in the company of Joe McDonald. Mr Buchan was also ordered to surrender his current Construction, Forestry, Mining and Energy Union of Workers entry permit until such time as the Registrar imposes the requisite condition.
Penalty	Mr Buchan's right of entry permit be remitted back to the Registrar for the insertion of the condition that restricts Mr Buchan from using his entry permit in the company of Joe McDonald
Site	

Case name	*Clarke v Levy & Aleknavicius*
Decision date	26 June 2008
Court	Industrial Magistrates
Basis / Facts	➢ Background: In July and August 2004 it is alleged that shop steward, Mr Peter Levy and a crane driver, Roger Aleknavicius, engaged in unlawful industrial action and also breached the dispute settlement procedures of the relevant certified agreement on the Thornlie railway station site in Perth. The ABCC is seeking penalties against both respondents. Matter before the Western Australian Industrial Magistrates Court ➢ Court decision: Mr Aleknavicius agreed to a $750 penalty which was imposed by the court. At a hearing on 26 June 2008, Cicchini J imposed a $750 penalty on Mr Levy
Penalty	Aleknavicius $750 Levy $750
Site	Thornlie railway station site

Case name	*Temple v Powell, CFMEUW, McDonald and CFMEU*
Decision date	23 May 2008
Court	Federal
Basis / Facts	➢ Background: The ABCC alleged that on 17 and 18 August 2005, CFMEU and CFMEUW members employed at the Ravensthorpe mine site took strike action for 48 hours, notwithstanding the fact that certified agreements with 5 employers on site had just been finalised. On 25 August 2005, there was a second strike on the site by employees of AGC Industries Pty Ltd who were members of the CFMEU and CFMEUW. This time the strike was for 24 hours. ➢ Court decision: The Federal Court found that the respondents contravened the law as outlined below and imposed the following penalties: • Michael Powell: $1000 for contravening s170MN of the *Workplace Relations Act 1996* (WR Act) in the first strike and $2500 for breaching s38 of *the Building and Construction Industry Improvement Act 2005* (BCII Act) in the second strike. **Total = $3500;** • CFMEUW: **$12,000** for breaching s38 of the BCII Act in the second strike; • Joseph McDonald: **$1500** for contravening s170MN of the WR Act in the first strike; and • CFMEU: $1000 for contravening s170MN and $5000 for failure to follow disputes procedures in the first strike and $12,000 for contravening s38 of the BCII Act during the second strike **Total = $18,000**
Penalty	Numerous – total of $35,000
Site	Nickle mine construction site Ravensthorpe WA

Case name	*Hadgkiss v Aldin and Ors*
Decision date	20 December 2007
Court	Federal
Basis / Facts	➢ Background: On 5 July 2006, the ABCC filed proceedings in the Federal Court at Perth against 107 employees working on the Perth to Mandurah Railway Project. The statement of claim alleged that from 24 February 2006 to 3 March 2006 on the section of the railway known as New Metro Rail City Project - Package F: 107 employees contravened section 38 of the BCII Act by taking unlawful industrial action; and 82 of those employees breached an order to the AIRC made pursuant to section 127 of the WR Act. The order directed the CFMEU members employed by the Leighton Kumagai Joint Venture on the Package F not to take industrial action for the remainder of the Project. The issue that precipitated the strike was the termination of a CFMEU shop steward. The employees' union, the CFMEU, was not subject to the proceedings. A CFMEU official addressed the stopwork meetings and advised the employees they were exposed to severe penalties by taking strike action and recommended a return to work. The employees rejected this recommendation on three separate occasions. ➢ Court decision: The Court made declarations that: • 64 employees contravened the *Building and Construction Industry Improvement Act 2005* by engaging in unlawful industrial action and the *Workplace Relations Act 1996* by breaching an order of the AIRC. The penalty for these employees was $10,000 of which $6750 is suspended; • three employees contravened the BCII Act and the WR Act. The penalty for these employees was $8400 of which $5600 is suspended; • 20 employees contravened the BCII Act. The penalty for these employees was $9000 of which $6000 is suspended; and • four employees who failed to file an appearance or defence also contravened the legislation. The penalty for two of these employees was $10,000, of which $6750 is suspended. The penalty for the other two employees was $9000 of which $6000 is suspended. The employees to pay $5000 costs each.
Penalty	Numerous – total of $883,200 ($594,300 suspended)
Site	Perth to Mandurah Railway project

Case name	*Clarke v CFMEU, Molina & Powell*
Decision date	8 June 2007
Court	Full Court
Basis / Facts	➢ Background: The investigation of this matter by the Building Industry Taskforce related to strike action taken over four days in July and August 2004 by workers at the Barclay Mowlem Railway Station site at Thornlie, Western Australia. The proceedings instituted by the Building Industry Taskforce claimed that representatives or agents of the CFMEU, including two CFMEU organisers, Michael Powell and Walter Molina had attended meetings with the employees on 9 July 2004, 29 July 2004 and 19 August 2004. As a consequence of these meetings the employees commenced the industrial action. It was also claimed that the two organisers had attended meetings on 13 July 2004 to report back on the industrial action and a further meeting with employees on the site on 13 August 2004. The ABCC alleged that Molina and Powell conveyed information and claims relating to the industrial action to the employer. It was further alleged that on 9 July 2004, Powell threatened the project manager on site that he would 'take the boys out'. ➢ Court decision: On 8 June 2007, the Full Court delivered a unanimous decision upholding the appeal and dismissing the proceedings. The penalties were set aside and no order was made as to costs. The Full Court decided that the workers were discouraged from striking by the union. The Full Court concluded that the Magistrate erred in finding that there was "an irresistible inference" that the CFMEU played a significant part in the activities which led to the withdrawal of labour
Penalty	
Site	Thornlie Railway Station, Barclay Mowlem Site

Case name	*Standen v Justin Feehan*
Decision date	23 October 2008
Court	Federal
Basis / Facts	➢ Background: The ABCC alleges that in May 2004 a CFMEU union official, Justin Feehan, breached the WR Act when he attended a building site and hindered and obstructed those working at the site. It is alleged amongst other things that Feehan parked his vehicle in such a way as to prevent the delivery of concrete to the site. ➢ Court decision: On 3 July 2008 Justin Feehan was found to have breached s.285E(1) of the *Workplace Relations Act 1996.* Justice Lander found that Mr Feehan parked his vehicle in such a way that prevented the delivery of concrete to the site and refused to move his vehicle when asked by site management. When Mr Feehan did move his vehicle, he moved it to a position that continued to impede access to the site. Mr Feehan also stood in a position to prevent trucks from entering the site.
Penalty	Feehan $1,300
Site	Scott Salibury Homes site

Case name	*Carr v CEPU & Harkins*
Decision date	4 September 2007
Court	Federal Magistrates
Basis / Facts	➢ Background: The proceedings relate to a snap strike of Tasmanian electrical workers on 14 December 2005 when 81 employees of electrical contractors failed to attend for work. Mr Harkins had presided over a meeting at which the vote was taken for workers to withdraw their labour. Harkins also addressed a rally on the day of the strike. ➢ Court decision: The CEPU and Mr Harkins admitted contravening section 38 of the BCII Act by engaging in unlawful industrial action constituted by a 24-hour strike of employees in the electrical contracting industry in Tasmania on 14 December 2005. Federal Magistrate Lucev ordered that a penalty of $11,000.00 be imposed on the CEPU and a penalty of $8,800.00 be imposed on Mr Harkins for contravening section 38 of the BCII Act. The CEPU has also agreed to the provision of training by the ABCC for Southern States officials and delegates in relation to the rights and obligations of the union, its officials and delegates arising under the BCII Act and the *Workplace Relations Act* 1996. Mr Harkins has undertaken to attend this training.
Penalty	CEPU $11,000, Harkins $8800
Site	

Case name	*Alfred v Lanscar & CFMEU*
Decision date	4 July 2007
Court	Federal
Basis / Facts	Background: On 9 February 2005, Mr Lanscar, and through him the CFMEU, advised, encouraged or incited a painting company to take discriminatory action against a number of self-employed painters who had been engaged on The Avenue project. Mr Lanscar advised, encouraged or incited the painting company to refuse to make use of the services offered by those painters, because they were not members of the union. Lanscar told the painting contractor that he would direct the head contractor on the project to use other painters. - On 9 February 2005, Mr Lanscar, and through him the CFMEU, threatened to take industrial action against the painting company with intent to coerce it to take discriminatory action against the painters, namely to refuse to make use of their services, because they were not members of the union. ➢ Court decision: Court imposed the agreed penalties of $10,000 for the CFMEU and $2,000 for CFMEU Delegate Les Lanscar
Penalty	CFMEU $10,000, Lanscar $2000
Site	The Avenue project

Case name	*Hogan v Riley, Byatt & Iqon Pty Ltd (Under Appeal)*
Decision date	10 July 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: The ABCC alleges that on 7 June 2007, two CFMEU organisers were refused entry to the National Convention Centre site by Iqon Pty Ltd and its employees Michael Riley, Wayne Clark and a Director, Brendan Byatt. The organisers were attempting to gain entry to the site to investigate alleged breaches of the *Occupational Health and Safety Act 1989* (ACT) and were authorised under that Act to enter the site without giving prior notice ➢ Court decision: On 10 July 2009 FM Neville gave judgment dismissing the case
Penalty	
Site	National Convention Centre, Canberra

CURRENT CASES

Case name	*Alfred v CFMEU & Manna*
Date filed	10 April 2008
Court	Federal Magistrates Court
Basis / Facts	➢ Background: In February 2006 head contractor North East Developments Pty Ltd (North East) awarded a contract to Conform Australia Pty Ltd (Conform) to provide construction services at The Portico Plaza in Toongabbie. Conform engaged concreting subcontractors to work on the site. It is alleged that on 11 April 2006 CFMEU official Sammy Manna made threats of bankruptcy to a representative of the concreting subcontractor in an attempt to coerce him to become a member of the CFMEU. ➢ Status: Federal Magistrate Smith handed down judgment on 10 July 2009. The Respondents, CFMEU, CFMEU (NSW branch) and CFMEU organiser Sammy Manna have been found to have contravened section 789 of the WR Act. The matter has been listed for hearing of submissions on penalty or other order on 11 September 2009.
Site	The Portico Plaza, Toongabbie

Case name	*Grant v Michael Lane*
Date filed	28 November 2007
Court	AIRC
Basis / Facts	➢ Background: The ABCC is seeking the revocation or suspension of CFMEU organiser Michael Lane's entry permit due to conduct at the Conrod Straight construction site at Mt Panorama, Bathurst. It is alleged that on 19 April and 16 May 2007 Mr Lane as a permit holder abused the rights of entry conferred by Part 15 of the *Workplace Relations Act 1996* (WR Act) while on site. Watson SDP dismissed the ABCC's application on the basis that he was not satisfied that Lane was purporting to rely on rights conferred by Part 15 of the WR Act when he visited the Conrod Straight site on the two occasions. The fact that entry notices had been issued by Lane under s.760 of the WR Act before each visit was not enough for that purpose. It was held that the occupier of the site consented to Lane uplifting copies of employment records to show to the Immigration Department. On 19 November 2008 a Full Bench of the AIRC upheld an appeal by the ABCC. The Full Bench found that *"[The] right of entry under s.760 is for a specific and limited purpose and is subject to the limitations set out in Division 6 of Part 15."* The Full Bench said: *"When Lane, a permit holder, entered with the intention to, and then sought to, go beyond the scope of the rights conferred by the section he abused those rights."* ➢ Status: On Wednesday, 19 November 2008, a Full Bench of the Australian Industrial Relations Commission upheld an appeal by the ABCC. The Full Bench has referred the matter back to Watson SDP to consider what orders should now be made in respect of Mr Lane's permit.
Site	Conrod Straight, Mt Panorama, Bathurst

Case name	*Cahill v CFMEU & Mates*
Date filed	2 March 2006
Court	Federal Court
Basis / Facts	➢ Background: In this proceeding, the ABCC alleged that Mr Mates contravened s.38 and s.43 of the *Building and Construction Industry Improvement Act 2005* (BCII Act) (unlawful industrial action and taking action with intent to coerce a person to employ, or designate particular duties to a building employee) in relation to a site at Mount Street, Heidelberg, Victoria. ➢ Status: On 5 February 2009, Justice Kenny handed down her decision and found that Mr Mates and the CFMEU contravened the coercion provisions at s.43 of the BCII Act, on three occasions. Justice Kenny did not find that Mr Mates had engaged in unlawful industrial action as pleaded or argued in the trial. A hearing on penalty hearing will take place in the Federal Court on 1 June 2009.
Site	Heidelberg

Case name	*Cozadinos v AWU, Lee, CEPU, Mooney, AMWU and Dodd*
Date filed	9 April 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: Australian Paper Pty Limited owns and operates the Maryvale Paper Mill facility in Morwell, Victoria. In 2007-2008 Australian Paper was undertaking a large expansion project involving various building and construction works, known as the Pulp Mill Project. On 23 November 2007, employees of four contractors engaged on the PMP left the site between 10.40 am and 11.15am and did not return to work that day. The ABCC alleges that Mr Lee, Mr Mooney, Mr Dodd and the AWU, CEPU and AMWU by the conduct of their organisers, contravened the *Workplace Relations Act 1996* and the *Building and Construction Industry Improvement Act 2005*. The respondents are alleged to have aided, abetted, counselled or procured the unlawful industrial action or were knowingly concerned in the unlawful industrial action. The respondents are also alleged to have contravened the *WR Act* by failing to follow the dispute resolution procedures in the relevant workplace agreements. Mr Lee and the AWU are alleged to have contravened the *BCII Act* by placing a ban on the performance of work at the site on 24 and 25 November 2007. ➢ Status: A directions hearing before Federal Magistrate Burchart has been set down for 11 August 2009.
Site	Maryvale Paper Mill Facility, Morewell, Victoria

Case name	*Cozadinos v CFMEU & Ioannidis*
Date filed	27 May 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: AD Jeffrey (Concrete) Pty Ltd was engaged to carry out concreting work at the Westfield Doncaster Shoppingtown project in Doncaster, Victoria. On 3 March 2008, a company director of AD Jeffrey and two employees were engaged in a concrete pour at the project. The workers were asked to attend a meeting with CFMEU organiser Mr Tony Ioannidis at the CFMEU site office. Mr Ioannidis asked the AD Jeffrey director and the two employees whether they were members of the CFMEU. The AD Jeffrey director was a financial member of the CFMEU but the two AD Jeffrey employees were not. Mr Ioannidis told the two employees that he was going to stop them working at the site because they were not members of the CFMEU. The ABCC alleges that the CFMEU and Mr Ioannidis contravened the Freedom of Association provisions of the *Workplace Relations Act 1996*. ➢ Status: The first directions hearing is scheduled to take place on 10 August 2009.
Site	Westfield Doncaster Shoppingtown, Doncaster

Case name	*Cozadinos v CFMEU, Beradi & Mates*
Date filed	30 January 2009
Court	Federal Court
Basis / Facts	➢ Background: Adco Constructions (Victoria) Pty Ltd was the head contractor at a construction project located in Caulfield, Victoria. On 7 March 2007, Adco terminated the services of an employee at the site, Mr Leigh Scott. The next day three CFMEU representatives and Mr Scott visited the site and held a meeting with employees engaged by two subcontractors at the site. Workers who attended this meeting did not perform work for the rest of the day. The ABCC alleges that the CFMEU and its representatives, Danny Berardi and Robert Mates encouraged others to take unlawful industrial action and institute work restrictions, in contravention of the BCII Act. The ABCC further alleges that the CFMEU, Mr Berardi and Mr Mates contravened the WR Act by encouraging industrial action before the nominal expiry date of an agreement. ➢ Status: Directions were made on 10 July 2009 and a further directions hearing will be held on 31 August 2009.
Site	Glen Eira Rd, Caulfield

Case name	*Cozadinos v CFMEU & Salta*
Date filed	5 May 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: Westfield Design and Construction Pty Ltd was the head contractor at the Westfield Doncaster Shoppingtown Project in Doncaster, Victoria. Westfield Design and Construction contracted Revolution Retail Pty Ltd to perform specialist shop-fitting services at the project. On 12 March 2008 two employees of Revolution Retail arrived at the project to commence work. At the conclusion of their site induction the two employees were introduced to Mr Nick Salta. Mr Salta was the OH&S representative of the CFMEU on the site. Mr Salta told the two employees they had to become members of the CFMEU before they could use the site amenities, including the rest area and the toilets. Mr Salta also told the two employees that they would receive a higher rate of pay if they joined the CFMEU. ➢ Status: A directions hearing was held on 1 June and a further directions hearing will be listed after 13 July 2009 (Date to be advised).
Site	Westfield Doncaster Shoppingtown, Doncaster

Case name	*Cruse v CFMEU and Washington*
Date filed	30 September 2008
Court	Federal Court
Basis / Facts	➢ Background: Bovis Lend Lease Pty Ltd was the head contractor for the construction of the Melbourne Recital Hall and the Melbourne Theatre Company's theatre located at 133 Southbank Boulevard, Melbourne (the site). LCR Lindores Group Pty Ltd (LCR Lindores) and Sergi Pty Ltd were retained to perform crane work at the site. On 6 October 2006, four employees of Sergi Pty Ltd (Sergi employees) were scheduled to work on a crane installation. Noel Washington of the CFMEU attended the site and held an unauthorised stop work meeting with the Sergi employees. The ABCC alleges that during the stop work meeting Mr Washington encouraged, persuaded, recommended, endorsed and directed those employees not to perform the crane installation work. The ABCC alleges that the Sergi employees did not do any work that concerned the crane installation for part of the afternoon of 6 October as a result of Mr Washington's direction. The ABCC further alleges Mr Washington and the CFMEU by the conduct of Mr Washington, aided, abetted, counselled or procured the unlawful industrial action or was knowingly concerned in the unlawful industrial action in contravention of the Building and Construction Industry Improvement Act 2005 (BCII Act). Also on 6 October 2006, Mr Washington threatened that the CFMEU would arrange a picket at the site the next morning unless LCR Lindores immediately stopped work at the site, pending the signing of a union building agreement with the CFMEU. The ABCC alleges that this conduct amounted to coercion and discrimination on the part of Mr Washington and the CFMEU, as provided by the BCII Act. ➢ Status: The Respondents have admitted contraventions of s.38 of the BCII Act. On 15 July 2009 Justice Marshall reserved his decision on penalty**.**
Site	Yarra Arts, Southbank Boulevard, Melbourne

Case name	*Gregor v CFMEU & Berardi*
Date filed	20 May 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: In June 2007 Masbuild (Aust) Pty Ltd commenced work as construction manager for a demolition and renovation project at Bialik College in Hawthorn, Victoria. It is alleged that on 19 July 2007 CFMEU official Daniel Berardi engaged in unlawful industrial action at the site. The alleged unlawful conduct included holding a stop work meeting, and directing subcontractors' employees to cease work for the remainder of the day. It is alleged that Mr Berardi engaged in the unlawful conduct because Masbuild was not a party to a collective agreement with the CFMEU. ➢ Status: Directions were made in this matter on 18 June 2009 and a further directions hearing is scheduled for 21 August 2009.
Site	Bialik College, Auburn Rd, Hawthorn, Victoria

Case name	*Gregor v Setka*
Date filed	26 June 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: Bovis Lend Lease is the head contractor of a construction project for ANZ, located at North Wharf Road, Docklands, Victoria. On 6 March 2008, CFMEU Assistant Secretary Mr John Setka entered the Docklands site. Mr Setka allegedly entered the site under the *Occupational Health and Safety Act 2004* (Vic) as prescribed by s.756(1) of the *Workplace Relations Act 1996.* While at the site Mr Setka made a serious threat to the personal safety of Bovis Lend Lease's construction manager and general foreman. The ABCC alleges that Mr Setka acted in an improper manner while exercising his rights as a permit holder, in contravention of s.767(1) of the WR Act. ➢ Status: A first directions hearing has been scheduled for 10 August 2009.
Site	ANZ Building, North Wharf Rd, Docklands

Case name	*Keene v AMWU & Dodd*
Date filed	27 March 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: Paper Australia Pty Ltd owns and operates the Maryvale Paper Mill facility in Morwell, Victoria. During 2007 and 2008 Paper Australia was undertaking a large expansion project involving various building and construction works at the site, known as the Pulp Mill Project. BMC Welding and Construction Pty Ltd (BMC) were engaged by Australian Paper to perform welding work on the Pulp Mill Project. On 5 February 2008 Mr Steven Dodd, an organiser for the AMWU, held an authorised meeting with BMC employees at the brew hut during their morning tea break. The meeting was scheduled to finish at 10.10am. The meeting ran overtime and BMC management asked Mr Dodd to conclude the meeting. Shortly after 10.25am, Mr Dodd reconvened the meeting outside the project gate. Following this meeting, the majority of BMC employees in attendance at the meeting failed or refused to recommence work for the remainder of the day. The ABCC alleges that this industrial action was unlawful and motivated by the purpose of supporting or advancing claims against BMC. ➢ Status: A directions hearing before Federal Magistrate Burchart has been set down for 11 August 2009.
Site	Maryvale Paper Mill Facility, Morwell, Victoria

Case name	*Stuart v AMWU and Dodd*
Date filed	29 June 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: In early 2008, Australian Paper Pty Ltd ("Australian Paper") was expanding the Maryvale Pulp Mill site that it owned at Morwell, Victoria ("the Site"). At that time, Sandvik Mining and Construction Australia Pty Ltd ("Sandvik") was seeking to enter into a contract with Australian Paper Pty Ltd to carry out certain building work on the Site. On 26 February 2008, the Second Respondent told an employee of Australian Paper that Sandvik would need to get their site agreement right before they could start on the Site. On 28 February 2008 the Second Respondent told an employee of Sandvik that Sandvik needed to have an agreement that was in line with other industrial agreements that were in use at the Site. Later that day, the Second Respondent threatened to organise unlawful industrial action by contractors on the Site if Sandvik came on to the Site with the intention that Sandvik agree to make a building agreement with the AMWU under Part 8 of the *Workplace Relations Act 1996*. On 29 February 2008, the Second Respondent sent an email to Sandvik with a copy of an industrial agreement entered by another employer at the Site. On 13 March 2009 the Second Respondent told an employee of Sandvik that Sandvik must sign a like agreement before undertaking construction work at the Site. The threatened action would, if carried out, have been unlawful and constituted a contravention of s.44(1)(a) of the BCII Act because the Second Respondent intended to coerce, or apply undue pressure to, Sandvik to agree to make a building agreement with the AMWU under Part 8 of the *Workplace Relations Act* 1996. The conduct of the Second Respondent referred to above was conduct of the AMWU for the purposes of the BCII Act and, as a consequence, the AMWU also contravened s.(1)(a) of the BCII Act. This proceeding was issued on 29 June 2009 and a hearing will be held on a date to be fixed for the Court to consider the imposition of penalties ➢ Status: Prior to the issue of this proceedings, the parties reached a Statement of

	Agreed Facts. A first hearing has been set down before Justice North on 31 August 2009.
Site	Maryvale Paper Mill Facility, Morwell, Victoria

Case name	*Stuart v AMWU & Lee*
Date filed	30 March 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: Paper Australia Pty Ltd owns and operates the Maryvale Paper Mill facility in Morwell, Victoria. During 2007 and 2008, Paper Australia was undertaking a large expansion project involving various building and construction works at the site, known as the Pulp Mill Project. BMC Welding and Construction Pty Ltd (BMC) were engaged by Paper Australia to perform welding work on the project. On 24 July 2007 Mr Terry Lee, organiser for the AWU, held a 1.00pm meeting with employees of BMC in the crib room at the site. The meeting was scheduled to finish at 1:30 pm. At approximately 1.50pm the meeting concluded and the BMC employees left the crib room. Each BMC employee who had attended the meeting failed to return to work for the remainder of the working day. The ABCC alleges that the industrial action was unlawful, industrially motivated and taken for the purpose of supporting or advancing claims against BMC. ➢ Status: A directions hearing before Federal Magistrate Burchart has been set down for 11 August 2009.
Site	Maryvale Paper Mill Facility, Morwell, Victoria

Case name	*Stuart v AMWU, Lee, CEPU, Mooney, AMWU & Dodd*
Date filed	26 September 2008
Court	Federal Magistrates Court
Basis / Facts	➢ Background: Australian Paper Pty Limited owns and operates the Maryvale Paper Mill facility in Morwell, Victoria (the site). Australian Paper is undertaking a large expansion project involving various building and construction works, known as the Pulp Mill Project (PMP). On 25 October 2007, employees of five contractors (the Employees) engaged on the PMP left the site between 10.20 am and 11.30am and did not return to work that day. On or before 25 October 2007, Terry Lee of the AWU (Lee) booked the hall at the Gippsland Soccer League Club for 11am on 25 October 2007. That afternoon, Peter Mooney (Mooney) of the CEPU arranged a meeting with Australian Paper representatives that he attended with Steven Dodd (Dodd) of the AMWU and Lee. At this meeting, they informed Australian Paper that the Employees had attended a mass meeting that morning. The purpose of the meeting was to enable the unions to secure a mandate to progress claims with respect to the completion of the PMP. A resolution passed at the mass meeting was given to the Australian Paper representatives. The ABCC alleges that Lee, Mooney, Dodd and the AWU, CEPU and AMWU by the conduct of their organisers, aided, abetted, counselled or procured the unlawful industrial action or were knowingly concerned in the unlawful industrial action. ➢ Status: Listed for trial on 25 August 2009.
Site	Maryvale Paper Mill Facility, Morwell, Victoria

Case name	*Stuart v CFMEU & Corbett*
Date filed	25 February 2008
Court	Federal Court
Basis / Facts	➢ Background: In September 2006, a subcontractor was engaged to perform building work on the Police and Law Courts Complex at Morwell. The subcontractor's employees were not covered by a CFMEU industrial agreement. It is alleged that on 19 September 2006, the CFMEU shop steward, Charlie Corbett, refused to induct the employees of the subcontractor, caused delay to employees of the subcontractor unloading paint in the course of their work, demanded that the subcontractor enter into an EBA with the CFMEU and demanded that the employees attend for a second induction. It is further alleged that on or from 20 September 2006, demands were made for a CFMEU industrial agreement with the subcontractor, including demands from Mr Corbett and the CFMEU organiser John Parker. It is further alleged that on 3 October 2006, Mr Corbett demanded the employees of the subcontractor attend a third induction which he then refused to perform. Mr Corbett allegedly organised a stopwork meeting over the failure by the subcontractor to enter a CFMEU industrial agreement for all other employees on the site which resulted in workers not returning to work that day. ➢ Status: Justice Gray has reserved his decision on penalty.
Site	Morwell Police and Law Courts Complex site

Case name	*White v CFMEU & McLoughlin*
Date filed	13 July 2009
Court	Federal Court
Basis / Facts	➢ Background: Brady Constructions Pty Ltd was the head contractor at the Alto Apartments site on St Kilda Road, Melbourne, Victoria. On 19 February 2008, an organiser for the CFMEU, Adrian McLoughlin visited the site and directed employees of a contactor on the site to cease work and take industrial action. A concrete pour that was scheduled to take place was disrupted as a result of the employees stopping work. The ABCC alleges that the CFMEU and Mr McLoughlin engaged in unlawful industrial action by imposing a ban on building work at the site in contravention of s.38 of the *Building and Construction Industry Improvement Act 2005.* ➢ Status: A first directions hearing before the Federal Magistrates Court in Melbourne has been scheduled for 21 September 2009
Site	Alto Apartments, St Kilda Rd, Melbourne

Case name	*Williams v AMWU, CFMEU, Powell, Mavromatis, Stephenson & Pizzaro*
Date filed	6 February 2009
Court	Federal Court
Basis / Facts	➢ Background: John Holland has been contracted to undertake building work on the West Gate Bridge Strengthening Project (the Project). John Holland is negotiating an industrial agreement with the AWU. On Friday, 6 February 2009, the CFMEU and the AMWU (the unions) began a picket at the building site at Hyde Street, Spotswood. The unions wanted to represent the workers engaged by John Holland at the site and to negotiate their own industrial agreement. In the afternoon of Friday, 6 February 2009, the ABCC obtained an injunction in the Federal Court restraining the CFMEU, the AMWU and their employees from preventing or hindering access to the site. The order also prohibits the unions from encouraging any person not to enter or work at the site and prescribes their ability to attend at the site. John Holland later brought its own proceedings, which are being heard with the ABCC proceedings. The ABCC has intervened in the John Holland proceedings. Justice Jessup accepted the ABCC had presented an arguable case that the unions had arranged a picket at the site with the intention of coercing John Holland and a labour hire company to enter into industrial agreements with the Unions. This conduct is arguably contrary to s.44 of the *Building and Construction Industry Improvement Act 2005*. The interlocutory injunctions were extended on 17 February 2009 and 17 March 2009. The matter returned to Court on 24 March 2009 and Jessup J broadened the scope of the injunctions. The injunctions now extend to the site of the West Gate Bridge Strengthening Project in Spotswood, John Holland's project office in Port Melbourne and John Holland's head office in Abbotsford. The orders apply to the AMWU, the CFMEU and a number of union officials until the conclusion of the matter. These injunctions have been broadened on three occasions since 6 February 2009, the last occasion being 30 April 2009. At present, the ABCC is alleging more than 100 separate instances of unlawful industrial action and coercion by the Respondents in contravention of the BCII Act. A further injunction application was heard by Justice Jessup on 1 May 2009. Justice Jessup granted the ABCC and John Holland's application that the injunctions be extended to cover the West Gate Bridge itself, and work areas either side of the West Gate Bridge. This injunction covers the bridge

	and the site entrances at Lorimer and Sardine Streets, Port Melbourne. On 5 May 2009 the ABCC filed a Particulars of Contraventions document with the court which alleges in excess of 100 contraventions of the BCII Act at the Westgate Bridge project. At the direction hearing on 29 May, the court timetabled the matter towards trial. A further directions hearing is scheduled for October 2009. It appears likely that the trial will occur in March 2010, unless resolved by the parties before then. Mediation has been adjourned and is expected to recommence in October 2009. The parties, by consent, presented the court with proposed orders removing some of the existing injunctions to ensure work on the Westgate Bridge project was not prevented, delayed or hindered by the injunctions. ➢ Status: A further directions hearing is scheduled for October 2009. The matter is expected to be heard in the Federal Court in Melbourne in March 2010. Mediation has been adjourned and is expected to recommence in October 2009
Site	West Gate Bridge, Spotswood

Case name	*Wotherspoon v Brown*
Date filed	3 April 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: Hickory Developments Pty Ltd was the head contractor at a construction site in Mount Alexander Road in Flemington, Victoria. Hickory Developments contracted Austress Freyssinet Pty Ltd to carry out specialist works at the site. On the morning of 14 February 2008 Austress engaged one new employee on the site and one other temporary worker through a labour hire firm. Before commencing work at the site both workers attended a site induction that was carried out by Mr Robert Brown. At the site induction Mr Brown told both workers that they were required to be members of the CFMEU before they could commence work at the site. The ABCC alleges that Mr Brown contravened the freedom of association provisions of the *Workplace Relations Act 1996* ➢ Status: This matter has been filed in the Federal Magistrates Court in Melbourne. A mediation was held between the parties on 9 July 2009. The parties are scheduled to return to the court on 10 August 2009.
Site	Mount Alexander Road, Flemington

Case name	*Wotherspoon v CFMEU, CEPU, Spernovasilis, Gray, Christopher, McLoughlin and Hudson*
Date filed	12 November 2008
Court	Federal Court
Basis / Facts	➢ Background: Bovis Lend Lease Pty Ltd (BLL) has implemented a swipe-card access system known as "Blue Glue" on Australian building sites since mid-2007. In 2008, BLL was head contractor for the four major construction sites in Melbourne. A barbeque was held at Dockland's Park for BBL employees on 23 May 2008. It is alleged that CFMEU and CEPU organisers urged workers not to use the Blue Glue system at this barbeque. At the conclusion of the barbeque employees voted not to return to work that day in protest at Blue Glue. On 5 August 2008, about 40 organisers of the CFMEU and CEPU, attended the BLL Royal Children Hospital Project. The organisers told workers that they should leave work and gather round the Flemington Road Gate at the site. They distributed flyers and told BLL management that they wanted the Blue Glue system turned off. Many of the workers did not attend for work at the site on this day. CFMEU and CEPU organisers were among 150-300 employees gathered outside the ANZ Project site on 14 August 2008. The organisers directed the employees not to attend work and instead attend proceedings at the AIRC between BLL and the CFMEU and CEPU. The majority of the employees departed to attend the AIRC proceedings. A concrete pour scheduled for 10am that morning was disrupted by CFMEU organisers and others who linked arms to stop two concrete trucks entering the site. An AIRC order banning industrial action by the CFMEU and CEPU on BLL sites was in effect on 28 August 2008. On this morning BLL announced that the Docklands Projects were open and that guards would swipe employees in and out of the site. CFMEU organisers allegedly told 250-300 employees of BLL and its subcontractors that BLL was locking them out. At a meeting of the organisers and the employees a motion was passed that workers go home until Monday morning. The organisers and employees then marched to BLL's head office in Bourke St, Melbourne. Also on 28 August 2008, approximately 200 BLL employees allegedly left the site and did not return to work in protest over the Blue Glue system. CFMEU President Ralph Edwards and Vice President Frank O'Grady, CFMEU organisers Matt Hudson and Mr Reardon, and CEPU organisers Kevin Fitzgerald, and Wes Hayes allegedly trespassed on the site on this day and directed employees to down tools. The ABCC alleges that whilst acting in their capacity as officers of the

	CFMEU and CEPU, or with the authority of the CFMEU and CEPU, on 23 May 2008, 5 August 2008, 14 August 2008, and 28 August 2008, Mr Spernovasilis, Mr Gray, Mr Christopher, Mr McLoughlin and Mr Hudson breached s.38 of the *Building and Construction Industry Improvement Act 2005* (BCII Act) by aiding and abetting unlawful industrial action. ➢ Status: A penalty hearing has been set down for 25 September 2009.
Site	Royal Children's Hospital, Parkville, ANZ, Myer and Montage sites, Docklands

Case name	*Wotherspoon v CFMEU, Stephenson and Slater*
Date filed	20 May 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: Fulton Hogan Pty Ltd were engaged to undertake a road-widening project on the Monash Freeway between Jacksons Road and the South Gippsland Highway in South-East Melbourne. On 30 April 2008 CFMEU Officer Mr Gareth Stephenson and Mr Harry Slater, a CFMEU representative employed by Fulton Hogan, addressed two meetings at the site. The meetings were attended by Fulton Hogan employees as well as employees of building contractors engaged by Fulton Hogan. At the conclusion of the second meeting all or most of the employees failed to perform work on the site for the remainder of the day. The ABCC alleges that the CFMEU, Mr Stephenson and Mr Slater engaged in and procured unlawful industrial action. ➢ Status: The matter will be listed for mediation after 14 August 2009 and a further directions hearing is set for 8 October 2009.
Site	Monash Freeway, South-East Melbourne

Case name	*Dux v Bradley & AMWU*
Date filed	21 April 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: Laing O'Rourke Australia Construction Pty Ltd is a principal contractor engaged to build the new Darling Downs Power Station, near Dalby, west of Brisbane. On 18 September 2008, AMWU organiser, Terrence Bradley, spoke at a meeting of members of the AMWU and other Laing O'Rourke employees at the site. Following the meeting, 98 employees left the site and failed to return to work for the remainder of that day and on 19, 20 and 21 September 2008. It is alleged that the action was in support of a claim for paid travel time, which was not provided for in the workplace agreement. The ABCC alleges contravention of s.38 of the BCII Act. ➢ Status: A first directions hearing was held on 22 May 2009. The matter will be heard by Federal Magistrate Wilson on 16 November 2009.
Site	Darling Downs Power Station, Dalby, Queensland

Case name	*Wilson v Nisbet, Baker & CFMEU*
Date filed	27 January 2009
Court	Federal Court
Basis / Facts	➢ Background: Budget Shopfitters Pty Ltd operates an office and workshop at Brendale which engages in the manufacture of fittings for offices and shops. On 23 June 2008 CFMEU organisers, Tim Nisbet and Guy Baker, visited the Brendale premises and spoke to the managing director and a director of the company. The staff of the company were employed under an employee collective agreement. It is alleged that Mr Nisbet made threats intended to force Budget Shopfitters to terminate their collective agreement. It is alleged that Mr Baker, who was also present, was a party to the threats made by Mr Nisbet. ➢ Status: Listed for hearing before Justice Dowsett on 17 September 2009
Site	Terrance Road Brendale, Brisbane

Case name	*ABCC v CFMEU, McDonald & Buchan*
Date filed	26 June 2009
Court	Federal Court
Basis / Facts	➢ Background: In June 2009 Diploma Constructions (WA) Pty Ltd was constructing an office building at the Knoxville site at 915 Hay Street, Perth. Mr Joe McDonald and Mr Michael Buchan, officers of the CFMEU, visited the site on 5 June 2009 and addressed employees of various contactors engaged at the site. The ABCC alleges that Mr Buchan counselled the employees to stop work and leave the site for a three day period. Employees of nine contactors stopped work and did not return to work and did not return to work until 9 June 2009. Mr McDonald attended the site on 24 June 2009 and addressed employees of contractors engaged in the street outside the site. Employees of four subcontractors engaged to perform work at the site failed to attend for work on 24 June 2009. On 25 June 2009, Mr Buchan attended the site. Employees of five subcontractors engaged to perform work at the site failed to attend for work on 25 June 2009. The ABCC alleges that the CFMEU, Mr McDonald and Mr Buchan organised, or aided and abetted, counselled or procured a ban, limiation or restriction on the performance of building work at the site, in contravention of s.38 of the *Building and Construction Industry Improvement Act 2005.* ➢ Status: A first hearing took place on 2 July 2009. An interim interlocutory injunction was imposed upon the respondents restraining them from procuring industrial action or organising within 100 metres of the site. A further hearing has been scheduled for 17 July 2009 in the Federal Court in Perth before Justice Gilmour
Site	Hay St, Perth

Case name	*Flynn v CFMEU and Feehan*
Date filed	27 May 2009
Court	Federal Magistrates Court
Basis / Facts	➢ Background: John Hindmarsh (South Australia) Pty Ltd was the head contractor for a construction site at Flinders University, Bedford Park, South Australia. On 30 May 2008, a representative of the CFMEU, Mr Justin Feehan visited the site. Mr Feehan met with Hindmarsh site management and made several demands including that union officials should be allowed unrestricted access to the site and should be allowed to conduct meetings with union members at any time of their choosing. Mr Feehan's demands were rejected by Hindmarsh site management and he was directed to leave the site. Mr Feehan refused to leave the site. Hindmarsh site management called the police and the police attended the site. Shortly after the attendance of the police Mr Feehan organised a meeting outside the entrance to the site with employees of several contractors engaged at the site. Mr Feehan spoke to the employees and actively encouraged them not to return to work at the conclusion of the meeting. The employees did not perform work at the site for the remainder of the day, disrupting the performance of work at the site. As a consequence of both the stop-work meeting and the absence of the employees from work for the remainder of the day, the employees failed to perform the work that they were engaged to perform on the project. The ABCC alleges that the CFMEU and Mr Feehan were involved in two instances of unlawful industrial action. ➢ Status: The first directions hearing is scheduled to take place on 30 June 2009.
Site	Flinders University, Bedford Park

Case name	*Standen v Justin Feehan*
Date filed	5 May 2006
Court	Federal Magistrates Court
Basis / Facts	➢ Background: The ABCC has taken action against a CFMEU union official, Justin Feehan, seeking the revocation of his permit due to his alleged conduct at three different building sites between May 2004 and November 2005. It is alleged as part of the proceedings that Feehan was in breach of various obligations under the WR Act including that he failed to provide adequate notice of his attention to enter the sites, did not leave the sites upon request and acted in an inappropriate manner whilst on the site. The proceedings before the Australian Industrial Relations Commission in Adelaide had been stayed pending the outcome of the related Standen v Justin Feehan matter before the Federal Court at Adelaide. ➢ Status: Proceedings before the Australian Industrial Relations Commission in Adelaide are on hold. Mr Feehans' Right of Entry Permit expired on 10 February 2009 and he has not applied for a new permit
Site	Scott Salibury Homes site, and others.

Case name	*Robertson v Harrison*
Date filed	6 July 2009
Court	Fair Work Australia
Basis / Facts	➢ Background: The ABCC seeks the revokation of the right of entry permit held by Mr Brett Harrison, organiser for the CFMEU's Australian Capital Territory branch. The ABCC alleges that Mr Harrison is not a fit and proper person to hold a permit in accordance with s.513 of the Fair Work Act 2009. ➢ Status: A first hearing before FWA has been scheduled for Thursday, 16 July 2009.
Site	Not applicable

BUILDING INDUSTRY TASKFORCE CASES

Coercion/Intimidation

Alfred v CFMEU
CFMEU fined $2,000 for coercion
In October 2002, the CFMEU took unlawful industrial action to coerce a head contractor at the Sutherland Hospital site to sign an EBA. The CFMEU was found by the District Court of NSW to have breached the WR Act. A penalty of $2,000 was imposed.

Alfred v AMWU
AMWU fined $2,000 for coercion
In January 2003, the AMWU took industrial action to coerce a contractor to sign a new EBA at Shoalhaven District Hospital site. AMWU was found by the Chief Industrial Magistrates Court of NSW to have contravened the WR Act and ordered to pay $2,000.

R v Setka
Union Organiser Setka fined $500 for intimidation
In October/November 2002, CFMEU organiser, John Setka, threatened and intimidated a project manager prior to his appearance before the AIRC. Setka was found guilty in the Magistrates Court of Victoria on 5 November 2003 and fined $500.

Hadgkiss v Blevin, McGahan & CFMEU
CFMEU fined $5,500 and CFMEU organisers Blevin and McGahan fined $1,100 each for coercion
In November 2002, the CFMEU, CFMEU organiser Joe McGahan and site delegate Alan Blevin, demanded that a worker join the CFMEU or leave the site. In July 2004, the Federal Court (Sydney) fined the CFMEU $5,500 and ordered them to refund $200 in union dues. Blevin and McGahan were fined $1,100 each and, along with the union, required to make up almost $1,100 in lost pay.

Alfred v CFMEU & Ors
CFMEU fined $7,500 for breach of anti-coercion provisions
In April 2003, the CFMEU threatened to disrupt the work of a major subcontracting company because the subcontractor chose not to enter the CFMEU endorsed EBA. The CFMEU conceded that official, David Kelly, and delegate Scott Wilcox, breached the WR Act anti-coercion provisions. The Federal Court (Sydney) imposed a total of $7,500 in penalties on the CFMEU.

Industrial Action

Clarke v CFMEU, Molina & Powell
CFMEU fined $6,000 and union organisers Molina and Powell ordered to pay $1,500 and $1,000 respectively
In July and August 2004, a number of workers took industrial action on the Thornlie railway station site in WA. The Industrial Magistrates Court found the CFMEU and two of its officials, Walter Molina and Michael Powell, engaged in illegal industrial action and also breached the dispute settlement procedures of CA. The CFMEU had a penalty of $6000 imposed, with union organisers penalised $1500 and $1000 respectively.

Ponzio v McLean
CFMEU Shop Steward McLean fined $750 for failure to comply with dispute settlement procedures
In July 2003, Peter McLean, a CFMEU shop steward, failed to comply with the dispute resolution procedures in a certified agreement by closing a building site and refusing entry of subcontractors. Mr McLean admitted to the breach and was fined $750 by the Mildura Magistrates Court.

Freedom of Association

Hadgkiss v Barclay Mowlem
Barclay Mowlem fined $6,000
In November 2002, Barclay Mowlem reversed a decision to award a tender for earthworks worth $1.2m to an excavation subcontractor. It was found that the decision was made because the subcontractor did not have a union-endorsed EBA. Justice Branson imposed a penalty of $6,000 on Barclay Mowlem.

Strike Pay

Pine, Ponzio & Furlong v Multiplex Constructions (Vic) Pty Ltd, CFMEU, CEPU, ETU, and Ors
In August 2003, there was unprotected industrial action at a Melbourne construction site. The Taskforce commenced proceedings against various respondents regarding breaches of the WR Act including claiming, paying and receiving strike pay and failing to comply with dispute resolution clauses of Certified Agreements.
Between March and June 2005, a head contractor and several subcontractors were found to have breached the WR Act by paying strike pay.

- Schiavello (Vic) Pty Ltd were given a penalty in the form of a "good behaviour bond" of $1000 to be paid by the company if there was a further contravention of the Act within 12 months.
- BVM Builders and Maxim were given a penalty of $200 and $1,750 respectively.
- No penalty was imposed on Seelite Windows & Doors, Firebase Sprinkler Systems, D&E Air Conditioning, Expoconti, WJ Pratt or Casello Constructions, however it was declared that their conduct was a contravention of the WR Act.
- A penalty of $800 was imposed on Austress Freyssinet. Multiplex Constructions (Vic) Pty Ltd admitted to paying strike pay and was fined $4,000.

ATTACHMENT F: ACCI RESPONSE TO WILCOX RECOMMENDATIONS

ACCI Response - Wilcox Report Recommendations (May 2009)

Preamble

ACCI's response to the Wilcox J Report and Recommendations should be read in conjunction with other ACCI members (MBA, AMMA and CCIWA) involved in the DEEWR consultation process.

ACCI lodged a detailed written submission to the Wilcox J inquiry into the ABCC, and we continue to rely upon that submission (attached).

Recommendations	Comments
Recommendation 1: The proposed Specialist Division be located within the Office of the Fair Work Ombudsman but have: (i) operational autonomy under a Director, appointed by the Minister, who would implement policies, programs and priorities determined by an advisory board comprising the Fair Work Ombudsman, the Director and a number of part-time members appointed by the Minister; and (ii) funds allocated each year against an Outcome related only to the Specialist Division.	R1. **ACCI supports the retention of the ABCC in its current form. This also includes the Federal Safety Commissioner, *Building Construction and Industry Improvement Act 2005* (BCIIA), and associated legislation. It was the result of a robust and extensive Royal Commission into the industry. To disturb the existing framework in either a minor or substantive way opens up the possibility for the return to past unlawful practices that Commissioner Cole found in his final report.[1]** **We reiterate our primary thesis that the ABCC has made significant achievements in a short amount of time, with evidence of increased productivity, increased community benefits[2], decreased periods of unlawful conduct and a demonstrated change of behaviour in many instances.** **But the evidence also indicates that there is still significant cultural reform to be realised. This will undoubtedly take time. To dislocate the current arrangements by transferring the ABCC into a division of the Fair Work Ombudsman (FWO) would be to put in jeopardy the current work and reform process that has already begun.**

[1] Final Report of the Royal Commission into the Building and Construction Industry – Summary of Findings and Recommendations, Volume 1, pp.5-6.
[2] KPMG Econtech's 2009 report, *Economic Analysis of Building and Construction Industry Productivity*.

	However, should the Government continue with its policy to create a Specialist Division (SD), all of the current structures, legislative powers, penalties, procedures and resources should be successfully and smoothly transferred into the new body. It should, for want of a better word, be as close to a "rebadging" exercise as much as possible. Should the Government implement further amendments, such as the safeguards referred to in R4, then it should do so on such a foundation. We do not support R1 (ii) in its current form. An independent Director, similar to the current ABCC Commissioner should not be required to fulfil its statutory functions under direction of a "advisory board" or similar external source. This is the antithesis of independence – particularly if the board sets operational programs and priorities that allocate time and resources to areas that are dealt with by other agencies (ie. underpayments, OHS etc). This will do a disservice to the continued challenge of implementing a cultural shift which is required in the sector. It is Parliament's role to set the statutory responsibilities for a statutory office holder. It is up to that office holder to discharge those functions in a manner according to its own independently determined priorities, programs and policies. This is what occurs in other areas of public regulation, such as the Workplace Ombudsman, the ACCC, ATO. Recalling that public agencies have a finite amount of allocated resources by which they must discharge their functions and duties. The Workplace Ombudsman sets out its on education and compliance campaigns within its broad set of statutory functions. It exercises equivalent powers to the ABCC and does not require a board to do so. ACCI is also concerned that a board as described in R1(ii), will confuse the demarcation between the Director and the FWO. Furthermore, we are concerned that part-time members may be appointed from industry where they may come (consciously or not) with their own

[3] http://www.finance.gov.au/financial-framework/governance/docs/Uhrig-Report.pdf

	agendas/biases. This will ultimately impact upon the compliance activities of the Director. Industry and the community must be reassured that a Director is independent from external influence. ACCI does not oppose a consultative committee, derived from key stakeholders, which would inform the Director of contemporary issues in the industry and provide constructive feedback on the work of the new SD. This is what currently occurs within the ABCC. It is a concept also used by other regulators. For example, ACCI sits on the ATO's Superannuation Consultative Committee to provide employer feedback to the ATO. It's governed by a Charter and proceedings are minuted. The Australian Fair Pay Commission also has its disability roundtable, which serves to inform the Commissioners in a similar manner. Similarly, the Board of Taxation is not a governance Board, nor outlines priorities for the Commissioner of Taxation – it merely offers advisory and consultation to the ATO. The Administrative Review Council similarly informs the Attorney-General through its reports. The Government's *"Review of the Corporate Governance of Statutory Authorities and Office Holders"* recommends that the main role of an "advisory board" is to *"contribute a business and broader community perspective to improve the implementation of government policy"*. It is therefore, a passive and not active body, and it is to inform Government not the actual agency on policy implementation.[3] We believe that such a Fair Work Building and Construction Industry Consultative Committee would serve as a better mechanism to inform the Director of industry, employee and unions views. It would assist the Director set its own policies and programs, but not necessary impose any requirement for the Director to have regard to those views. R1 (ii). ACCI supports adequate Government funding being allocated to the SD. This is essential if the SD is to have an impact in enforcing the rule of law. We would expect

	that the SD would be providing with a similar amount of funding. **ACCI member feedback does suggest that more resources are required in certain States, such as WA and Vic, due to the nature and level of industrial action and unlawful conduct.** **ACCI supports the current ABCC Commissioner and would welcome a continued succession to the new SD, as has occurred with appointments to Fair Work Australia.**
Recommendation 2: The provisions of the Fair Work Bill governing: (i) the conduct of employers, employees and industrial associations; and (ii) penalties for contraventions of the Fair Work Bill; apply, unchanged, to participants in the building and construction industry.	**R2.** **ACCI continues to support the BCIIA in its current form. We believe that this should be translated into either a separate Act (preferred), or into the *Fair Work Act 2009* (FW Act).** **A separate Act would provide a signal that there is a "strong cop on the beat".[4] It would also ensure that "the principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue".[5]** **The current objectives in s.3 should remain, as should:** **- All provisions in the BCIIA that govern unlawful conduct (ie. Part 2, 3, 4, Chapter 6 and 7).** **- Particularly, ss.36- 49 and s.52(6)'s penalty provision.** **These are all essential to ensuring that building industry participants adhere to the rule of law and comply with industrial relations rules.** **ACCI does not support the FW Act applying to the industry. Essentially, this is what occurred prior to the Cole Royal Commission, and is essentially why Cole recommended a specialist enforcer and regime to deal with the industry. Should building industry participants be subject to the FW Act, as other employers, employees and unions are, we fear that unions would ignore orders**

[4] ALP, *Forward with Fairness – Policy Implementation Plan*, p.24.
[5] Ibid.

	of FWA and the Courts, just as Cole observed in his report under the *Workplace Relations Act 1996*.[6] Cole also stated that: "*Section 127 of the [WR Act] has proved to be ineffectual in preventing unlawful industrial action taking place in the building and construction industry*".[7] Cole recommended in his report that the existing penalty regime at the time was inadequate, and specifically recommended that penalties for individuals and body corporates be substantially increased.[8] Cole recommended that *"a comprehensive package of reforms implemented on a long term basis is required"*.[9] ACCI does not agree with a number of statements in the Wilcox J report, particularly, 1.17 – 1.19 and 4.62. Parliament did not decide on the content of the BCIIA or its replacement when it considered the FW Act. The two issues are separate and were not on the table during the Parliamentary process. There is a very real difference between the unlawful industrial provisions under the FW Act and those under the BCIIA. They are more real than semantic as suggested by Wilcox J. Under s.38 of the BCIIA, unlawful industrial action as defined, is unlawful per se and subject to penalties. Under the WR Act or FW Act, unions engaged in unlawful industrial action (outside of the nominal expiry date of an agreement) would only be subject to a penalty, if it breached an order of Commission or the Courts. This is a very real motivator for unions not to engage in industrial action as defined under the BCIIA. ACCI also disagrees with the analysis contained in 4.64 to 4.70. We support the current provisions regarding the onus of proof in s.36(1)(g) of the BCIIA. This was specifically included in the BCIIA because unions often rely on OHS grounds (whether legitimately or not) to avoid liability of unlawful industrial action.

[6] Volume 1, p.63
[7] Ibid.
[8] Ibid, at pp.35, 38,86, and 96.
[9] Ibid, at p.7

	ACCI also strongly supports provisions in the BCIIA that allows the ABCC Commissioner the right to intervene in proceedings. This has been another powerful motivator for all building construction participants. **Government should exercise extreme caution before it considers removing the provisions in the BCIIA as Wilcox J has recommended.**
Recommendation 3: The Director of the Building and Construction Division be invested with a power, similar to that contained in section 52 of the *Building and Construction Industry Improvement Act 2005*, to cause people compulsorily to attend for interrogation, but subject to the safeguards contained in Recommendation 4; and (i) the grant of this power be reviewed after five years; (ii) in order to ensure review, the provisions in the new legislation providing for compulsory interrogation be made subject to a five-year sunset clause.	**R3.** **ACCI welcomes the continued retention of s.52 powers.** **However, we also want to ensure that s.52, which is modelled on s.155 of the *Trade Practices Act 1974* (TPA) is translated as consistent as possible. We support the penalty regime associated with a breach of s.52.** **R3(i).** **ACCI does not oppose a review of this power after 5 years. However, we oppose R3(ii).** **R3(ii).** **Given that Wilcox J has recognised that *"there is still a level of industrial unlawfulness in the building and construction industry ... that it would be inadvisable not to empower the BCD to undertake compulsory interrogation"* ACCI does not support R3 (ii) if it is an automatic repealing of the coercive power.** **The coercive powers should continue until Parliament decides to revoke them or modify them, and that should only take place after the 5 year review.**
Recommendation 4: The use of compulsory interrogation be subject to the following safeguards: (i) a notice to a person compulsorily to attend for interrogation be issued only by a presidential member of the Administrative Appeals Tribunal who is satisfied by written material, which may include evidence on the basis of "information and belief", that: (a) the Building and Construction Division has commenced an investigation into a particular suspected contravention, by one or more building industry participants, of the Fair Work Act, an "industrial law", as defined by that Act, or an industrial instrument made under that Act; (b) there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation, or is capable of giving evidence that is	**R4.** **ACCI does not believe that additional safeguards have been proven to be necessary. There has not been any evidence of misuse or abuse by the Interim Building Taskforce or the ABCC. The ABCC has its own policy on how it will use its powers which is published. The ABCC also ensures that the use of the s.52 powers is in compliance with the Administrative Review Council's principles contained in Report No.48 (May 2008).**

relevant to that investigation; (c) it is likely to be important to the progress of the investigation that this information or evidence, or those documents, be obtained; and (d) having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact upon the person of being required to do so, insofar as this is known, it is reasonable to require that person to attend before the Director or a Deputy Director and answer questions and/or produce documents relevant to the investigation; (ii) the Director or a Deputy Director of the Building and Construction Division preside at all compulsory interrogations; (iii) the Commonwealth Ombudsman monitor proceedings at all compulsory interrogations and for that purpose the Director: (a) promptly notify the Commonwealth Ombudsman of the issue of all notices to attend for interrogation; and (b) promptly after the interrogation, supply to the Commonwealth Ombudsman a report, a video recording of the interrogation and a copy of any written transcript; and (iv) the Commonwealth Ombudsman report to Parliament annually, and otherwise as required, concerning the exercise of the power of compulsory interrogation.	**The structure, content and formulation of s.52, was based upon s.155 of the TPA which was recommended by Cole in his report.[10]** **All other agencies which have similar coercive gathering powers, such as the ATO, APRA, ASIC, ACCC, Centrelink and Medicare, do not have additional safeguards. According to the annual reports of ASIC and the ACCC, these agencies use the powers a greater number of times than has been the case with the ABCC.** **Currently the Commonwealth Ombudsman can inquire into complaints against decisions and practices of the ABCC. We do not oppose this continuing.** **ACCI does not support R4. However, we do not oppose the following measures in lieu of R4:** - **The Commonwealth Ombudsman to prepare a report for tabling in Parliament on the exercise of the coercive functions of the SD (Cole Recommendation No. 197) and what essentially occurred under the now repealed s.88AI of the *Workplace Relations Act 1996*.** - **The Minister to prepare a report on coercive functions to be tabled in Parliament. (Cole Recommendation No.196).** **Notwithstanding, we make the following recommendations:** **R4(i) (c) and (d) are not necessary as it is captured by (a) and (b). (a) and (b) shifts the onus on the AAT to decide matters that would otherwise be considered by the Director. ACCI does not think this additional step is necessary as the Director is able to form these views and the potential for abuse of process remains extremely limited.** **We also don't support (d) because it requires the AAT to inquire into the *"nature or likely seriousness of the suspected contravention"* which may be unknown at that**

[10] Recommendation 184, with the addition of the immunity provisions contained in s.6DD of the *Royal Commissions Act 1902*.

	point in time as the coercive power is necessary to obtain that information in the first instance. It also requires the AAT to assess the likely *"impact upon the person"* which does not go the heart of the issue as to whether there is relevant information in a person's possession. **It should be made clear in any proposed legislation that the Director may re-apply to the AAT for the issuance of a notice for either the same person or same factual circumstances. An application should not be ousted by virtue that an application has been knocked back previously. An aggrieved applicant should not be able to challenge a subsequent applications on grounds that it may be an abuse of process (or other similar grounds) in the Courts. This should be dealt with in proposed legislation.** **R4(ii).** **ACCI does not oppose this recommendation.** **R4(iii).** **ACCI does not consider (a) to be necessary, as it would be a regulatory burden on the SD to provide all notices to the Commonwealth Ombudsman. (b) requires a report, video and transcript to be supplied. ACCI does not have an in-principle opposition (subject to ACCI members comments) for a copy of the transcript or report to be supplied. This should be subject to strict confidentiality/secrecy requirements. These additional processes should not, however, invalidate, or have any implications on the lawfulness of the exercise of the coercive power.** **R4(iv).** **ACCI supports this recommendations for the reasons articulated above.**
Recommendation 5: The legislation authorising compulsory interrogation provide for: (i) payment to persons summoned for interrogation of their reasonable expenses (travelling, accommodation and legal, as may be) and any loss of wages or other income; and (ii) recognition and availability of client legal privilege and public interest immunity.	**R5 (i).** **ACCI does not oppose this recommendation, except for the payment of legal expenses. We are not aware of any other agency having to compensate a person for expenses associated with legal costs incurred.**

	There is a very real prospect that a person subject to coercive powers will intentionally incur extensive costs with respect to providing instructions, obtaining legal advice from solicitors and counsel, associated expenses (travel, accommodation of legal advisers etc.). **ACCI does not oppose the Commonwealth paying (in accordance to an allowance or scale of costs) loss of wages or other income. This should be a matter for the Commonwealth to determine.** **R5(ii).** **ACCI notes that the ABCC in its Guide to Compliance Powers, at paragraph 35 *"... the ABC Commissioner expects that the section 52 investigative power does not abolish the right to claim legal professional privilege when responding to a notice."* Therefore, it appears that there is no need for a specific provision to address this issue.** **ACCI is concerned that if public interest immunity should be available, there is a possibility that claimants may unnecessarily invoke this exception to providing information and slow down investigations. There must be an ability for the Director to apply to either the AAT or Court to determine whether something should be subject to public interest immunity.**
Recommendation 6: (i) A new Division 4 be added to Part 5-2 of the Fair Work Bill relating to the "building and construction industry", as therein defined. (ii) The definition of "building and construction industry" follow the definition of "building work" in the *Building and Construction Industry Improvement Act 2005*, but excluding off-site work.	**R6(i).** **ACCI supports a separate stand-alone Act which translates the BCIIA consistent with ACCI's submissions.** **R6(ii).** **ACCI does not make any specific submission on this recommendation and refers to ACCI members submissions.**
Recommendation 7: The Director of the Building and Construction Division have all the functions, powers and responsibilities, in relation to the "building and construction industry", as defined in the new legislation, that the Fair Work Ombudsman has in respect of other industries; including, in particular, investigation of suspected unlawful behaviour by any building industry participant (whether employer, employee or industrial association) and the prosecution of penalty and other legal proceedings.	**ACCI does not have an in-principle objection to this, and also refers to ACCI member submissions.**
Recommendation 8: Except perhaps in rural and remote areas, the Building and Construction Division have its own dedicated operational staff, including inspectors.	**ACCI supports this recommendation. The SD should have dedicated officers who currently work for the ABCC. This also includes support staff, such as lawyers who have developed expertise and skills in this area.**

ACCI Response - Wilcox Report Suggestions and Comments on the Guidelines

Comment (paragraph reference)	Comments
It seems desirable to retain the Code and Guidelines as an adjunct to the statutory provisions governing conduct in the industry. (paragraph 7.32(a))	**ACCI supports the retention of the Code and Guidelines.**
I think it would be preferable to limit the application of the Guidelines to on-site work. (paragraph 7.32(c))	**ACCI refers to ACCI member submissions.**
I make the suggestion that the Government review the content of the Guidelines, in consultation with industry participants, including the unions and the States and Territories, both to remove existing ambiguities and to include desirable positives. It would be good to have the revised Guidelines take effect when the new regime commences on 1 February 2010. (paragraph 7.32(d))	**ACCI refers to ACCI member submissions, however notes the following:** **ACCI would be concerned that current provisions were removed or watered down which would prejudice the positive contribution it has had to industry, Commonwealth and the community. The guidelines should not simply be amended to be "compatible" or consistent with the FW Act for that goal per se. The criteria should be whether *"continue[s] to act as a catalyst for reform in the building and construction industry"*. That is the benchmark which the Government should assess the guidelines and by which building industry participants, and the wider community should assess any amendments to the Code/Guidelines.**
If the Guidelines are to be retained, either in their present or an amended form, they ought to be made a disallowable instrument, using either the present section 27 or a similar provision in the new Act. (paragraph 7.32(e))	**ACCI refers to ACCI member submissions.**
To demonstrate code-compliance, the entity would need to show that its industrial instruments comply with the Guidelines and, I suggest, that neither it nor any related entity has been found to have contravened the legislation, or an industrial instrument, within (say) the previous two years. (paragraph 7.32(f))	**ACCI refers to ACCI member submissions.**

ACCI – LEADING AUSTRALIAN BUSINESS

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

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- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.
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- Research and policy development on issues concerning Australian business.

- The publication of leading business surveys and other information products.

- Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

Publications

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- The ACCI Policy Review; a analysis of major policy issues affecting the Australian economy and business.

- Issue papers commenting on business' views of contemporary policy issues.

- Policies of the Australian Chamber of Commerce and Industry – the annual bound compendium of ACCI's policy platforms.

- The Westpac-ACCI Survey of Industrial Trends - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia.

- The ACCI Survey of Investor Confidence – which gives an analysis of the direction of investment by business in Australia.

- The Commonwealth-ACCI Business Expectations Survey - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories.

- The ACCI Small Business Survey – which is a survey of small business derived from the Business Expectations Survey data.

- Workplace relations reports and discussion papers, including the ACCI Modern Workplace: Modern Future 2002-2010 Policy Blueprint and the Functioning Federalism and the Case for a National Workplace Relations System and The Economic Case for Workplace Relations Reform Position Papers.

- Occupational health and safety guides and updates, including the National OHS Strategy and the Modern Workplace: Safer Workplace Policy Blueprint.

- Trade reports and discussion papers including the Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World Position Paper.

- Education and training reports and discussion papers.

- The ACCI Annual Report providing a summary of major activities and achievements for the previous year.

- The ACCI Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004–2014.

- The ACCI Manufacturing Sector Position Paper: The Future of Australia's Manufacturing Sector: A Blueprint for Success.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports, is available on our website – www.acci.asn.au.

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