Chapter 2

Issues

Importance of the sector

2.1 There is no argument from the committee majority about the importance of the building and construction industry to the economy and employment. In 2007-08 construction accounted for about 7.9 per cent of Australia's GDP or around $82 billion[1] and employed 985,000 people.[2] In addition, the government recognises that delivering the $22 billion Nation Building for the Future package depends on a safe, productive and harmonious construction industry.[3]

Productivity attributed to the BCII Act and ABCC

2.2 The committee majority notes that employer groups continue to link the productivity of the sector to the existence of the BCII Act and the ABCC, almost to the exclusion of any other factors. They point to reports produced by Econtech which outline the productivity gains in the sector attributable to the BCII Act and the ABCC. What has been omitted are independent assessments of the data used in the Econtech reports from 2007 which found major problems with the reports.[4]

2.3 After assessing the evidence, these flaws were recognised by Mr Wilcox who concluded:

> The 2007 Econtech report is deeply flawed. It ought to be totally disregarded.[5]

2.4 Despite these findings, in May 2009 Econtech produced another report for Master Builders Australia. Again a figure of 9.4 per cent is claimed as the productivity gain from the BCII Act and the ABCC. In assessing these findings Professor David Peetz found that:

> Nowhere in the 2009 report is there any number, or mathematical combination of numbers, that produces a 9.4 per cent productivity gain.

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1 ABS, 5204.0, *Australian System of National Accounts*, 2007-08.

2 ABS, 6291.0.55.003, *Labour Force, Australia*, May 2009.

3 DEEWR, *Submission 21*, p. 2.

4 For a comprehensive review of the Econtech reports see Professor David Peetz, *Submission 20*, pp. 6-19.

5 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 46.

> Instead, the 9.4 per cent is simply recycled again from the 2007 report which Justice Wilcox said should be 'totally disregarded'.[6]

2.5 Regarding the Econtech findings, Professor David Peetz concluded:

> …The boost to GDP, savings to the CPI and national welfare gains in each of the Econtech reports, estimated as they were 'from the recent closing of the cost gap between commercial building and domestic housing', have lost their basis in the 'closing of the cost gap'. If there are any economic effects from the operation of the ABCC, they are more likely to be increasing profits than increasing productivity. The literature suggests that the unionised building and construction industry would benefit from more cooperative union-management relations. The role of the ABCC has been to penalise cooperative relations, and so it should come as no surprise that previous policy makers' productivity expectations have not been met.[7]

Industrial action

2.6 In addition, employer groups point to the trend of reduced industrial action in the sector and attribute this to the BCII Act and ABCC. However, they overlook ABS data which shows that over recent years there has been a significant reduction in time lost due to industrial action in all industries, not just building and construction.

Committee comment

2.7 The committee majority does not deny that some productivity gains have been made in the sector but it is clear that the figures offered in the Econtech reports are questionable at best and should be disregarded. It also emphasises that productivity gains cannot be attributed only to the existence of the BCII Act and ABCC. Witnesses before the committee emphasised the need for collaborative relationships to address issues such as productivity, OH&S and skills development.[8] The committee majority believes that the abolition of the ABCC, the work of the new Building Inspectorate and refocusing of resources will take the industry in a more cooperative direction.

Separate legislation for the industry remains

2.8 The industry remains subject to industry specific legislation. Schedule 1 amends the title of the *Building and Construction Industry Improvement Act 2005* to become the *Fair Work (Building Industry) Act 2009*. This operates alongside the general framework for workplace relations regulations under the *Fair Work Act 2009* (FW Act).

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6 Professor David Peetz, *Submission 20*, p. 23. See pp. 24-25 for detailed analysis.

7 Ibid., p. 27.

8 See Mr Jeff Lawrence, *Proof Committee Hansard*, 31 August 2009, pp. 9-10, pp. 12-13 and Mr Greg Quinn, *Proof Committee Hansard*, 31 August 2009, pp. 33-34.

2.9 While the ACTU saw a role for some industry specialisation within the Office of the Fair Work Ombudsman (FWO), it submitted this should be undertaken administratively rather than by statute to ensure the best use of resources.[9] Ms Cath Bowtell detailed this point of view to the committee:

> The Fair Work Ombudsman, as I understand it, has established some specialisation within his organisation—for example, a discrimination unit that is looking at discrimination matters, a new area for the Fair Work Ombudsman to deal with. In oc[cupational] health and safety inspectorates, you often find industry specialists who have an understanding of particular machinery or whatever, and that is useful in that it builds up detailed knowledge of the likely compliance issues in an industry. But because it is integrated into the whole you can maintain a culture across the whole organisation. You can rotate people so that skills are spread across an organisation and you can direct taxpayers' resources to areas of most need. So if compliance issues arose in an alternative industry or in an alternative geographic area, such as the Northern Territory, where the current Fair Work Ombudsman has found significant areas of breach, you would be able to easily move your resources to those areas of most need. The problem with having a statutorily separate organisation is that you cannot readily shift resources to areas of most need and so, whilst specialisation is useful in a compliance agency, having it within a broad agency so that you can shift resources to address the need is our preferred model. We think it is useful and you can understand in depth the likely compliance issues in an industry. There might be certain industries that are vulnerable and that need overlap with the migration authorities—for example, the horticultural industry. Those specialisations are useful but, within a context that the overarching compliance agency can allocate its resources to the areas of most need, we think that is a good piece of public policy.[10]

2.10 The Combined Construction Unions (CCU) took the view that the FW Act provides a comprehensive and detailed system of regulation which includes 'effective remedies against all parties for breaches of the law'. It submitted that the construction industry should fall under the general laws which apply to the rest of the workforce. In support of this argument it pointed out that the bill does not, and has never, dealt with criminal conduct. The target is industrial conduct. It emphasised that this lack of understanding is widespread in the community and explained:

> This is not a semantic distinction. It goes to the heart of the debate about the justifications which have been used to underpin 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.[11]

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9 ACTU, *Submission 19,* pp. 6-7; Mr Jeff Lawrence, *Proof Committee Hansard,* 31 August 2009, p. 9, pp. 12-13.

10 Ms Cath Bowtell, *Proof Committee Hansard,* 31 August 2009, pp. 12-13.

11 CCU, *Submission 18,* p. 3. See also Mr David Noonan, *Proof Committee Hansard,* 31 August 2009, p. 54.

2.11 This view was supported by the ACTU[12] and emphasised by George Williams and Nicola McGarrity:

> The ABCC is primarily responsible for monitoring and enforcing civil law, or more specifically, federal industrial law like the BCII Act and industry awards and agreements... Such powers should never be bestowed on a body dealing with contraventions of the civil law and potentially minor breaches of industrial instruments.[13]

2.12 The committee majority was pleased to note that employer groups recognised that the matters investigated by the ABCC are 'not inherently of the criminal magnitude and threat to the state that police corruption would be'.[14]

Committee comment

2.13 The committee majority understands that the target of the BCII Act and the ABCC has always been unlawful industrial conduct in an industrial context. The legislation does not deal with criminal behaviour. It is disappointing that this distinction is sometimes blurred by those who seek to retain the ABCC. As noted in previous inquiries, the committee majority does not agree with industry specific legislation in principle. Workers in the building and construction sector being regulated under the FW Act is the ultimate goal. The committee majority recognises that this legislation is the next step in that process.

Objects, definitions and scope of the Act

Object

2.14 The object of the Act in section 3 is to be amended to provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry. The ACTU welcomed the revised object of the Act but proposed some minor amendments consistent with the legislative intent.[15]

Definition of 'building work'

2.15 Schedule 1, item 48, subparagraph 5(1)(d)(iv) amends the current definition of 'building work' to exclude off-site prefabrication. This is to focus the scope of operations on work on-site. Employers groups expressed some concern about the change in definition and suggested that any industrial action taken off-site may have

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12 Mr Jeff Lawrence, *Proof Committee Hansard*, 31 August 2009, p. 9.

13 *Submission 1*, George Williams and Nicola McGarrity, 'The investigatory Powers of the Australian Building and Construction Commission', *Australian Journal of Labour Law, (*2008) 21, p. 274.

14 ACCI, *Submission 11*, p. 55.

15 ACTU, *Submission 19*, p. 5.

the potential to affect on-site work.[16] However, the ACTU supported the exclusion of off-site pre-fabrication from the definition and indicated that it will clarify the scope of the Act. It suggested, however, that the exclusions be clarified in the bill. It also suggested that as the definition of 'office' is already in the Fair Work Act, section 6 of the Principal Act could be repealed.[17]

2.16 The committee majority notes that the Explanatory Memorandum (EM) clarifies that pre-fabrication of building components that takes place on auxiliary or holding sites separate from the primary construction site(s) will remain covered by the definition of building work.[18]

Establishment of the Fair Work Building Industry Inspectorate

2.17 Item 49 repeals Chapter 2 of the BCII Act and replaces it with a new Chapter 2 containing proposed sections 9 to 26M. This abolishes the Office of the ABCC and establishes the Office of the Fair Work Building Industry Inspectorate. Section 26K provides that the Director and the staff of the office constitute a statutory agency for the purposes of the *Public Service Act 1999*.

2.18 The ABCC has been often criticised for what is perceived to be a one-sided approach where the focus of compliance is on employees and unions and not employers. Ms Cath Bowtell, ACTU, provided detail:

> I am not aware of any investigations or prosecutions by the ABCC of breaches of industrial instruments—so breach of award or of industrial agreement. If you look at other industries where the Fair Work Ombudsman does compliance work, we have non-compliance in the order of 40, 50, 60 and 70 per cent, and in some industries 80 or 90 per cent non-compliance, you would expect to find non-compliance of that order in the construction industry as well. Certainly our affiliates in that industry tell us there is non-compliance by employers of that order. Yet the ABCC has not conducted any activities in relation to compliance by employers in relation to awards, agreements and minimum standards as far as we are aware.[19]

2.19 The current arrangements regarding employer contraventions were explained by Ms Bowtell:

> …in operation under the current regime the ABCC and the Fair Work Ombudsman have had an operational arrangement where breaches of industrial instruments, non-payment of awards, et cetera, would be dealt with by the Fair Work Ombudsman and the ABCC would only deal with matters relating to alleged contraventions by unions and their officials. So

16 AMMA, *Submission 12*, p. 15; HIA, *Submission 8*, p. 2; MBA *Submission 13*, p. 9.

17 ACTU, *Submission 19*, pp. 5-6. See also Ms Cath Bowtell, *Proof Committee Hansard*, 31 August 2009, p. 15.

18 *Explanatory Memorandum*, p. 5.

19 Ms Cath Bowtell, *Proof Committee Hansard*, 31 August 2009, p. 10.

> while the ABCC has had a statutory authority to use its coercive powers in pursuit of employers who have breached their industrial obligations, the operational arrangements that have been put in place have meant that it has not conducted investigations or inspections of breaches of industrial instruments by employers and has left that work to the Fair Work Ombudsman, who of course has a different set of enforcement and compliance powers.[20]

2.20 Employer groups are satisfied with this artificial demarcation. It preserves the notion of an ABCC devoted to protecting its interests. The ABC Commissioner told the committee that the arrangements continue:

> The Workplace Ombudsman and I exchanged a letter. We made a conscious decision not to enter into a formal memorandum of understanding. We did not need to do that as we were two agencies within the portfolio. We exchanged a letter that we would refer matters back and forth basically. That has worked well. There has been no new letter signed, but given the normal machinery of government arrangements, the arrangements continue, so we do refer matters to the Fair Work Ombudsman as they arise.[21]

2.21 It is important to note that the Building Inspectorate will ensure compliance with workplace relations laws by all building industry participants and this will include the underpayment of employee entitlements such as wages.[22] This is contained in proposed section 10 which requires the Director to inquire into, investigate and commence proceedings in relation to safety net contractual entitlements as they relate to building industry participants.

2.22 Employer groups were concerned that this section will divert resources from policing the obligation to act lawfully and argued that this function is best addressed by the FWO where the skills reside.[23] The Department of Education, Employment and Workplace Relations (DEEWR) did not agree with this view:

> The ABCC currently has these powers but has chosen to refer them to the Workplace Ombudsman. Similarly, some of the witnesses today have spoken about the need for a differing skill set when dealing with employers, unions and employees. The department does not agree with this position. It is evident from the Fair Work Ombudsman and, previously, the Workplace Ombudsman, who deal with all three already, that a differing skill set is not required.[24]

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20 Ms Cath Bowtell, *Proof Committee Hansard*, 31 August 2009, p. 10.

21 Hon John Lloyd, *Proof Committee Hansard*, 31 August 2009, p. 68.

22 DEEWR, *Submission 21*, p. 5.

23 MBA, *Submission 13*, p. 9; AiG, *Submission 10*, p. 4.

24 Mr Michael Maynard, *Proof Committee Hansard*, 31 August 2009, p. 59.

Committee comment

2.23 The committee majority has concerns regarding the anomalous situation of the ABCC retaining the statutory authority to use its powers to pursue breaches of industrial obligations by employers but referring cases to the FWO. This means employers are subject to a different set of rules and leaves the ABCC open to allegations of bias. The committee majority also notes advice from the ABC Commissioner that the ABCC has underspent by $5 million for the past two financial years.[25] In the committee's view this could have been used to deal with complaints against employers. As noted earlier, the ABCC will not fulfil its goal of achieving cultural change in the industry so long as it is regarded solely as an agency which acts on behalf of employers. The committee majority therefore supports the function in section 10 which reinforces the requirement for the Director to inquire into, investigate and commence proceedings in relation to safety net contractual entitlements and notes advice from DEEWR that rejects an ABCC argument that a different skill set is required to carry out these duties.

Director

2.24 Proposed section 9 establishes the statutory office of the Director of the Fair Work Building Industry Inspectorate who will be appointed by the Minister by written instrument for a period of up to five years. The Director will manage the operations of the Building Inspectorate and will not be subject to oversight or control by other statutory office holders. The government considered that this model gives best effect to Mr Wilcox's recommendation that the Director have 'operational autonomy' and reflects stakeholder consultation on this point.[26]

Advisory board

2.25 Proposed sections 23 to 26H would establish the Fair Work Building Industry Advisory Board. It will make recommendations to the Director on the policies and priorities of the Building Inspectorate. While the Advisory Board will not determine the Inspectorate's policies and priorities, the Director will consider its recommendations when determining them. It will consist of the Director, the Fair Work Ombudsman (FWO), one building industry employee representative, one building industry employer representative and no more than three other members. Section 26G provides that the chair of the Advisory Board is to convene at least two meetings in each financial year.

2.26 Some submissions pointed to the divergence from the Wilcox recommendation that the board 'determine' the policies, programs and priorities of the Inspectorate. DEEWR explained that the board will have a strategic advisory role only and that:

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25 Hon John Lloyd, *Proof Committee Hansard*, 31 August 2009, p. 70.

26 DEEWR, *Submission 21*, p. 6.

> This departure from the Wilcox Report recommendations ensures the operational autonomy of the Building Inspectorate is not compromised through scenarios such as the 'determinative' Advisory Board being unable to reach agreement on the policies, programs and priorities of the Building Inspectorate.[27]

2.27 The ACTU supported the establishment of an Advisory Board and suggested this model could be applied more broadly to the Office of the FWO. It advocated changing the composition to increase industry representation and changing the quorum requirements to include a two-third majority vote. It recommended that proposed section 26G(2) be amended as:

> It is inappropriate to specify that a decision of the board cannot be taken unless each of the Chair, the Director and the Fair Work Ombudsman is present, This would mean that any one of these people has a veto over decisions.[28]

2.28 In addition, the ACTU submitted that the bill does not give effect to the statement in the second reading speech by the Minister that 'the director will consider their recommendations when determining the polices and priorities of the building inspectorate'. It recommended that the Director be required to report to the Advisory Board on how recommendations have been implemented or why they have not.[29]

Committee comment

2.29 The committee majority agrees that in the interests of transparency there should be a process for the Director to notify the Advisory Board which of its recommendations are being acted on.

Recommendation 1

2.30 The committee majority recommends that a mechanism be developed for the Director to notify the Advisory Board which of its recommendations have been implemented or why they have not.

Comparison of BCII Act and FW Act

2.31 Item 51 removes Chapters 5 and 6 of the BCII Act to give effect to the recommendation by Mr Wilcox to repeal the provisions dealing with unlawful industrial action, coercion and the associated civil penalties that are specific to the building industry. Mr Wilcox identified three significant difference between the rules for building workers under the BCII Act and those for other workers under the (then) Workplace Relations Act:

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27 DEEWR, *Submission 21*, p. 22.

28 ACTU, *Submission 19*, pp. 8-9.

29 Ibid., p. 9.

- the wider circumstances under which industrial action attracts penalties under the BCII Act;
- the exposure of building workers to statutory compensation orders; and
- higher penalties are available under the BCII Act.[30]

Industrial action

2.32 The bill removes the broader circumstances under which industrial action attracts penalties in relation to the building industry and would apply the industrial action control and penalty regime introduced by the FW Act. Employer groups submitted that section 38 of the BCII Act has been particularly effective in limiting wildcat, unprotected and unlawful industrial action and argued for its retention, believing there are important differences between the BCII Act and the FW Act on this issue.[31]

2.33 In comparing these areas under the BCII Act and the FW Act, Mr Wilcox noted '…during most of the time, in almost all Federal workplaces, either an enterprise agreement or a workplace determination will be in operation, with the result that any industrial action will be unlawful'. He understood the main concern of employers to be wildcat stoppages which often cause considerable disruption. Regarding this area, Mr Wilcox explained:

> The effect of clause 417 of the Fair Work Bill is that, if an enterprise agreement or workplace determination is then in place, those involved in such a stoppage or ban will be exposed to both penalty and compensation orders. If the stoppage or ban caused significant loss to the employer, a large compensation payment may be ordered.[32]

2.34 Mr Wilcox also noted clause 474, which prohibits the employer paying the employee for the period of the industrial action, with a minimum deduction of four hours wages and that this may be expected to affect the attitude of employees to wildcat action. He concluded:

> Although there is clearly a technical difference between the circumstances under which industrial action is unlawful under the BCII Act (not 'protected action') and the Fair Work Bill (during the operation of an enterprise agreement or workplace determination), 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

30 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 17.

31 See ACCI, *Submission 11*, p. 29; AMMA, *Submission 12*, p. 14.

32 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 20.

> 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.[33]

2.35 Regarding industrial action and compensation, Mr Wilcox concluded that no reasoned case was put to him for retaining the difference in rules applying to building workers, adding that differences would only serve to complicate the law.[34]

2.36 The ACTU agreed and argued that the FW Act narrowly confines the ability of employees to take protected industrial action and that it 'provides a myriad of opportunities for employers to obtain relief against action taken outside these narrow confines'.[35]

2.37 On this issue, DEEWR responded that:

> 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.[36]

Penalties

2.38 As recommended by Mr Wilcox the bill removes higher penalties for building industry participants for breaches of industrial law. The bill would reduce the maximum penalties for unions from $110,000 to $33,000 and for an individual from $22,000 to $6,000.

2.39 Employer groups opposed the decision to reduce the penalties to bring the industry in line with other industries and argued that the level of the penalties provides an effective deterrent to unlawful industrial action.[37] Employer groups also warned that the industry is particularly vulnerable to industrial action.[38] This argument was not accepted by Mr Wilcox who stated:

> …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 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. There is no

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33 Ibid., p. 21.

34 Ibid., p. 26.

35 ACTU, *Submission 19*, p. 10.

36 DEEWR, *Submission 21*, p. 9.

37 See CCI WA, *Submission 2*, p. 5; AiG, *Submission 10*, p. 17, 4; AMMA, *Submission 12*, p. 14.

38 MBA, *Submission 13*, p. 6; AMMA, *Submission 12*, p. 17.

> less need to regulate industrial action in those industries than in the building and construction industry.[39]

2.40 Mr Wilcox explained that the FW Act recognises the serious consequences of industrial action and contains constraints upon its occurrence by the following provisions:

> Clause 418 requires FWA to make a termination order in relation to any non-protected industrial action that comes to its notice, whether or not an affected person has applied for an order. Clause 419 makes a similar provision in relation to industrial action by non-national system employees (or employers) if the action will, or would, be likely to have the effect of 'causing substantial loss of damage' to a constitutional corporation…Clause 421 subjects contravention of an order under clause 418 or clause 419 to a civil penalty and, importantly, exposes those responsible for the contravention to a compensation order under clause 545 of the Fair Work Bill. It should also be noted that Division 6 of Part 3-3 empowers FWA to make an order, in a variety of circumstances, for suspension or termination of even protected industrial action.[40]

2.41 Persons suffering damage because of a contravention can seek compensation. Section 545 of the FW Act provides an opportunity for affected persons to recover losses and Mr Wilcox noted this would be a significant deterrent to unlawful conduct.[41]

2.42 In relation to the level of penalties, Mr Wilcox concluded:

> 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, mentioned by ACTU, of equality before the law…[42]

2.43 The CCU told the committee that Mr Wilcox's report adequately addresses employer arguments to retain higher penalty provisions and it agreed that each is dealt with in the FW Act.[43] The ACTU also agreed with this conclusion and noted that the level of penalties contained in the BCII Act is out of all proportion to the public harm,

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39 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 26.

40 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, pp. 26-27.

41 Ibid., p. 27.

42 Ibid., pp. 27-28.

43 CCU, *Submission 18*, p. 15.

if any, that may occur as a result of unprotected industrial action.[44] Responding to concerns voiced by employer groups, DEEWR made a number of points. First, there is nothing in the bill which would reduce the capacity of the Building Inspectorate to respond quickly to stakeholder concerns. Second, it noted that more than half of the court cases in which the ABCC successfully obtained penalties were brought under the WR Act alone and the maximum penalty rates available under the BCII Act were irrelevant. In addition:

> …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.[45]

2.44 DEEWR indicated that this had recently occurred by the Federal Court in Bovis Lend Lease Pty Ltd v CFMEU.[46] The committee majority agrees that industrial action and penalties are adequately covered in the FW Act.

Coercive interrogation powers

2.45 Section 52 of the BCII Act provides the power to compel a person to provide information or produce documents if the ABC Commissioner believes on reasonable grounds that the person has information or documents relevant to an investigation and is capable of giving evidence. Mr Wilcox found the need to retain the existing coercive interrogation powers. He described reaching this conclusion as follows:

> It is understandable that workers in the building industry resent being subject to an interrogation process that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power. However, that would not be a responsible course. 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 BCD to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.[47]
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> …I have reached the opinion that it would be unwise not to endow BCD (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...[48]

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44 ACTU, *Submission 19*, p. 10. See also Ms Bowtell, *Proof Committee Hansard*, 31 August 2009, p. 15.

45 DEEWR, *Submission 21*, pp. 9-10.

46 Ibid., p. 10.

47 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 3.

48 Ibid., p. 58.

2.46 Mr Wilcox mentioned the still significant degree of contravention of industrial laws, particularly in Victoria and Western Australia and that the rate of commencement of proceedings is not declining.[49] The Wilcox report recommended that the power be retained and then reviewed after five years. This recommendation was supported by the current ABC Commissioner.[50]

2.47 The committee received a number of submissions which argued against the retention of the coercive powers. While supporting the proposed safeguards (detailed below) as important improvements to the primary Act, Professor George Williams and Ms Nicola McGarrity argued that the coercive powers are not justified in this industrial setting as:

> The safeguards do not, for example, overcome the fact that the coercive powers can be used in an overly-broad set of circumstances, such as in regard to non-suspects and children in the investigation of minor or petty breaches of industrial law and industrial instruments.[51]

2.48 Instead, Professor Williams and Ms McGarrity recommended a strong and effective enforcement and investigation regime that applies across all industries[52] and stated:

> The introduction of safeguards on the investigatory powers of the ABCC by legislation or ministerial direction would be a step forward, but not an adequate answer to the many problems with the powers…and the problems with the powers cannot be remedied merely by greater checks and executive or judicial oversight. The ABCC's investigatory powers simply have no place in a modern, fair system of industrial relations, let alone one of a nation that pries itself on political and industrial freedoms.[53]

2.49 Unions have criticised the retention of the coercive powers which they claim discriminates against building workers and breaches their civil rights. They argued that all workers should be equal under the law. The ACTU expressed its opposition to the use of coercive information gathering powers in the enforcement of workplace laws.[54] It reminded the committee that the powers:

- are used only to investigate breaches of some civil penalty offences under the FW Act. They have no connection with breaches of criminal law as allegations of violence or criminal damage will be investigated by the police;

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49 Ibid.

50 Letter from ABC Commissioner, the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 4.

51 Professor George Williams and Ms Nicola McGarrity, *Submission 1*, covering letter. See also Mr Chris White, *Submission 9*, p. 2.

52 Professor George Williams and Ms Nicola McGarrity, *Submission 1*, covering letter.

53 Professor George Williams and Nicola McGarrity, 'The investigatory Powers of the Australian Building and Construction Commission', *Australian Journal of Labour Law,(* 2008) 21, p. 279.

54 ACTU, *Submission 19*, p. 3, 11.

- are aimed not at those suspected of wrongdoing but their associates such as colleagues, spouses, other family members or professional advisors and also bystanders; and
- override the ordinary protection of private and confidential information.[55]

2.50 The ACTU submitted that though it was opposed to the coercive powers, the proposed safeguards represent an improvement on the exiting provisions. However, it recommended that the person seeking to use them should be required to demonstrate the overwhelming public interest that justifies their use.[56]

2.51 The CCU also argued that coercive powers have no place in industrial law and told the committee:

> We have one worker at the moment who faces imprisonment because he is accused of attending a safety meeting and refusing to talk to the ABCC about becoming an informant against his workmates. He is not accused of thuggery and violence and corruption and those sorts of things that we hear bandied around by people who appear before this committee; he is accused of attending a safety meeting on a site which was deemed unsafe by the regulator. That is in an industry that on average loses one worker every week with a safety record that has worsened under these laws.[57]

2.52 The CCU also addressed the issue of witnesses wanting to provide information but being fearful of the consequences of being seen to cooperate and stated:

> …there would be nothing to stop somebody from taking information to a regulatory authority on a confidential basis if no coercive powers existed. Many agencies, including the FWO, operate in this way.[58]

2.53 In addition, the CCU noted that around one-quarter of all compulsory examinations are finalised without any court proceedings being taken. Therefore the question of whether someone has volunteered information does not arise as the issue does not reach the public domain. It also noted that:

> Where no coercive powers exist and proceedings have been commenced, it would still be open to a prosecuting authority to 'protect' a witness who wants to give (and/or has already given) evidence voluntarily but not be seen to be doing so (and whose evidence is essential to the prosecutor's case), by subpoenaing that person as a witness in the proceedings. To any outside observer the person giving evidence under subpoena is in no different position to someone who has been compelled to do so as part of a

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55 Ibid., pp. 11-12. See also Ms Cath Bowtell, *Proof Committee Hansard*, 31 August 2009, p. 14.

56 Ibid., p. 4.

57 Mr David Noonan, *Proof Committee Hansard*, 31 August 2009, pp. 51-52.

58 CCU, *Submission 18*, p. 6.

> coercive interview. They are obliged to testify and required to do so truthfully.[59]

2.54 On the other hand, retention of the coercive powers was strongly supported by employer groups. They warned that the new safeguards will weaken the coercive powers and lead to a resurgence of industrial disputes in the construction sector.

2.55 Professor Breen Creighton warned that employer fears about the watering down of the coercive powers should be treated with caution. He explained that the introduction of safeguards mean that the powers are likely to be used only in extreme circumstances. The procedures to obtain exemptions are quite complicated so few 'interested persons' are likely to use them, particularly as the application would have a realistic prospect of success only where the project concerned was so peaceful that it was unlikely that the interrogation power would be invoked in the first place. He concluded that it is unlikely that the rule of law in the building industry will be seriously compromised by the availability of the exemption procedure or by anything else in the bill.[60]

2.56 The Minister has acknowledged the discontent caused by the retention of the coercive powers and expressed her disappointment that there are elements in the industry which believe they are above the law, and where people engage in intimidation and violence. As she explained:

> Ultimately, whether or not the powers are used is in the hands of all building industry participants themselves. If the law is abided by then the powers will not be used.[61]

Safeguards

2.57 As noted above, while the coercive powers will be retained, they will be tempered by new safeguards regarding external oversight. The new safeguards include the following:

- section 47 provides that each use of the powers is dependent upon a presidential member of the Administrative Appeals Tribunal (AAT) being satisfied a case has been made for their use;
- subsection 51(3) provides that the person being examined will be entitled to be represented at the examination by a lawyer of the person's choice and their rights to refuse to disclose information on the grounds of legal professional privilege and public interest immunity will be recognised (52(2));

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59 Ibid., p. 6.

60 Professor Breen Creighton, 'Building industry bill strikes the right regulatory balance', *The Age*, 18 June 2009, p. 21.

61 Hon. Julia Gillard MP, Minister for Workplace Relations, Second reading speech, *House of Representatives Hansard*, 17 June 2009, p. 6250.

- section 58 provides that people required to attend an interview will be reimbursed for their reasonable expenses, such as travel and accommodation as well as legal expenses;
- all examinations will be videotaped (subsection 54A(1)) and undertaken by the Director (51(2)) or an SES officer (13(3));
- section 54A provides that the Commonwealth Ombudsman will monitor and review all examinations and provide reports to the Parliament on the exercise of this power; and
- section 46 makes the powers subject to a five year sunset clause and it is intended that before the end of that period, the government would undertake a review to determine whether these powers continue to be required.

2.58 The committee received comment on the following safeguards.

Criteria to be used to determine whether to issue an examination notice

2.59 Under proposed subsection 47(1), the nominated AAT presidential member to whom an application for an examination notice has been made is required to only issue the examination notice if the presidential member is satisfied of the following:

(a) that the Director has commenced the investigation (or investigations) to which the application relates;

(b) that the investigation (or investigations) are not connected with a building project in relation to which a determination under subsection 39(1) is in force;

(c) that there are reasonable grounds to believe that the person to whom the application relates has information or documents, or is capable of giving evidence relevant to the investigation (or investigations);

(d) that any other method of obtaining the information, documents or evidence:

(i) has been attempted and has been unsuccessful; or

(ii) is not appropriate;

(e) that the information, documents or evidence would be likely to be of assistance in the investigation (or investigations);

(f) that, having regard to all the circumstances, it would be appropriate to issue the examination notice;

(g) any other matter prescribed by the regulations.

2.60 The ACTU noted the lack of a process to ensure the AAT member is made aware of issues such as the person claiming the information is protected by privilege or provided in confidence or is claiming a public interest immunity. It pointed out that:

> As currently drafted the Director is not under any obligation to advise the AAT member that the subject of the notice is, for example, the spouse of a person suspected of breaching a law or is a minor. Nor is the Director required to disclose to the AAT member the reasons that a person may have for refusing to participate in an interview under the general powers of investigation…[62]

2.61 The ACTU suggested that to address this, either the Director could be required to disclose all relevant circumstances or the AAT member could hear from the person who is the subject of the application.[63] The CCU also suggested that the person issued with an examination notice should have the opportunity to be heard by the AAT member on whether the requirements for the notice have been satisfied. It argued that this may bring to light that other methods of obtaining the information have not been exhausted and establish that their knowledge or events is important to the investigation.[64]

2.62 The ACTU also pointed out that proposed subparagraph 47(1)(e) requires the information is 'likely to be of assistance' whereas Mr Wilcox recommended the notice be issued where it is likely to be important to the progress of the investigation. It recommended that the bill be amended to reflect this higher threshold.[65] This was supported by the CCU.[66]

2.63 The EM indicated that the coercive powers would not be used except where the AAT member is satisfied that 'all other methods of obtaining the material or evidence have been tried or were not appropriate'.[67] The ACTU pointed out that this is not guaranteed in the bill and recommended an amendment to require the Director to have exhausted the ordinary powers before making an application.[68] The CCU also urged that it must be clear that examination notices are only to be issued as a last resort.[69]

2.64 The ACTU submitted that there is no requirement that the examination notice specify the type of document to be produced.[70] The CCU also argued that there should

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62 Ibid., p. 13.

63 Ibid., pp. 13-14.

64 CCU, *Submission 18*, p. 9.

65 ACTU, *Submission 19*, p. 14.

66 CCU, *Submission 18*, p. 8.

67 EM, p. 20.

68 ACTU, *Submission 19*, p. 15.

69 CCU, *Submission 18*, p. 8.

70 ACTU *Submission 19*, p. 16.

be a reasonable degree of specificity regarding any documents sought to ensure the process does not turn into a 'fishing expedition'.[71]

Committee comment

2.65 The committee majority agrees that safeguards, while an improvement, do not resolve the issues raised by the use of coercive powers in an industrial relations setting. As already stated, the committee majority wishes to see all workers regulated by the FW Act and this is the ultimate goal. However, the committee would like to see the following issues regarding safeguards addressed.

2.66 The committee majority agrees with the findings of Mr Wilcox that requiring the recipient of the examination notice to attend before the AAT member would in effect be requiring them to attend for interrogation.[72] While it should be expected to occur anyway, the committee majority believes there should be a clear requirement for the Director to disclose all relevant details to the AAT member. The ability for the AAT member to seek addition information should remain (subsection 45(6)).

Recommendation 2

2.67 The committee majority recommends that the requirement for the Director to disclose all relevant circumstances to the AAT member be included in subsection 45(5).

2.68 The committee majority is mindful of additional layers of bureaucracy but agrees that to guard against 'fishing expeditions', the examination notice should specify the type of documents to be produced.

Recommendation 3

2.69 The committee majority recommends that an examination notice be required to specify the type of documents to be produced.

2.70 Subparagraph 47(1)(g) requires the AAT member to consider additional criteria prescribed by the regulations. The Minister informed the committee that the government intends the regulations to prescribe that the nominated AAT presidential member must also consider additional criteria relating to the nature and likely seriousness of the suspected contravention and the likely effect on the person subject to the notice.[73]

2.71 The EM refers to consideration of addition criteria such as whether complying with the notice would have an undue effect on a person. A number of submissions

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71 CCU, *Submission 18*, p. 9.

72 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p.67.

73 Letter from the Minister for Employment and Workplace Relations to the Committee Chair, 16 July 2009, p. 3.

pointed out the difficulty for a presidential member to be satisfied of the likely effect on the person.[74] The committee agrees this suggestion has far too subjective an element.

Recommendation 4

2.72 The committee majority recommends that should the likely effect on a person be included as a criteria for the powers then the words 'in so far as it is known' be added.

Payment of reasonable expenses

2.73 Section 58 provides for the payment of expenses incurred in attending an examination. This was supported by the CCU.[75] The Law Institute of Victoria pointed out that the EM defines reasonable expenses to include travel, legal and accommodation expenses but there is no reference to the loss of wages or ordinary income of a witness.[76] Mr Chris Molnar explained:

> It would be normal in a court situation, if a person is compulsorily required to attend a court room under subpoena, for that person's expenses to be covered. We do not see this situation as being any different to that. If you are compulsorily required to attend an examination, your travel expenses, your legal expenses and any loss of wages or income, subject to a reasonableness test, ought to be paid. It is a compulsory process and we should not undergo these compulsory processes, which in the industrial law area are relatively unusual, without the individual who is subject to that process being compensated, subject to the reasonableness test.[77]

2.74 The committee majority notes recommendation five of Mr Wilcox where he argued that the bill should make provision for loss of wages as well as travel and accommodation expenses and concluded:

> Moreover, the party issuing the subpoena is responsible, at least in the first instance, for the person's other reasonable expenses, including loss of wages. It is unconscionable to put people in the position of being required, under threat of imprisonment, to attend a hearing as a witness, at their own expense.[78]

74 CCF, *Submission 14*, p. 20.

75 CCU, *Submission 18*, p. 10.

76 Law Institute of Victoria, *Submission 17*, p. 75.

77 Mr Chris Molnar, Law Institute of Victoria, *Proof Committee Hansard*, 31 August 2009, p. 4.

78 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 75.

Committee comment

2.75 The committee majority agrees with the recommendation of Mr Wilcox that loss of wages or ordinary income be included. Although the DEEWR submission appears to indicate that this is included,[79] the committee majority believes that this should be made clear in the bill.

Recommendation 5

2.76 The committee majority recommends that in Schedule 1, section 58, 'reasonable expenses' be clarified to include the loss of wages or ordinary income.

Role of the Commonwealth Ombudsman

2.77 Mr Wilcox recommended that the function of oversight be given to the Commonwealth Ombudsman:

> The CO's [Commonwealth Ombudsman's] office is well-respected in the community. It is readily accessible with a call-centre and offices in every State and Territory. It is staffed by people who are experienced in monitoring the performance of sensitive duties by public officials.[80]

2.78 The Commonwealth Ombudsman noted that the existing role fits very well with the function proposed under the bill. However, he noted it is important that the scope of the function is properly understood and detailed the expected functions:

- review each application made by the Building Inspectorate to the AAT;
- track the status of each notice of examination, variation to notice, conduct of examination, record of examination and report of examination;
- review each examination to ensure that:
    - the form of the examination satisfies the requirements of the Act;
    - the examination is held for a relevant purpose;
    - the questions asked during the examination are relevant to that purpose;
    - any requirement to produce documents or anything else at an examination is reasonable;
    - any objections on the basis of relevance by the examinee or his or her legal representative are properly dealt with;
    - any claims of privilege made by the examinee or his or her legal representative are properly dealt with;
    - any submissions made by the examinee or his or her legal representative at the conclusion of an examination are properly dealt with;

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79 DEEWR, *Submission 21*, pp. 13-14.

80 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 74.

- investigate and resolve (where possible) complaints relating to the conduct of examinations and other actions of the Building Inspectorate; and
- report to Parliament at least once each year on the conduct of examinations under the Act.[81]

2.79 Based on the Special Investigations Monitor (SIM) of Victoria, which has a similar role, the Commonwealth Ombudsman indicated that the new function cannot be performed without adequate resources.[82]

Recommendation 6

2.80 The committee majority recommends that the scope of the Commonwealth Ombudsman function be clearly defined and that the government ensure appropriate resources be made available to undertake the function.

2.81 Employer groups expressed concern that the new safeguards to use the coercive powers will be overly bureaucratic and result in delays. In response government senators note the view expressed by Mr Wilcox that:

> …I am confident the safeguards I have recommended, if implemented, will minimise the unnecessary use, and potential misuse of the power; without impeding, or significantly delaying investigations…[83]

2.82 In relation to these claims DEEWR noted that the compulsory examination powers are a last resort and are not intended as the primary or first process in an investigation. The safeguards relate only to the use of the compulsory examination powers and will have no effect on the conduct of the majority of investigations. DEEWR indicated furthermore that during 2007-08 less than nine per cent of the ABCC's investigations included the use of the compulsory examination powers. DEEWR emphasised that the safeguards will not impose a significant number of new administrative obstacles and will not constrain the capacity of the Building Inspectorate to respond quickly to matters.[84] DEEWR stated:

> It is important to note the safeguards contained in the bill do not apply to or affect the inspectorate's capacity to exercise its other powers, nor do they affect the speed with which those powers can be exercised.[85]

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81 Commonwealth Ombudsman, *Submission 5*, pp. 2-3.

82 Ibid., p. 3.

83 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 76.

84 DEEWR, *Submission 21*, p. 15.

85 Mr Michael Maynard, *Proof Committee Hansard*, 31 August 2009, p. 59.

Committee comment

2.83 The committee majority supports the introduction of these safeguards. It notes that the government attempted to impose similar safeguards on the ABCC from 3 August until it is due to be replaced in January 2010. Under section 11 of the BCII Act 2005, on 17 June 2009, the Minister for Workplace Relations issued a ministerial direction in the form of a letter to the Hon. John Lloyd, the Australian Building and Construction Commissioner. The direction, which is a disallowable instrument, was disallowed in the Senate on 25 June 2009. The government is now prevented from reintroducing the direction for six months. The committee majority notes this disappointing outcome which prevented the early introduction of the safeguards.

Independent assessor

2.84 In response to the observation by Mr Wilcox that parts of the building and construction industry have increased compliance problems, the legislation is aimed at driving cultural change and will focus compliance where it is most needed. Proposed section 36B creates the statutory office of the Independent Assessor–Special Building Industry Powers (Independent Assessor) who will be appointed by the Governor-General providing the Minister is satisfied that the person has suitable qualifications and is of good character. Under section 39 the Independent Assessor, on application from an 'interested person', may make a determination that the examination notice powers will not apply to particular building projects.

2.85 The Minister has advised the committee that the regulations prescribe that the Independent Assessor must be satisfied that those engaged in a building project have a demonstrated record of compliance with workplace relations laws, including court or tribunal orders; and that the views of other interested persons connected to the project have been considered.[86]

2.86 Proposed section 38 details that such determinations can only be made in relation to building projects that begin on or after commencement of these provisions which is expected to be 1 February 2010. All projects that commenced prior to 1 February 2010 will remain covered by the coercive powers. All projects that commence on or after 1 February 2010 will start with the coercive powers switched on.

2.87 The exemption can apply to multiple building sites and be approved before a project starts. The Independent Assessor can only make a determination if there has been an application in accordance with proposed section 40 which means there is no capacity for the Independent Assessor to act alone. Under section 43, the powers can be switched back on if there is any outbreak of compliance issues on the site.

2.88 In the second reading speech, the Minister explained:

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86 Letter from the Minister for Employment and Workplace Relations to the Committee Chair, 16 July 2009, p. 2.

> In the event that a project where the coercive powers have been switched off experienced industrial unlawfulness the Independent Assessor may rescind or revoke the original decision, thereby switching the powers back on. Additionally, the Director of the Building Inspectorate may request the Independent Assessor reconsider the decision at any time based on changes in circumstances on a specific project.[87]

2.89 The Law Institute of Victoria pointed out that exempting particular projects from the powers in the bill would be inconsistent with the object and purpose of the bill which is to ensure compliance with workplace relations laws by 'all' building industry participants. It added that:

> …it may provide those projects and persons with immunity from the reach of investigation powers before the project has even begun.[88]

2.90 The CCU considered that the rules around switching off the powers are unworkable and unfair. As an example, large projects commencing just prior to these amendments with a life of many years cannot be excluded even where the record of compliance is exemplary. The CCU also pointed out the definition of when a project began may open up an area of dispute.[89]

2.91 In opposing the coercive powers, the CCU pointed to the conclusions of the Wilcox report that the construction industry is generally free of major industrial misconduct. It suggested that it would be more logical for the coercive powers to be the exception rather than the rule.[90]

2.92 The ACTU argued that if the coercive powers are to remain they should be available only where there is a compelling public interest justification. This could be achieved by having projects start with the coercive powers switched off, but allowing applications to have them switched on. This would be consistent with the approach outlined by the Minister to focus compliance activities where they are most needed. The ACTU also noted the difficulties that may be faced when determining the commencement of the project and suggested it would be simpler for the new regime to apply to all building projects regardless of the stage of the project from 1 February 2010.[91]

2.93 Commentators questioned the value of an Independent Assessor being able to 'switch off' the coercive powers for particular projects. The procedures to obtain an exemption have been described as 'elaborate'. In addition, they have pointed out that such applications seem likely to succeed where a project is so peaceful that there

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87 Minister for Employment and Workplace Relations, Hon Julia Gillard MP, second reading speech, *House of Representatives Hansard*, 17 June 2009, p. 6249.

88 Law Institute of Victoria, *Submission 17*, p. 3.

89 CCU, *Submission 18*, p. 7.

90 Ibid.

91 ACTU, *Submission 19*, pp. 16-17.

should not be a need to use the powers anyway.[92] The Law Institute of Victoria agreed, and explained that as the ability to switch off the powers will only apply to sites with a demonstrated record of compliance, it is unlikely that the coercive powers would be used on these sites. The Institute questioned the purpose of exempting those sites from the legislation and noted that it may remove the motivation to comply with the relevant laws. The Institute considered that the safeguards proposed by the bill are more appropriate protections.[93]

2.94 The Minister informed the committee that the Independent Assessor may rescind or revoke a determination to 'switch off' the availability of coercive powers to a project where the project experiences industrial unlawfulness. The Minister also informed the committee that if a determination were made and subsequently rescinded, the subsequent use of coercive powers may apply to events which occurred during the period the availability of the powers had been switched off.[94]

2.95 DEEWR clarified that:

> The capacity for interested persons to apply to have the availability of the inspectorate's coercive powers switched off on a specified project appears to have been misunderstood and/or misrepresented by some commentators. The switch off powers of the independent assessor relate only to the inspectorate's use of coercive powers on a specified project. They do not affect the other compliance powers the building industry inspectorate will have. Determinations made by the independent assessor do not affect the inspectorate's capacity to monitor, investigate and enforce general workplace relations matters in the building and construction industry…[95]

Committee comment

2.96 The committee majority notes Mr Wilcox's conclusion of the need to retain the coercive powers based on recent examples of inappropriate behaviour. The committee is disappointed that the inappropriate actions of a few tarnish the reputation of the industry as a whole. These provisions will serve to further encourage cultural change and reward good behaviour by providing the industry with the opportunity to demonstrate that a lawful culture is in place. As the Minister pointed out, if a project is peaceful then the stakeholders have nothing to fear from the powers as they will not be invoked. The committee majority notes that the establishment of the Office of the Independent Assessor will facilitate the objective of focusing the powers where they are most needed to encourage lawful behaviour and a change in the industry's culture.

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92 See Professor Breen Creighton, 'Building industry bill strikes the right regulatory balance', *The Age*, 18 June 2009, p. 21; Michelle Grattan, 'Debate highlights unions' isolation', *The Age*, 17 June 2009, p. 6.

93 Law Institute of Victoria, *Submission 17*, p. 3.

94 Letter from the Minister for Employment and Workplace Relations to the Committee Chair, 16 July 2009, p. 2.

95 Mr Michael Maynard, *Proof Committee Hansard*, 31 August 2009, p. 59.

Definition of 'interested person'

2.97 Section 40 provides for an 'interested person' (defined in subsection 36(2)) to apply for a determination that the coercive interrogation powers not apply for a specified project. The Minister informed the committee of the government's intention that regulations prescribe all 'building industry participants', as defined by the current Act, in relation to the project to which the application relates, to be 'interested persons'. This means all project employers, employees, their respective associations and the client(s), would be able to make an application to the Independent Assessor.[96]

2.98 The ACTU suggested that peak councils and state ministers should also be able to make applications. While not opposing a means to dispose of frivolous applications, it opposed the suggestion by employer groups that a person could be disqualified from making an application based on their record of compliance.[97]

Definition of existing project

2.99 Proposed section 38 details that the capacity to make application to the Independent Assessor would not apply to projects that commenced prior to 1 February 2010. The Minister advised the committee that the subdivision will commence on 1 February 2010 thereby excluding all current projects. The effect 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 1 February 2010.[98]

Criteria to be used by the Independent Assessor

2.100 The committee majority notes that regulations detailing the factors that the Independent Assessor must take into account when deciding whether to switch off the coercive powers are yet to be released.

2.101 Proposed Subsection 39(3) does not allow the Independent Assessor to make a determination in relation to a particular building project unless they are 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; and

  (ii) any matters prescribed by the regulations; and

(b) it would not be contrary to the public interest to make the determination.

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96 Letter from the Minister for Employment and Workplace Relations to the Committee Chair, 16 July 2009, p. 2.

97 ACTU, *Submission 19*, pp. 17-18.

98 Letter from the Minister for Employment and Workplace Relations to the Committee Chair, 16 July 2009, p. 2.

2.102 These criteria are consistent with:

- the object of the Act, which includes '(a) ensuring compliance with workplace relations laws by all building industry participants';
- the Explanatory Memorandum (paragraph 92) 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'; and
- administrative law principles which provide affected persons the opportunity to have their views considered.[99]

2.103 The Minister informed the committee of the government's intention for regulations to prescribe that the Independent Assessor must be satisfied that the building industry participants in a building project have a demonstrated record of compliance with workplace relations laws, including court or tribunal orders; and that the views of other interested persons in relation to the project have been considered.[100]

2.104 DEEWR indicated that the bill does not prescribe the process the Independent Assessor must use to be satisfied that the views of other interested person have been considered as this may vary for each case.[101]

2.105 The ACTU submitted that the bill does not provide sufficient guidance to the Independent Assessor about the process to be applied in making a determination. It suggested the inclusion of the following:

- an obligation for the Independent Assessor to be satisfied that evidence put to them about the prior conduct of a building industry participant is reliable;
- a requirement for the Independent Assessor to publish reasons for their decision;[102] and
- where an application under proposed section 43 to reconsider a decision of the Independent Assessor is made, that the applicant be advised and given an opportunity to be heard.[103]

2.106 Regarding the last point, the CCU noted that the Director may apply to the Independent Assessor for a reconsideration of their determination. However, the original 'interested person' who made the application will have no part in this process. The CCU pointed out that as the interests of the original applicant are potentially

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99 Letter from the Minister for Employment and Workplace Relations to the Committee Chair, 16 July 2009, pp. 2-3.

100 Ibid., p. 2.

101 DEEWR, *Submission 21*, p. 18.

102 Also supported by CCF, *Submission 14*, p. 17; HIA, *Submission 8*, pp. 6-7; AiG, *Submission 10*, p. 27; ACCI, *Submission 11*, p. 69.

103 ACTU, *Submission 19*, p. 19.

affected by any reconsideration by the Independent Assessor, as a matter of natural justice, they should be provided with the opportunity to make submissions.[104]

2.107 On this issue DEEWR pointed out that the Independent Assessor must be satisfied that the views of interested persons have been considered before making a determination. It also drew attention to Note 2 under section 39 which states:

> 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).

2.108 The committee majority notes that under proposed section 42 a determination must be published in the gazette and will take effect from the date of publication.

The office of the federal safety commissioner

2.109 The bill retains the provisions of the BCII Act that relates to the Office of the Federal Safety Commissioner (OFSC) and its related OHS Accreditation Scheme. This was supported in the evidence provided to the committee. In particular, DEEWR noted that currently about 150 companies are accredited under the scheme which covers about 50 per cent of construction employees and:

> Their statistics indicate that fatality incident rates for these companies are nearly half those of other construction industry companies and workers compensation claims for accredited companies are also significantly lower than the industry norms. So there have been some very strong positives coming out of the creation of the OFSC.[105]

International Labour Organisation

2.110 The ACTU expressed concern that the International Labour Organisation (ILO) is likely to remain critical of the legislation as the bill may breach the Labour Inspection Convention and the Freedom of Association Convention.[106] The committee majority notes advice from DEEWR that a report to the ILO on the legislation is being prepared.[107]

Conclusion

2.111 The committee majority acknowledges that Mr Wilcox has found that despite improvements, the culture of the building and construction industry has yet to be fully transformed. The legislation is aimed at driving this cultural change in the industry through rewarding good behaviour and focusing compliance measures where these are most needed.

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104 CCU, *Submission 18*, p. 8.

105 Mr Jeff Willing, *Proof Committee Hansard*, 31 August 2009, p. 60.

106 Ms Cath Bowtell, *Proof Committee Hansard*, 31 August 2009, p. 14.

107 Mr Michael Maynard, *Proof Committee Hansard*, 31 August 2009, p. 60.

2.112 Although it retains the coercive powers, the legislation puts in place a number of safeguards for their use. Conditions must be met before the building inspectorate can proceed with a compulsory interrogation. The committee majority notes that this was recommended by the committee in its last report on the industry in 2008. The committee is pleased to see additional safeguards in this legislation but disappointed that they could not have been introduced sooner.

2.113 The committee majority is opposed to industry specific legislation in principle. The most desirable outcome is an eventual inclusion of workers in the building and construction sector under the provisions of the Fair Work Act alone. The committee majority trusts that legislation providing for this will be the next step in that process.

Recommendation 7

2.114 The committee majority recommends that the bill be passed after government consideration of the committee majority recommendations.

Senator Gavin Marshall

Chair