

Chapter 2

2.1 This chapter covers issues raised in submissions about the functions and powers of the BCII Act and the ABCC.

2.2 The committee majority notes that on 22 May 2008, the government announced the appointment of the Honourable Murray Wilcox QC to consult with the industry and report on how best to transform the ABCC to a specialist division of Fair Work Australia.¹ The department noted that as consultations by Mr Wilcox are continuing, it would be inappropriate for them to pre-empt the outcome of that process, due to be reported by the end of March 2009.² The issues raised in a discussion paper released by Mr Wilcox will be referred to in this report where relevant.

Functions of the ABCC

2.3 As recommended by the Cole royal commission, the industry is now subject to specific legislation, the *Building and Construction Industry Improvement Act 2005*, which is monitored and enforced by the ABCC. This operates alongside the general framework for workplace relations regulation under the *Workplace Relations Act 1996*.

2.4 The purpose of the Building and Construction Industry Improvement Act 2005 (BCII Act) is to:

...provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.³

2.5 Chapter 2, Part 1, section 10 of the BCII Act establishes the ABCC with the responsibility for a range of activities including:

- monitoring and promoting appropriate standards of conduct for building industry participants, including by
 - monitoring and promoting compliance with this Act and the Workplace Relations Act; and
 - monitoring and promoting compliance with the Building Code; and
 - referring matters to other relevant agencies and bodies;

1 Fair Work Australia will be the new independent umpire which will oversee Labor's new industrial relations system. See election policies 2007, Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, 'Labor's New Industrial Umpire Fair Work Australia'.

2 DEEWR, *Submission 3*, p. 1.

3 *BCII Act 2005*, p. 3.

- investigating suspected contraventions, by building industry participants, of:
 - this Act, the Workplace Relations Act or an award, certified agreement, AWA or order of the AIRC; and
- the Building Code;
- instituting, or intervening in, proceedings in accordance with this Act;
- providing assistance and advice to building industry participants regarding their rights and obligations under this Act and the Workplace Relations Act;
- providing representation to a building industry participant who is, or might become, a party to a proceeding under this Act or the Workplace Relations Act, if the ABC Commissioner considered that providing the representation would promote the enforcement of this Act or the Workplace Relations Act;
- disseminating information about this Act, the Workplace Relations Act and the Building Code, and about other matters affecting building industry participants, including disseminating information by facilitating ongoing discussions with building industry participants;
- any other functions conferred on the ABC Commissioner by this Act or by another Act;
- any other functions conferred on the ABC Commissioner by the regulations.⁴

Powers of the ABCC

2.6 The ABCC has wide ranging powers to monitor, investigate and enforce the legislation and the National Code of Practice for the Construction Industry (the code).

2.7 Submissions raised issues in regard to the exercise of these powers. Employer organisations see the powers as necessary to safeguard a productive and industrially peaceful building and construction industry. Organisations such as AMMA believe the powers have been instrumental in effecting change in the building and construction industry and that they are adequately balanced by the protections afforded under the BCII Act.⁵

2.8 Others see the powers as extraordinary. Professor George Williams for instance, argued the powers are unwarranted, create a disturbing precedent and have been created without adequate safeguards. Professor Williams and Nicola McGarrity provided the committee with a detailed peer-reviewed legal analysis of the coercive and investigatory powers of the ABCC. As this provides a very detailed analysis of these powers, the issues raised in this submission will be detailed below.

4 *BCII Act 2005*, pp. 13–14.

5 AMMA, *Submission 4*, p. 4.

Investigatory Powers

Power to compel information, documents or give evidence

2.9 Section 52 of the BCII Act gives the ABCC the power to compel a person to provide it with information or documents or to give evidence before it. The Act states:

(1) If the ABC Commissioner believes on reasonable grounds that a person:

(a) has information or documents relevant to an investigation; or

(b) is capable of giving evidence that is relevant to an investigation;

the ABC Commissioner may, by written notice given to the person, require the person:

(c) to give the information to the ABC Commissioner, or to an assistant, by the time, and in the manner and form, specified in the notice; or

(d) to produce the documents to the ABC Commissioner, or to an assistant, by the time, and in the manner, specified in the notice; or

(e) to attend before the ABC Commissioner, or an assistant, at the time and place specified in the notice, and answer questions relevant to the investigation.⁶

2.10 Williams and McGarrity criticised the ABCC's powers under section 52. They pointed to the low investigatory threshold of 'relevant to an investigation' which could be used to require a person to reveal their phone, email and bank account records or to undertake a 'fishing expedition' or 'roving inquiry'. The guidelines for the exercise of compliance powers state the ABC Commissioner must have 'belief on reasonable grounds' that the threshold has been met. Williams and McGarrity noted that the proper use of the investigatory powers is thus dependent upon the discretion and goodwill of the holder of the power and pointed out that:

This is at odds with the rule of law principle that a power should be limited by law to its justifiable uses and not left subject to the discretion of whoever uses it.⁷

Ability to override other laws

2.11 Williams and McGarrity also noted that neither the privilege against self-incrimination nor the provisions of other laws, such as secrecy laws enable a person to avoid the investigatory powers. Section 53 details the excuses not available in relation to section 52 and states:

6 *BCII Act 2005*, s 52, p.46.

7 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 257.

(1) A person is not excused from giving information, producing a document, or answering a question, under section 52 on the ground that to do so:

- (a) would contravene any other law; or
- (b) might tend to incriminate the person or otherwise expose the person to a penalty or other liability; or
- (c) would be otherwise contrary to the public interest.⁸

2.12 The ACTU highlighted that section 53(1) infringes basic civil liberties, including the right to silence.⁹

2.13 Williams and McGarrity argued that section 52(7) is particularly remarkable as it states:

The operation of this section is not limited by any secrecy provision of any other law (whether enacted before or after the commencement of this section), except to the extent that the secrecy provision expressly excludes the operation of this section.¹⁰

2.14 They noted that this section enables the investigatory powers to 'override, for example, the protection of journalists' sources, privacy law and even the confidentiality of Cabinet proceedings'.¹¹ It also overrides national security laws relating to the gathering of intelligence by ASIO. They concluded that this provision:

...elevates the ABCC, and its objective of eliminating unlawful conduct in the building and construction industry, above even the protection of national security.¹²

2.15 The ACTU supported the comments made by Professor Williams and added that such powers are excessive when dealing with extensively regulated contractual arrangements between employees, their representatives and employers.¹³

Legal representation

2.16 Section 52(3) provides that a person appearing before the ABCC is entitled to legal representation.¹⁴ However, Williams and McGarrity noted that in *Bonan v Hadgkiss*, the Federal Court found that it was appropriate to prevent a legal representative from acting for more than one person giving evidence to the ABCC.

8 *BCII Act 2005*, p. 48.

9 ACTU, *Submission 15*, p. 9.

10 *BCII Act 2005*, p. 47.

11 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 258.

12 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 258.

13 ACTU, *Submission 15*, p. 11.

14 *BCII Act 2005*, p. 46.

They expressed concern that despite section 52(3), out of the 121 people examined by the ABCC from 1 October 2005 to 30 September 2008, only 67 have been legally represented.¹⁵

Exceptions to protections

2.17 Section 53(2) provides some protection of the rights of people providing evidence or giving information and documents to the ABCC through the conferral of 'use' and 'derivative use' immunities.¹⁶ As explained by Williams and McGarrity:

This means that neither the information, answers given or documents produced by a person, nor any information, document or things obtained as a direct or indirect consequence of giving the information, answers or producing the document, is admissible against the person in civil or criminal proceedings.¹⁷

2.18 However, Williams and McGarrity noted that there are several exceptions to this immunity:

The information, answer, document or thing may be used in proceedings for an offence under the BCII Act or the Criminal Code Act 1995 (Cth) relating to the failure by a person to comply with a notice issued by the ABC Commissioner, the failure to take an oath or affirmation when requested by the ABC Commissioner or an assistant, the failure to answer questions relevant to the investigation when attending as required by the notice, the provision of false or misleading information or documents or the obstruction of a Commonwealth official.¹⁸

2.19 The ACTU pointed out that section 53(2) does not protect the right to silence undermined in section 52.¹⁹ The ACTU also highlighted that the effect of section 53 is for compliance powers to be most frequently used to interview people who are not suspected of doing anything wrong.²⁰ The submission referred to data which showed that out of 85 examinations, 22 were closed with no proceedings.²¹

15 Professor George Williams and Nicola McGarrity, Submission 6, p. 255 and ABCC *Report of Compliance Powers by the ABCC for the Period 1 October 2005 to 30 September 2008* available at <http://www.abcc.gov.au/NR/rdonlyres/36149C0F-B6C9-4AC7-B2C2-34379BA26C2E/0/CPowersReportSep08.pdf> accessed 14 November 2008.

16 *BCII Act 2005*, p. 48.

17 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 260.

18 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 260.

19 ACTU, *Submission 15*, p. 9.

20 ACTU, *Submission 15*, p. 10.

21 ABCC, *Report on the Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 31 March 2008*, p. 3.

2.20 Williams and McGarrity noted that section 54 is an adjunct to the 'use' and 'derivative use' immunities in section 53(2) and that it protects a person from prosecution on the basis that:

...he or she violated another law, or caused damage to a third party, by the mere fact of giving information to the ABCC. For example it would apply where another piece of legislation makes it an offence to disclose otherwise confidential information.²²

2.21 They noted this is important because 53(2) does not cover such situations. However, they stated that:

s 54 does not protect a person from proceedings arising out of the *content* of the information, answers or documents that he or she provided to the ABCC. It is this content that the privilege against self-incrimination is chiefly concerned with, and s 54 is a less significant safeguard than s 53(2) in protecting that privilege.²³

2.22 Williams and McGarrity concluded that there has never been sufficient justification in the building and construction industry in regard to the investigation of industrial matters for the abrogation of the important common law principle of privilege against self-incrimination.²⁴

2.23 Their submission also highlighted that the investigatory power can be applied to an extremely broad range of people including:

Workers in the building industry under no suspicion of having acted unlawfully; innocent bystanders; the families (including children of any age) of workers in the building and construction industry; journalists and academics; and to take what might seem a farfetched example, a priest in relation to what someone has told them in the confession box.²⁵

Severe penalties

2.24 Williams and McGarrity's final point in relation to the investigatory powers is that a person may be subjected to criminal penalties if he or she fails to provide the information, documents or attend to answer questions as required by a notice.²⁶ The maximum penalty is six months imprisonment.²⁷ They noted that the Committee on Freedom of Association of the International Labour Organisation (ILO) has expressed concerns and continues to do so, about this provision when considering a complaint brought by the ACTU in March 2004. It noted that:

22 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 260.

23 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 260–261.

24 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 259.

25 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 262.

26 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 262.

27 *BCII Act 2005*, p. 47.

As for the penalty of six months' imprisonment for failure to comply with a notice by the ABCC to produce documents or give information, the Committee recalls that penalties should be proportional to the gravity of the offence and requests the Government to consider amending this provision.²⁸

2.25 Further concerns of the ILO will be detailed in chapter three.

Committee comment

2.26 The committee notes the legal analysis provided by Professor Williams and Ms McGarrity regarding the investigatory powers, in particular, the concerns raised in the following areas:

- the low investigatory threshold of 'relevant to an investigation';
- the use of powers being dependent on the discretion and goodwill of the holder of the power which is at odds with the rule of law principle that a power should be limited by law to its justifiable uses and not left subject to the discretion of whoever uses it;
- the abrogation of the important common law principle of privilege against self-incrimination;
- the ability to override secrecy provisions of any other law thus elevating the ABCC above the protection of national security;
- overriding the right to silence and this not being protected;
- the exceptions to immunities;
- the broad range of people the investigatory powers can be applied to;
- the severe penalty of facing a six month gaol term for failing to comply with a notice which cannot be mitigated to a fine which the ILO has requested the government to amend; and
- the finding of the Federal Court that a legal representative can be prevented from acting for more than one person giving evidence to the ABCC.

2.27 The committee points out that in the latest report on the exercise of compliance powers by the ABCC, out of 121 examinations only 67 have been legally represented.²⁹

2.28 The committee also notes the case in point of the first person to be charged with failing to cooperate with the ABCC, Mr Noel Washington, a senior official with

28 International Labour Organisation. Committee on Freedom of Association, Report No 338 (Case No. 2326): available at: <http://www.ilo.org/ilolex/english/casframeE.htm> accessed 27 October 2008.

29 ABCC Report of Compliance Powers by the ABCC for the Period 1 October 2005 to 30 September 2008 available at: <http://www.abcc.gov.au/NR/rdonlyres/36149C0F-B6C9-4AC7-B2C2-34379BA26C2E/0/CPowersReportSep08.pdf> accessed 28 October 2008.

the CFMEU. The ABCC requested that Mr Washington attend to give evidence about a union meeting and he refused to attend. As the case is continuing the committee will only make reference to it as an example of action being taken against an individual where they could face a six month gaol sentence.³⁰

Are the powers unusual and are they appropriate?

2.29 Some submissions stated that the powers of the ABCC are neither unusual nor unwarranted. As an example, it was pointed out that those working in the finance industry are the subject of equally strict provisions. Others stated that the powers are anti-democratic and breach international labour conventions.

2.30 Williams and McGarrity explained that at first glance the investigatory powers of the ABCC and bodies like the ACCC, ATO and ASIC may appear similar, but that on closer inspection there are important differences in the investigatory powers. Taking the ACCC as an example:

- the *Trade Practices Act 1974* (TPA) recognises that the confidentiality of some documents should be maintained, for example, cabinet documents and documents containing information which is the subject of legal professional privilege. Section 52(7) of the BCII Act does not include such an exemption;
- the penalty for failing to comply with a notice issued by the ACCC or providing information or evidence that is false or misleading is either a fine or imprisonment for 12 months. The BCII Act provides no option of a monetary penalty; and
- judicial review under the *Administrative Decisions (Judicial Review) Act 1977* is available in relation to a decision by the ACCC to exercise its investigatory powers but no such review is included in the BCII Act.³¹

2.31 Williams and McGarrity concluded that the powers in the BCII Act are inappropriate and detailed three significant factors to explain this view.

2.32 First, the submission pointed to the broad scope of the ABCC to exercise its investigatory and coercive powers and the lack of a prohibition on the use of the powers to investigate minor or petty contraventions.³²

2.33 This point was supported by The Hon Murray Wilcox QC in his discussion paper. It was noted that section 52 does not require the issuing officer of a summons to 'make a judgement as to the need to make that investigation, having regard to the

30 For further information on the case the following websites, among others, provide background: <http://www.cfmeuvc.com.au/storage/documents/NW%20download.pdf> and <http://www.abcc.gov.au/abcc/Prosecutions/CurrentCourtCases/CrusevCFMEUandWashington.htm> accessed 28 October 2008.

31 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 270.

32 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 272.

nature and seriousness of the suspected contravention, nor the importance to the investigation of having evidence from this particular person'.³³ He noted the desirability to impose an express obligation to consider these matters and for another, who is not a subordinate, to concur.³⁴

2.34 Second, the ABCC deals with breaches of the civil, not criminal law. The submission by Williams and McGarrity noted that only two criminal offences are created by the BCII Act, both of which relate to procedural matters: the failure of a person to comply with a notice issued by the ABCC, and, the recording or disclosure of protected information that a person such as an employee of the ABCC has obtained in the course of their employment. It highlighted that the target of the legislation, unlawful industrial action, is dealt with by way of civil sanctions and suggested that the types of powers held by the ABCC should be appropriate for the contraventions it is required to investigate. The submission also argued that the functions of the ABCC are not comparable to those of the ACCC.³⁵ In summary:

The ABCC is primarily responsible for monitoring, investigating and enforcing civil law, or more specifically, federal industrial law like the BCII Act and industry awards and agreements. Investigatory powers of the type bestowed on the ABC Commissioner had previously been unheard of in the industrial context. In this light, the powers possessed by the ABC Commissioner are not only extraordinary, but unwarranted. Extraordinary powers of this kind should not be vested without adequate checks and balances, and even then should only be given to a body required to deal with serious criminal conduct. Such powers should not be bestowed on a body dealing with contraventions of the civil law and potentially minor breaches of industrial instruments.³⁶

2.35 Third, the submission highlighted the selectivity of the ABCC's jurisdiction. It noted there is nothing about the 'lawlessness' identified by the Cole royal commission which is unique to the building and construction industry. It found that the existing non-industry specific bodies had inadequate powers to enforce Commonwealth industrial law. The submission posited why this is not a problem that needs to be addressed for all industries? This selectivity differs from bodies such as ACCC where they have jurisdiction over all persons and organisations that contravene the TPA.³⁷

2.36 Mr Wilcox explained in his discussion paper that it is commonplace for an unwilling witness to be subpoenaed to give evidence or produce documents to a court and that this has not been considered a human rights issue. In fact he added that the

33 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 30.

34 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 31.

35 Professor George Williams and Nicola McGarrity, *Submission 6*, pp.273–274.

36 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 274–275.

37 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 275.

power to compel attendance may assist a witness to avert criticism. However, he did note that this action:

...understandably causes resentment amongst building workers that they, but not workers in almost any other industry, can be summoned to give evidence about work-related events, with a view to building up a case against their co-workers and/or their union.³⁸

What is the alternative?

2.37 Mr Wilcox noted in his discussion paper that the Workplace Ombudsman (WO) will be folded into Fair Work Australia. He put the view for comment that the WO already investigates and, if appropriate, prosecutes any breaches of workplace law and the success of the WO could indicate that there is no need for the powers of compulsory interrogation conferred by the BCII Act.³⁹

Committee comment

2.38 The committee majority notes that Professor Williams argues that context is important when considering the powers in the BCII Act. He asks whether these powers are appropriate in an industrial relations and industry context where the ABCC focuses on breaches of civil and not criminal law. As argued and concluded by the committee majority in previous reports, the evidence confirms that industry specific legislation is not appropriate in this context and therefore not warranted.

2.39 The committee is encouraged by the discussion paper released by Mr Wilcox which raises the question as to whether the existing industrial relations machinery should be sufficient for the industry.

2.40 Although the committee majority does not agree with industry specific legislation in principle, given that it exists it is important to ensure that adequate safeguards are in place to ensure that these broad powers are not used unfairly.

Are there adequate safeguards?

2.41 Given that the powers exist and that they are wide-ranging and have serious consequences including possible gaol terms, a basic question is whether adequate safeguards have been built into the legislation.

2.42 Organisations such as AMMA stressed there are significant qualifications to the powers contained in sections 52 and 53 of the Act in that:

- only the ABC Commissioner can make a request under section 52;

38 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 30.

39 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 20.

- the ABC Commissioner must have reasonable grounds to believe a person has information or documents, or is capable of giving evidence relevant to an investigation before using its coercive powers;
- a person attending before the ABC Commissioner may choose to be legally represented; and
- any evidence given, or information obtained, by the ABCC is inadmissible against the witness in future proceedings.⁴⁰

No need for approval to exercise the powers

2.43 Williams and McGarrity noted that although the power rests entirely in the hands of the ABCC Commissioner, 'He or she is not required to obtain the approval, such as a warrant, of either a member of the Commonwealth executive or the judiciary'.⁴¹

Perceptions of political influence

2.44 Section 15(1) of the Act provides that the ABCC Commissioner is appointed by the Minister for Employment and Workplace Relations and they hold 'office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister'.⁴² As pointed out in the committee's 2004 report, the ability for the executive to influence the exercise of the powers has contributed to criticism that the agency could be subject to a high level of political direction.⁴³ Mr Wilcox raised this question of too much or too little ministerial direction and control as an issue in his discussion paper.⁴⁴

2.45 Williams and McGarrity suggested introducing an independent and apolitical element such as the inclusion of a Federal Court judge in the approval process for the exercise of the investigatory and coercive powers. They argued that such a step is appropriate given the serious consequences of the use of these powers such as the gaol term and the abrogation of the right to silence and the privilege against self-incrimination.⁴⁵

2.46 For instance, they pointed out that judicial approval is required for the exercise of the Australian Secret Intelligence Organisation's investigatory powers and that the threshold for exercising these powers is higher than for the ABCC, for

40 Summary of qualifications provided by AMMA, *Submission 4*, p. 13.

41 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 264.

42 *BCII Act 2005*, p. 17.

43 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole: The future of the construction industry: confrontation or co-operation?*, June 2004, pp. 56-57.

44 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 25.

45 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 264.

example, that the warrant must 'substantially assist' an investigation rather than being 'relevant' to an investigation. They further argued that as judicial oversight is appropriate under counter-terrorism laws:

It is difficult to see what the justification could be for excluding such oversight in regard to the ABC Commissioner's exercise of his or her investigatory powers.⁴⁶

2.47 There is no mechanism in the Act for either internal or external review of the merits of a decision to exercise the ABCC's investigatory powers and there is only limited scope for judicial review of the legality of such a decision. Williams and McGarrity explained:

Because Parliament has excluded judicial review under the ADJR Act, it is not possible to challenge a decision by the ABC Commissioner to exercise his or her investigatory powers on the grounds set out in ss 5 and 6 of that Act.⁴⁷

2.48 They noted that the review of the legality of the decision will still be available under the constitutional writs on section 75(v) of the Constitution but this is restricted to challenges based on a 'jurisdictional error'.⁴⁸

2.49 The importance of judicial review has been accepted by a number of independent bodies, including the Cole royal commission and the ILO's Committee on the Freedom of Association which noted:

The Committee considers that the expansive powers of the ABCC, without clearly defined limits or judicial control, could give rise to serious interference in the internal affairs of trade unions. The Committee therefore requests the Government to introduce sufficient safeguards into the 2005 Act so as to ensure that the functioning of the ABC Commissioner and inspectors does not lead to such interference and, in particular, requests the Government to introduce provisions on the possibility of lodging an appeal before the courts against the ABCC's notices prior to the handing over of documents.⁴⁹

2.50 Submissions noted that given the nature and scope of the investigatory powers of the ABCC, the methods of oversight referred to by the royal commission are inadequate, in particular the requirement for an annual report or the ability to make a complaint to the Commonwealth Ombudsman. In summary:

In the absence of adequate safeguards, the ABC Commissioner's investigatory powers have the potential to severely restrict basic democratic

46 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 266.

47 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 266.

48 Professor George Williams and Nicola McGarrity, *Submission 6*, pp. 266.

49 Report available from: <http://www.ilo.org/ilolex/english/casframeE.htm> accessed 28 October 2008.

rights such as freedom of speech, freedom of association, the privilege against self-incrimination and the right to silence.⁵⁰

2.51 Mr Wilcox also noted there is no significant external supervision of the ABCC and he listed the Victorian Office of Police Integrity model which is monitored by the Special Investigations Monitor as a possible model. He explained that people can complain to the Commonwealth Ombudsman but this will be one of thousands of complaints involving the full range of Commonwealth agencies. He highlighted that any action the Ombudsman could take would be after the event. He concluded that if the new division of Fair Work Australia is to be granted coercive powers then subjecting it to external monitoring seems essential.⁵¹

Burden placed on recipient of summons

2.52 Mr Wilcox also noted the compulsory interrogation powers impose a burden on the recipient of the summons. Quite apart from the emotional distress of receiving a notice to attend a formal interrogation to answer questions that involve workmates, there is the financial burden as the recipient is left to bear any lost wages and the expense of obtaining legal assistance.⁵²

Committee comment

2.53 The committee majority notes that Professor Williams argues that increased oversight is not necessarily the answer to powers which are already 'exceptional and unwarranted' and the committee concurs with this view.

2.54 The committee majority is encouraged by Mr Wilcox's observations that the coercive powers in current legislation should be subjected to external monitoring as a safeguard against misuse. As the ABCC will remain in force until 2010, the committee majority recommends that such safeguards be put in place.

Recommendation 1

As the office of the Australian Building and Construction Commissioner will remain in force until 2010, the committee majority recommends that appropriate safeguards for the use of coercive powers by the ABCC be put in place as a matter of urgency.

50 Professor George Williams and Nicola McGarrity, *Submission 6*, p. 268.

51 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 33.

52 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 30.

The importance of the building and construction industry to the economy

2.55 Submissions, which argued for the retention of industry specific legislation, pointed to reports showing increased productivity and levels of industrial peace and made a causal link that the BCII Act and ABCC are responsible for improvements. The committee majority questions whether such a causal link can be made.

2.56 Australian Bureau of Statistics (ABS) data shows a reduction in time lost in the construction industry.⁵³ However, Mr Wilcox pointed out that the ABS statistics also show substantial reductions in time lost in other industries over the period 1996-2007 leading to the conclusion that community-wide factors may be responsible for most, if not all, of the reduction of time lost in the construction industry.⁵⁴ Mr Wilcox also pointed to the 2007 Allen Consulting Group report which explained:

The number of industrial disputes in the construction industry has been very low since 2000, and particularly low in the past year...With the exception of a couple of significant spikes in the number of days lost in the mid 1990s, the long term trend has been towards a declining number of industrial disputes in the industry.⁵⁵

2.57 The committee majority notes the importance of the industry to the economy as it directly accounts for about 7.5 per cent of GDP, provides 940,000 jobs and has an average employment growth rate of seven per cent with most of this concentrated in non-residential construction.⁵⁶

2.58 Submissions highlighted the reports undertaken by the consulting firm Econtech over recent years which show that since the passage of the BCII Act:

- GDP is 1.5 per cent higher than it otherwise would be;
- the CPI is 1.2 per cent lower than it otherwise would be;
- the price of dwellings are 2.5 per cent lower than they otherwise would be; and
- consumer living standards have improved, reflected in an annual economic welfare gain of \$5.1 billion.⁵⁷

2.59 The validity of the data and the modelling used in these reports has been questioned. In its 2004 report, this committee noted the limited scope of the research

53 ABS, *Industrial Disputes, Australia*, Category 6321.0.55.001, December 2007, Table 2b.

54 The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia, Discussion Paper*, October 2008, p. 17.

55 The Allen Consulting Group, *The Economic Importance of the Construction Industry in Australia*, 21 August 2007, p. vi.

56 Reserve Bank of Australia, *Statement of Monetary Policy*, 13 August 2007, p. 44.

57 MBA, *Submission 5*, pp. 6-7.

and questioned the inferences drawn.⁵⁸ This questioning was continued recently by Senator Doug Cameron at Senate estimates hearings on 23 October 2008 where he questioned the ABCC Commissioner about an error in the data used in the 2007 Econotech report. Commissioner John Lloyd read from an ABCC Media Backgrounder which stated:

Econotech reviewed its use of the Rawlinsons data and removes anomalies. In the 2007 report some data was inadvertently juxtaposed in manually extracting it from Rawlinsons hard copy publications. The recording of incorrect data for 2007 has been rectified.⁵⁹

2.60 Mr Lloyd further explained the reason for the error:

The reason for the change in the presentation of the data in that regard is that the base year changed because there is an apparent break in the Rawlinsons data series from 2003 to 2004. Some of the cost series spiked at the time of the series break, and that is why they have changed it. They are the experts in the Rawlinsons data. Rawlinsons data is a very thick, big document and that is why it was changed in that manner.

2.61 Senator Cameron further questioned Mr Lloyd about examples which may have been provided to Econotech by the ABCC to use in the modelling which would contribute favourably to the findings of productivity improvements. Mr Lloyd stated that he was not sure if the example had been fed into the model but explained that the model takes different variables of movements and various economic data.⁶⁰

Committee comment

2.62 The committee majority makes no comment on issues raised about the veracity of the data used in the Econotech reports except to note that the findings are not universally accepted. The committee also notes the findings of reduced time lost in other industries which bring into question the causal link often cited between improvements in the industry and the BCII Act and the ABCC. The committee notes the lack of evidence to support this link and is encouraged that this linkage too is being questioned by Mr Wilcox.

58 Senate Employment, Workplace Relations and Education References Committee, *Beyond Cole The future of the construction industry: confrontation or co-operation?*, June 2004, pp. 25–29.

59 Education, Employment and Workplace Relations Committee, Supplementary Budget Estimates, *Proof Hansard*, 23 October 2008, p. 132; and Media Backgrounder available at: <http://www.abcc.gov.au/NR/rdonlyres/9D99CD5C-8C6E-4242-B533-66FE7897FD20/0/MB20080801ProductivityintheConstructionIndustryContinuestoImprove.pdf> accessed 30 October 2008.

60 Education, Employment and Workplace Relations Committee, Senate Supplementary Budget Estimates, *Proof Hansard*, 23 October 2008, p. 134.

Senator Gavin Marshall
Chair