



THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

16 July 2009

Committee Secretary
Senate Education, Employment & Workplace Relations Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

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

Thank you for the opportunity to make a submission on this Bill.

We have written an academic article on the primary Act that this Bill seeks to amend. It is attached, as published as 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244. We reached the conclusion that the coercive and investigatory powers conferred upon the Australian Building and Construction Commission by the primary Act are unwarranted, especially given the absence of appropriate safeguards.

The safeguards proposed in this Bill represent an important range of improvements to the primary Act. The safeguards are of a kind recommended in our article and in our subsequent submission to the Wilcox Inquiry into the Transition of the Australian Building and Construction Commission to a Specialist Division of Fair Work Australia. We support each and every one of the safeguards and recognise that they amount to an impressive, and much needed, set of improvements. In particular, conditioning use of coercive powers upon the approval of a presidential member of the Administrative Appeals Tribunal will remove both the possibility and the perception that the powers may be used for inappropriate, even ideological, purposes. Other improvements such as the imposition of a sunset clause, and an expanded role for the Commonwealth Ombudsman are also highly desirable.

The Bill should therefore be enacted in order to bring about much needed improvements to the primary Act.

However, we note that even with these safeguards the coercive powers provided for in the primary Act are not justified. The safeguards do not, for example, overcome the fact that the coercive powers can be used in an overly-broad set of circumstances, such as in regard to non-suspects and children in the investigation of minor or petty breaches of industrial law and industrial instruments. The coercive powers are not justified in this industrial setting. The

preferable course would be to remove the powers entirely and to have a strong and effective enforcement and investigation regime that applies across all industries.

Yours sincerely

A handwritten signature in black ink, appearing to read 'N. McGarrity', written in a cursive style.

Ms Nicola McGarrity
Director
Terrorism and Law Project

A handwritten signature in black ink, appearing to read 'George Williams', written in a cursive style.

Professor George Williams
Anthony Mason Professor
and Foundation Director