The Senate

# Education, Employment and Workplace Relations Legislation Committee

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 [Provisions]

September 2009

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# Senate Standing Committee on Education, Employment & Workplace Relations
## *Legislation Committee*

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# Preface

This is the committee's fourth report relating to the building and construction industry since 2004. In 2004 the committee undertook a wide-ranging inquiry into the construction industry in the light of recommendations of the Cole royal commission. In considering whether there was a need for separate, industry-specific legislation for the building and construction sector, the 2004 inquiry also considered broader issues relating to the nature of the industry; its unique operational characteristics and culture. Later inquiries, including this one, have focussed on examining specific legislation, and the committee has not had the opportunity to revisit the broader issues facing this industry in any comprehensive way. The committee believes that these broader issues remain relevant today, as highlighted in the report to the government by Mr Wilcox[1], and require a brief mention here.

While this report examines the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, the committee majority reminds the Senate that many of the issues which characterise the building industry cannot be addressed by legislation alone.[2] The Australian Building and Construction Commission (ABCC), established under the Building and Construction Industry Improvement Act (BCII) has taken a narrow view of its role and has not sought to remedy all the unacceptable practices which occur in the industry. This has resulted in a perception that the ABCC is interested only in protecting employers against union 'aggression' rather than safeguarding the interests of all stakeholders in the industry.

This is a tough industry with tough players, working in a physically demanding and inherently risky work environment. Pressures are linked to cost structures, profit margins and sensitivity to economic cycles. The building and construction industry is underscored by commercial imperatives which drive tensions in industry relationships. These tensions are more likely to spill over into the industrial relations arena in this industry than in other industries. The industry is highly competitive with contracts largely determined by price. In the 2004 inquiry, the committee observed how commercial pressures resulted in reduced compliance with workplace entitlements and occupational health and safety (OH&S) regulations, which creates workforce tensions. Business practice, determined by fluctuating rhythms of construction activity and the temporary nature of construction sites has led to the use of extensive subcontracting rather than direct employment of labour by principal contractors. Securing payments

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1 Hon Murray Wilcox QC, *Transition to Fair Work Australia for the Building and Construction*, March 2009, p. 55.

2 See Mr Jeff Lawrence, *Proof Committee Hansard*, 31 August 2009, p. 14; Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole The future of the construction industry: confrontation or co-operation?*, June 2004; Martin Loosemore (2004) Reform in the Australian construction industry, *The Australian Institute of Quantity Surveyors refereed journal*, Sydney, Australia, 3 (2) 1-8.

is complicated by this hierarchical employment system. As a result this industry has seen the use of sham corporate structures to avoid legal obligations and evasion or underpayment of taxation. The attitudes of the workforce are influenced by these characteristics.

It was unfortunate that the ABCC was established for the purpose of curbing the militancy of building unions. In the view of the government of the day, this was believed to be the main, if not the sole-source of the building industry's problems. Few of the industry characteristics listed above appear to have had a bearing on the initial or continuing rationale for separate legislation. The committee majority makes the obvious point that 'fixing' the problems in this industry cannot be reduced to a simple formula of 'fixing' the conduct of industrial relations by legislation.

Although it concentrated on union behaviour, the Cole royal commission unearthed a wealth of evidence regarding unacceptable practices by employers, including the use of phoenix companies, tax avoidance, evading payment of workers entitlements, and disregard for OH&S rules. The committee majority is concerned that the focus of ABCC investigations continues to be on employee organisations rather than on broader problems bearing on workplace conduct. It notes the more recent observations of Professor David Peetz that employer compliance is not without its problems:

> …There is no reason to believe the building and construction industry would have no problems of employer compliance and indeed an exercise by the Sydney Office of the Workplace Ombudsman found 31 per cent non-compliance in the NSW construction industry, even though inspections were restricted to head offices and no building worksites, where breaches could be expected, were visited (Workplace Ombudsman 2009c). Yet most actions taken by the ABCC against employers are for cooperation with unions that are seen to be in breach of the law, rather than for unfair treatment of employees.[3]

To this end the committee majority welcomes the expanded role of the Office of the Fair Work Building Industry Inspectorate to ensure compliance with safety net contractual entitlements.

The building and construction industry is enormously important to the economic, social and environmental fabric and its many achievements can be celebrated. The committee majority accepts there is still work to do to improve practices and culture in the sector to ensure the industry fosters cooperative and harmonious workplaces. In view of the prevailing focus of ABCC activity this cultural change has been difficult to achieve.

As noted in previous committee reports, genuine and broad reform can only succeed through collaboration with states/territories and through consultation with all

3 Professor David Peetz, *Submission 20*, p. 29.

stakeholders. To take an example, OH&S has been identified as one of the critical issues for the industry. It remains a source of workplace tension and dispute.

The Minister for Employment and Workplace Relations has emphasised the need for a new focus on cultural change in the workplace, to build partnerships between management and workers and their unions to benefit all.[4] This desire for greater collaborative and cooperative relationships in the building and construction industry to address issues like OH&S, skills development and productivity was stressed in evidence to the committee.[5]

The building and construction industry is treated differently to other industry sectors on the basis that it is more prone than other industries to industrial disputes. The committee majority notes, however, Australian Bureau of Statistics data which shows the building and construction industry conforming to the industry-wide reduction in industrial disputes. The amount of this reduction directly attributable to the BCII Act and ABCC is a matter of conjecture.

Regarding the alleged lawlessness and criminality in the sector, importantly, it is not criminal activity that is being addressed by the coercive powers held by the ABCC which are to be retained under this legislation. This point is recognised by employer groups[6] as well as unions.[7] The ABC Commissioner has no power regarding the general criminal law as it might apply in the industry. The ABCC is primarily responsible for investigating civil breaches of federal industrial law.[8] There are criminal laws and police to deal with criminal activities. The strong coercive powers are usually reserved for serious crime, not arguments on building sites and potentially minor breaches of industrial instruments. The committee majority understands that the coercive powers impinge on civil liberties and that their use should be limited to circumstances where there is an overwhelming public interest. With the exception of the coercive powers, construction workers should soon join other workers in being regulated by the Fair Work Act (FW Act) on most matters. In this regard, the committee majority points out that more than half of the court cases in which the ABCC successfully obtained penalties were brought under the WR Act (now FW Act) alone.

The committee majority welcomes the introduction of additional safeguards in the legislation. This was recommended in the committee's last report in 2008. It notes

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4 Hon Julia Gillard MP, Minister for Employment and Workplace Relations, Speech to the 15th World Congress International Industrial Relations Association, 25 August 2009.

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

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

7 CCU, *Submission 18*, p. 3.

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

with disappointment that the early introduction of these safeguards by the government was prevented by the Coalition in June 2009. While supporting the increased safeguards it maintains its in-principle objection to separate legislation for one sector of the workforce when it deprives employees of the rights they enjoy in other occupations. Whatever particular issues remain in the building and construction industry, they should be dealt with under the same law that applies to any other industry. The committee majority believes there needs to be a strong and effective enforcement and investigation regime that applies across all industries. The coercive powers should not have a continuing role in the enforcement of workplace laws. The ultimate goal must be the regulation of the building and construction industry under the same laws as the rest of the workforce. This bill is the next step in this process. The committee majority recommends that the bill be passed.

**Senator Gavin Marshall**

**Chair**

# Chapter 1

# Introduction and Background

## Reference

1.1 On 17 June 2009 the Minister for Education, Employment and Workplace Relations, the Hon. Julia Gillard MP, introduced the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the bill) in the House of Representatives. On 18 June 2009, the Senate referred the provisions of the bill to the Senate Standing Legislation Committee on Education, Employment and Workplace Relations for report by 10 September 2009.

## Conduct of the inquiry

1.2 Notice of the inquiry was posted on the committee's website and advertised in *The Australian* newspaper, calling for submissions by 17 July 2009. The committee also directly contacted a number of interested parties, organisations and individuals to notify them of the inquiry and to invite submissions. 22 submissions were received as listed in Appendix 1.

1.3 The committee conducted a public hearing in Melbourne on 31 August 2009. Witnesses who appeared before the committee are listed at Appendix 2.

1.4 A copy of the Hansard transcript from the hearing is tabled for the information of the Senate. The transcript can be accessed on the internet at http://aph/gov.au/hansard.

## Acknowledgements

1.5 The committee thanks those who assisted with the inquiry.

## Background

1.6 The bill is familiar ground for this committee. In 2003 the government introduced the Building and Construction Industry Improvement Bill 2003 which lapsed in the Senate when Parliament was prorogued for the 2004 election. The committee produced a report in June 2004 covering the 2003 bill and industry related matters.[1] In 2005 the Building and Construction Industry Improvement Bill 2005 (BCII bill) was introduced and passed as the current *Building and Construction Industry Improvement Act 2005* (BCII Act). The committee reported on the 2005 bill

1 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole: The future of the construction industry: confrontation or co-operation?*, June 2004.

in May 2005.[2] In 2008, Senator Siewert introduced the Building and Construction Industry (Restoring Workplace Rights) Bill 2008. The committee reported on this bill in November 2008.[3]

1.7 The committee stands by the findings of the committee majority report in 2004, the Opposition senator's report in 2005 and the committee majority report in 2008. Rather than reproduce the various findings in this report, the committee refers readers who are unfamiliar with the history of the bill to the detail in the committee's reports. Briefly, regarding the Cole royal commission, the committee majority notes that the Cole findings were not accepted without question. The exercise was seen by many as politically motivated and directly aimed at weakening the unions representing employees in the industry. However, the committee acknowledged the need for reform in the industry to address practices which were clearly unacceptable. Government senators note that findings of the royal commission continue to influence opinions on the BCII Act and the Office of the Australian Building and Construction Commissioner (ABCC).

1.8 Prior to the 2007 election the Labor Party promised that it would retain the ABCC until 31 January 2010, when it would be replaced by a specialist division of the Inspectorate of Fair Work Australia.[4]

1.9 On 19 June 2008, the Hon Justice Murray Wilcox QC was appointed to consult and prepare a report by 31 March 2009 on matters related to the creation of the specialist Fair Work Inspectorate. The government has accepted the key recommendations of the report.

## Purpose of the bill

1.10 This bill gives effect to the government's election commitment to retain the ABCC until 31 January 2010. It also implements the key recommendations of the Wilcox report through amendments to the BCII Act.

1.11 The key amendments include:

- creation of the Office of the Fair Work Building Industry Inspectorate; (the Building Inspectorate)
- removal of building industry specific laws that provide higher penalties for building industry participants for breaches of industrial law and broader circumstances under which industrial action attracts penalties;

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2 Senate Employment, Workplace Relations and Education Legislation Committee, *Provisions of the Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005*, May 2005.

3 Senate Employment, Workplace Relations and Education Legislation Committee, *Building and Construction Industry (Restoring Workplace Rights) Bill 2008*, November 2008.

4 Kevin Rudd, MP, Labor Leader, Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, *Forward with Fairness, Policy Implementation Plan*, p. 24.

- capacity for the Director of the Building Inspectorate to compulsorily obtain information or documents from a person whom the Director believes has information or documents relevant to an investigation;
- introduction of safeguards in relation to the use of the power to compulsorily obtain information or documents;
- establishment of an Advisory Board that will make recommendations to the Director about policies, priorities and programs; and
- creation of the Independent Assessor, who may make a determination that the examination notice powers will not apply to a particular project.[5]

5 Explanatory Memorandum, p. 1.

# Chapter 2

# Issues

## Importance of the sector

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

### *Productivity attributed to the BCII Act and ABCC*

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

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

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

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

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

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

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

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

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

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

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

2.5 Regarding the Econtech findings, Professor David Peetz concluded:

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

### *Industrial action*

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

### *Committee comment*

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

## Separate legislation for the industry remains

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

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

7 Ibid., p. 27.

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

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

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

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

> This is not a semantic distinction. It goes to the heart of the debate about the justifications which have been used to underpin violence or threats of violence, criminal damage to property, extortion and the like are not only misplaced but have the effect of distorting the policy debate and the public perception of what the laws are designed to achieve.[11]

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

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

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

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

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

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

### *Committee comment*

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

## Objects, definitions and scope of the Act

### *Object*

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

### *Definition of 'building work'*

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

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

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

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

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

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

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

## Establishment of the Fair Work Building Industry Inspectorate

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

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

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

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

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

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

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

18 *Explanatory Memorandum*, p. 5.

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

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

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

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

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

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

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

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

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

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

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

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

***Committee comment***

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

***Director***

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

***Advisory board***

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

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

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

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

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

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

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

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

### *Committee comment*

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

**Recommendation 1**

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

## Comparison of BCII Act and FW Act

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

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

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

29 Ibid., p. 9.

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

### *Industrial action*

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

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

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

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

> Although there is clearly a technical difference between the circumstances under which industrial action is unlawful under the BCII Act (not 'protected action') and the Fair Work Bill (during the operation of an enterprise agreement or workplace determination), I found it difficult to find a scenario under which this would make a practical difference. Accordingly, at each of the forums, I invited the help of the employers' representatives who were present. They each undertook to consult with others and let me

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

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

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

> know if they could imagine such a scenario. None of them have done so. This confirms my view that the difference has no practical importance.[33]

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

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

2.37 On this issue, DEEWR responded that:

> The general industrial action provisions in the Fair Work Act are clear, tough and provide workable options for employers and employees to respond to industrial action. The provisions ensure that industrial action is only protected when taken during genuine bargaining and subject to strict requirements.[36]

### *Penalties*

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

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

> …it is necessary to remember there are many other industries in which industrial action may cause great loss to an employer, and even the national economy, and/or considerable public inconvenience. One has only to think of our major export industries, most components of the transport industry, the gas and electricity industries, the telecommunication industry and emergency services such as police, ambulances and hospitals. There is no

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33 Ibid., p. 21.

34 Ibid., p. 26.

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

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

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

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

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

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

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

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

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

> The history of the building and construction industry may provide a case for the retention of special investigative measures, to increase the chance of a contravener in that industry being brought to justice. However, I do not see how it can justify that contravener then being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and happened to be brought to justice. To do that would be to depart from the principle, mentioned by ACTU, of equality before the law…[42]

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

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

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

41 Ibid., p. 27.

42 Ibid., pp. 27-28.

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

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

> …where parties consistently refuse to comply with the industrial law, the courts retain the ability to impose strong penalties for non-compliance with any court orders and penalties, under the general contempt jurisdiction.[45]

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

## Coercive interrogation powers

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

> It is understandable that workers in the building industry resent being subject to an interrogation process that does not apply to other workers, designed to extract from them information for use in penalty proceedings against their workmates and/or union. I sympathise with that feeling and would gladly recommend against grant of the power. However, that would not be a responsible course. I am satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the BCD to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove.[47]
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> …I have reached the opinion that it would be unwise not to endow BCD (at least for now) with a coercive interrogation power. Although conduct in the industry has improved in recent years, I believe the job is not yet done...[48]

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

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

46 Ibid., p. 10.

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

48 Ibid., p. 58.

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

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

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

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

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

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

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

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49 Ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56 Ibid., p. 4.

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

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

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

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

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

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

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

## Safeguards

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

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

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59 Ibid., p. 6.

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

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

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

2.58 The committee received comment on the following safeguards.

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

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

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

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

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

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

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

(ii) is not appropriate;

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

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

(g) any other matter prescribed by the regulations.

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

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

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

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

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

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

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62 Ibid., p. 13.

63 Ibid., pp. 13-14.

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

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

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

67 EM, p. 20.

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

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

70 ACTU *Submission 19*, p. 16.

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

***Committee comment***

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

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

**Recommendation 2**

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

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

**Recommendation 3**

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

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

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

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

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

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

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

**Recommendation 4**

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

***Payment of reasonable expenses***

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

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

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

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

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

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

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

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

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

***Committee comment***

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

**Recommendation 5**

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

***Role of the Commonwealth Ombudsman***

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

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

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

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

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

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

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

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

**Recommendation 6**

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

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

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

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

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

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

82 Ibid., p. 3.

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

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

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

***Committee comment***

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

## Independent assessor

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

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

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

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

2.88 In the second reading speech, the Minister explained:

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

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

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

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

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

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

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

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

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

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

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

90 Ibid.

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

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

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

2.95 DEEWR clarified that:

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

***Committee comment***

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

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

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

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

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

### *Definition of 'interested person'*

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

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

### *Definition of existing project*

2.99 Proposed section 38 details that the capacity to make application to the Independent Assessor would not apply to projects that commenced prior to 1 February 2010. The Minister advised the committee that the subdivision will commence on 1 February 2010 thereby excluding all current projects. The effect of this provision with the definition of building work as defined in section 5 of the current BCII Act, means that an 'existing project' would be one which has had on-site activity commence prior to 1 February 2010.[98]

### *Criteria to be used by the Independent Assessor*

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

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

(a) it would be appropriate to make the determination, having regard to:

  (i) the object of this Act; and

  (ii) any matters prescribed by the regulations; and

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

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

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

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

2.102 These criteria are consistent with:

- the object of the Act, which includes '(a) ensuring compliance with workplace relations laws by all building industry participants';
- the Explanatory Memorandum (paragraph 92) which states, in part, 'Matters prescribed by the regulations might include, for example, a demonstrated record of compliance with workplace relations laws, including court or tribunal orders, in connection with the building project'; and
- administrative law principles which provide affected persons the opportunity to have their views considered.[99]

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

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

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

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

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

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

100 Ibid., p. 2.

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

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

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

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

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

> A determination can be varied or revoked on application by an interested person (see subsection 33(3) of the *Acts Interpretation Act 1901*) or on request by the Director (see section 43 of this Act).

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

## The office of the federal safety commissioner

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

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

## International Labour Organisation

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

## Conclusion

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

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

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

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

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

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

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

**Recommendation 7**

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

**Senator Gavin Marshall**

**Chair**

# 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**

# Minority Report

# The Australian Greens

The *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* is an attempt to find balance where there is none to be found. The BCII Act is an affront to our democracy, demonising building workers and treating them as criminals in an industrial relations context.

The Australian Greens have placed on record a number of our times our complete opposition to the BCII Act and in particular its provisions providing separate offences of unlawful industrial action and coercion with harsher penalties for building workers and the coercive powers of investigation afforded to the ABCC.

We remain committed to the principle that there should be one law for all workers and that building and construction workers should not be singled out for more punitive treatment.

Supporters of the BCII Act and the retention of the coercive powers in the Bill point to the need for cultural change in the building and construction industry and cite examples of unacceptable behaviour to back their claims.[1] The Australian Greens do not condone any criminal activities or bullying or coercive behaviour whether in the workplace or not. However, we do not believe the BCII Act or the activities of the ABCC are a necessary or sufficient means of addressing such behaviour when it occurs.

The cultural change that is need in the building and construction industry is much broader and requires more than merely a concerted attack on the legitimate role of building unions. The introduction to the Majority Report comments on the nature of the building and construction industry and the broader problems identified within the industry including the use of phoenix companies, non- payment of workers entitlements, and disregard for occupational health and safety. The Australian Greens endorse the comments made concerning the limitations of the ABCC and the need to address a broader range of issues within the industry.

One of the key limitations of the approach embodied by the BCII Act and the ABCC is the almost exclusive focus on the actions of workers and their unions with employers seemingly targeted only due to their relations with unions. There is little focus on the problems engendered by management. It is quite clear that the ABCC has no interest in fulfilling its function in respect of investigating breaches by employers

1 see ACCI, *Submission 11*, MBA, *Submission 13*.

of their obligations to employees. By its own admission to ABCC does not investigate claims of underpayments or breaches of awards or agreement conditions.[2]

The Committee was reminded of the importance of good management practices in the evidence given by Mr Quinn. His evidence was a reminder that there remains a role for good management in changing the culture of the industry and that a collaborative approach is preferable and often more effective.[3] In our view, the ABCC has not operated to enhance working relationships in the building and construction industry but has been an ideological experiment in vilifying workers and their representatives.

## The Amendment Bill

As the Majority Report indicates, the background and issues raised by the BCII Act have been well covered in previous reports of the Committee including the 2004 Senate Committee Inquiry into the future of the construction industry and the report last year into the Australian Greens' Private Senator's Bill to repeal the BCII Act.

The Majority Report also provides a comprehensive summary of the key elements of the Bill. The Australian Greens generally agree with the comments of the Majority Report and endorse recommendations 1-6 made by the Government Senators.

We diverge in our views in relation to the need for the continued existence of a separate compliance agency for the building and construction industry and the retention of the coercive powers.

## Removal of industry specific offences relating to industrial action and coercion

The Australian Greens support the removal of Chapters 5 and 6 of the BCII Act. These Chapters provide specific and harsher prohibitions on industrial action and increased penalties for unlawful industrial action and coercive behaviour in the building industry.

The removal of these provisions means that building and constructions workers are covered by the same prohibitions as all other workers and importantly the same penalties as other workers. We remain unconvinced by arguments made by industry representatives the BCII Act prohibitions and penalties are necessary. No other workers in Australia are subject to such harsh individual civil penalties for exercising their fundamental to right withdraw their labour.

2 See evidence of Hon John Lloyd, *Proof Committee Hansard*, 31 August 2009.

3 Mr Greg Quinn, *Proof Committee Hansard*, 31 August 2009, p. 32.

Building and construction workers will still face unnecessary restrictions on collective bargaining and freedom of association through the application of the Fair Work Act. The Australian Greens believe strongly that freedom of association is a fundamental right and that an integral part of that right is the right to take industrial action.

With the Fair Work Act now containing the substantive rights and obligations for all workers, the logical step is for all breaches of those laws to be dealt with by the Fair Work Ombudsman without a separate compliance agency for one section of the workforce. We agree with the ACTU that if there is to be a particular focus on the building and construction industry it should be in the form of a specialist division within the Office of the Fair Work Ombudsman. In particular we agree with the comments of the ACTU regarding the importance of the culture of an enforcement agency to its success and their comment that:

> an inspectorate that is an administrative unit within the Fair Work Ombudsman is more likely to develop a successful culture……..In contrast, we fear a separate inspectorate will struggle to develop an impartial enforcement culture, and that the deep distrust of the ABCC felt by many workers is likely to carry over to the new Fair Work Building Industry Inspectorate.[4]

An impartial enforcement culture is crucial to the success of the new Inspectorate, particularly if it is to carry out its functions in regard to ensuring compliance by employers of their obligations.

## Coercive powers

The Australian Greens remain utterly opposed to the existence of the coercive powers in relation to investigating breaches of industrial law. We appreciate the safeguards the Government is seeking to introduce through this Bill, including the need for a Presidential member of the AAT to approve the use of coercive powers, the oversight of the Ombudsman, the specific provisions allowing people a lawyer of their choice and the addition of legal professional privilege and public interest immunity.

We understand the intention behind the "switching off" mechanism and the role of the Independent Assessor and we are sympathetic to the union calls for the coercive powers to be "switched on" rather than apply to all until "switched off" at a particular project.

All these measures, however, do not solve our fundamental objection, that is, that these coercive powers have no place in the regulation of industrial relations matters. As Professor Williams and Ms McGarrity conclude in their article on the investigatory powers of the ABCC:

4 ACTU, *Submission 19*, p.7.

> It is wrong as a matter of legal policy to confer a draconian, overbroad and inadequately checked investigatory power on a body whose principal function is to investigate civil breaches of federal industrial law in a single industry….Given such fundamental concerns, our view is that the ABCC should be abolished. We further believe that it is inappropriate to create any other body to deal only with the building and construction industry. Contraventions of industrial law by participants in that sector should be investigated by a single body with a brief to apply its powers in a non-discriminatory manner to all employers and employees across all industries.[5]

We further note that as confirmed by the Commissioner in evidence to the Committee[6], the coercive powers are not directed at the wrongdoers but at people who are not suspected of doing anything unlawful. Furthermore, as Mr Noonan commented in evidence, these laws are not directed at the types of behaviour that are used to justify their application:

> The argument that is made in favour of these laws constantly reverts back to often unsubstantiated and hysterical allegations about criminality, violence, corruption and so on…….and yet these laws have absolutely nothing to do with any of those matters and are incapable of being used to prosecute any of those matters, and my view is that those who are the proponents of these laws continue to refer to those matters because they are unable to articulate an argument as to why industrial laws should require the removal of the right to silence and the imprisonment of working people for six months for attending a union meeting. If people could justify that, they would not be continually returning to matters which are unconnected, unrelated and incapable of being prosecuted under this law.[7]

The potential for a penalty of imprisonment for a worker not complying with a request under the coercive powers remains objectionable. We agree with the ACTU that:

> Our view is that, before imprisonment could become a penalty, you would have to be found to be in contempt of either a court or an institution. The problem with the regime, even with the safeguards that are proposed, is that the person is not heard until they are prosecuted for failure to appear, with a penalty of imprisonment hanging over their head. In industrial law, for all other workers in the country, there is no prospect of imprisonment unless you are in contempt of court. We think that the same regime should apply to construction workers and construction employers and that imprisonment should only be an available, as it is to all other citizens, if they are in contempt. The problem with this regime is that you move to imprisonment

5 Professor George Williams and Ms Nicola McGarrity, *Submission 1*, pp. 276-277.

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

7 Mr Dave Noonan, *Proof Committee Hansard*, 31 August 2009, p. 54.

> without having an opportunity to be heard or having an opportunity to explain why you do not wish to comply with the orders.[8]

We believe if these powers are to remain, the penalty of imprisonment must be removed.

The Australian Greens also do not accept the argument that the BCII Act is justified on the ground of perceived economic benefit. We are persuaded by the submission of Professor Peetz that much of the argument for the ABCC contributing to productivity gains is unsubstantiated and are concerned by his conclusion that 'if there are to be any economic effects from the operation of the ABCC, they are more likely to be increasing profits than increasing productivity.'[9] In any event, we do not believe that economic gains can justify the assault on fundamental human rights that the BCII Act perpetrates.

We also do not accept the Government's continued rhetoric about a tough 'cop on the beat' for the building industry as justifying the continued singling out of building and construction workers for special treatment. Universal industrial, civil and criminal laws should be complied with and enforced on building sites as in any other workplaces.

The Australian Greens agree with the conclusion of Professor Williams and Ms McGarrity that:

> even with these safeguards the coercive powers provided for in the primary Act are not justified. The safeguards do not, for example, overcome the fact that the coercive powers can be used in an overly-broad set of circumstances, such as regard to non-suspects and children in the investigation of minor or petty breaches of industrial law and industrial instruments. The coercive powers are not justified in this industrial setting. The preferable course would be to remove the powers entirely and to have a strong and effective enforcement and investigation regime that applies across all industries.[10]

It was to this end that the Australia Greens introduced our Private Senators' Bill to repeal the BCII Act in its entirety. We do not resile from this position.

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

9 Professor David Peetz, *Submission 20*, p.27.

10 Professor George Williams and Ms Nicola McGarrity, *Submission 1*, covering letter, pp. 1-2.

## International Obligations

The BCII Act has been considered by the ILO on a number of occasions to breach fundamental rights. The Australian Greens note the evidence given by the ACTU that in their view the Act as amended by the Bill will continue to be in breach of ILO conventions, in particular the Labour Inspection and the Freedom of Association and Right to Organise conventions.[11] Australia is a signatory to both these conventions which signal that we as a nation accept the principles found in those documents. ILO conventions are important as representing the framework for fair and balanced industrial relations. If we are in breach of the conventions we are falling outside what is acceptable international practice. The Australian Greens believe the Government should endeavour to ensure we live up to international standards not ignore them.

## Occupational Health and Safety

The affect of the ABCC and its operations on occupational health and safety on building sites has been on ongoing concern of the Australian Greens. We referred to the potential of the ABCC having a detrimental effect on OHS when opposing the BCII Act back in 2005 and are afraid our concerns have been realised.

We note that under the amendments building workers can stop work if they have reasonable concern for their safety pursuant to provisions in the Fair Work Act. However, the prospect of investigation using the coercive powers and the heavy penalties for a worker making the wrong judgement places a disincentive on workers to be active in identifying unsafe work practices. It is unacceptable in an industry as dangerous as the building and construction industry for legislation to act counter to achieving the highest standards of health and safety practice.

As Mr Noonan commented in evidence, the only person facing imprisonment under the BCII Act at present is a worker who went to a safety meeting.[12] It is through this type of intimidation that the activities of the ABCC or its replacement body can have a detrimental impact on OH&S. The building and construction industry stills has an unacceptable number of fatalities and serious injuries. We note the comments of Professor Peetz on the number of fatalities exceeding the growth in employment in construction and that there is considerable research showing that unions have an important role in ensuring observance with occupational safety requirements.[13] The new Inspectorate must ensure its activities do not operate to the detriment of strong occupational health and safety practices including the legitimate role of union delegates and workers' representatives.

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

12 Mr Dave Noonan, *Proof Committee Hansard*, 31 August 2009, p. 54.

13 Professor David Peetz, *Submission 20*, p.27.

## Conclusion

We reiterate that the BCII Act is an affront to our democracy and that in our view the amendments do not ultimately change that position. This Parliament has a duty to ensure that the building industry is regulated just like any other industry - in a fair and just manner that balances the needs of productivity and the economy with the health, safety and democratic rights of workers.

**Recommendation 1**

The Government withdraw the Bill and reintroduce a Bill to repeal the BCII Act, abolish the ABCC while maintaining the role of the Federal Safety Commissioner.

**Recommendation 2**

If Recommendation 1 is not acted upon, remove the penalty of imprisonment from clause 52 and replace it with a maximum penalty of 30 penalty units.

**Senator Rachel Siewert**

# APPENDIX 1

## Submissions Received

| Submission Number | Submitter |
|---|---|
| 1 | University of New South Wales |
| 2 | Chamber of Commerce & Industry WA (CCIWA) |
| 3 | Master Electricians Australia |
| 4 | Business Council of Australia (BCA) |
| 5 | Commonwealth Ombudsman |
| 6 | Air Conditioning & Mechanical Contractors' Association (ACMCA) |
| 7 | NSW Government |
| 8 | Housing Industry Association (HIA) |
| 9 | Chris White |
| 10 | Australian Industry Group (AIG) |
| 11 | Australian Chamber of Commerce & Industry (ACCI) |
| 12 | AMMA |
| 13 | Master Builders Australia (MBA) |
| 14 | Civil Contractors Federation (CCF) |
| 15 | Australian Business Industrial |
| 16 | WA Government |
| 17 | Law Institute of Victoria |
| 18 | Combined Construction Unions |
| 19 | ACTU |
| 20 | David Peetz |
| 21 | DEEWR |
| 22 | Hutchinson Builders |

# APPENDIX 2

## Public Hearings and Witnesses

**MELBOURNE – MONDAY, 31 AUGUST 2009**

Mr James David (Jim) Barrett, Associate Director,
Construction and Infrastructure, Australian Industry Group; and Executive Director,
Australian Constructors Association

Ms Cath Bowtell, Industrial Officer,
Australian Council of Trade Unions

Mr Philip Brewin, Accredited Specialist,
Workplace Relations, Nevett Ford, Law Institute of Victoria

Mr Richard Calver, National Director Industrial Relations and Legal Counsel,
Master Builders Australia

Mr Peter James Cully, Branch Manager,
Workplace Relations Legal Group, Department of Education, Employment and Workplace Relations

Mr Ross Dalgleish, Deputy Commissioner,
Legal, Office of the Australian Building and Construction Commissioner

Mr David Gregory, Director, Workplace Policy,
Australian Chamber of Commerce and Industry

Mr Wilhelm Harnisch, Chief Executive Officer,
Master Builders Australia

Mr Leigh Andrew Hyland Johns, Deputy Commissioner,
Operations, Office of the Australian Building and Construction Commissioner

Mr Jeff Lawrence, Secretary,
Australian Council of Trade Unions

The Hon. John Lloyd, Commissioner,
Office of the Australian Building and Construction Commissioner

Mr Daniel Mammone, Manager,
Workplace Relations and Legal Affairs, Australian Chamber of Commerce and Industry

Mr Michael Maynard, Group Manager,
Workplace Relations Implementation Group, Department of Education, Employment and Workplace Relations

Mr Chris Molnar, Partner and Accredited Specialist,
Workplace Relations, McKean Park Lawyers, Law Institute of Victoria

Mr David John Noonan, National Secretary,
CFMEU Construction and General Division

Mr Gregory Denis Quinn, Managing Director,
Hutchinson Builders

Mrs Heather Ridout, Chief Executive,
Australian Industrial Group

Mr Thomas Roberts, Senior National Legal Officer,
CFMEU Construction and General Division

Mr Stephen Smith, Director, National Workplace Relations,
Australian Industrial Group

Mr Glenn Andrew Thompson, Assistant National Secretary,
Australian Manufacturing Workers Union

Mr Jeff Willing, Branch Manager,
Building Industry Branch, Department of Education, Employment and Workplace Relations