

***Building and Construction Industry Improvement
Amendment (Transition to Fair Work) Bill 2011***

JOINT SUBMISSION ON BEHALF OF THE

AUTOMOTIVE, FOOD, METALS, ENGINEERING, PRINTING

AND KINDRED INDUSTRIES UNION,

AUSTRALIAN WORKERS UNION,

COMMUNICATIONS, ELECTRICAL, ELECTRONIC, ENERGY,

INFORMATION, POSTAL, PLUMBING AND ALLIED SERVICES UNION OF AUSTRALIA

AND

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

January 2012

1 Introduction

- 1.1 On 3 November 2011 the Federal Government introduced the *Building and Construction Industry Improvement (Transition to Fair Work) Bill 2011* (the 2011 Bill) into the House of Representatives. That Bill substantially reproduces the terms of an earlier Bill, the *Building and Construction Industry Improvement (Transition to Fair Work) Bill 2009*, (the 2009 Bill) which lapsed when Parliament was prorogued for the 2010 federal election.
- 1.2 On 10 November, 2011 the 2011 Bill was referred to the Senate Education, Employment and Workplace Relations Committee for inquiry and report.
- 1.3 The 2011 Bill retains and renames the existing legislation, the *Building and Construction Industry Improvement Act 2005* (BCII Act), but makes five key changes to the law.
 - (i) It abolishes the Office of the Australian Building and Construction Commissioner (ABCC) and creates a new statutory agency, the Office of the Fair Work Building Industry Inspectorate (the Building Inspectorate), to regulate industrial relations in the construction industry.
 - (ii) It repeals construction industry specific laws that provide for higher penalties for breaches of industrial law and a wider range of circumstances in which industrial action attracts penalties.
 - (iii) It allows the Director of the Building Inspectorate to obtain an examination notice under which persons can be compulsorily questioned or required to provide documents relating to an investigation.
 - (iv) It introduces a series of procedural safeguards in relation to the power to issue and rely on these coercive examination notices; and
 - (v) It creates a new office of 'Independent Assessor' which is to determine applications to have particular projects exempt from the reach of coercive notices that would otherwise be available to the Director of the Building Inspectorate.
- 1.4 Many features of the 2011 Bill appeared in the 2009 Bill. The 2009 Bill was also the subject of an inquiry and report by this Committee. We refer the Committee to the submissions which we made in relation to that Bill.
- 1.5 After more than six years of separate and additional regulation in the construction industry, these changes go some way towards bringing the industrial laws in that industry back into line with those applying to the rest of the community. However the 2011 Bill fails to deliver on some key points of principle.
- 1.6 Firstly, the Bill adopts the flawed notion that there is a need for a separate statutory regulator for the construction industry. The creation of the ABCC in 2005 was the first time ever that an industry-specific industrial inspectorate had been legislated into existence by the Federal Parliament. Up to then, all industries had been covered by a single government inspectorate.
- 1.7 The current Government has accepted that having a single national system of industrial laws is in the national interest. That idea was fundamental to the creation of the *Fair Work Act* (2009) (FW Act). Since 2009, the FW Act has provided a comprehensive and

detailed system of regulation, including rules relating to the taking of industrial action and effective remedies against *all* parties for breaches of industrial law. Importantly, it also created a new industrial inspectorate, the Office of the Fair Work Ombudsman (FWO).

- 1.8 The FWO is a very active and well-resourced agency with broad investigatory powers that enable it to carry out its work across all industries. It has carried out its enforcement role in an effective and impartial way without the use of coercive interrogation powers. In doing so, it has garnered widespread public confidence and support.
- 1.9 Prior to the 2007 election, the ALP in opposition undertook to create a single 'one-stop shop' inspectorate which would also include specialist Divisions and which would focus on, and have expertise in, particular industries. The construction industry was identified as one of those industries. The 'Forward with Fairness' industrial relations policy of April 2007 said *'Labor does not believe in separate industrial rules and regulations for different industries.'* However, instead of merging the operations of the new inspectorate into the FWO, this Bill seeks to retain a separate, industry-specific statutory agency and simply rename it.
- 1.10 Abolition of the ABCC has been ALP policy at the last two federal elections. As at 1 December 2011 the ALP National Platform said the ALP will *'abolish the ABCC from 1 February 2010 and ensure that the new Fair Work inspectorate provides a balanced and effective compliance regime, which will provide procedural and substantive fairness to all parties in the construction industry.'*¹
- 1.11 The notion that there should be one standard applying equally to all citizens is not simply a matter of efficiency or administrative convenience. Equal treatment before the law is a bedrock principle underpinning our democratic tradition. If a separate statutory regulator is maintained for this industry, this will mean persisting with a range of other laws that go with it and will be an unnecessary departure from the principle of having a single set of laws for all citizens.
- 1.12 We urge that the responsibility for the construction industry be given to the FWO. If it were thought necessary thereafter, a dedicated group within that office with specialist knowledge of the industry could be allocated a specific role by the FWO.
- 1.13 The 2011 Bill also retains, albeit with some safeguards, coercive powers for use in the investigation of industrial issues. These powers are unprecedented. No other industrial inspectorate in Australia or anywhere else in the world has ever been given such intrusive and far-reaching powers to compel its citizens to attend and face interrogation over what has happened in the workplace.
- 1.14 Coercive powers have no place in the industrial laws of a democracy. The addition of procedural safeguards will not render these powers acceptable. The history of the use and abuse of these coercive powers by the ABCC makes a compelling case for their repeal.

¹ Chapter 4, paragraph 36.

1.15 The 2011 Bill must ensure that the regulation of the construction industry is returned to the general laws applying to everyone else in the federal system. The separate inspectorate and coercive powers proposed by this Bill cannot be justified and the 2011 Bill should be amended to remove these features.

2 Background

- 2.1 The BCII Act has its origins in the recommendations of the Cole Royal Commission into the Building and Construction Industry. That Commission was created by the Howard Government in the lead-up to the closely-fought 2001 federal election. The Commission was not a response to any crisis in the industry or because of any consensus on the need for reform. It was set up purely as a political stunt designed to generate sensationalist anti-union headlines, to damage by association, the Labor Opposition and to give the Coalition Government an electoral advantage.
- 2.2 The Royal Commission was an intensely politicised process from the outset. Its focus, processes, findings and recommendations were all controversial. There was no serious attempt to investigate or expose employer wrongdoing during this Commission. The focus was union conduct. Virtually without exception, the recommendations that were ultimately made neatly coincided with existing Liberal Party industrial relations policy. The Royal Commission's recommendations went on to find their way not just into the BCII Act, but also into the 'WorkChoices' legislation that followed it.
- 2.3 Despite its enormous cost to the public (around \$60m) and the intense scrutiny of union activity, and contrary to the political hyperbole both before and after the Commission, the Cole Royal Commission did not uncover criminality, violence or institutionalised corruption.
- 2.4 The Report did identify what it described as unlawful and 'inappropriate' industrial behaviour. These conclusions were disputed by the unions who complained bitterly during the inquiry that the hearing process, which was largely at the discretion of the Commissioner, did not give them a proper opportunity to present their case.
- 2.5 However, of the 392 instances of so-called 'unlawful conduct' in the Final Report, only one was ever pursued and it was ultimately dropped, without being prosecuted to finality². Of the supposed more serious instances contained in the 'secret volume' of the Final Report, six years after the Report was released, the Government confirmed that 98 referrals to external agencies had resulted in **one** prosecution of a company for the payment of strike pay and one prosecution of a unionist for giving false testimony to the Commission itself.³
- 2.6 One of the Royal Commission's key recommendations was the creation of the ABCC and the conferral on that body of coercive powers to use to investigate breaches of industrial law.
- 2.7 Up until 30 May 2007, the ALP had opposed the BCII Act and criticised the way the ABCC conducted itself. On that day the then Shadow Minister announced that under a Labor Government, the ABCC would remain in place until 31 January 2010, at which point a specialist division of FWA would replace the ABCC and assume responsibility for the construction industry. This sudden about-face was prompted by speculation that damaging reports about union behaviour were about to be released by the media. It was designed to minimise any possible damage from those reports and deflect criticism of

² Senate Employment, Workplace Relations and Education References Committee 25/05/04 Hansard page 81.

³ See letter from Deputy Prime Minister to CFMEU dated 13 January 2009, attached as Appendix 1.

the ALP as being 'soft on unions' in the lead-up to the 2007 election. The decision to retain the ABCC on a temporary basis was purely a matter of political convenience. It had no sound basis in public policy.

3 Busting the Myth – Industrial, Not Criminal Laws

- 3.1 It is important to be clear about what the BCII Act does and does not do. The Act makes virtually all forms of industrial action unlawful and those taking the action are made subject to a fine. It also creates the ABCC and gives it power to compel people to attend interviews, answer questions and/or provide documents or information relating to its investigations. These interrogations are conducted in private and interviewees are generally not allowed to disclose to anyone else what happens during the interrogation. The penalty for not complying with a notice is six months imprisonment.
- 3.2 There is no ‘right to silence’ under these laws. In other words, people can be compelled under these laws to ‘dob in’ their workmates over industrial matters.
- 3.3 Fundamentally however, the BCII Act **does not and has never** dealt with **criminal** conduct. It is concerned with the regulation of **industrial** behaviour.
- 3.4 Alleged breaches of the industrial action provisions of the BCII Act can result in **civil** proceedings⁴ and where breaches are proved, civil, not criminal, penalties. This is not a semantic distinction. It goes to the heart of the debate about the justifications which have been used to underpin these laws.
- 3.5 Arguments about the need to retain the laws because of allegations of widespread violence or threats of violence, criminal damage to property, extortion and the like are not only misplaced but have the effect of distorting the policy debate and the public perception of what the laws are designed to achieve.
- 3.6 A lack of understanding about the nature of the laws is widespread in the community. The public commentary surrounding the laws perpetuates these misconceptions. In some cases it is difficult to discern whether the commentary is simply inaccurate or intentionally misleading.
 - An opinion writer for the *Melbourne Herald Sun* has described the *BCII Act* as a law that ‘*compels building workers to give evidence to regulators investigating criminal activity, or face jail.*’⁵
 - *The Adelaide Advertiser* has editorialised about the ‘*widespread corruption*’ in the industry and the need to ensure that employers, contractors and suppliers have the right to operate free from ‘*threats of physical violence.*’⁶
 - On 9 June 2009, *ABC News* reported that the Australian Building and Construction Commissioner [ABCC] was ‘*set up by the previous government to crack down on violent behaviour.*’⁷
- 3.7 Many employer organisations have made similar public comments, a number of which will no doubt be repeated during the course of the debate about this Bill.

⁴ There are two criminal offences created by the *Act*. The first is refusing to provide information/evidence/documents when required under the coercive powers, discussed below. The second is the disclosure of ‘protected information’ by ABCC officials/staff.

⁵ Andrew Bolt, *Herald Sun* Friday 19 June 2009 page 38. 4 15 June, 2009, page 16. 5

⁶ 15 June, 2009, pg 16

⁷ <http://www.abc.net.au/news/stories/2009/06/09/2592647.htm>

- 3.8 Of most concern however are the ongoing references by lawmakers to the BCII Act as an antidote to criminal behaviour. This problem extends right back to the time when the BCII Act was first brought before the Parliament.
- 3.9 In its pre-election policy announcements in 2007, the ALP was also apparently unable to appreciate just what work the BCII Act and the ABCC do. In its *'Forward with Fairness Policy Implementation Plan'* where the limited rationale for the continuation of the ABCC is set out, the ALP in Opposition stated *'A future Rudd Labor Government will not tolerate intimidation or violence by any party in the building and construction industry.'*
- 3.10 In the Second Reading speech for the 2009 *Bill* there were references to pockets of the industry where *'violence and intimidation'* occur and to the need to comply with laws relating to the payment of wages and sham sub-contracting as well those outlawing *'violence and intimidation.'*
- 3.11 The target of the BCII Act, and the ABCC, is and has always been, unlawful industrial action. This is dealt with by civil sanctions.
- 3.12 In the debate about the powers that a government agency should have to investigate these matters the starting point should be that the powers must be appropriate having regard to the types of matters that are being investigated. The point was well summarised by Williams and McGarrity in their submission to a Senate Committee in the inquiry into the *Building and Construction Industry (Restoring Workplace Rights) Bill* in 2008:-
- 'The ABCC is primarily responsible for monitoring, investigating and enforcing civil law, or more specifically, federal industrial law like the BCII Act and industry awards and agreements. Investigatory powers of the type bestowed on the ABC Commissioner had previously been unheard of in the industrial context. In this light, the powers of the ABCC are not only extraordinary, but unwarranted...Such powers should not be bestowed on a body dealing with contraventions of the civil law and potentially minor breaches of industrial instruments.'*
- 3.13 No-one has suggested that the criminal law is not adequate to deal with criminal behaviour whether it occurs in the workplace or elsewhere. The trade union movement has always accepted that criminal behaviour must be dealt with under the criminal law. The Parliament is not being asked here to consider criminal sanctions to bring criminal behaviour to account. References to criminality in this debate are completely misplaced and show that there are no other arguments of substance to justify these laws. Particularly in the discussion about coercive powers, the real question is whether they are desirable or necessary in an *industrial* context.
- 3.14 The 2011 *Bill*, if passed, will not change the focus of investigations by the Director of the re-badged ABCC. In the same way as the FWO investigates alleged (civil) industrial breaches in other industries, the Director the Building Inspectorate will have that responsibility in the construction industry. What is abundantly clear however, is that the FWO has operated very successfully without coercive interrogation powers. There is no justification for allowing such powers to continue to apply to construction workers.

4 HOW HAS THE ABCC OPERATED?

ABCC Investigations

- 4.1 The ABCC's 2009-2010 Annual Report disclosed that 55% of all its investigations were directed at trade unions.⁸ Only 7% of the ABCC's investigations in 2009-2010 were directed to employers.⁹ Unions or employees were the subject of on average 76.5%¹⁰, or more than three-quarters of all ABCC investigations, between 1 July, 2006 and 30 June, 2009.
- 4.2 The types of matters which are investigated also show a strong bias towards the examination of alleged conduct of unions and workers. For example, 24% of all investigations related to alleged contraventions of right of entry provisions.¹¹ Unlawful industrial action investigations constituted 22.5% of the ABCC's investigation.¹²
- 4.3 The fact that the overwhelming majority of the ABCC's investigations concern the alleged conduct of trade unions or union members/workers is not accidental. It is the result of a policy decision of the ABCC to direct their resources toward union-related matters.
- 4.4 In recent times, in a belated and cynical effort to establish its credentials as something other than publicly funded union-busters (or, in the ABCC's language, to show that they are a 'full service' regulator) and to carve out an ongoing role for itself, the ABCC has argued that it has devoted more resources to investigating employer breaches of industrial law. It has also tried to give the appearance of taking issues such as sham contracting seriously. The fact remains that the ABCC has over many years chosen to ignore the main role of any government industrial inspectorate, namely securing the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work.¹³
- 4.5 The priorities and the allocation of investigative resources continue to be reflected in the identity of the parties who are prosecuted by the ABCC.

ABCC Prosecutions

- 4.6 The total number of ABCC prosecutions and the number of prosecutions against unions and workers have both dramatically increased in recent times.¹⁴ In 2009-10 the ABCC conducted 58 penalty proceedings before the courts, including 31 proceedings that were

⁸ At page 29

⁹ 11% of investigations were conducted in respect of head contractors and 15% were for subcontractors.

¹⁰ The figure is the average of the total percentage for unions and employees being the subject of investigations from 2006-2009

¹¹ 2009-2010 Annual report page 30

¹² *ibid*

¹³ See ILO Convention 81 Labour Inspection Article 3.

¹⁴ See ABCC Annual Report 2008-09 page 42

<http://www.abcc.gov.au/Performanceandreports/Reports/Annualreports/2008-09/Pages/2008-09.aspx>

commenced in this period. This compares with 21 penalty proceedings commenced by the ABCC in 2008-09, 17 in 2007-08 and 10 in 2006-07.¹⁵

- 4.7 Since the ABCC recently reversed its previous policy of not pursuing employer breaches involving unpaid employee entitlements, there have been a number of prosecutions brought against employers. However the heavy bias of the ABCC in targeting trade unions with these prosecutions continues to be evident from the official figures.
- 4.8 From October 2005 until June 2011 the ABCC brought a total of 86 prosecutions against unions and union officials.¹⁶ This compared to 5 prosecutions against employers in the same period.¹⁷ In the period 1 July 2009 to 30 June 2010 there were 29 prosecutions brought against unions and union officials and none against employers.¹⁸ From 1 July 2010 to 1 June 2011, union prosecutions still outnumbered employer prosecutions by almost three to one.¹⁹
- 4.9 The matters which are prosecuted by the ABCC demonstrate its bias in pursuing union and employee-related conduct. Allegations of unlawful industrial action accounted for 61 per cent of cases commenced in 2009-2010, followed by right of entry prosecutions at 26 per cent.
- 4.10 The prosecution of unions and workers by the ABCC is made worse by the fact that the laws they are enforcing have been repeatedly found by the International Labour Organisation (ILO)²⁰ to be contrary to core international labour standards including Conventions 87 and 98.
- 4.11 The courts and tribunals have also been strongly critical of the way the ABCC has conducted prosecutions. For example the Australian Industrial Relations Commission criticised the evidence-gathering processes of the ABCC:

*'....., the manner in which the investigation and interviews appear to have been conducted and recorded by ABCC Inspectors was to cast Mr McLoughlin in the worst possible light, rather than to provide full evidence as to the manner in which Mr McLoughlin exercised his right of entry on to sites.'*²¹

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

*'The ABCC is not obliged in an administrative proceeding, to ensure that everything in favour of the respondent finds its way into witness statements.'*²²

¹⁵ 2009-2010 Annual Report page 46

¹⁶ Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Additional Estimates 2010-2011 Question No.EW0675_11

¹⁷ *ibid*

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association – see below

²¹ *Martino* RE 2007/2179.

²² ABCC letter to CFMEU 17 July 2008.

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

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

In another matter, after listening to an ABCC inspector's interview with an employee, the Federal Court described the interviewer's approach as biased against the union and the tone of the inspector to be 'avidly anti-union'.²³

ABCC Coercive Interviews

4.13 From 1 October 2005 to 21 June 2011, 235 notices for compulsory examinations were issued pursuant to section 52(1)(e) of the *BCII Act*. Further, 7 notices requiring the production of documents were issued pursuant to section 52(1)(d) of the Act.²⁴

4.14 The breakdown by classification of persons examined by use of these compulsory notices in the period 1 October 2005 to 30 April 2011 is as follows²⁵:-

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

4.15 In *Commonwealth Director of Public Prosecutions v Tribe (Ark)* (File No: MCPAR-09-2146 Magistrates Court SA) the Court held that the Notice issued by the ABCC to construction worker Ark Tribe, was defective. Mr Tribe was therefore acquitted of the charge of failing to attend in response to a coercive interview notice.

4.16 Since the Tribe decision, the ABCC has confirmed that **all 203 coercive notices issued from October 2005 until the date of the Tribe decision on 24 November 2010, suffered from the same defect as the Tribe notice.**²⁶

²³ *Duffy v. CFMEU* VID 687 of 2007, 28 November 2008.

²⁴ Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Budget Estimates 2011-2012 Question No.EW0117_12

http://www.aph.gov.au/Senate/committee/eet_ctte/estimates/bud_1112/answers/EW0117_12.pdf

²⁵ Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Budget Estimates 2011-2012 Question No. EW0118_12

http://www.aph.gov.au/Senate/committee/eet_ctte/estimates/bud_1112/answers/EW0118_12.pdf

²⁶ Senate Standing Committee on Education Employment and Workplace Relations Questions on Notice Budget Estimates 2011-2012 Question No.EW0119_12 – See attached at Appendix 2.

4.15 The only advice provided by the ABCC to people issued with one of the 203 defective notices was to contact one of them and tell them that the interview was not going ahead.²⁷

4.16 A number of prosecutions have proceeded on the basis of information or material obtained by the ABCC through the use of defective s 52 notices.²⁸ The ABCC has also conceded that evidence which has been obtained through the use of a defective s 52 notice has been subsequently admitted into evidence by a court in the course of a prosecution.²⁹

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

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

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

- (i) The ABCC's track record of investigations, advice, prosecutions and interventions has clearly favoured employers
- (ii) Enforcement of employee rights such as wages and entitlements and freedom of association have been consciously overlooked by the ABCC even though they have a statutory responsibility to deal with them
- (iii) The ABCC has no proper regard to the public interest in determining which matters to litigate and on whose behalf litigation should be brought.
- (iv) The ABCC had been the subject of extensive criticism by superior courts and other tribunals both as to their investigative methods, choice of matters for prosecution and conduct of cases.

²⁷ Ibid Question No.EW0124_12

²⁸ Ibid Question No.EW0121_12

²⁹ Ibid Question No EW0122_12

Occupational Health and Safety in the Construction Industry

- 5.1 The construction industry is a dangerous and arduous industry to work in. It is characterised by a system of sub-contracting, many small employers, widespread use of a 'labour hire' workforce and intense competitive pressures. These can contribute to corner-cutting on safety issues, breakdowns in the chain of responsibility and difficulties in maintaining effective employee representation on safety issues from job to job. Injury and fatality rates remain unacceptably high.
- 5.2 Various studies have pointed to the positive correlation between trade union involvement at workplaces and improved OHS outcomes.
- 5.3 According to official statistics, there were 50 fatalities in the construction industry in 2006-07. This represents a fatality incidence rate of 7.8 fatalities per 100,000 employees, which is more than three times the overall rate for Australia of 2.5 fatalities per 100,000 employees.³⁰
- 5.4 In the same year, there were 14,130 serious workers' compensation claims in the construction industry, which represents 10% of all serious claims. This equates to 39 claims per day or 22 claims per 1,000 employees, involving one or more weeks off work. The construction industry recorded the fourth highest incidence rate of all industries in 2006-07.³¹
- 5.5 The Federal Government has recognised the scale of the problem for the industry. In an address to the Federal Safety Commissioner's CEO Forum on 21 August, 2008 the then Deputy Prime Minister said: -

"2005-06 figures show the fatalities incidence rate in the building and construction industry twice as high as the 'all industries' rate..."

It is sobering to realise that there were 30 notified fatalities during the nine month period from July 2007 to March 2008. That's 30 deaths in 36 weeks.

Alarming, this is the worst performance since 1 July 2003."

Prohibition on Industrial Action – OHS Implications

- 5.6 The prohibition on 'unlawful industrial action'³² in the BCII Act includes not just commonly accepted instances of industrial action, such as strikes; it can include any situation where work is carried out 'in a manner different from that in which it is customarily performed'³³. It can also include certain occupational health and safety related disputes.

³⁰ (Source: Australian Safety and Compensation Council Information Sheet for Construction Industry)

³¹ (Source: Compendium of Workers' Compensation Statistics Australia 2006-07 (March 20019) pg 45).

³² (see ss. 38, 37 and 5 BCII Act)

³³ (ss. 5 and 36)

- 5.7 In an article focussing on the coercive powers within the *BCII Act*, Professor George Williams and Nicola McGarrity from the Gilbert and Tobin Centre of Public Law at the University of NSW have highlighted the reach of the Act and the types of conduct that can be made unlawful by it.

“It would be within the ABC Commissioner’s investigatory powers to require any person who might have information about a strike, a slow-down or even a sick-day taken by an employee to provide information or documents or to give evidence under oath. For example, in May 2006, the ABCC issued a declaration that the actions of a CFMEU site representative and a CFMEU organiser had contravened the BCII Act. The action being investigated by the ABCC was a 20 minute meeting organised by the two men to collect money for the widow of a worker crushed to death on a building site.”³⁴

- 5.8 Under the BCII Act provisions, any departure from ordinary work practices as a result of an OH&S risk can expose those taking the action to a pecuniary penalty. Employees are therefore faced with the impossible dilemma of having to assess and balance an occupational health and safety issue against the prospect of large fines if they take building industrial action in response to any risk.
- 5.9 There is little doubt that had these laws applied many decades ago when the building unions mounted an industrial campaign to ban the use of asbestos, the unions and their members would have been exposed to significant fines for action that proved to be instrumental in outlawing this deadly product and saving many thousands of Australian lives.

Role of ABCC

- 5.10 Whilst the ABCC plays no direct role in the prosecution of OHS breaches in the industry, its prosecution record demonstrates scant regard for promoting the importance of OHS and compliance with OHS laws.
- 5.11 In the case of *Cahill v. CFMEU and Mates* the ABCC brought proceedings alleging that the union and an official had unlawfully coerced an employer to engage certain employees, including OHS officers, on a site in Heidelberg Victoria and had taken unlawful industrial action to prevent a crane company from working on the site.
- 5.12 The company whose interests the proceedings were brought to protect, Melbourne Transit Pty Ltd (Melbourne Transit), had previously been the subject of very strong criticism by the County Court of Victoria in relation to a workplace fatality of an employee in September 2004. The Court said: -

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

³⁴ (*The Investigatory Powers of the ABCC* (2008) 21 Australian Journal of Labour Law 246 at 273)

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

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

Changes Essential

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

- 6.1 On 31 March 2009 the final report of the Government inquiry into the construction industry was delivered to the Australian Government by Hon. Murray Wilcox Q.C. [the *Wilcox Report*].³⁵ The *Wilcox Report* made a number of specific recommendations many of which are now reflected in the 2011 Bill.
- 6.2 Firstly, it recommended that the special provisions relating to the definition of unlawful industrial action, additional penalty provisions and higher monetary penalties in the *BCII Act*, be repealed.

Industrial Action

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

*'Although there is clearly a technical difference between the circumstances under which industrial action is unlawful under the BCII Act ...and the Fair Work Bill...I found it difficult to find a scenario under which this would make a practical difference. Accordingly, at each of the forums, I invited the help of the employers' representatives who were present. They each undertook to consult with others and let me know if they could imagine such a scenario. None of them have done so. This confirms my view that the difference has no practical importance.'*³⁶

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

Ultimately the *Report* concluded:-

*'..no reasoned case was put to me for retention of either of the first two differences in the rules applying to building workers, on the one hand, and the remainder of the workforce, on the other. I see no such case.....the retention of these differences would serve only to complicate the law.'*³⁷

Fines/Penalties

- 6.5 The issue of penalties was also analysed in some detail.

³⁵ <http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/>

³⁶ Final Report paragraph 4.32.

³⁷ Ibid paragraph 4.50.

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

*'...it is necessary to remember there are many other industries in which industrial action may cause great loss to an employer, and even the national economy, and/or considerable public inconvenience. One has only to think of the major export industries, most components of the transport industry, the gas and electricity industries, the telecommunication industry and emergency services such as police, ambulances and hospitals. There is no less need to regulate industrial action in those industries than in the building and construction industry. Recognising the serious consequences of industrial action in virtually any industry, the Fair Work Bill proposes a number of severe constraints upon its occurrence.'*³⁸

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

*'I do not see how (the history of the building and construction industry) can justify ...the contravener.. ...being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and happened to be brought to justice. **To do that would depart from the principle..of equality before the law.**'*³⁹ (emphasis added)

- 6.9 The *Wilcox Report* disposed of the arguments about the need to retain additional penalty provisions from the *BCII Act* once and for all. It concluded that each of the provisions is comprehensively dealt with in the *Fair Work Bill* (now the *Act*) and that there was no need to carry any of them forward. We agree with that conclusion.
- 6.10 However the *Report* also recommended the continuation of different treatment for the industry in some key respects, most notably the retention of coercive powers, for a limited period, for use by this inspectorate during its investigations. This aspect of the *Report* has carried over into the 2011 Bill and is strongly opposed.

³⁸ Ibid paragraph 4.52.

³⁹ Ibid paragraph 4.63.

Coercive Powers

- 7.1 There is no good reason why there should be any differences between the regulatory arrangements that apply to the construction industry and those in other industries. As a matter of fundamental principle, and as a matter of fairness, the starting point for our lawmakers should be that Australian employees (and employers) be subject to the same national industrial laws
- 7.2 The industrial jurisdiction deals with matters that do not warrant the introduction of coercive powers in the same way as other areas of the law might. For example industrial issues do not generally raise matters of national security, fraud on the public revenue, serious corruption or criminality or public safety. The public interest considerations that might weigh in favour of the use of coercive powers in these other areas are not present in the industrial context. To the contrary, the public interest very much favours keeping these powers out of the industrial arena to ensure that the exercise of industrial rights, like the right to associate, organise and take collective action is not tainted with the quasi-criminal overtones and general opprobrium reserved for these other matters.
- 7.3 It should also be kept in mind that the coercive powers are not used to interrogate persons under suspicion of a crime but simply against any person who may be able to assist with an investigation.
- 7.4 The national industrial regulator, the FWO, has operated effectively without these kinds of coercive powers. They are simply not necessary for the enforcement of industrial laws.

The 2011 Bill should be amended to remove the coercive powers.

Fair Work Building Industry Inspectorate – Location and Structure

- 7.5 The *Wilcox Inquiry* specifically considered the arguments about the structure and location of any specialist agency. Ultimately the Inquiry rejected the model which is now set out in the 2011 Bill, i.e. a separate and autonomous statutory agency working in parallel with, but independently of, the FWO.
- 7.6 Wilcox recommended that the proposed Specialist Division be located **within** the office of the FWO but with operational autonomy⁴⁰. The '*Forward with Fairness*' policy also provides that any specialist division should be located *within* the parameters of a single general inspectorate or regulatory agency.⁴¹

⁴⁰ Recommendation 1 *Final Report* page 6.

⁴¹ '*Forward with Fairness*' - April 2007, page 17 and *Policy Implementation Plan* - August 2007 page 24.

7.7 The Report also recommended that the Specialist Division implement policies, programmes and priorities **determined** (rather than recommended⁴²) by, an advisory board. The 2011 Bill provides for the establishment of an Advisory Board to make *recommendations* to the Director of the industry inspectorate. The Board is to consist of representatives of employers and employees. An Advisory Board, constituted by apolitical public servants and industry representatives, would introduce much-needed accountability and balance into the work of this agency.

The 2011 Bill should be amended to provide that the Building Inspectorate becomes part of the FWO and has the same powers to conduct its investigations and prosecutions.

Intervention

7.8 The *Wilcox Report* recommended against retaining a statutory right of intervention in court or FWA proceedings.⁴³

*'In order to guard against the case being hijacked, it is better to give the court or FWA discretion to allow intervention. In that way terms may be imposed.'*⁴⁴

Items 91 to 93 of the 2011 Bill do not reflect this recommendation.

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

The 2011 Bill should be amended so that the issue of intervention by a regulator is left to the discretion of the relevant court or tribunal.

⁴² Schedule 1 Item 49 (proposed s 24) of the *Bill*.

⁴³ Paragraph 9.15 page 99.

⁴⁴ *Ibid*.

8 ILO CRITICISMS

8.1 The *BCII Act* has on no less than eight separate occasions been found by the ILO's *Committee of Experts on the Application of Conventions and Recommendations* and the *Committee on Freedom of Association* to be contrary to core International Labour Conventions to which Australia is signatory. A summary of these findings is set out at Appendix 3.

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

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

8.3 A matter of days after the first adverse finding by the ILO, the then Shadow Foreign Affairs Minister, Mr. Rudd said:

*'As a member of the ILO, Australia voluntarily agreed to and is bound to implement International Labour Standards in Australian Labour law, including the application of international jurisprudence protecting the right to strike from legal sanctions.'*⁴⁵

And

Australians cannot sit idly by while its government systematically traduces Australia's obligations under international law'.

8.4 In February 2010 the Committee of Experts said:-

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

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

Noting with concern that the manner in which the ABCC carries out its activities seems to have led to the exclusion of workers in the building and construction industry from the protection that the labour inspection system ought to secure for these workers under the applicable laws, the Committee urges the Government to ensure that the priorities of the ABCC (or the Fair Work Building Industry Inspectorate) are effectively reoriented so that labour inspectors in the building

⁴⁵ Hansard Second Reading, 9 November, 2005 page 7

and construction industry may focus on their main functions in full conformity with Article 3(1) and (2) of the Convention.

- 8.6 It is important to have regard to international obligations that have been voluntarily assumed in deciding the fate of the new laws.

9 CONCLUSION

- 9.1 The process for deciding the future of the industrial laws in the Australian construction industry is now at a critical stage.
- 9.2 If the 2011 Bill is approved in its current form the coercive powers would continue to exist although their use would be conditional on meeting a range of statutory safeguards. The penalty for failure to comply with these powers would remain six months imprisonment under the terms of the 2011 Bill. Whilst such laws continue to exist, the spectre of criminal penalties hangs over people working in this industry. These coercive powers have no place in the industrial jurisdiction.
- 9.3 The proposed separate and industry-specific labour inspectorate, armed with these intrusive and unprecedented coercive powers, represents the continuation of flawed policy. The ABCC has politicised the enforcement aspect of industrial relations and abandoned the fundamental purpose for which labour inspectorates are established - the protection and enforcement of workers' rights in the workplace. Vast amounts of public resources have been and continue to be used to support employers in industrial disputes. Simply renaming a statutory agency which has no credibility in the industry and has been thoroughly discredited internationally, would be a grave mistake.
- 9.4 The BCII Act represents the last and most extreme vestige of the *WorkChoices* era. Future arrangements for the industry must be consistent with binding international labour standards and must also promote the fundamental principle of equality before the law. The Committee should recommend the amendments discussed in this submission to achieve that result.