
**SENATE EDUCATION, EMPLOYMENT AND
WORKPLACE RELATIONS COMMITTEE**

**INQUIRY INTO THE BUILDING AND
CONSTRUCTION INDUSTRY
IMPROVEMENT AMENDMENT
(TRANSITION TO FAIR WORK) BILL
2011**

**DEPARTMENT OF EDUCATION,
EMPLOYMENT AND WORKPLACE
RELATIONS**

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Section 1. Introduction

Overview

- 1.1 The Department of Education, Employment and Workplace Relations welcomes the opportunity to make a written submission to the Senate Committee Inquiry into the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* (the Bill).
- 1.2 The Bill was introduced into the House of Representatives on 3 November 2011. It gives effect to the *Forward with Fairness – Policy Implementation Plan* policy commitments the Government took to both the 2007 and 2010 Federal elections. The Bill also represents the Government’s response to the report by the Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (the Wilcox Report).
- 1.3 This Bill is very similar to the Bill of the same name that was introduced into Parliament on 17 June 2009 (the 2009 Bill). Senate debate on the 2009 Bill was not completed during the 42nd Parliament and the Bill lapsed when the 2010 Federal election was called.
- 1.4 The one notable change between the 2009 Bill and the current Bill relates to the timing of the ‘sunset’ clause for the new regulator’s compulsory examination powers. In the current Bill these powers will ‘sunset’ three years after the Act commences whereas the 2009 Bill provided a five year ‘sunset’ period. The reason for this change is outlined in Section 5 of this submission.
- 1.5 The Bill also includes a number of minor text changes that are consequential to amendments to the *Acts Interpretation Act 1901* when compared to the 2009 Bill (for example, section headings are now part of an Act and therefore need to be amended by an item in a bill rather than through a legislative note as previously occurred). These changes were made, in the main, in anticipation of amendments to the *Acts Interpretation Act 1901* that commenced in December 2011.
- 1.6 The Department is aware of two publications that incorrectly stated that a significant change has been made to the section 12 of the Bill, when compared to the 2009 Bill. In short, it was suggested that the new subsection 12(3) would mean that Ministerial directions issued under the proposed section 12 would put ‘...them out of reach of Senate disallowance motions’¹, or would mean that ‘...such a direction is no longer a legislative instrument’². In fact, Ministerial directions under this section of the current *Building and Construction Industry Improvement Act 2005* (BCII Act) or either version of the Bill have never been disallowable instruments because of the operation of section 44 of the *Legislative Instruments Act 2003*. The new subsection 12(3) simply includes an

¹ 2011, *Government re-introduces bill to replace ABCC with new watchdog*, Workplace Express, Australia, viewed 3 November 2011, <http://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=1&selkey=46795>.

² O’Neill, S and Neilsen, M 2011, *Bills Digest No.80, 2011-12 - Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, Parliamentary Library, Australia, viewed 25 November 2011, < <http://www.aph.gov.au/library/pubs/bd/2011-12/12bd080.pdf>>

express statement to this effect. It is relevant to note that the Parliamentary Library publication has since been corrected.

- 1.7 The provisions in the Bill are designed to create a strong and fair set of compliance arrangements for the building and construction industry. Specifically the Bill provides for:
- the creation of a new agency, the Office of the Fair Work Building Industry Inspectorate (the Building Inspectorate) to regulate the building and construction industry; [refer Section 3 of this submission] to replace the Office of the Australian Building and Construction Commissioner (ABCC) which is to be abolished;
 - a capacity for the Director of the Building Inspectorate (the Director) to compulsorily obtain information (including through requiring a person to attend an examination and answer questions) or documents from a person whom the Director believes has information or documents relevant to an investigation; [refer Section 5 of this submission];
 - a number of safeguards in relation to the use of the power to compulsorily obtain information or documents, including all the safeguards recommended in the Wilcox Report [refer Section 5 of this submission];
 - creation of an office, the Independent Assessor, who, on application from stakeholders, may make a determination that the examination notice powers will not apply to a particular project; [refer Section 6 of this submission];
 - building industry participants to otherwise be subject to the same workplace relations framework that applies to other employers and employees, including in respect of penalties and industrial action;
 - the creation of the Fair Work Building Industry Inspectorate Advisory Board (the Advisory Board) whose role will be to make recommendations to the Director about the policies, priorities and programs of the Building Inspectorate [refer Section 7 of this submission]; and
 - retention of the provisions that establish the Office of the Federal Safety Commissioner and its related OHS Accreditation Scheme [refer Section 8 of this submission].
- 1.8 In addition, the key components of the new system will be supported by transitional arrangements which are dealt with in Section 9 of this submission.

Importance of Building and Construction Industry

- 1.9 The building and construction industry is a critical sector of the Australian economy with immediate and direct impacts on jobs, growth and productivity. This was demonstrated during the global economic crisis when the Australian Government's Nation Building and Jobs Plan ensured that the Australian economy remained one of the strongest in the world. The Australian Bureau of Statistics estimates the total value of construction work in 2010-11 to be \$99.5 billion³ and that the industry employs 1,045,500 people⁴.

³ Australian Bureau of Statistics, *ABS 5204.0 Australian System of National Accounts*.

⁴ Australian Bureau of Statistics, *ABS 6291.0.55.003 Labour Force Australia*.

- 1.10 The Australian Government and the Australian taxpayer have a strong vested interest in ensuring a vibrant and strong building and construction industry. The Australian Government's 2011-12 Budget includes \$36 billion in funding for new and improved national infrastructure including in relation to roads, rail and ports. The Budget also invests \$4.3 billion in our regions including \$1.8 billion over six years in critical regional health infrastructure under the Health and Hospitals Fund regional priority round.
- 1.11 Australia's capacity to deliver on these important initiatives is dependent on having a safe, productive and harmonious construction industry.

Purpose of the submission

- 1.12 In this submission, the Department will focus on a number of key aspects of the Bill and set out the policy underpinning those aspects.
- 1.13 In doing so, the submission will also respond to a number of issues that have been raised by various stakeholders since the 2009 Bill was introduced.

Section 2. Consultation preceding the Bill

Introduction

- 2.1 The Government made a commitment before the 2007 election, as outlined in its *Forward with Fairness Policy Implementation Plan*, to consult widely with industry stakeholders on the transition to new regulatory arrangements for the industry. On 22 May 2008, the Government announced an extensive consultation process, to be undertaken by the Hon Murray Wilcox QC, a retired Federal Court judge, on the transition to Fair Work Australia for the building and construction industry.
- 2.2 Mr Wilcox' consultations were separate to the consultative processes established by the Government to inform the broader workplace relations framework and the establishment of Fair Work Australia.
- 2.3 Mr Wilcox conducted his consultation process over the period June 2008 to March 2009 and provided his report, *Transition to Fair Work Australia for the Building and Construction Industry* (the Wilcox Report), to the then Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, on 31 March 2009.
- 2.4 The Wilcox Report was based on extensive consultation with industry stakeholders including:
- 22 formal comments on the proposed Terms of Reference;
 - consultation with 45 stakeholder groups including face to face meetings, a site visit and telephone consultations;
 - receipt of 48 written submissions in response to the release for public comment of a discussion paper on 9 October 2008; and
 - three public debates on key issues at law schools in Sydney, Melbourne, and Perth.
- 2.5 Mr Wilcox reported on the diametrically opposed positions held by stakeholders both in support of and in objection to the ABCC and BCII Act, noting that:
- Opinion on some issues is polarised. There were times when I wondered whether my discussants appreciated even the existence of a contrary view, still more its arguable merit and the passion of its adherents.*⁵
- 2.6 The Wilcox Report contains eight recommendations which address Mr Wilcox' terms of reference. The full recommendations of the Wilcox Report are provided at **Attachment A**.

⁵ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraph 2.8.

Subsequent Consultations

- 2.7 The Government undertook further consultation with key industry stakeholders, following the release of the Wilcox Report, including State and Territory Workplace Relations Ministers, employer and employee associations, individual employers and subcontractor associations. These consultations were to inform the Government's response to the Wilcox Report recommendations.
- 2.8 In addition to this, the Government also held two meetings of the Committee on Industrial Legislation (CoIL). The first related to the Bill, while the second explored a number of possible regulations. It is proposed further meetings of CoIL will be held following the Senate inquiry to consider regulations before they are made.

Section 3. Fair Work Building Industry Inspectorate

Introduction

- 3.1 The Government made a commitment prior to the 2007 election to maintain the existing arrangements for the building and construction industry, including the ABCC until 31 January 2010, at which time it would replace the ABCC with a specialist building and construction industry inspectorate. As the 2009 Bill was not passed by the previous Parliament the target date was not met. Prior to the 2010 election the Government committed to reintroduce the Bill.
- 3.2 While the 2007 election commitment had stated the Building Inspectorate was envisaged to be within Fair Work Australia, industry feedback strongly supported the specialist body remaining an autonomous body independent of the Fair Work Ombudsman. The Government has accepted the industry views. This model also gives best effect to the Wilcox Report's recommendations that the Director have 'operational autonomy' a clearly identified funding allocation and dedicated operational staff.

Overview

- 3.3 The Government's *Forward with Fairness – Policy Implementation Plan* promised that there would “*not be a single moment where the construction industry is without a strong ‘cop on the beat’*”. The Government has consistently made it clear that it will not tolerate intimidation or violence by any party in the industry, or any conduct which breaks the law.
- 3.4 The Bill reflects the Government's commitment to implement a strong and balanced set of compliance arrangements for all industry participants and honours the Government's pre 2007 and 2010-election commitments to abolish the ABCC.
- 3.5 The Bill provides for an autonomous specialist inspectorate, focussed on ensuring the building and construction industry's compliance with workplace relations obligations. Like the ABCC, the Building Inspectorate will:
- be headed by an independent statutory office holder (the Director);
 - have a separate budget; and
 - be subject to legislative direction from the Minister, however, directions may not relate to individual cases.
- 3.6 The Building Inspectorate will ensure compliance with workplace relations laws by all building industry participants. It will actively pursue the unlawful or inappropriate conduct of all building industry participants including, importantly, the underpayment of employee entitlements such as wages.

Role of Inspectorate and the Definition of Building Work

- 3.7 The Wilcox Report noted that a major criticism of the BCII Act was the broad definition of building work. In its current form the BCII Act defines building work to include the pre-fabrication of made-to-order components to form part of any building, structure or works, “whether carried out on-site or off-site”.

The Wilcox Report recommended that the Building Inspectorate's jurisdiction and powers should not extend off-site (Recommendation 6(ii)).

- 3.8 Based on this Recommendation the Bill deletes the reference to 'off-site' prefabrication works in the proposed definition of building work (refer item 48 of Schedule 1 of the Bill). The Explanatory Memorandum clarifies that "auxiliary or holding sites separate from the primary construction site(s) will remain covered by the definition of building work".⁶

Director

- 3.9 The Building Inspectorate will be headed by a statutorily independent Director appointed by the Minister. The Director will manage the operations of the Building Inspectorate and will monitor and promote appropriate standards of conduct by building industry participants.
- 3.10 The Director will not be subject to oversight or control by other statutory office holders. This model gives best effect to the Wilcox Report's recommendation that the Director have operational autonomy and reflects stakeholder consultations on this point.
- 3.11 The Director's functions will include providing education, assistance and advice to building industry participants in order to promote a harmonious and productive industry and compliance with the law. The Director will also monitor and investigate suspected contraventions of Commonwealth workplace relations legislation and industrial instruments and commence or intervene in, proceedings in accordance with the proposed legislation (proposed section 10).

Inspectors

- 3.12 The Bill provides that the Director will also be a Fair Work Building Industry Inspector (Inspector) (proposed section 59A) and may appoint Inspectors (proposed section 59).
- 3.13 The Director may appoint persons of good character as Inspectors for a period not exceeding four years (proposed section 59).

Director's and Inspector's powers

- 3.14 The Building Inspectorate will have the powers in the building and construction industry which the Fair Work Ombudsman has in other industries.
- 3.15 Inspectors will have all the powers in the building and construction industry that Fair Work Inspectors have in other industries (proposed subsections 59C(1), (2) and (3)).
- 3.16 The Bill provides that any reference in an Act to the Fair Work Inspector has effect as if it were a reference to an Inspector (proposed subsection 59C(4)(a)).
- 3.17 In addition, Inspectors will have powers in relation to enforcement of a Building Code (should one be issued).

⁶ Explanatory Memorandum, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, paragraph 8.

- 3.18 The policy intention is that Inspectors will encourage cooperative and voluntary compliance, particularly through educative activities. However, the Building Inspectorate will be able to take more formal steps to enforce the law, for example by court proceedings or by using mechanisms such as entering into enforceable undertakings or exercising the compulsory examination powers discussed in Section 5 of this submission.
- 3.19 In addition, the Director will have powers in relation to:
- the conduct of compulsory examinations (see Section 5 of this submission for a detailed discussion on these powers and the associated safeguards); and
 - the capacity to intervene in court proceedings which relate to building industry participants.

Disclosure provisions

- 3.20 In response to numerous stakeholder concerns the Bill specifically provides that the Director must not require a person attending a compulsory examination not to disclose information or answers given at the examination, or not to discuss matters relating to the examination with any other person (refer proposed subsection 51(6)).

Enforcement of Building Code

- 3.21 The Bill retains the capacity currently provided in the existing BCII Act for the Minister to issue a Building Code. The Government has not issued a Building Code under the BCII Act, but this will remain an option for the Government following passage of the Bill.
- 3.22 If a Building Code is issued under the proposed legislation Inspectors will have the power to monitor compliance with the Building Code and will have the same functions and powers that they would have if the Building Code were a Fair Work instrument (proposed section 59E).

Conclusion

- 3.23 The establishment of the Building Inspectorate honours the Government's 2007 and 2010 election commitments to transfer the ABCC's responsibilities to a specialist inspectorate for the building and construction industry.
- 3.24 The requirement that the Building Inspectorate monitor compliance activities of unions, employers and employees alike provides for a balanced compliance regime. The Government is confident that the Building Inspectorate will assist in creating the sort of long term change Australia's building and construction industry needs if it is to be efficient, create jobs and make a positive contribution to national productivity.

Section 4. Compliance and Penalties

Introduction

- 4.1 The Bill reflects the Government's acceptance of the Wilcox Report recommendations that:
- (a) the provisions and penalties for contraventions of the *Fair Work Act 2009* (the Fair Work Act) governing the conduct of employers, employees and industrial associations of the Fair Work Act apply, unchanged, to participants in the building and construction industry⁷ (Recommendation 2); and
 - (b) the existing compulsory examination powers, currently available under section 52 of the BCII Act, be retained for the new Building Inspectorate subject to new safeguards for their use (Recommendations 3, 4 and 5).

- 4.2 The Wilcox Report justifies this approach, as follows:

The history of the building and construction industry may provide a case for the retention of special investigative measures, to increase the chance of a contravener in that industry being brought to justice. However, I do not see how it can justify that contravener then being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and happened to be brought to justice. To do that would be to depart from the principle ... of equality before the law. It is not inconsistent with that principle for a court, in determining the penalty to be imposed in the particular case, to take into account the facts of that case, including the circumstances surrounding the contravention and the prior record of the contravener; but it is inconsistent with the principle to use a yardstick that varies according to the identity of the contravener's industry.⁸

- 4.3 Section 5 of this submission includes detailed discussion of the retention of compulsory examination powers.

Removal of Industry specific penalties

- 4.4 In response to Recommendation 2 of the Wilcox Report the Bill brings general compliance and penalties in the building and construction industry into line with those under the Fair Work Act.
- 4.5 Some stakeholders have expressed the need to maintain penalty levels applicable to the building and construction industry which exceed those more generally available due to the potential cost of industrial action in the industry. The Wilcox Report explicitly addresses this concern:

... it is necessary to remember there are many other industries in which industrial action may cause great loss to an employer, and even the

⁷ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), page 30.

⁸ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraph 4.63.

*national economy, and/or considerable public inconvenience. One has only to think of our 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.*⁹

- 4.6 Consistent with Mr Wilcox's recommendations, the Building Inspectorate will be charged with enforcing the building industry's compliance with the general law as prescribed in the Fair Work Act. The provision of higher financial penalties for industrial action and the broader definitions of unlawful industrial action in the building industry have been removed by the Bill (item 51 of Schedule 1). The general industrial action provisions in the Fair Work Act are clear, tough and provide workable options for employers and employees to respond to industrial action. The provisions ensure that industrial action is only protected when taken during genuine bargaining and subject to strict requirements.

Impact on lawlessness

- 4.7 Some stakeholders and commentators have sought to portray the proposed decrease in maximum penalty levels as making the Building Inspectorate a 'toothless tiger' and decrease the associated deterrent effect against unlawful behaviour. The Government does not agree with this suggestion for the following reasons.

- 4.8 First, a key element of the deterrent effect of the ABCC (or any specialist inspectorate) is their existence and capacity to quickly respond to stakeholder concerns. In his Report, Mr Wilcox stated:

*One of the most impressive aspects of the ABCC's work, as recounted to me by several people in management positions (head contractors and subcontractors), is the speed with which the ABCC responds to requests for assistance. Apparently, it is not unusual for the ABCC to have somebody on a building site within an hour of receiving a telephone call. I was told that, once the ABCC inspector explains the parties' legal positions, the dispute often resolves itself.*¹⁰

Nothing in the Bill inhibits the capacity of the Building inspectorate to respond quickly to stakeholder concerns.

- 4.9 Secondly, an analysis of the ABCC's litigation history shows that a significant percentage of the court cases in which the ABCC successfully obtained penalties were brought under the *Workplace Relations Act 1996* (WR Act) or the Fair Work Act alone. The maximum penalty rates available under the BCII Act were irrelevant to these cases; as they will be for future cases brought under the Fair Work Act.

⁹ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraph 4.52.

¹⁰ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraph 3.24.

- 4.10 Thirdly, where parties consistently refuse to comply with the industrial law, the courts retain the ability to impose strong penalties for non-compliance with any court orders and penalties, under the general contempt jurisdiction. This was illustrated in March 2009 by the awarding of a \$75 000 penalty for contempt of court (under the *Federal Court of Australia Act 1976*) and the awarding of legal costs on an indemnity basis against the CFMEU by the Federal Court in *Bovis Lend Lease Pty Ltd v CFMEU*.¹¹ This Federal Court decision reflects the serious view that the courts take in relation to conduct that is viewed as being in contempt of court.
- 4.11 Given these factors, it is the Government's view that the Building Inspectorate with the associated powers and penalties made available in the Bill will continue to represent a significant deterrent to those who may be considering unlawful behaviour.

Application of other laws

- 4.12 The Government has consistently stated that it will not tolerate illegal conduct in the building and construction industry. In addition to the scope of regulation available under the Fair Work Act for conduct related to unlawful industrial action or improper use of right of entry provisions, the criminal law will continue to apply to criminal behaviour which will be a matter for the police.
- 4.13 In addition, the *Competition and Consumer Act 2010* (formerly the *Trade Practices Act 1974*) will operate as well as a number of other laws and common law remedies in tort.
- 4.14 Other Commonwealth and State and Territory legislation applicable to all industries across all sectors of the Australian economy will continue to apply after the passage of the Bill. This includes relevant Federal and State and Territory occupational health and safety legislation and issues arising under legislation such as the *Privacy Act 1988* and *Independent Contractors Act 2006*. Where, in the course of performing their duties, an inspector of the Building Inspectorate identifies issues under other legislation, they will be able to refer matters to the appropriate bodies.

Conclusion

- 4.15 The Government believes the Bill appropriately balances the need to ensure the positive lasting cultural changes in the industry continue, the requirement for strong and effective enforcement of workplace laws and fairness.

¹¹ [2009] FCA 650.

Section 5. Compulsory Examination – Powers and Safeguards

Introduction

- 5.1 Mr Wilcox recommended that the existing compulsory examination powers, currently available under section 52 of the BCII Act, be retained for the new Building Inspectorate subject to new safeguards for their use.
- 5.2 The Government agrees with Mr Wilcox' conclusions on these powers and the Bill maintains the availability of the powers for the Building Inspectorate. Very importantly, the Bill also implements all of Mr Wilcox' recommended safeguards.

Ongoing Need

- 5.3 Mr Wilcox came to the following pivotal conclusions about the ongoing need for compulsory examination powers:

I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the [Specialist Division] to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.¹², and

I have reached the opinion that it would be unwise not to endow [Specialist Division] (at least for now) with a coercive interrogation power. Although conduct in the industry has improved in recent years, I believe the job is not yet done.¹³

- 5.4 The Government has agreed with the Wilcox Report recommendations. In his second reading speech to Parliament when introducing this Bill, Minister Crean noted:

The Government accepts the need to retain these powers for the time being but is also heartened by the continuing improvements in behaviour in the industry. Changes in practices by the ABCC have seen a dramatic reduction in the need to use these powers. For example the ABCC only resorted to using its compulsory examination powers six times in 2010 - 2011, compared to 37 times in the previous year.

The ABCC attributes this reduction to a number of factors including better communication about the obligation to provide information voluntarily, a focus on the timeliness of investigations and changes to the way investigations are carried out. Of course much of the credit for these changes and decreased use of the compulsory examination powers should be attributed to the ABC Commissioner Mr Leigh Johns. Since his

¹² The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraph 1.23.

¹³ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraph 5.98.

appointment in October 2010 Mr Johns has administratively implemented a number of Mr Wilcox recommendations and personally driven a number of positive custom and practice changes within the ABCC.

It is also important to note that this reduction in use of these strong powers have, according to the ABCC, not hampered their ability to investigate matters. As the ABCC's 2010-2011 annual report states:

“A key feature of the ABCC's activities this year was a marked decrease in the use of s. 52 as a compliance technique with no reduction in the number of investigations undertaken. In short, the reduced reliance on s. 52 has not adversely affected regulatory activity or success.”¹⁴

Balanced approach

5.5 While recommending the retention of the compulsory examination power Mr Wilcox also recommended a number of new safeguards be implemented to protect against the inappropriate use of the power. These safeguards included processes before, during and after the use of the powers as outlined in recommendations 4 and 5 of the Wilcox Report.

5.6 Importantly Mr Wilcox did not suggest that these safeguards were required because of any misuse of these powers by the ABCC, as he says:

“...the question is not whether the ABCC has satisfactorily handled its powers but what is the system that ought to be put into place, in new legislation, to govern the exercise of extraordinary powers by a new body.”¹⁵

5.7 By accepting all of the safeguards recommended in the Wilcox Report, the Bill reflects the Government's commitment to:

- ensure compulsory examination powers are used in a fair and balanced manner;
- formalising a number of existing administrative arrangements by giving them the strength of law; and
- both promoting cultural change in the industry and rewarding law abiding industry participants by providing for the capacity to ‘switch off’ the availability of compulsory examination powers on a project by project basis.

Approval of notice

5.8 Mr Wilcox' recommendation 4(i) is that a notice to attend for compulsory examination can only be issued by a presidential member of the

¹⁴ Commonwealth Parliament, *Parliamentary Debates*, House of Representatives, Introduction and Second Reading of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, 3 November 2011 (The Hon Simon Crean MP, Minister for Regional Australia, Regional Development and Local Government; Minister for the Arts)

¹⁵ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraph 6.4.

Administrative Appeals Tribunal (AAT). This recommendation is given effect by the Bill in proposed sections 44 to 47.

- 5.9 Clause 47 of the Bill requires the AAT presidential member to whom an application for an examination notice has been made to be satisfied of a number of specified criteria outlined in proposed subsection 47(1), including any other matters prescribed by the regulations.
- 5.10 On 16 July 2009 the then Minister Gillard wrote to the Senate Education, Employment and Workplace Relations Committee in relation to the Committee's inquiry into the 2009 Bill. Minister Gillard advised that it was the Government's intention that the Regulations prescribe that the AAT presidential member also considers additional criteria relating to the nature and likely seriousness of the suspected contravention and the likely impact upon the person subject to the notice. This remains the Government's intention in relation to the Regulations for the 2011 Bill.
- 5.11 While the exact form of the regulations have not been settled, it is anticipated that the AAT presidential member would be required to have regard to these criteria rather than, for example, be satisfied that there is no impact on the person subject to the notice.
- 5.12 The decision of the AAT presidential member will be made *ex parte* (i.e. in the absence of the intended recipient) because as Mr Wilcox points out:
- '...the effect of such a decision is only to require the recipient to attend for interrogation. Particularly if my recommendations for greater supervision of the interrogation process are adopted, the occasional case in which the notice might not have been issued may seem a lesser evil than the prospect of frequent litigation about the justification for the notice.'*¹⁶
- 5.13 However, it remains open to the AAT member to seek additional information from the Director should the application be deficient or if he or she requires further information to make a decision (proposed subsection 45(6)).

Director or Deputy to preside over all examinations

- 5.14 Mr Wilcox' recommendation 4(ii) is that the Director or a Deputy Director of the Building Inspectorate is to preside at all compulsory examinations. This recommendation is given effect by the Bill in proposed subsection 51(2) in conjunction with proposed subsection 13(3).

Commonwealth Ombudsman to review and report

- 5.15 Mr Wilcox' recommendation 4(iii) is that the Commonwealth Ombudsman monitor all compulsory examinations by reviewing examination notices and a video recording and transcript of all compulsory examinations. This recommendation is given effect by the Bill in proposed subsections 54A(1) to 54A(5).
- 5.16 Mr Wilcox' recommendation 4(iv) is that the Commonwealth Ombudsman report to Parliament annually and otherwise as required, concerning the use of

¹⁶ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraph 6.33.

the compulsory examination power. This recommendation is given effect by the Bill in proposed subsections 54A(6) and 54A(7). The Commonwealth Ombudsman performed a similar oversight role in relation to the compulsory examination powers of the Building Industry Taskforce (the predecessor to the ABCC).

Payment of reasonable costs

- 5.17 Mr Wilcox' recommendation 5(i) is that people summoned for compulsory examination be reimbursed their reasonable expenses (travelling, accommodation and legal) and any loss of wages or other income. This recommendation is given effect by the Bill in proposed section 58, as are the mechanics of making such a claim.

Right to legal representation

- 5.18 The Bill enshrines the rights of persons subject to compulsory examination to be represented by a lawyer of their choice including during the examination. The reference to a lawyer of 'the person's choice' is intended to make clear that there is no express or implied power on the part of the Director to refuse a person representation by a particular lawyer because that lawyer has represented or is also representing another person who has been examined. This subsection is intended to provide an individual with free choice. It is intended to address the decision in *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner)* [2006] FCA 1334, which found that there is a discretionary power under the examination provisions in the existing Act to exclude a particular legal practitioner from appearing or acting at an examination.

Right to client legal privilege and public interest immunity

- 5.19 As the ABCC itself acknowledges, legal professional privilege is currently available as the privilege is not explicitly or impliedly abolished by the BCII Act.
- 5.20 To make it clear on the face of the legislation that legal professional privilege does apply, the Bill explicitly confirms the right to refuse to disclose information on the grounds of legal professional privilege, as well as public interest immunity, while noting that the defendant continues to bear the evidentiary burden in relation to these matters.
- 5.21 If claims of privilege and/or immunity cannot be agreed between the person subject to interview and the Director, they may be tested by the Commonwealth Director of Public Prosecutions and ultimately by the Courts.

Sunset Provision

- 5.22 While recommending that the compulsory examination power should be available to the Building Inspectorate Mr Wilcox accepted that this may not always be the case:

...it seems to me, that any tough new regulator in the building and construction industry will need a power of coercive interrogation; at least under present conditions.

However, the position may change. Even some of the employer associations concede it may not always be necessary for the regulator to have a coercive interrogation power. They suggest it may be desirable to review the situation in (say) five years and, for that purpose, impose a sunset clause on the relevant part of the new legislation. I think there is merit in this.¹⁷

- 5.23 On this basis, and in addition to the recommended safeguards outlined above, Mr Wilcox also recommended that the compulsory examination power be subject to review and a five year sunset clause. Proposed section 46 provides that the Director cannot make an application for an examination notice under proposed section 45 after the end of three years after the section commences. The Government's decision to 'sunset' the availability of the coercive powers in three years (rather than the five years specified in the 2009 Bill) reflects the fact that the powers have continued to operate in the industry since 2010 when the 2009 Bill was intended to commence.
- 5.24 The Bill's Explanatory Memorandum states 'It is intended that, before the end of that period, the Government would undertake a review into whether the compulsory examination powers continue to be required'.¹⁸

Impact of safeguards on investigations

- 5.25 A number of stakeholders have criticised the imposition of these safeguards as 'fatally compromising investigations'. This view is not shared by the Government for the following reasons.
- 5.26 First, the compulsory examination powers have never been intended as the primary or first process in the investigators' processes. In fact they are rightly described as the method of last resort once all other options have been attempted and on this basis when used the investigation is usually well under way.
- 5.27 Secondly, the safeguards relate solely to the use of the compulsory examination powers and will therefore have no impact on the conduct of the majority of investigations conducted by the Building Inspectorate. The ABCC's use of the compulsory examination powers has significantly decreased in recent years. According to the ABCC's Annual Report 2010-11, less than two per cent of their investigations conducted during that year required the use of compulsory examination powers.
- (a) During 2010-11 the ABCC conducted 402 investigations into suspected contraventions of workplace laws and a further 496 reports were subject to preliminary investigation¹⁹; and

¹⁷ The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraphs 5.109 – 5.110.

¹⁸ Explanatory Memorandum, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, paragraph 125.

¹⁹ ABCC Annual Report 2007-08, page 28.

(b) during 2010-11 the ABCC conducted 6 examinations as a result of notices to attend compulsory examination.²⁰

5.28 It is the Government's view that these safeguards do not impose an additional administrative impost on the use of the coercive powers. Nor in any way will they inhibit the capacity of the Building Inspectorate to speedily respond to matters. On the contrary, the processes provide safeguards to both parties involved in the use of these powers, by protecting:

(a) the rights of persons required to attend an interview; and

(b) the Building Director from claims of inappropriate use of the powers.

Conclusion

5.29 The Government believes that the safeguards on the use of compulsory examination powers achieve the balance required to ensure compliance with the law and the fair treatment of individuals. Similarly, the arrangements balance the need for safeguards both before and after the use of these powers.

5.30 The proposed arrangements do not impose a significant number of new administrative 'hurdles'; in most cases they formalise existing administrative processes.

5.31 Law abiding industry participants have nothing to fear from the existence of these powers. Ultimately, if the law is abided by, the powers will not be used.

²⁰ ABCC Annual Report 2007-08, page 37.

Section 6. Independent Assessor

Introduction

- 6.1 In addition to the safeguards recommended by Mr Wilcox, the legislation is aimed at driving cultural change in the industry and focussing compliance activities where those activities are most needed.
- 6.2 On this basis the Bill creates an office, the Independent Assessor – Special Building Industry Powers (the Independent Assessor), who may, on application from an interested person, make a determination that the compulsory examination powers will not apply to one or more building projects (proposed section 39).

Determination Cannot Be Made in Relation to Existing Building Projects

- 6.3 The capacity to make application to the Independent Assessor will not apply to projects that commence prior to the commencement of this Act. This has been reflected in proposed section 38 which states:

This Subdivision [*which relates to the Independent Assessor's ability to make determinations*] applies in relation to a building project if the *building work* that the project consists of, or includes, **begins on or after the commencement of this Subdivision.** [emphasis added]

- 6.4 The impact of this provision with the definition of *building work* as defined in section 5 of the current BCII Act, means that an 'existing project' would be one which has had on-site activity commence prior to the commencement of this Act.

Applications for a Determination by Independent Assessor

- 6.5 Subject to the passage of the Bill, in relation to projects that commence after the Act commences, an interested person may apply in writing to the Independent Assessor to make a Determination that the compulsory examination powers under the Act do not apply to a particular building project.
- 6.6 In making a Determination, the Independent Assessor must be satisfied in relation to that building project, that:
- (a) it would be appropriate to make the determination, having regard to:
 - (i) the object of this Act;
 - (ii) any matters prescribed by the regulations; and
 - (b) it would not be contrary to the public interest to make the determination (proposed section 39(3)).
- 6.7 Subject to the outcomes of the Senate inquiry, it is the Government's intention that the Regulations also prescribe that the Independent Assessor must be satisfied that:

- (a) the building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, including court or tribunal orders; and
 - (b) the views of other interested persons in relation to the project have been considered.
- 6.8 These criteria are consistent with:
- (a) the Object of the Act, which includes “ensuring compliance with workplace relations laws by all building industry participants”;
 - (b) the Explanatory Memorandum which states, in part, “Matters prescribed by the regulations might include, for example, a demonstrated record of compliance with workplace relations laws, including court or tribunal orders, in connection with the building project.”²¹; and
 - (c) administrative law principles which provide affected persons the opportunity to have their views considered.
- 6.9 If the Independent Assessor receives an application for a Determination the Independent Assessor must provide a copy of the application to the Director and give the Director an opportunity to make submissions in relation to the application (proposed subsection 41(1)). The Independent Assessor may also seek further information about the application from the applicant or Director.
- 6.10 The Bill does not prescribe the process the Independent Assessor must use to be satisfied that the views of other interested persons have been considered as this may vary from case to case. In the event an application does not adequately address the issue, the Independent Assessor may seek further information from the applicant, the Director and/or other ‘interested persons’ directly.

Definition ‘Interested Persons’

- 6.11 The Bill provides that an ‘interested person’ may apply to the Independent Assessor to make a determination in relation to a building project. The Bill defines ‘interested persons’ to be the Minister and any other persons prescribed by Regulations (proposed subsection 36(2)).
- 6.12 Subject to the outcomes of the Senate inquiry, it is the Government’s intention that the Regulations prescribe all ‘building industry participants’ (as defined by the existing Act) in relation to the project to which the application relates, to be ‘interested persons’. This would mean all project employers, employees, their respective associations and the client(s) in relation to the project would be able to make an application to the Independent Assessor.

²¹ Explanatory Memorandum, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011, paragraph 91

Decision by Independent Assessor – notice, reapplication and reconsideration

- 6.13 As soon as practicable after making a decision in relation to an application for a Determination the Independent Assessor must notify the applicant and Director in writing (proposed subsection 41(5)).
- 6.14 If the Independent Assessor decides not to make a Determination the original applicant(s) cannot make another application in relation to the same building project unless new information becomes available (proposed subsection 40(5)).
- 6.15 If the Independent Assessor decides to make a Determination they must as soon as practicable give a copy of the Determination to the applicant and the Director, and arrange for it to be published in the Gazette (proposed subsection 42(1)).
- 6.16 In addition, the Director may request in writing the Independent Assessor to reconsider a Determination at any time after the original determination is made setting out the reasons for the request. In this case the Independent Assessor must:
- reconsider the Determination,
 - make a determination affirming, revoking or amending the original determination,
 - advise the Director and the original applicant of the new Determination and publish the new Determination in the Gazette (proposed section 43).
- 6.17 Some stakeholders have expressed concern about the apparent inability for an interested person to seek a review or revocation of a Determination by the Independent Assessor. Noting that the Independent Assessor must be satisfied that the views of interested persons have been considered before making a determination, it is also important to refer to the note under proposed section 39 which says:
- Note 2: A determination can be varied or revoked on application by an interested person (see subsection 33(3) of the Acts Interpretation Act 1901) or on request by the Director (see section 43 of this Act).*
- 6.18 Section 33(3) of the *Acts Interpretation Act 1901* provides that the power to make, grant or issue an instrument is taken to also include the power to repeal, rescind, revoke, amend or vary any such instrument in the same manner.

Effect of a Determination by the Independent Assessor

- 6.19 Where the Independent Assessor has made a Determination in relation to a building project the Director can not apply to an AAT presidential member for an examination notice if the investigation is connected with that project while the Determination is in force (proposed subsection 45(2)).
- 6.20 A Determination by the Independent Assessor in no way affects any other compliance or investigation powers of the Building Inspectorate.

- 6.21 If the Independent Assessor decides to revoke a Determination, the compulsory examination powers would again be available in relation to the project. This would allow the compulsory examination powers to be used in relation to events which occurred during the period the Determination was in force.

Conclusion

- 6.22 In summary, subject to the passage of the Bill the following parameters will apply to the compulsory examination powers:
- From the Act's commencement the increased safeguards on the use of compulsory examination powers will apply to all existing and new projects.
 - An application cannot be made to the Independent Assessor for a determination in relation to any building project that began before the Act commenced. That is the compulsory examination power will always be available for these projects.
 - The default situation for all projects that begin on or after the Act's commencement is that the compulsory examination powers will be available.
 - In relation to projects that begin on or after the Act's commencement an interested person will be able to make an application to the Independent Assessor to make a determination that the compulsory examination powers will not apply.
 - If a Determination is made the Director (or interested person see paragraph 6.17 above) can apply for the Determination to be reconsidered or revoked.
 - If a Determination is revoked the compulsory examination powers would be able to be used in relation to events which occurred during the period the Determination was in force.
 - A Determination by the Independent Assessor in no way affects any other compliance or investigation powers of the Building Inspectorate.

Section 7. Advisory Board

Introduction

- 7.1 The Fair Work Building Industry Inspectorate Advisory Board is established in Part 2 of the Bill.
- 7.2 The Advisory Board expands and formalises the arrangements which underpin the ABCC's existing administratively based Industry Forum.
- 7.3 One of the Government's priorities for the industry is to continue the cultural reform that has been underway in recent years and an effective Advisory Board will be able to play an important role in this. Relevantly the Wilcox Report states:

My reason for favouring an advisory board is that I think it important that the [Specialist Division] do more than investigate and prosecute suspected contraventions of the relevant legislation and industrial instruments.

Many people have spoken to me about the need to change the culture within the building and construction industry. The best way of changing any culture is through education, so educational programs ought to be a major [Specialist Division] activity. Suitable programs are best devised with input from people steeped in the industry and conversant with its characteristics, Australia wide...²²

Role of Advisory Board

- 7.4 The role of the Advisory Board is to make recommendations to the Director about:
- (a) policies to guide the performance of the Director's functions and the exercise of the Director's powers;
 - (b) the priorities of, and the programs to be implemented by, the Director; and
 - (c) any matter that the Minister requests the Advisory Board to consider (proposed section 24).
- 7.5 The Bill does not obligate the Director to comply with the Advisory Board's recommendations.

Alternative to Wilcox Report 'Determinative' Advisory Board

- 7.6 The Wilcox Report recommended establishing an Advisory Board that would be responsible for **determining** the policies, programs and priorities of the Building Inspectorate but not exercise executive powers (emphasis added). The Bill however, provides that the Advisory Board will **make recommendations** to the Director rather than be a determinative body for the reasons outlined below.
- 7.7 This departure from the Wilcox Report recommendation ensures the operational autonomy of the Building Inspectorate is not compromised through scenarios such as the 'determinative' Advisory Board being unable to

²² The Hon. Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry* (2009), paragraphs 8.14 and 8.15.

reach agreement on the policies, programs and priorities of the Building Inspectorate.

- 7.8 However, the proposed model ensures representatives of the industry have a formal means of informing the policies, programs and priorities of the Building Inspectorate.

Advisory bodies for other Commonwealth Agencies

- 7.9 Advisory boards are quite common in the Commonwealth public sector, and provide very useful and relevant input, expertise and ‘coal face’ intelligence to public sector bodies. For example:

- The Australian Competition and Consumer Commission (ACCC) has a number of Advisory Boards and consultative committees covering, amongst other things, the health sector, infrastructure, franchising, and small business.
- The Australian Securities and Investments Commission (ASIC) also has a number of Advisory Boards, including its Financial Literacy Board and External Advisory Panel.
- The Australian Research Council (ARC) Advisory Council provides advice to the Chief Executive Officer (CEO) of the ARC on strategic issues, policy matters and matters relating to the evaluation of the research and research training. The Council is chaired by the ARC CEO and has up to nine other members appointed for their distinguished research records or achievements in business research and development.

Advisory Board Members

- 7.10 Consistent with the Wilcox Report recommendation the Advisory Board will consist of the Director, the Fair Work Ombudsman (FWO) and five other members.
- 7.11 The Director and the FWO are members of the Advisory Board to ensure that they are appropriately informed about, and that there is no duplication between, the work of the Building Inspectorate and the Office of the Fair Work Ombudsman.
- 7.12 The members (other than the Director and the FWO) will be appointed by the Minister for a specified term not to exceed three years (proposed section 26). Members appointed by the Minister must have experience or knowledge in workplace relations, law, business, industry or commerce (proposed subsection 26(2)). In addition, one member must have experience or a background in employee representation (proposed subsection 25(c)) and one member must have experience or a background in employer representation (proposed subsection 25(d)).

Conclusion

- 7.13 The Bill implements the Wilcox Report recommendation to establish an Advisory Board (albeit without a ‘determinative’ role) because the Government accepts the important role that these bodies can play in developing and implementing public policy.

Section 8. Office of the Federal Safety Commissioner

Introduction

- 8.1 The Bill retains the provisions of the BCII Act that relate to the Federal Safety Commissioner (FSC) and its related Australian Government Building and Construction OHS Accreditation Scheme (Accreditation Scheme).

Commitment to Occupational Health and Safety

- 8.2 The Government's review of existing regulatory arrangements for the building and construction industry was never intended to address the Office of the Federal Safety Commissioner (OFSC) and the Accreditation Scheme. It has always been the Government's intention to retain the OFSC and the Accreditation Scheme.
- 8.3 Given the Government's intention to retain the OFSC and Accreditation Scheme the Terms of Reference for the Wilcox Review deliberately did not include consideration of the operations of the OFSC or Accreditation Scheme.
- 8.4 The building and construction industry's OHS performance needs dramatic improvement, with industry data showing disturbing numbers of injuries and fatalities. Established in 2005, the FSC works with industry and government stakeholders to ensure that building work that is funded directly or indirectly by the Australian Government is undertaken by builders who recognise the significance of OHS and ensure that it is a key element of their business. The key functions of the FSC (and the OFSC) include: promoting sustainable OHS cultural change in the building and construction industry; developing and administering the Accreditation Scheme; and identifying and progressing initiatives to improve OHS performance. These functions will continue to drive the OFSC's activities under the proposed legislation.
- 8.5 However, it is important to note that in his second reading speech Minister Crean did indicate that the Department of Education, Employment and Workplace Relations is considering the details of a review of the OFSC and Accreditation Scheme.

Conclusion

- 8.6 The Government remains committed to the highest standards of occupational health and safety in the building and construction industry.
- 8.7 The OFSC and its related Accreditation Scheme have resulted in demonstrated improvements in the occupational health and safety practices of accredited companies and related projects.
- 8.8 The OFSC will continue to support and encourage industry and government stakeholders in working towards achieving the highest possible occupational health and safety standards on building and construction projects.

Section 9. Transitional and Consequential Provisions

Introduction

- 9.1 Schedule 2 of the Bill provides for transitional arrangements and consequential amendments to other Acts.
- 9.2 As a general statement of principle, the arrangements which will apply to the transition from the ABCC to the Building Inspectorate will, wherever practicable, be similar to those that applied to the transition of pre-existing agencies to Fair Work Australia.

Investigations and Prosecutions

- 9.3 Subject to the passage of the Bill it is the Government's intention that the following broad transitional arrangements will apply:
- investigations and prosecutions commenced by the ABCC will be transferred to the Building Inspectorate;
 - no transitional arrangements will be made for compulsory examination notices, meaning that any such notices would need to be reissued in accordance with the new processes provided in the Bill; and
 - until such time as the Director has met with and taken account of the Advisory Group's views, the policies and programs of the Building Inspectorate will be set by the Director, however, they must be consistent with written instructions provided to the Director by the Minister for Employment and Workplace Relations.

Resources

- 9.4 Subject to the passage of the Bill it is expected that the Building Inspectorate will be funded from the current ABCC allocation. Some minor elements of this allocation may also be made available to the other Commonwealth bodies performing related functions (e.g. the AAT and Commonwealth Ombudsman in respect of their proposed new functions).
- 9.5 It is anticipated an interdepartmental committee in relation to the transition from the ABCC to the Building Inspectorate will be formed in the first quarter of 2012. This timing will ensure any proposals may be informed by the Senate inquiry report.
- 9.6 ABCC employees engaged under the *Public Service Act 1999* will be subject to machinery of government change provisions under section 72 of that Act and will transfer to the Building Inspectorate.

- 9.7 Existing Statutory Office holders appointed under the BCII Act (Commissioner and Deputy Commissioners) will be able to apply for the statutory position in the Building Inspectorate (Director). If unsuccessful they will be dealt with in accordance with the longstanding arrangements for compensation for early loss of office as determined by the Remuneration Tribunal.

Section 10. Conclusion

- 10.1 The Bill delivers on the Government's commitment to implement a strong set of compliance arrangements for all building and construction industry participants. It makes it clear that the Government will not tolerate intimidation or violence by any party in the industry, or any conduct which breaks the law. The Bill acknowledges the critical importance of an efficient and effective building industry to Australia's economic wellbeing and the need for a specialist industry regulator for the industry.
- 10.2 The Hon Murray Wilcox QC consulted extensively in producing his report. This was followed by further consultations by the Government with stakeholders on the Wilcox Report recommendations and possible approaches.
- 10.3 The Government considered the Wilcox Report to be well considered and balanced and it is on this basis that the Bill gives effect to the reports recommendations (with some modifications) including, in particular, all of the recommended safeguards in relation to the compulsory examination powers to be retained by the Building Inspectorate. The Bill also includes provisions enabling the removal of the compulsory examination powers in relation to lawful projects in recognition that most industry participants are decent and honest and to give the industry the opportunity to demonstrate continuing cultural change.
- 10.4 The Government believes the Bill appropriately balances the need to ensure the positive lasting cultural changes in the industry continue, the requirement for strong and effective enforcement of workplace laws and fairness.

Glossary

Accreditation Scheme	Australian Government Building and Construction OHS Accreditation Scheme
AAT	Administrative Appeals Tribunal
ABCC	Office of the Australian Building and Construction Commission
BCII Act	<i>Building and Construction Industry Improvement Act 2005</i>
Building Inspectorate the Bill	Office of the Fair Work Building Industry Inspectorate Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011
Director	Director of the Building Inspectorate
Fair Work Act	<i>Fair Work Act 2009</i>
FWO	Fair Work Ombudsman
FSC	Federal Safety Commissioner
Independent Assessor	Independent Assessor – Special Building Industry Powers
OFSC	Office of the Federal Safety Commissioner
OHS	Occupational Health and Safety
WR Act	<i>Workplace Relations Act 1996</i>

Attachment A

Wilcox Report Recommendations

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.

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.

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.

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 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.

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.

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.

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.

Recommendation 8:

Except perhaps in rural and remote areas, the Building and Construction Division have its own dedicated operational staff, including inspectors.