Australian Government
Australian Building and Construction Commissioner

GPO Box 9927
Melbourne VIC 3001
t. 03 8509 3001
f. 03 8509 3020

27 April 2009

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

Dear Deputy Prime Minister

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

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

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

Yours sincerely

John Lloyd
ABC Commissioner PSM

WILCOX REPORT – ABCC COMMENTS

Chapter 3 – Specialist Division of What?

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

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

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

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

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

Chapter 4 – The Content of the Rules Governing Building Workers

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

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

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

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

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

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

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

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

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

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

Chapter 5 –Coercive Interrogation

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

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

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

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

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

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

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

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

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

Chapter 6 – Safeguards

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

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

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

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

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

Chapter 7 – The Code and Guidelines

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

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

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

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

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

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

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

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

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

Chapter 8 – The Building and Construction Division

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

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

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

Chapter 9 – What of the BCII Act?

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

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

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

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

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

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

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

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

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

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