Coalition Senators' Dissenting Report

Introduction

Coalition senators reject the government's claim that this bill will retain 'a tough cop on the beat' in the building and construction industry. The legislation will weaken the powers necessary to ensure the productivity of the building and construction sector, drive up costs through higher risk profiles on projects and disregards the evidence which points to the need to retain the current powers of the ABCC. As noted by the Hon. Murray Wilcox QC in his report to the Rudd Government, lawlessness is still a problem in the building and construction industry. A record number of cases of alleged unlawful activity are currently under investigation by the ABCC. Alleged activities include intimidation, abuse, illegal entry and illegal wildcat strikes. The industry specific unlawful industrial action and penalty provisions which will be removed by the bill have proved essential in securing a change in behaviour and their removal threatens industrial peace in the industry.

While it can be said that the Government has recognised that the *Fair Work Act 2009* alone does not provide adequate protection against the unlawful conduct still occurring in the industry, it has fatally compromised its earlier stated intention by weakening the effectiveness of its proposed legislation.

Evidence presented to the committee showed that the legislation will reduce the capacity of the Building Inspectorate to deal with unlawful behaviour by making the process cumbersome. This will lead to delays in responding to unlawful behaviour on building sites.

The unnecessary provisions which allow for the coercive powers to be switched off will provide a loophole through which unions can bring the damaging practices of coercion and intimidation back to building sites. Coalition senators note that employer groups have called for the powers to remain on all projects as, despite the progress of recent years, there has not been a sustained and genuine cultural change in the industry.

The work of the ABCC is not yet complete

A brief look at recent history will place these concerns with the legislation in context. The lawless behaviour in the industry has been well documented. Coalition senators point to the findings of the Cole royal commission between 2001 and 2003 which led to the enactment of the *Building and Construction Industry Improvement Act 2005*. The Commission recommended structural change that would gradually transform the culture of the industry. This required both strong regulation and a strong regulator. While the type of conduct found by the royal commission has been reduced it is clear that the culture in the industry has not changed sufficiently to warrant a lessening of

the powers of the ABCC.[1] Mr Wilcox accepted in his report that there is still work to be done to change behaviour in the industry:

> The ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain. It would be unfortunate if the inclusion of the ABCC in the OFWO led to a reversal of the progress that has been made.[2]

The statistics available since the ABCC commenced work show not only the growing activity of the ABCC but confirm the need to retain the current powers.

Date	**Notices issued**	**Examinations conducted or documents produced**
to 30 June 2006	29	27
to 31 Dec 2006	44	41
to 31 Aug 2007	61	52
to 31 Mar 2008	96	85
to 30 Sept 2008	142	121
to 31 Mar 2009	175	148

Source: ABCC reports on compliance powers at http://www.abcc.gov.au/abcc/Reports/LegalReports/.

Tellingly, the need to retain the current powers of the ABCC was confirmed in a letter from the ABC Commissioner, the Hon. John Lloyd to the Minister.[3] Mr Lloyd highlighted that the building industry has a 'record that sets it apart from other industries'. Mr Lloyd went on to state:

> It has over the years recorded excessive levels of unlawful industrial action, coercion and discrimination. The majority of the cases initiated by the ABCC involve these types of contraventions.[4]

Australian Business Industrial (ABI) argued that the building and construction industry is not to be classified as 'just another industry'.[5] On the contrary, the ABCC is

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1 See Air Conditioning and Mechanical Contractors' Association, *Submission 6*, p. 2; HIA, *Submission 8*, p. 2; AiG, *Submission 10*, p. 2; ABI, *Submission 15*, p. 8; AMMA, *Submission 12*, p. 19.

2 Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction Industry Report*, March 2009, p. 14.

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

4 Ibid., p. 2.

currently involved in a record 69 investigations and 25 cases dealing with unlawful industrial action, coercion, violations of freedom of association and rules on union right of entry.[6] Mr Lloyd emphasised to the committee that:

> …Certainly unlawful industrial action is down at historically the lowest levels ever. But there are still instances of unlawful conduct. On a national basis we have investigations currently underway in almost every state and territory. We have court cases in almost every state and territory. It has improved, but the culture is still of concern, as I said. It is not settled. Instances of unlawful conduct still occur.[7]

Coalition senators note that recent reports of intimidation and harassment show the culture reform process has far to go.[8] Most recently in early 2009, the West Gate Bridge Project in Melbourne suffered from industrial disputes and saw allegations of criminal conduct.[9] The Australian Chamber of Commerce and Industry (ACCI) noted:

> The incident suggests that unions may once again be more comfortable with the reality that the ABCC will be abolished from 1 February 20[10] its powers extensively curtailed and unlawful conduct provisions repealed. Despite reports that one of the contractors has withdrawn legal proceedings against the unions involved in that matter, the ABCC has nonetheless forged ahead to enforce the rule of law.[10]

Recent reports on the West Gate Bridge Project have told of the considerable loss and damage to John Holland and a number of third parties as a result of the industrial disputes on the project. The cost appears likely to run into millions. The action has also delayed construction works on the project for three months. The media quoted the Victorian Opposition industrial relations spokesperson, Mr Robert Clark MP, describing this as 'further evidence we're steadily heading back to the bad old days of union militancy in Victoria'.[11]

The Western Australian Government drew the committee's attention to the manner in which the CFMEU operates in WA to argue for the retention of current federal regulatory and enforcement arrangements:

> The CFMEU prides itself on engaging in conduct that it describes as militant. In many cases such conduct transgresses industrial, civil and, on occasions, criminal law.[12]

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5 ABI, *Submission 15*, p. 5.

6 AMMA, *Submission 12*, p. 19.

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

8 See ACCI, *Submission 11*, Attachment A, pp. 73-79 and Attachment E, pp. 115 -191.

9 ACCI, *Submission 11*, p. 37.

10 Ibid., p. 38.

11 Ben Schneiders, 'Union war hits bridge upgrade', *The Age*, 28 July 2009, p. 3.

12 Western Australian Government, *Submission 16*, p. 1.

It concluded that any winding back of the effective regulatory and enforcement arrangements 'is an open invitation to the industry's union leaders to embark on a costly and disruptive campaign of fear and intimidation'.[13]

Mr Michael Keenan MP, Shadow Minister for Employment and Workplace Relations, has summed up the concerns and indicated that the legislation will be a 'green light for militant construction unions to return to the days of thuggery, lawlessness and intimidation'.[14]

Comment

Improvement to the industrial climate in the industry has resulted from the firm hand of the ABCC, but the body of evidence relating to the disruptive behaviour in the industry over a long period cannot be dismissed. The Deputy Prime Minister herself has acknowledged that there is more work to do to address pockets of intimidation and violence in the industry.[15]

Effectiveness of the ABCC

The committee was told that the ABCC is an effective and efficient organisation. Mr David Gregory, ACCI, told the committee that the ABCC:

> …in our view, has been universally acknowledged as having had a dramatic impact upon the industry and upon the sorts of behaviour and attitudes that we and the Deputy Prime Minister have spoken about. That impact has been quantified in a range of different ways: dramatic reductions in lost time in the industry and dramatic improvements in productivity and efficiency in the industry estimated at being worth more than $5.5 billion per annum.[16]

Mr Lloyd informed the committee that:

> The workplace relations conduct of the industry's participants has improved during the tenure of the ABCC. More projects are now completed on time and within budget. Industrial disruption of projects is lessened. The allowance made for industrial risk when calculating cost of a project has been reduced. Industry productivity and efficiency have improved. The ABCC has been an active and resolute regulator. It has conducted 646 investigations, commenced 61 court proceedings and undertaken 118 interventions and tribunal and court cases. It is crucial that the industry

13 Ibid., p. 2.

14 Patricia Karvelas and Ewin Hannan, 'Coalition to thwart building bill', *The Australian*, 18 June 2009, p. 1.

15 Minister for Employment and Workplace Relations, Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 17 June 2009, p. 6250.

16 Mr David Gregory, *Proof Committee Hansard*, 31 August 2009, p. 16.

> knows that the ABCC is out and about and that it will commence court proceedings without fear or favour.[17]

He also emphasised that the influence of the powers extends beyond a simple count of the number of times they have been used as:

> They have played an important role in breaking down the code of silence and the intimidation of witnesses to unlawful conduct. The influence of the powers extends beyond simply counting the number of times they have been used. The very existence of the powers has altered the behaviour of many industry participants.[18]

Failure to accept the culture in sector

Worryingly, there are some who still fail to accept the existence of a culture peculiar to the building and construction sector. The Australian Council of Trade Unions (ACTU) told the committee that they do not accept the findings of the Cole royal commission.[19] When questioned as to if there was a culture of fear, intimidation or thuggery within the sector, Mr Jeff Lawrence stated:

> Absolutely not.[20]

The CFMEU also dispute the existence of an unsavoury culture, describing such an assertion as involving:

> ...unsubstantiated and hysterical allegations about criminality, violence, corruption and so on…[21]

Such observations should, and do, represent a genuine concern to other stakeholders in the sector. The Australian Industry Group observed:

> I think it is unfortunate that they do not accept the findings of a royal commission and a judicial review by one of the people that really understand both sides of the argument on this. In the end you have got to accept the independent assessors. We would have had to accept it. I think they are quite wrong in that regard and they are not doing their members a good service, because a productive, harmonious worksite in any industry is so fundamental. In all my years, I have never seen such a lawless industry as the construction industry. It has been improved and we should hang onto those improvements by our chewed-down fingernails. It would be very unfortunate if we lost all the progress that we have seen made in this industry. Our members have seen it. Our members have had to lift their game too. I think both sides of the argument have participated in improving the performance of the Australian

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17 Hon John Lloyd, *Proof Committee Hansard*, 31 August 2009, p. 67.

18 Ibid.

19 Mr Jeff Lawrence, *Proof Committee Hansard*, 31 August 2009, p. 11.

20 Mr Jeff Lawrence, *Proof Committee Hansard*, 31 August 2009, p. 11.

21 Mr David Noonan, *Proof Committee Hansard*, 31 August 2009, p. 54.

> construction industry as a place to work. A lot of young people did not want to go into the industry. It was not a pleasant workplace in many ways. It has improved now. It is not there finally, it is not totally done, but certainly the changes have been quite profound since these laws have come in. I do not understand why the ACTU will not accept it.[22]

Allegations of ABCC inappropriate practices

Occasionally the denial that a problem culture exists in the construction sector has dovetailed with allegations of inappropriate behaviour on the part of ABCC. The CFMEU told the Committee of concerns it held about the manner in which the ABCC exercised its investigative powers. One example was cited in which a witness alleged that inspectors had laughed at his command of the English language.[23]

This allegation was later put to the ABCC, which told the committee that it was unaware of any complaint being made by the individual witness or his union.[24] In supplementary evidence provided to the committee, the ABCC said it became aware of the relevant allegation following reports in national media and not from the individual witness or his union.[25] The ABCC had written to the union upon becoming aware of the allegation seeking further information to enable an investigation to commence.[26] The union did not respond to the letter.

Persistence of No ticket – No start

Almost one quarter of the investigations undertaken by the ABCC involve suspected contraventions of relevant freedom of association provisions.[27] The committee was told that such contraventions involve the concept of 'no ticket – no start' whereby workers are required to be union members before the can work on a building site.[28]

Despite denials by the CFMEU that such practices exist[29] the evidence presented by the ABCC confirmed that 'no ticket – no start' remains alive and well in the sector notwithstanding it is against the law and breaches a fundamental principle of industrial law.[30]

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22 Mrs Heather Ridout, *Proof Committee Hansard*, 31 August 2009, p. 26.

23 Mr David Noonan, Proof Committee Hansard, 31 August 2009, p. 56

24 Mr John Lloyd, *Proof Committee Hansard*, 31 August 2009, p. 72.

25 Mr John Lloyd, Answers to Questions taken on Notice

26 Mr John Lloyd, Attachment to Answers to Questions taken on Notice

27 Mr Ross Dalgleish, *Proof Committee Hansard*, 31 August 2009, p. 72.

28 Mr Ross Dalgleish, *Proof Committee Hansard*, 31 August 2009, p. 72.

29 Mr David Noonan, *Proof Committee Hansard*, 31 August 2009, p. 52.

30 Mr John Lloyd, *Proof Committee Hansard*, 31 August 2009, p. 72.

Importance of the sector to the economy

The benefits brought to the industry and the economy by the BCII Act and the ABCC are well accepted. The 2009 Econtech report explained that higher construction productivity leads to lower construction prices, which flow through to savings in production costs across the economy. The report highlighted the following benefits of earlier reforms for the national economy:

- that the Consumer Price Index is 1.2 per cent lower than it otherwise would be;
- GDP is 1.5 per cent higher than it otherwise would be;
- the price of housing fell by 2.2 per cent; and
- consumers are better off by $5.5 billion on an annual basis in 2007-08 terms.[31]

Employer groups were concerned that the proposed changes may drive up construction costs and threaten billions of dollars of government-funded infrastructure projects. The Australian Mines and Metals Association (AMMA) warned that the expected changes to behaviour in the industry after the ABCC ceases to operate will affect investment in major projects. It explained:

> Key decision makers within member companies, as part of the due diligence process, will consider what the likely industrial relations environment will be for their project and in the absence of strong laws and an adequate enforcement body, it is likely that the concern about the industrial environment will increase and impact on investment decisions.[32]

Effect of the reforms on productivity in the sector

Submissions pointed to quantifiable increases in productivity resulting from the BCII Act and ABCC, as demonstrated in recent reports by Econtech.[33] It noted the following findings regarding gains in construction industry productivity:

- ABS data shows that, by 2008, construction industry labour productivity outperformed predictions based on its relative historical performance to 2002 by 10.2 per cent;
- the Productivity Commission found that multifactor productivity in the construction industry was no higher in 2000-01 than 20 years earlier, but rose by 13.6 per cent in the four years to 2005-06; and
- the Allen Consulting Group found a gain in non-residential construction industry multifactor productivity of 12.2 per cent in the five years to 2007.[34]

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31 KPMG Econtech, *Economic Analysis of Building and Construction Industry Productivity: 2009 Report*, 6 May 2009, p. 4.

32 AMMA, *Submission 12*, p. 16.

33 See ACCI, *Submission 11*, p. 11.

34 KPMG Econtech, *Economic Analysis of Building and Construction Industry Productivity: 2009 Report*, 6 May 2009, p. 2.

While noting that not all measures are strictly comparable, the Econtech report concluded that the ABCC and related industrial relations reforms have added about 9.4 per cent to labour productivity in the construction industry.[35] ACCI argued that no valid arguments had been advanced to counter the findings of the Econtech reports.[36]

As to doubts expressed about the validity of Econtech reports, Mrs Heather Ridout, AiG, told the committee:

> If you look at working days lost in the sector, they have dropped like stones. A lot of the productivity data is pretty variable and—not ambiguous but messy. But look at all the measures that the industry would take—project completions, working days lost, work done to budget on time. All these measures are cast-iron indicators of a more productive industry. Whilst we cannot necessarily claim productivity in the industry in the last two years has risen by X and say it is all attributed to that, all the major indicators of industry performance lead you to that conclusion.[37]

Comment

Coalition senators believe the Government's replacement scheme for the ABCC is fundamentally flawed. Its passage into law would represent an open invitation for a return to thuggery, standover tactics and violence within the building and construction sector, with disastrous consequences for costs and productivity.

Recommendation 1

Coalition senators recommend that the bill not be passed.

If however the Senate sees fit to pass the bill, Coalition senators recommend that the bill be amended in the ways indicated in this dissenting report.

Object of the Act

While supporting the object of the proposed Act, AMMA warned that the proposed changes indicate that the government appears to have lost sight of the purpose of the legislation, that is, the history of workplace relations in the building and construction industry identified by the Cole royal commission which found separate legislation necessary. AMMA recommended the retention of the following means for achieving the object of the Act, specified in paragrpah 3 (2)(b)(c)(d) and (e) of the BCII Act:

- promoting respect for the rule of law;
- ensuring respect for the rights of building industry participants;
- ensuring that building industry participants are accountable for their unlawful conduct; and

35 Ibid., p. 3.

36 ACCI, *Submission 11*, p. 11.

37 Mrs Heather Ridout, *Proof Committee Hansard*, 31 August 20-09, p. 26.

- providing effective means for investigation and enforcement of relevant laws.[38]

This view was supported by Master Builders Australia (MBA) which submitted that making building industry participants accountable for their unlawful conduct must continue as an objective of the legislation as:

> It will be difficult for the new agency to be a 'tough cop on the beat' if its job does not include making building industry participants accountable for their unlawful actions.[39]

Diminished independence of the Inspectorate

The Hon. John Lloyd outlined his concerns with the changes in a letter to the Deputy Prime Minister on 27 April 2009 which included diminished independence as:

> …the proposed structure means the BCD Director has considerably less independence than the ABC Commissioner.[40]

Proposed section 11 provides increased powers to the Minister than those under the BCII Act. MBA opposed this provision describing the independence of the ABCC as being of great benefit to the industry:

> Under the Bill, the Minister would have the power to neutralise the function of the successor body in relation to the enforcement of the law relating to industrial action by, for example, requiring the inspectorate to devote an express percentage of its recourses to the enforcement of safety net contractual entitlements.[41]

ABI also raised concerns about the power which the Minister would have over actions of the Director, how the Director operates and in directing the priorities of the Building Inspectorate. In its view this capacity does not provide confidence in the Director's capacity to conduct his or her role independently.[42]

AMMA noted that the independent status of the ABCC allows it to respond effectively and efficiently to matters which arise. It argued that the creation of an Advisory Board, when combined with the capacity for the Minister to give directions to the Director, has the potential to put at risk the independence of the Director and this:

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38 AMMA, *Submission 12*, p. 20.

39 MBA, *Submission 13*, p. 8.

40 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 1.

41 MBA, *Submission 13*, pp. 10-11. See also Mr Richard Calver, *Proof Committee Hansard*, 31 August 2009, pp. 43-44.

42 ABI, *Submission 15*, p. 11.

> …could lead to a loss of confidence in the capability of the Inspectorate to act impartially and to be able to respond to issues across the industry as they arise, which is necessary to achieve the required cultural change.[43]

Comment

Coalition senators believe that a law-enforcement agency must be protected from influences which could impede its independent action, fetter its discretion and reduce its effectiveness. Such bodies should be constrained only by the limits imposed in the legislation that supports it.

Establishment of the Building Inspectorate

Advisory Board

AMMA submitted that the advisory nature of the board is not adequately reflected in the drafting of the bill and recommended it be amended to state explicitly that any recommendation of the Advisory Board is non-binding.[44] AMMA was also concerned to ensure that the members of the Advisory Board are carefully selected to ensure its integrity and recommended that the bill be amended to exclude persons who are not of good character and have been found to have breached any workplace or other law.[45] Overall, however, MBA submitted that the Advisory Board is unnecessary, will be ineffective, cause unnecessary delays and may lead to conflict. It pointed out that as only two meetings per year are required, the board's function appears to be remote from the day to day activities of the inspectorate.[46]

The Western Australian Government also questioned what useful operational direction the Advisory Board could provide given the frequency of the meetings. It warned of the Building Inspectorate's operational direction being influenced by the interests of members rather than being able to respond professionally to unlawful conduct which is its duty to prevent.[47]

Mr Lloyd observed that the policies and programs proposed by an Advisory Board may conflict with the management of issues arising 'in the field and that the selection of current industry participants on the advisory board may give rise to conflict of interest situations'.[48]

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43 AMMA, *Submission 12*, p. 21.

44 Ibid., p. 22.

45 AMMA, *Submission 12*, p. 22.

46 MBA, *Submission 13*, pp. 12-13.

47 Western Australian Government, *Submission 16*, p. 3.

48 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 1.

Director

MBA pointed out that the functions of the Director are now largely tailored to the expanded role for the Building Inspectorate of ensuring compliance with safety net contractual entitlements. It noted that this will divert resources from policing the obligation to act lawfully, particularly regarding unlawful industrial action. MBA opposed any diversion of resources away from the vital role of restoring the rule of law in the industry.[49] Mr Lloyd told the committee that the arrangement with the FWO is still in place because this organisation has the necessary expertise to undertake the work. Although DEEWR did not agree,[50] Coalition senators are more persuaded by Mr Lloyd:

> The main reason is that they have the expertise. One of the core roles of the Workplace Ombudsman, now the Fair Work Ombudsman, is to investigate unpaid entitlements. They have the expertise and they do it on a regular basis. Also, their contact lines have been very credible and recognised, so complaints tend to go to them and not to us. Frankly, we get very few complaints about unpaid entitlements coming to us from unions or employees. Given that and given their expertise it was just considered to be the most efficient way to use Commonwealth resources to have them do it rather than us replicate with our staff the skills which they have been discharging quite effectively.[51]

Enforcement of Safety Net Entitlements

The bill at section 10 outlines proposed functions of the proposed Building Inspectorate Director. An additional function is created, relating to the enforcement of safety net contractual entitlements, including investigating alleged contraventions of the National Employment Standards and awards.

Evidence presented to the committee expressed concern that this new function would detract from the core role of the proposed Building Inspectorate due to the dispersion of resources.[52]

The committee was told that at present this function is undertaken by the Office of the Fair Work Ombudsman (formerly the Workplace Ombudsman).[53] The ABCC refers instances of alleged breaches of safety net entitlements to the Ombudsman who in turn refers alleged breaches of the existing building legislation.

Coalition senators see no reason as to why the existing arrangements should not continue. It is an appropriate and efficient use of Commonwealth resources and will

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49 MBA, *Submission 13*, p. 9.

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

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

52 Mr Richard Calver, *Proof Committee Hansard*, 31 August 2009, p. 45.

53 Mr John Lloyd, *Proof Committee Hansard*, 31 August 2009, p. 70.

ensure that both the Fair Work Ombudsman and the proposed Inspectorate maintain their core focus.

Recommendation 2

Coalition senators recommend that the proposed functions of the Building Inspectorate Director exclude responsibility for enforcement of safety net contractual entitlements and that existing arrangements involving reciprocal referral remain.

Definition of building work

Schedule 1, item 48, subparagraph 5(1)(d)(iv) amends the current definition of 'building work' to exclude off-site prefabrication. Mr Lloyd did not agree with the change in the definition of building work. He submitted that the extended definition in the BCII Act has proved useful and should be retained.[54] This was supported by the Western Australian Government which cited pre-cast concrete panelling as an example of work now performed off-site. It also pointed out the potential difficulties and confusion for employers who employ workers in work that is completed both on-site and off-site. It added:

> Of great concern is that the delivery and installation of the work performed off-site is critical to progression of the work on-site. Accordingly, there is enormous scope to cause major on-site disruption by instigating industrial action [in] workplaces that are off-site [55]

The inclusion of temporary prefabrication yards established specifically to provide prefabrication work to a particular project was supported by AMMA.[56] The Housing Industry Association (HIA) submitted that a likely result of narrowing the definition of 'building work' will be that it is easier to damage projects through lawless conduct at the supply end.[57] HIA advocated that off-site work should continue to be monitored as:

> Many contractors involved in the offsite prefabrication of certain building components such as cabinets and window frames will also be involved in the on-site installation of those components.[58]

MBA noted several examples where both on-site and off-site work regularly occurs, such as the making of tilt-up concrete panels, joinery businesses and glazing and glass

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54 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 7.

55 Western Australian Government, *Submission 16,* pp. 3-4.

56 AMMA, *Submission 12*, p. 15.

57 HIA, *Submission 8*, p. 2.

58 Ibid.

cutting activities. MBA submitted that these activities should be covered by the legislation.[59]

ACCI cautioned that the change may introduce the potential for problems to develop as:

> Offsite construction work often very closely flows into onsite construction work, so I guess we would not want to see that change in definition leading to a more deregulated part of the industry in that offsite area creating problems that then flow back into onsite activity.[60]

MBA provided the following example:

> If you go back in history not that long ago, in the Saizeriya Japanese food dispute in Victoria only the suppliers were targeted, yet Victoria and Australia missed out on a very large amount of investment because the Japanese investor was thrown off balance by the fact that the interruptions to supply could occur and that industrial relations could become the No. 1 constraining issue. For all those reasons we believe that off-site work and on-site work should be covered, and certainly that is what Cole recommended.[61]

The AiG supported the amendment but noted that:

> It is essential that the pre-fabrication of components on-site, or in a temporary yard of other facility set up by a construction contractor to prefabricate substantial parts of a building or structure (eg. pre-castings) remain covered.[62]

The EM provided clarification that:

> It is intended that the amended definition will exclude manufacturing that takes place in permanent off-site facilities and is separate from the building project but 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.[63]

Comment

Coalition senators agree that the bill provides potential for activities off-site to cause disruption to on-site work and therefore do not support the change in the definition of 'building work'. It is clear that the Government has succumbed to pressure from the AMWU and other manufacturing unions to restrict the effectiveness of the legislation in regard to industries external but essential to the building industry.

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59 MBA, *Submission 13*, p. 9.

60 Mr David Gregory, *Proof Committee Hansard*, 31 August 2009, p. 20, 21.

61 Mr Richard Calver, *Proof Committee Hansard*, 31 August 2009, p. 43.

62 AiG, *Submission 10*, p. 12.

63 EM, p. 5.

Recommendation 3

Coalition senators recommend that the definition of 'building work' remain unchanged.

Reduction in powers

Despite claims by the government that there will still be a 'tough cop on the beat', the legislation will result in a clear reduction in the powers of the Building Inspectorate. While the coercive powers have been retained, the legislation introduces a number of hurdles that must be jumped before the powers can be used. These obstacles will reduce the powers of the Building Inspectorate to deal with unlawful behaviour by complicating the process to access them. There will be delays in responding to unlawful behaviour on building sites.

Reduced powers are evident in the following areas: the reduction of the maximum level of penalties; the limitation of the range of circumstances in which industrial action is unlawful; abolition of the right to intervene in cases, allowing parties to apply 'undue pressure' to make, vary or terminate an agreement; narrowing the definition of 'building work'; and no longer requiring the Building Inspectorate to publish reports of non-compliance incidents where breaches did not go to court.[64]

Coercive interrogation powers

Employer groups agreed with the retention of the coercive powers but not the safeguard of third party approval processes. They argued that the safeguards will make the process overly bureaucratic and lead to delays that will ultimately weaken the ability of the inspectorate to respond to unlawful behaviour.[65] Mr Steve Knott, Chief Executive of AMMA, warned that the new processes could cause delays that would fatally compromise investigations.[66]

Mr Peter May, a Melbourne commercial building contractor, said the coercive powers had led to the building industry 'undergoing a lot of change for the good'. He explained that 'a lot of the unlawfulness on building sites is very hard to prove and that's why the coercive powers are needed'.[67]

Employer groups advocated the retention of coercive powers for all projects. ACCI argued that the ability to switch off the powers 'was akin to a large company asking to

64 MBA, *Submission 13*, p. i.

65 AMMA, *Submission 12*, p. 25; Ewin Hannan and Patricia Karvelas, 'Building watchdog loses bite', *The Australian*, 17 June 2009, p. 1.

66 Steve Knott, 'Construction unions offered a way out', *AFR*, 17 June 2009, p. 3.

67 Ewin Hannan, 'Builders see IR switch as asking for trouble', *The Australian*, 17 June 2009, p. 4.

be free of the scrutiny of the tax office and competition and securities watch dogs because they have been a good corporate citizen'.[68]

ACCI and AMMA pointed out that there have been no complaints to the Commonwealth Ombudsman about the misuse or abuse of the coercive powers by the ABCC and therefore they questioned the need for the additional safeguards proposed in the bill.[69]

The ABCC has advised in its reporting that its compliance powers have been critical to the success of its court proceedings. Another important factor was raised by Mr Lloyd who explained that in a third of cases people asked for the powers to be applied. He noted:

> It must be recognised that not all persons subject to a compulsory examination are 'hostile' witnesses. A significant number of examinees are persons who ask to give information pursuant to this power. They take this approach because they fear reprisals if seen to be cooperating with the ABCC. We consider such a fear to be a genuine concern for many people. It is a feature of many of our investigations that people fear reprisals if seen to be cooperating with the ABCC…[70]

Mr Lloyd added that it will be important for any threshold tests to accommodate an examination undertaken for this reason.[71] This point was supported by MBA which stated:

> …the Bill should take into account the fact that those with information about a building industry investigation (or a contravention under the Bill) may need to be protected and to remain anonymous so that the information can be collected and used to assist with the restoration of the rule of law in the industry.[72]

MBA pointed out that section 47 offers a potential means to take into account the interests of those who wish to use the power to require persons to give evidence in that it could be regarded as not 'appropriate' to obtain the information in another way. However, MBA advocated an explicit provision to give information under compulsion or anonymously without the need to exhaust other avenues first.[73]

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68 Patricia Karvelas and Ewin Hannan, 'Coalition to thwart building bill', *The Australian*, 18 June 2009, p. 1.

69 ACCI, *Submission 11*, p. 49; AMMA, *Submission 12*, p. 25.

70 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 5.

71 Ibid.

72 MBA, *Submission 13*, p. 24.

73 Ibid., p. 25.

Comment

Coalition senators agree that it is important to recognise that some people ask for the powers to be applied as they fear reprisals if they are seen to be cooperating with the ABCC. This needs to be clarified in the legislation.

Recommendation 4

Coalition senators recommend that the legislation clearly identify a means to take into account the interests of persons who ask for the powers to be applied and those who wish to remain anonymous.

New requirements

While the legislation continues to enable the Director to compulsorily acquire information, the bill imposes a number of new requirements:

- paragraphs 45(1)(c)(d) and (e) require the Director to apply to a nominated Administrative Appeals Tribunal (AAT) presidential member for the issue of an examination notice requiring a person to give information, produce documents or attend to answer questions;
- subsection 45(1) provides that only the Director can make this application;
- subsection 45(3) states that the application must be in a form prescribed by the regulation;
- paragraphs 45(5)(a)-(g) require an application to be accompanied by an affidavit by the Director which details the investigation;
- subsection 45(6) provides that the AAT presidential member may request further information from the Director;
- paragraphs 47((a)-(g) require the presidential member to consider a number of criteria before issuing the examination notice; and
- section 49 requires the Director to notify the Commonwealth Ombudsman of the issue of an examination notice.

Mr Wilcox expressed the opinion that these safeguards will not impede or significantly delay investigations.[74] Employer groups disagreed. The Western Australian Government expressed concern about the proposed role of the AAT presidential member warning that it could cause undue delay which may lead to the loss of critical evidence. In particular it noted that:

> …the proposed role of the AAT will only serve to impede the FWBII's investigative response capacity. Given expediency is an investigative

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

> imperative, the proposed bureaucratic processes are likely to slow FWBII's operations and provide scope for evidence and witnesses to be lost.[75]

Mr Wilhelm Harnisch, MBA, described the safeguards as 'overelaborate precautions', and warned the committee that they will be 'bureaucratically cumbersome' and are likely to curb its ability to take quick action.[76]

AMMA pointed out that there appears to be no provision for the Director to request a reconsideration of any decision of the nominated AAT presidential member to refuse to issue an examination notice. AMMA recommended that if an external body is given responsibility for issuing an examination notice, a review mechanism, must be provided to allow the Director to appeal an unfavourable decision.[77]

Comment

Coalition senators note that the coercive powers are neither new nor unique. They were recommended by the Cole royal commission as necessary to address industrial problems found in the industry. The Minister has acknowledged that the cultural and behavioural change required in the industry is not yet complete. So why are we changing an institution and legislation that is necessary and effective? The evidence is overwhelming that the ABCC and the BCII Act are successful; the ABCC has not abused its coercive powers; and it is not yet time to take steps which ultimately will weaken the effectiveness of these powers. Coalition senators believe that the introduction of new requirements to access the coercive powers will result in a highly bureaucratic process which will delay investigations and reduce both their effectiveness and access to them.

Penalty provisions reduced

The bill removes section 38 and proposes that penalties for contraventions be reduced to those in the Fair Work Act (FW Act). This means the maximum level of penalties in the BCII Act will be reduced by around two-thirds. Employer groups opposed the decision to substantially reduce the penalties and argued that the penalty provisions have worked as an effective deterrent to unlawful behaviour in the industry.[78] CCI WA warned:

> The availability of the power to impose significant penalties and its judicious use has acted as a significant deterrent bringing down construction industry disputation to a level consistent with other industries. It is for this reason that current penalties should be maintained.[79]

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75 Western Australian Government, *Submission 16*, p. 4.

76 Mr WilhelmHarnisch, *Proof Committee Hansard*, 31 August 2009, p. 42.

77 AMMA, *Submission 12*, p. 26.

78 See CCI WA, *Submission 2*, p. 5; AiG, *Submission 10*, p. 4.

79 CCI WA, *Submission 2*, p. 17.

This view was supported by Mr Lloyd who advised that penalty provisions are designed to deter unlawful conduct and argued that the level of penalties proposed will reduce the deterrence value of the penalties.[80] Mr Lloyd considered that the high and distinct penalty levels for the building and construction industry are justified because:

> The industry has a record that sets it apart from other industries. It has over the years recorded excessive levels of unlawful industrial action, coercion and discrimination. The majority of the cases initiated by the ABCC involve these types of contraventions.[81]

AiG also opposed the removal of the current maximum penalties, warning that enduring change in behaviour has not yet occurred in the industry.[82] This was supported by ABI which stated that Mr Wilcox has under-valued the importance of deterrence and its role in promoting cultural change.[83] AMMA submitted that the current penalty regime is a necessary deterrent and reflects the considerable financial consequences of unlawful and inappropriate behaviour.[84] AMMA explained:

> Our contractor members face significant financial consequences where disharmony leads to liquidated damages for failure to meet their contractual requirements, and an unproductive workforce. Our project owner members are exposed to increased costs and delays in project completion.[85]

MBA listed the severe consequences of industrial action in the industry. First, the potential to financially ruin builders, cause projects to be abandoned and firms to go out of business. Second, liquidated damages could be payable if a project is delayed by industrial action, with loss of a contractor's profit and leading to possible insolvency. Third, an additional cost of having to speed up a work program impeded by industrial action during operations such as a concrete pour. Fourth, any adverse financial effects also flow on to the subcontractors. For these reasons, MBA submitted that considering the consequences for taking unlawful industrial action, the current penalties are appropriate and should remain.[86]

The Western Australian Government agreed that industrial action has dramatic consequences for employers in the industry, making them susceptible for liquidated damages for lost time and the potential for work to be required to be redone.[87]

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80 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 2.

81 Ibid.

82 AiG, *Submission 10*, p. 17. See Also Mrs Heather Ridout and Mr Stephen Smith, *Proof Committee Hansard*, 31 August 2009, p. 26.

83 ABI, *Submission 15*, p. 8.

84 AMMA, *Submission 12*, p. 14.

85 Ibid., p. 17.

86 MBA, *Submission 13*, p. 6.

87 Western Australian Government, *Submission 16*, p. 6.

The Electrical and Communications Association (ECA) called for the level of penalties to be linked to the significant costs principal contractors, employers and other industry participants suffer when unlawful industrial action is taken. It provided examples including:

> In the recent case of Alfred v Wakelin, O'Connor, CFMEU, AWU and AWU(NSW) the Federal Court found that the AWU and one of its delegates took unlawful industrial action at the Lake Cowal gold mine site in October and November 2005. The Court handed down a total of $55 000 in penalties to the AWU and its delegate. Acting ABC Commissioner Ross Dalgleish stated "These strikes involved nearly 300 workers on each occasion and caused estimated losses of $200 000".
>
> In Cruse v CFMEU & Anor, the Court ordered the CFMEU and its official to pay penalties for engaging in strike action. While the company Roche Mining (JR) Pty Ltd stated that the costs incurred as a result of the strike was $330 000.[88]

The ECA explained that the significant penalties reflect the serious consequences of unlawful industrial action on a business and the economy and they demonstrate the need for the industry to maintain specific laws.[89]

MBA pointed out that in 2009 the CFMEU was ordered to pay a $75,000 penalty plus costs for wilfully disobeying a Court order in Bovis Lend Lease P/L vs CFMEU (No 2) [2009] FCA 650. This example illustrates that the intransigent attitude of the building industry unions towards the law identified in the Cole royal commission remains in place.[90]

CCI WA noted that the construction union in question is well resourced and able to pay large fines. It asked the committee to consider the significant reduction in deterrent that will result from the reduction in the current penalty provisions for those well resourced organisations.[91]

AMMA drew the committee's attention to the unprotected industrial action which took place in 2006 on the Perth to Mandurah railway project and caused losses of approximately $1.6 million. This also occurred in 2006 on the Roche Mining Murray Darling Basin Project which caused significant financial loss. AMMA pointed out the significant damage that such behaviour has not only on the individual employer and industry productivity, but also on the international reputation of the industry.[92]

ACCI pointed out that higher penalties exert a positive influence on the conduct of unions and employees as the Court has the ability to suspend part of the penalties it may order:

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88 ECA, *Submission 3*, p. 3.

89 Ibid.

90 MBA, *Submission 13*, p. 7.

91 CCI WA, *Submission 2*, pp. 26-28.

92 AMMA, *Submission 12*, pp. 30-31.

> For example in Hadkiss v Aldin the court ordered a total of $883,200 in penalties, but suspended for 6 months $594,300. This ensured that the project could continue without unlawful conduct or industrial disputation, which would risk the full penalty being imposed by the Court.[93]

Nature of the industry

In considering the penalty provisions Mr Lloyd explained that the building industry has particular characteristics that make it vulnerable to unlawful industrial action, coercion and discrimination. These included:

- the apportioning of most risk to contractors;
- the sequencing of work and interlocking tasks on projects;
- high liquidated damages for not completing a project on time;
- the large number of sub-contractors on a project;
- most workers employed by sub-contractors and not the head contractor;
- a union culture supporting direct action; and
- a willingness of some contractors to adopt a short term perspective and ignore unlawful conduct.[94]

In summary Mr Lloyd noted:

> …it is our experience that the building and construction industry has a number of special characteristics and many of its participants have a poor attitude towards lawful conduct. These considerations justify the retention of the maximum penalty levels in the BCII Act.[95]

Comment

Coalition senators disagree with the findings of Mr Wilcox regarding penalties. It is disappointed that the history of unlawful industrial action and the Minister's acknowledgement of continuing unacceptable conduct appear to have had insufficient influence on the legislation. Strong and continuing evidence showed that the level of the penalties provides a genuine deterrent to unlawful conduct. As acknowledged by the Minister, unacceptable practices in the industry are still occurring. The Coalition opposes any weakening of the penalty provisions: current high penalties must be retained to apply in order to effectively deter unlawful and inappropriate behaviour.

Recommendation 5

Coalition senators recommend that the existing higher penalties in the BCII Act be retained.

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93 ACCI, *Submission 11*, p. 37.

94 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 2.

95 Ibid., p. 3.

Industrial action

The 2009 Econtech report concluded that the ABCC and the reforms to the construction industry have led to a significant reduction in days lost in the industry due to industrial action.[96]

In the 2006-07 Annual Report of the ABCC, the Commissioner advised:

> The impact of the Office of the Australian Building and Construction Commissioner (ABCC) on the building and construction industry is significant. Industrial relations conduct has improved markedly. Industrial disputation has fallen to all time low levels. The key measure of industrial disputation is 4,200 per cent lower in 2007 compared to 2001 – the year the Cole Royal Commission commenced.[97]

Schedule 1, item 51 of the bill would repeal chapters 6 and 7 of the BCII Act. Employer groups submitted that section 38 of the BCII Act has been particularly effective in limiting wildcat, unprotected and unlawful industrial action. ACCI noted this came from the findings of the royal commission which found that 'something beyond the industrial norm is required in this industry'.[98]

ACCI pointed out that ABCC statistics indicate that between 1 October 2005 and 16 June 2009 there have been 73 proceedings and 21 of these were unlawful industrial action. ACCI warned that the bill will remove important provisions dealing with industrial action and this accounts for the majority of the ABCC's enforcement work.[99] ACCI noted that this appears to be based on the recommendations of Mr Wilcox. With due respect to Mr Wilcox, ACCI did not believe that his six month inquiry could compare to the extensive inquiry of the Cole royal commission. It submitted that section 38 is essential to maintain the rule of law in the industry as:[100]

> There is a very real difference between the unlawful industrial provisions under the FW Act and those under the BCIIA. They are more real than semantic as suggested by Wilcox J. Under s.38 of the BCIIA, unlawful industrial action as defined, is unlawful per se and subject to penalties. Under the WR Act or FW Act, unions engaged in unlawful industrial action (outside the nominal expiry date of an agreement) would only be subject to a penalty, if it breached an order of Commission or the Courts. This is a very real motivator for unions not to engage in industrial action as defined under the BCIIA.[101]

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96 KPMG Econtech, *Economic Analysis of Building and Construction Industry Productivity: 2009 Report*, 6 May 2009, p. 23.

97 Office of the ABCC, Annual Report 2006-07, Commissioner's Review, available at: http://www.abcc.gov.au/abcc/Reports/AnnualReport0607/ABCCommissionersReview.htm accessed 7 July 2009.

98 See ACCI, *Submission 11*, p. 71.

99 ACCI, *Submission 11*, pp. 26-27.

100 Ibid., pp. 28-29.

101 ACCI, *Submission 11*, p. 29.

This view that the FW Act is inadequate to deal with the unlawful industrial action and coercion occurring in the industry was supported by AMMA.[102] It disagreed with the view of Mr Wilcox that the definition of 'industrial action' in section 19 of the FW Act is almost identical to the wording in the BCII Act. It argued that the FW Act is concerned only with the conduct of employees and for this reason the unlawful industrial action provisions in the BCII Act are necessary to cover union conduct that is not adequately covered in the FW Act.[103]

MBA considered that Mr Wilcox's position does not fully account for the reality of industrial action in the building and construction industry. It submitted that the distinction between action prior to the nominal expiry date and action that is not 'protected' industrial action is substantial:

> For example, in Victoria, building industry participants routinely operate under agreements that have passed their nominal expiry date while awaiting negotiations to be finalised for a template industry agreements.[104]

The Western Australian Government noted that while there is some symmetry between the BCII Act and the FW Act there are differences and pointed out:

> Unlike the BCII Act, the FW Act does not provide offence provision coverage for participants that are not covered by the federal jurisdiction. In the context of the industry, where for example if a crane stops work all work must cease, it provides scope for targeted stoppage of non-federal jurisdiction workers to cause a complete stoppage. In such circumstances the workers concerned may fall outside the FW Act provisions and as a consequence, the FWBII's jurisdiction.[105]

AMMA also considered that Mr Wilcox's assumption that almost all workplaces will have an operating agreement under the FW Act is incorrect. It provided the following examples to show that workplaces in the building and construction industry could operate without an agreement or with an expired agreement:

- large mining expansion and construction projects will extend beyond the nominal operating life of an agreement, which has been reduced to four years under the FW Act. In addition, building industry unions continue to seek agreements with three year nominal terms;
- it does not give consideration to the award modernisation process and the role of modern awards. If the relevant modern award is sufficiently flexible, employers could rely on the award, and/or flexibility agreements and/or common law agreements to regulate the employment relationship without having to enter into formal statutory agreements; and

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102 AMMA, *Submission 12*, p. 14.

103 Ibid., pp. 35-36.

104 MBA, *Submission 13*, p. 4.

105 Western Australian Government, *Submission 16*, p. 5.

- it does not give consideration to the continuation of enterprise awards as Modern Enterprise Awards.

ECA argued that the evidence and case law presented to the committee demonstrated the continued need for the building and construction industry to maintain industry specific laws particularly regarding the industrial action.[106]

Mr Lloyd warned that changes to the definition of industrial action would make it harder to secure prosecutions. He warned that settlements could occur where an employer retrospectively conceded strike pay under pressure from a union.[107] The AiG emphasised that the risks associated with industrial lawlessness will be priced into construction contracts at great cost to project owners.[108]

Injunctions

Section 39 of the current BCII Act allows injunctions against unlawful industrial action which is occurring, threatened, impending or probable. The AiG submitted that this provision, as well as section 38 which prohibits unlawful industrial action, needs to be retained as there are no equivalent provisions in the FW Act. AiG commented:

> The Act does not include a specific, stand-alone penalty for the taking of unlawful industrial action, and the provisions relating to injunctions are narrower.[109]

AMMA agreed stating that section 39 is also important to ensure unlawful action is appropriately dealt with as:

> This general power to grant an injunction is wider than the *Fair Work Act 2009,* which is limited only to instances where industrial action (as more narrowly defined) is being organised or engaged in, not that which is threatened, impending or probable.[110]

Undue pressure

Section 44 of the BCII Act enables prosecution for 'undue pressure' to make, vary or terminate an agreement. This ground is an addition to contravention through 'coercion'. The Wilcox report considered undue pressure to be a form of coercion and argued that it should not be retained as sections 343 and 340 of the FW Act cover the same ground.

Mr Lloyd argued that contravention through undue pressure is a lower threshold for a prosecutor to satisfy. It has been relied on in ABCC prosecutions and should be

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106 ECA, *Submission 3*, p. 4.

107 Steven Scott and Mark Sculley, 'Gillard gets warning over IR regulator', *AFR*, 26 June 2009, p. 1.

108 AiG, *Submission 10*, p. 6.

109 Ibid., p. 16.

110 AMMA, *Submission 12*, p. 37.

retained.[111] The CCF noted Mr Lloyd's comments and agreed that the concept of undue pressure regarding making, varying or terminating agreements should be retained.[112] AMMA supported the retention of this section and submitted that Mr Wilcox is incorrect as:

> Firstly, section 340 of the Fair Work Act 2009 is limited to 'adverse action' and the types of conduct which is considered to be 'adverse action', defined in section 342, is quite restrictive. Item seven of section 342 covers action taken by a union that includes the less broadly defined 'industrial action', action that has the effect of prejudicing a person's employment or an independent contractor's contract for services, and action involving the imposition of a penalty on a member. If action is taken by a union that does not fall within this meaning of 'adverse action' but yet is taken with the intent to coerce another to make, vary etc and agreement, section 343 will not adequately deal with that behaviour. Section 44 of the BCII Act on the other hand, does not restrict the type of action and refers only to 'any action'.
>
> Secondly, the absence of 'undue pressure' from section 343 is significant. In John Holland v AMWU [2009] FCA 235 at paragraph 60, the following statement was made in respect to 'undue pressure'…
>
> [T]he expression 'undue pressure' has at least the potential to cover some forms of pressure which are somewhat more benign than those considered necessary to make good allegations of coercion in the statutory sense.
>
> Therefore, section 343 of the Fair Work Act imposes a higher threshold than the BCII Act and may not adequately deal with some of the inappropriate and unlawful conduct that continues to plague the industry – reliance on the Fair Work Act 2009 may mean that some behaviour in the industry will 'fall under the radar' so to speak. Furthermore, while section 344 of the Fair Work Act does specifically cover undue influence or pressure, it is restricted to the conduct of employers as against employees.[113]

Comment

Coalition senators consider that the Fair Work Act will be inadequate in dealing with all types of unlawful and inappropriate conduct in the industry and recommends the retention of sections 38, 39 and 44 of the BCII Act.

Recommendation 6

Coalition senators recommend the retention of sections 38, 39 and 44 of the BCII Act.

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111 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 3.

112 CCF, *Submission 14*, p. 22.

113 AMMA, *Submission 12*, pp. 37-38.

Non-compliance reports

It is proposed that section 67 of the BCII Act which allows the ABCC to publish non-compliance details where it is in the public interest is repealed. Mr Lloyd pointed out that this is an important tool to enforce the rule of law:

> The power to publish a report about findings of non-compliance with the relevant legislation has proved useful. The industry is characterised by numerous disputes of short duration involving unlawful conduct. Court litigation, with extensive evidentiary requirements and time delays, has limitations in being the sole means to hold people accountable for their conduct. Court proceedings are not appropriate in many of these cases. However, if unchallenged such disputes can entrench a lack of respect for the law. The s67 report option therefore has been useful in highlighting unlawful conduct that does not warrant a formal court proceeding.[114]

Retaining the ability to publish non-compliance details was supported by employer groups such as ACCI.[115] MBA told the committee:

> One of the keys to ensuring that there is an aboveboard method of operation is the requirement currently contained in section 14(2) of the Building and Construction Industry Improvement Act—that there be details of the number and type of matters that were investigated by the ABC Commissioner during the year. That obligation in particular should continue. The whole thing is about sunlight. The best disinfector is sunlight. That is exactly the same principle that guides Master Builders' policy in regard to the bill. There should be open and transparent operations but during the investigations, for the sake of confidentiality and integrity, there should be confidence at that point and there should be an annual report which clearly shows the nature and extent of those investigations.[116]

Comment

Coalition senators agree that the publication of non-compliance details is an important means of holding people accountable for their conduct and recommends its retention.

Recommendation 7

Coalition senators recommend the Building Inspectorate retain the ability to publish non-compliance details where it is in the public interest.

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114 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 8.

115 ACCI, *Submission 11*, pp. 40-41.

116 Mr Calver, *Proof Committee Hansard*, 31 August 2009, p. 44.

'Switching off' coercive powers

Origin of provisions

Coalition senators noted with concern the appearance in the bill of provisions allowing powers of the director to be 'switched off' in certain circumstances. Coalition senators were interested to discover the origin of these provisions.

The provisions in the bill allowing for coercive powers to be 'switched off' do not appear in the recommendations of Justice Wilcox.[117] The Committee was told that no industry stakeholder had made any recommendation about such a provision.[118] It appears that even officers of DEEWR were unaware where such a concept had its genesis and did not know of its potential inclusion during discussions with stakeholders.[119] Given the enormous implications of simply 'switching off' a key mechanism to deal with industrial lawlessness, Coalition senators view with alarm the inclusion of such provisions without any apparent call for them from stakeholders.

The bill proposes the establishment of the Independent Assessor–Special Building Industry Powers, who will be able to determine, on application from stakeholders, that the coercive powers will not apply to a particular project. Employer groups explained that they were not consulted on the provision enabling powers to be switched off and on. They opposed these provisions and advised that coercive powers should apply to all sites. Mr Michael Keenan MP, Shadow Minister for Employment and Workplace Relations, expressed his concern about the ability of switch off the powers and stated:

> It's the equivalent of saying that there will be no police on our streets, until someone gets mugged, and then we'll consider bringing them back.[120]

AiG opposed the provision to 'switch off' the coercive powers and argued that such powers are subject to numerous safeguards and can only be used in appropriate circumstances. In addition, AiG argued that the removal of the coercive powers would substantially change the industrial risk profile of a project:

> Knowledge that the compulsory examination powers are available reduces the risk of industrial turmoil on a project and hence this lower risk would be taken into account in project pricing.[121]

Mrs Heather Ridout, AiG, also cautioned the committee about switching off the powers before a project starts:

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117 Mr Michael Maynard, *Proof Committee Hansard*, 31 August 2009, p. 62.

118 Mr Michael Maynard, *Proof Committee Hansard*, 31 August 2009, p. 62.

119 Mr Michael Maynard, *Proof Committee Hansard*, 31 August 2009, p. 62.

120 Ewin Hannan and Patricia Karvelas, 'Building watchdog loses bite', *The Australian*, 17 June 2009, p. 1.

121 AiG, *Submission 10*, p. 10, 21.

> …For example, a project will start and then problems will arise of the sort we are concerned about and the powers will not be there to address them. When the project is on foot is exactly when they are needed, and when problems arise the powers will be there to deal with them.[122]

Mr Stephen Smith, AiG, added another important aspect:

> …with a significant construction project it is impossible to know at the start of the project all of the building industry participants who are going to participate because work is typically put out to tender progressively in packages. So the unions and employers working on a project would not be known typically at the start.[123]

Other witnesses also questioned whether this would be an improper delegation of parliamentary power, breaching the 'fundamental tenets of the rule of law that the law should be in advance predictive and applied in a manner which is not arbitrary'.[124]

The CCF also opposed the establishment of the Independent Assessor, and argued that it would add unnecessary complexity and uncertainty to operations.[125] CCF submitted that the changes in the industry are not yet sufficiently embedded to allow exclusion in the case of some projects. It pointed to the recent cases in Victoria and Western Australia already mentioned in this report and added:

> Many laws apply to sections of society regardless of whether parties have good behaviour or not. For example road safety laws apply to all travelling on our roads. Good drivers with no previous penalties or infringements are just as likely to be breath tested or fined for speeding or other traffic offences as other offenders.[126]

The CCF also pointed out the particular vulnerability of small to medium sized contractors with heavy sunk capital and slim margins which can be eliminated by a few days of disruption. These contractors have very little bargaining power and are required to meet industrial demands already negotiated by the head contractor.[127]

Employer groups noted that the proposed ability for projects to be exempted from the coercive powers goes beyond the recommendations of the Wilcox report.[128] Applications can be made before a project commences. The AiG pointed out that before the commencement of the project it is impossible to know whether the powers

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122 Mrs Heather Ridout, *Proof Committee Hansard*, 31 August 2009, p. 25.

123 Mr Stephen Smith, *Proof Committee Hansard*, 31 August 2009, p. 25.

124 Mr Richard Calver, *Proof Committee Hansard*, 31 August 2009, p. 44; MBA *Submission 13*, p. 19; ACCI, *Submission 11*, pp. 67-68.

125 CCF, *Submission 14*, p. 6.

126 Ibid., pp.7- 8.

127 Ibid., pp. 8-9.

128 ACCI, *Submission 11*, p. 67; MBA, *Submission 13*, p. 18.

will be needed and cautioned that 'unions are likely to make an application before the start of every project'.[129]

The HIA submitted that:

> The only purpose or reason by which parties would seek to 'switch off' the coercive examination powers for a particular project would be so that they could behave onsite as they like without fear that they may be subsequently examined on their behaviour.[130]

MBA opposed the establishment of the Independent Assessor as unnecessary and unwarranted and argued that:

> If there is to be lawful behaviour and ready compliance with the law on a building site, then proposed section 45 is unlikely to be utilised.[131]

Relevant criteria

Regulations prescribing what the Independent Assessor must take into account when deciding whether to switch off the coercive powers are yet to be released. Employer groups were concerned about how the exclusion process would operate. Business groups wish for a wider range of criteria to be taken into account. For example, AMMA advocated that the Independent Assessor take into account previous adverse findings against unions.[132] ABI advocated that behaviour on other projects and past behaviour should be relevant factors.[133] ECA submitted that industry stakeholders should be involved in drafting the regulations to ensure all relevant factors are considered. For example, ECA pointed to the term 'good industrial record' and indicated that it is very broad and should be clearly defined.[134] HIA noted the broad discretion open to the Independent Assessor and in particular that there is no time limit on their determinations. HIA recommended that the bill be amended to reflect a 'zero tolerance' stance on industrial misbehaviour. It also recommended that the Independent Assessor provide written reasons to support the decisions made.[135] HIA concluded that:

> If the switch off provisions are enacted, then determinations must be made under a strict set of rigid criteria by an accountable member of the judiciary, not a politically appointed bureaucrat.[136]

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129 AiG, *Submission 10*, p. 3.

130 HIA, *Submission 8*, pp. 5-6.

131 MBA, *Submission 13*, p. 19.

132 Steven Scott, 'Warning over coercive powers', *AFR*, 2 July 2009, p. 9.

133 ABI, *Submission 15*, p. 14.

134 ECA, *Submission 3*, p. 5.

135 HIA, *Submission 8*, pp. 6-7. See also AiG, *Submission 10*, p. 27; ACCI, *Submission 11*, p. 69.

136 HIA, *Submission 8*, p. 7.

The CCF submitted that consideration of the views of other interested persons in relation to a project is 'critical for sub-contractors and other parties who are not contractual parties to a head agreement between a major contractor and the project proponents'. CCF stated that notification and the right of other parties, such as subcontractors or the industry association acting on their behalf, to be heard are essential and suggested using the ACCC process in relation to authorisation applications under the Trade Practices Act. The CFF also argued that the Independent Assessor must be able to receive confidential evidence or hear evidence in camera and there must be the associated protections for people giving such evidence. It emphasised that the Independent Assessor must give reasons for its decisions in writing and determinations should not be open ended.[137]

AiG submitted that it was essential for industry participants to have a demonstrated record of compliance with workplace relations laws and court or tribunal orders, and that the views of interested persons in relation to the project must be considered.[138] AiG also recommended that a provision similar to subsection 587(1) of the FW Act be incorporated to enable the Independent Assessor to dismiss an application which has no reasonable prospect of success.[139]

MBA noted that proposed subsection 40(5) states that an interested person may make a further application in relation to the same building project if they become aware of 'new information'. It submitted that this criteria is too loose and preferred that only one application could be made. However, MBA also suggested that the provision could be better drafted by making clear that the 'new information' had to relate to one of the criteria to be determined for the purposes of section 39 and that any application should not amount to an abuse of the process.[140]

Comment

It is unclear to Coalition senators as to why crucial enforcement provisions in this legislation should be waived aside in certain circumstances. The application of such powers should, they would reason, be determined by conditions in the workplace, not by extraneous considerations. The 'switching off' of crucial enforcement powers in legislation in this way is unprecedented in Australian law, and the prospect of the powers being switched off for political reasons is alarming.

The committee received considerable evidence on factors which the Independent Assessor must take account of when deciding whether to switch off the coercive powers. There was general agreement that the reasons for the decisions of the Independent Assessor must be provided in writing. As pointed out by the CCF,[141] if

137 CCF, *Submission 14*, pp. 13-17.

138 AiG, *Submission 10*, p. 25; AMMA, *Submission 12*, p. 29.

139 AiG, *Submission 10*, p. 28.

140 MBA, *Submission 13*, p. 21.

141 CCF, *Submission 14*, p. 17.

this was not the case, how would one provide 'new information' under subsection 40(5)? Coalition senators consider there is potential for the process to be misused by parties who might make repeated claims based on some loose interpretation of 'new information'.

Recommendation 8

Coalition senators recommend the "switching off" provisions of the bill be deleted.

Recommendation 9

If the Senate retains the "switching off" provisions, Coalition senators recommend that for the purposes of increased accountability and transparency, the determinations made by the Independent Assessor to switch off the coercive powers include reasons for the decision.

Coalition senators recommend that the 'new information' referred to in proposed subsection 40(5) must clearly relate to a specific factor which has influenced a decision made by the Independent Assessor and about which the Independent Assessor is required to be satisfied.

Appeals

Employer groups were concerned about the avenue for appeals. ACCI pointed out that the only avenue of appeal is to petition the Director to request the Independent Assessor reconsider a determination (section 43). It recommended this be amended to allow the Director and any person affected by a determination to reconsider the matter. In addition the Minister should have the power to overturn a decision where appropriate.[142]

Comment

Coalition senators consider it a fundamentally flawed process which provides that the only avenue for review is by the same person who made the decision. There must be an independent review.

Recommendation 10

Coalition senators recommend that a clear process to appeal the determinations of the Independent Assessor be available. It should be conducted by an independent party and the Minister should have the power to overturn a decision where appropriate.

142 ACCI, *Submission 11*, p. 69.

Definition of interested person

Submissions indicated that the term 'an interested person' needs to be clearly defined.[143] ACCI warned that as currently drafted, virtually anyone could make an application without having anything to do with a particular project. Parties 'without a sufficient and direct commercial connection to a project' could make frivolous applications.[144]

ECA submitted that the term should be defined as 'parties who have a direct interest in the operational and financial functions of the project' as they will incur a direct financial loss as a result of any unlawful industrial practices.[145] ABI advocated that it should be confined to persons with a direct contractual interest, or in the case of unions, with members engaged on the project, or if there is a greenfields or other project agreement, unions covered by the agreement.[146]

While opposed to the ability to 'switch off' the coercive powers, AiG recommended that an 'interested person' should only include a union which is covered by an enterprise agreement which applies on the project or has members employed on the project.[147] AMMA submitted that an 'interested person' should be restricted to building industry participants who are (or will be) bound by the relevant industrial agreements.[148] MBA recommended that persons given the power to bring an application be narrowly defined. It cautioned that persons who have an interest 'at large', or those who wish to exercise a political point should not be permitted to lodge an application.[149] This was supported by CCF which suggested the 'interested person' should have a commercial or financial interest in the project. It also supported a definition based on a 'building industry participant' but noted it should be clear that it 'includes an industry association which is registered or designated as having the right to represent a class of person within an industry'.[150]

Comment

Coalition senators note advice from the Minister that 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

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143 See ABI, *Submission 15*, pp. 15-16.

144 ACCI, *Submission 11*, pp. 68-69.

145 ECA, *Submission 3*, p. 4.

146 ABI, *Submission 15*, p. 14.

147 AiG, *Submission 10*, p. 20.

148 AMMA, *Submission 12*, p. 29.

149 MBA, *Submission 13*, p.p. 16-17.

150 CCF, *Submission 14*, pp. 10-11.

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.[151]

Definition of building project

Submissions also called for clarification of the definition of a 'building project'. AiG cautioned that the definition is too broad as 'all construction, alteration, extension, restoration, repair, demolition of buildings in a particular State, could be deemed to be a building project'. AiG noted that the definition is particularly important when considering section 40 which enables the Independent Assessor to determine that the coercive powers will not apply in relation to one of more building projects. AiG recommended that the definition be more tightly defined.[152] This was supported by ACCI[153] and ABI which suggested the capacity to 'switch off' coercive powers apply to projects which were the subject of an expression on interest or tender let for the first time on or after 1 February 2010. The building project would then be defined by the scope of the contract and the date certain.[154] The CCF also submitted that the definition should be applied narrowly and suggested it be:

- site specific, but note there may be a number of sites;
- limited in scope; and
- subject to a time constraint.[155]

Application to existing building projects

Submissions questioned the 'commencement' of a project. The bill provides that the switch off provisions apply to building projects if the building work begins after the commencement of the provisions on 1 February 2010. HIA submitted that the determination should only be available for projects tendered for, or for which a principal construction contract has been entered into after February 2010. In addition, determinations should only be available for specific sites rather then building projects as a whole and should be made before the commencement of the project.[156]

The AiG informed the committee of the intention for an 'existing project' to be one where 'on-site activity' commenced prior to 1 February 2010. AiG submitted that deeming a project to commence when 'on-site activity' commences would result in uncertainty regarding the status of particular projects. AiG recommended that the Independent Assessor should not be able to issue a determination in response of any

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

152 AiG, *Submission 10*, pp. 18-19.

153 ACCI, *Submission 11*, pp. 66-67.

154 ABI, *Submission 15*, pp. 14-15.

155 CCF, *Submission 14*, pp. 11-12.

156 HIA, *Submission 8*, p. 6.

project where the expression of interest or tender was let for the first time before 1 February 2010.[157]

AMMA suggested that the term 'project' should be defined by the scope of the relevant commercial contract.[158] The CCF disagreed with the proposal that an existing project be defined as one where 'on site' activity had commenced prior to 1 February 2010. It suggested basing commencement on the letting of tenders which would be consistent with the Implementation Guidelines for the National Code of Practice for the Construction Industry.[159]

Recommendation 11

Coalition senators recommend that 'commencement' of a building project should be based on the letting of tenders.

Safeguards

The bill proposes a number of safeguards on the use of the coercive powers. Some employer groups argued that safeguards are not required while others admitted some safeguards are warranted.[160] ACCI did not find the Victorian Office of Police Integrity (OPI) an appropriate model for the safeguards as:

> [t]he matters investigated [by the ABCC] are very important but are not inherently of the criminal magnitude and threat to the state that police corruption would be.[161]

The main concern expressed by employer groups was that the new safeguards for issuing an examination notice could be counter-productive. Witnesses argued that it would make the process overly cumbersome and harder for the ABCC to use its powers effectively.[162] CCI WA argued:

> These requirements will make use of the coercive powers time consuming and unwieldy and the longer the time lag before prosecution the greater the likelihood of error from inaccurate evidence. Creating delays to the investigative process may weaken the ability for the Building Industry Inspectorate to gather enough information to prosecute.[163]

Similarly, HIA agreed and argued that the process to obtain an examination notice is 'cumbersome, with risks of delay and an unnecessarily high threshold'.[164]

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157 AiG, *Submission 10*, pp. 22-23.

158 AMMA, *Submission 12*, p. 29.

159 CCF, *Submission 14*, pp. 12-13.

160 AiG, *Submission 10*, p. 6.

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

162 See CCI WA, *Submission 2*, pp. 28-29; HIA, *Submission 8*, p. 3.

163 CCI WA, *Submission 2*, p. 29.

164 HIA, *Submission 8*, p. 4

The bill sets out factors that the AAT presidential member must take into consideration when assessing an application. The EM notes that taking into account all the relevant circumstances could include consideration of the effect on the person.[165] HIA questioned how the Director would be able to swear to the 'likely impact upon the person' receiving an examination notice.[166] AiG supported this view and added that as the use of the power is a last resort:

> …even if the examination is likely to have a negative impact upon the person, this should not prevent the examination going ahead of the factors set out in Section 47 of the Bill are satisfied.[167]

The CCF agreed with this view and despite opposing the criteria, suggested the inclusion of the words 'in so far as this is known'. It advocated that rather than 'being satisfied', the AAT presidential member should 'have regard to' those matters in paragraphs 47 (a) to (g) as this would provide some flexibility in their decision making.[168]

AiG argued that while some safeguards are warranted, the Director and Building Inspectorate must be able to perform their functions effectively and without undue delays. To ensure this, it recommended that the amendments be carefully monitored.[169]

Most employer groups argued for the retention of the status quo, that is, no additional safeguards, and in support of this they pointed out that the has been no evidence of abuse by the ABCC of the BCII Act powers.[170] Employer groups emphasised that it is not time to dilute the powers, particularly when further improvement in industry behaviour remains necessary.[171]

Comment

As there has been no evidence of abuse of the coercive powers by the ABCC, Coalition senators believe that oversight by the Commonwealth Ombudsman would be sufficient safeguard to their use.

Recommendation 12

Coalition senators recommend oversight by the Commonwealth Ombudsman as sufficient safeguard for the use of the coercive powers.

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165 EM, p. 20.

166 HIA, *Submission 8*, p. 4. Also see ABI, *Submission 15*, p. 12.

167 AiG, *Submission 10*, p. 31.

168 CCF, *Submission 14*, pp. 19-20.

169 AiG, *Submission 10*, p. 30.

170 See CCI WA, *Submission 2*, p. 30.

171 CCI WA, *Submission 2*, p. 5.

Sunset provision for coercive powers

Employer groups opposed the provision that automatically removes the powers after five years unless further legislation is passed. AiG recommended a cautious approach and for this provision to be deleted and replaced with a review after five years as:[172]

> A review after five years…is appropriate, but a provision which automatically removes the powers after five years unless further legislation is passed by both Houses of parliament is not appropriate.[173]

This was supported by ACCI which believed the provision pre-empts the outcome of any review.[174] AMMA also agreed that the inclusion of provision to automatically repeal the powers after five years represents a further weakening of the existing compliance regime. It pointed out that there is as yet no evidence that the level of unlawfulness will not be present in five years time. It submitted that given the other provisions in the bill which deal with unlawful industrial action and which weaken protection against coercion and undue pressure, conditions will continue and worsen.[175] ABI suggested the automatic sunset provision be subject to a public review of the need to retain the powers.[176]

Comment

Coalition senators agree that proposed section 46 pre-empts the review of the powers. If the review is not commenced or is delayed this may result in the powers lapsing even if conditions in the industry have not improved.

Recommendation 13

Coalition senators recommend that proposed section 46 be deleted.

Payment of legal expenses

There were differing views regarding the payment of legal expenses. While not objecting to an examinee being paid an allowance if they incur costs to attend an examination, ACCI did not agree with the payment of legal expenses.[177] MBA agreed with this position but added that if it were to occur, it should be restricted where the party has been successful and it should be subject to a means test.[178] While not opposing the reimbursement of reasonable costs and expenses, HIA cautioned that there needs to be appropriate checks to prevent potential abuse, such as the

172 AiG, *Submission 10*, p. 3.

173 AiG, *Submission 10*, p. 33.

174 ACCI, *Submission 11*, p. 70. See also CCF, *Submission 14*, p. 23.

175 AMMA, *Submission 12*, p. 27.

176 ABI, *Submission 15*, p. 17.

177 ACCI, *Submission 11*, p. 71.

178 MBA, *Submission 13*, p. 32.

unnecessary engagement of senior counsel. It recommended that the regulations include a scale of costs and charges. HIA also submitted that the reimbursement of expenses should be subject to the witnesses having properly responded to the examination notice. It recommended that witnesses who have refused to cooperate should be responsible for their own costs.[179] AiG agreed that the person should not be reimbursed expenses if they do not cooperate in making cost effective arrangements for carrying out the interrogation.[180]

Recommendation 14

Coalition senators recommend that legal expenses not be paid for witnesses who refuse to cooperate.

Public interest immunity

Employer groups warned that if public interest immunity is available (subsection 52(2)) that it may be misused to avoid providing information and slow down investigations.[181] AiG opposed the inclusion of public interest immunity claims because:

> Public interest immunity is a relatively vague concept which would no doubt be frequently cited as a ground for refusing to cooperate, and result in numerous problems during compulsory examinations. If the intention is to address say, matters of 'national security' then this term should be used rather than 'public interest immunity'.[182]

Comment

Coalition senators are concerned that the inclusion of public interest immunity may be liable to misuse. They agree that there should be a clear process available to the Director to seek a determination as to whether a document or information is subject to public interest immunity. This process should not delay investigations.

Recommendation 15

Coalition senators recommend the Director be empowered to seek a determination as to whether public interest immunity applies to a particular document or information.

Disclosure of information

Proposed subsection 51(6) prohibits the Director from denying the right of a person subject to an examination notice to discuss information or answers to other matters relating to the examination, with any other person. While supporting the right of a

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179 HIA, *Submission 8*, p. 4.

180 AiG, *Submission 10*, p. 34.

181 See CCI WA, *Submission 2*, p. 30; HIA, *Submission 8*, p. 5; AMMA, *Submission 12*, p. 14 and 28; MBA, *Submission 13*, p. 28.

182 AiG, *Submission 10*, p. 32.

person to discuss their evidence with their lawyer, HIA pointed out that there is now a risk that witnesses will collaborate to 'get their story straight'.[183] ABI expressed the view that this may compromise an investigation by allowing someone of interest to know what has been said already and importantly, removes protection from the first person.[184]

External monitoring

Mr Lloyd cautioned that monitoring arrangements should not be too cumbersome or expensive relative to the benefits derived.[185] MBA expressed the view that the safeguards proposed at the 'front end' of the process and at the 'back end' go too far. There is no evidence of abuse of its powers by the ABCC; and the safeguards add more layers of bureaucracy. MBA submitted that monitoring by the Commonwealth Ombudsman would be a sufficient safeguard.[186] MBA noted that the Commonwealth Ombudsman must prepare a report which contains the results of all reviews conducted by the Ombudsman. It submitted that the legislation should require that details which could reveal the identify of witnesses be omitted as per section 66 of the BCII Act.[187]

Code and guidelines

The BCII Act is complemented by the Building Industry Code of Practice and Guidelines which are designed to improve standards in the industry. MBA emphasised that:

> Together, they form a strong and effective regulatory framework that compels compliance with the rule of law, which traditionally has been starkly absent in the Australian building and construction industry.[188]

ACCI told the committee that these instruments are important to advance compliance and observance of the rule of law in the industry. Noting the revised guidelines, ACCI preferred the continuation of the existing guidelines.[189] It was supported by AMMA which listed a number of behaviours or practices that have been omitted from the new Guidelines and recommended that they be retained.[190]

Mr Lloyd supported the view that the Code and Guidelines should be retained noting that they have been important and effective in reforming conduct throughout the

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183 HIA, *Submission 8*, p. 5. Also see MBA, *Submission 13*, p. 27.

184 ABI, *Submission 15*, p. 17.

185 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 5.

186 MBA, *Submission 13*, pp. 25-26.

187 Ibid., p. 31.

188 AMMA, *Submission 12*, p. 11.

189 ACCI, *Submission 11*, pp. 60-61.

190 AMMA, *Submission 12*, pp. 39-40.

industry, but opposed the Guidelines being a disallowable instrument.[191] MBA advocated that the Code and Guidelines form the statutory Building Code under the bill 'so that they clearly form part of the work of the specialist agency with all the accountability measures that are linked to statutory instruments'.[192] This was supported by ABI.[193]

Recommendation 16

Coalition senators recommend that the Building Industry Code of Practice and Guidelines form a statutory Building Code.

Evidence of Law Institute of Victoria

The submission of the Law Institute of Victoria was provided on the basis that it was non-political and non-philosophical.[194] Coalition senators note, however, that the submission provided to the committee expressed concerns regarding protections for construction workers and union officials from the arbitrary use of examination notices but did not express similar concerns about the use of these devices against contractors, small and medium business and employers generally, for whom the same considerations apply. The Committee was told that such an approach was an 'inadvertent omission'.[195]

Coalition senators discerned a lack of emphasis in the evidence of the Institute on the position of employers and businesses under the bill's new regime. They found this lack of rigour surprising given the evidence of the ABCC that Victoria was the home of the worst industrial culture in Australia.[196]

The Law Institute of Victoria also recommended that officers of the building inspectorate be required to wear uniforms to enable easy identification when entering building sites.[197] Given evidence that existing ABCC inspectors face threats and abuse when entering worksites, this recommendation would inevitably lead to increased levels of risk exposure[198] and should not be accepted.

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191 Letter from ABC Commissioner the Hon. John Lloyd to the Deputy Prime Minister, 27 April 2009, p. 6.

192 MBA, *Submission 13*, p. 10.

193 ABI, *Submission 15*, p. 1.

194 Mr Chris Molnar, *Proof Committee Hansard*, 31 August 2009, p. 2.

195 Mr Chris Molnar, *Proof Committee Hansard*, 31 August 2009, p. 2.

196 Mr John Lloyd, *Proof Committee Hansard*, 31 August 2009, p. 71.

197 Mr Chris Molnar, *Proof Committee Hansard*, 31 August 2009, p. 6.

198 Mr John Lloyd, *Proof Committee Hansard*, 31 August 2009, p. 71.

Conclusion

Coalition senators believe that the legislation represents a significant weakening of the powers exercised by the ABCC. Despite the repeated reassurances by the Minister there will not be a sufficiently strong 'cop on the beat' if this legislation is passed without amendments.

We know that despite some improvement, the required behavioural and cultural change in the industry has been slow. The need to continue to drive these changes has been acknowledged by Mr Wilcox and by the Minister. Coalition senators agree that disruptive conduct continues and the number of proceedings is evidence that the powers should be retained. We have very recent examples of disruptive behaviour to draw upon which show that it is too early to reduce the powers of the ABCC. The reform process in the building and construction industry has a long way to go.

The Building Inspectorate will have reduced independence as it will only be a division of a larger industrial relations body, Fair Work Australia. It will be subject to a cumbersome process of direction. The ABCC is effective because it has the independence and the authority to exercise its powers without the constraints which this bill will impose.

The government claims that strong powers have been retained. They have not. The reduced powers relate to the reduction of the maximum level for fines which have been acknowledged to be a significant deterrent; the narrowing of the range of circumstances in which industrial action is unlawful; the narrowing of the definition of building work; the right to intervene in industrial relations cases has been removed; parties are apparently free to use 'undue pressure' to make, vary or terminate an agreement; and the Building Inspectorate is not required to publish reports of non-compliance where breaches do not go to court. A Building Inspectorate with fewer powers will risk a return to industrial lawlessness in the industry.

The powers of the ABCC have improved conduct in the industry. While they appear to be supported, the government seems determined to institute a number of hurdles which will hinder the ability of authorities to combat unlawful behaviour. The protections given to employees will be counter productive, leading to an onerous, complex, administrative and bureaucratic process. It will tie the Building Inspectorate up in red tape, slowing access to the coercive powers and leading to reduced effectiveness. The protections are excessive and their implementation is unnecessary in the absence of any abuse of powers by ABCC.

Evidence to the Committee has showed that the Fair Work Act alone does not provide adequate protection against unlawful and inappropriate conduct by participants in the building and construction industry.

The ability to 'switch off' the coercive powers is unnecessary. The use of the powers will be subject to more safeguards than is necessary given they are only able to be used in appropriate circumstances. Coalition senators wish to mention that the lack of regulations detailing what the Independent Assessor must take into account when

deciding whether to switch off the coercive powers has been a major impediment to understanding how this process will work in practice.

The ABCC has served to bring in a period of relative peace in the industry with fewer days lost to industrial action, a substantial increase in productivity and a record level of construction projects completed on or ahead of schedule and within budget. These improvements were not at the expense of the well-being of workers as indicated by declining accident rates and rising take home pay. This bill threatens to undo the progress that has been made and allow a return of the culture of industrial lawlessness to building sites.

Accordingly, Coalition senators reaffirm their Recommendation 1 above, **that the Senate not pass the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009.**

Senator Gary Humphries **Senator Michaelia Cash**

Deputy Chair

Senator the Hon Eric Abetz **Senator Mary Jo Fisher**