Australian Government

Proposed Building and Construction Division of Fair Work Australia

Discussion Paper

October 2008

ISBN 978-0-642-77775-1

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Discussion Paper

This paper is written and issued by the Honourable Murray Wilcox QC, Consultant to the Deputy Prime Minister and Minister for Employment and Workplace Relations. It does NOT purport to express the views of the Australian Government, the Minister or the Commonwealth.

Submissions on this paper are invited. They should be sent, by 5 December 2008, to:

Wilcox Consultations Secretariat
Department of Education, Employment and Workplace Relations
Location code 10M32
GPO Box 9879
Canberra ACT 2601

Email: **fwa_building@deewr.gov.au**

Terms of Reference

The Australian Government has committed to establish a Specialist Division within the Inspectorate of Fair Work Australia with responsibility for the building and construction industry. The Specialist Division will commence operation on 1 February 2010 and will replace the Office of the Australian Building and Construction Commissioner.

The building and construction industry makes a critical contribution to the Australian economy, employment and productivity. The Specialist Division will ensure that all participants in the building and construction industry comply with Australia's workplace relations laws.

The Australian Government has committed to consult extensively with industry stakeholders to ensure the transition to the new arrangements will be orderly, effective and robust.

The Australian Government has asked the Honourable Murray Wilcox QC to consult and report on matters related to the creation of the Specialist Division including, but not limited to:

- The operational structure of the Specialist Division and its relationship with other parts of Fair Work Australia;
- The independence and accountability of the Specialist Division;
- The need, if any, for external monitoring, review or oversight of the Specialist Division;
- The scope of investigations and compliance activities to be undertaken by the Specialist Division;
- The powers required by the Specialist Division and its inspectors for the purpose of conducting investigations and compliance activities;
- The rights of persons who are subject to the investigations and compliance activities of the Specialist Division;
- The responsibilities of the officers of the Specialist Division;
- The reporting requirements of the Specialist Division;
- The resolution of disputes and complaints about the activities of the Specialist Division;
- The use of information collected by the Specialist Division in its investigations;
- The commencement of proceedings by the Specialist Division;
- The interaction of the Specialist Division with other federal enforcement agencies such as the Australian Securities and Investments Commission, the Australian Taxation Office, the Australian Competition and Consumer Commission and with relevant state enforcement agencies;
- The likely resources to be required by the Specialist Division and the ways of ensuring those resources are efficiently and effectively allocated;
- The best ways of ensuring high quality personnel are recruited to and retained by the Specialist Division and are properly trained and supervised; and
- The best manner of ensuring an orderly transition between the ABCC and the Specialist Division.

His Honour's consultations relate solely to the Specialist Division and are separate to the existing consultative processes established by the Government to inform the broader workplace relations framework and the establishment of Fair Work Australia. The Government intends legislation creating a new workplace relations system will be introduced into the Parliament in the second half of 2008.

The Government has asked His Honour to provide his report by the end of March 2009. His Honour's report will assist to inform Government consideration of the creation and ongoing operation of the Specialist Division.

INTRODUCTION

The Australian Labor Party took to the 2007 federal election a workplace relations policy that included the establishment of a "one-stop shop" called Fair Work Australia ("FWA"). FWA was to commence operations on 1 February 2010.

The policy envisaged an inspectorate of FWA that would contain a Specialist Division concerned with the building and construction industry.[1] This division would replace the Office of the Australian Building and Construction Commissioner ("ABCC"). The Policy Implementation Plan, *Forward with Fairness*, promised a Labor Government, "will implement a strong set of compliance arrangements and anyone who breaks a law will feel the full force of the law …there will not be a single moment where our construction industry is without a strong 'cop on the beat'." To ensure that, the document said, the ABCC would continue in existence, with its present powers, until 31 January 2010. The document promised extensive consultation.

On 19 June 2008, the Honourable Julia Gillard MP, Deputy Prime Minister and Minister for Employment and Workplace Relations, appointed me "to undertake consultation and prepare a report on matters related to the creation" of the Specialist Division. The Deputy Prime Minister asked me to report to her by the end of March 2009. Terms of Reference were finalised on 21 July 2008 (see box opposite).

Over the period 21 July to 17 September 2008, I had 29 "first round" meetings with a total of 103 people concerned with the building and construction industry: executives and other representatives of employer organisations and of some individual employers, union leaders, senior officers of state governments, the President of the Australian Industrial Relations Commission, the Commissioner (and a Deputy Commissioner) of the ABCC and the Workplace Ombudsman. These meetings were of a preliminary nature. My purposes were: first, to apprise people of my task and proposed methodology; secondly, to learn what those people regarded as the key issues in the inquiry, and what factual or legal material they saw as bearing on those issues; and thirdly, to discuss with those who contemplated making a formal submission to me the most effective method of doing so.

I found sharp division of opinion on some matters. I highlight those matters in this paper. While I welcome submissions on all matters raised by the Terms of Reference, I am particularly keen to receive submissions about the more contentious issues.

I invite submissions from all interested parties, whether or not they were involved in the first round meetings. Submissions will be more persuasive if they go beyond stating a person's position on an issue; if they set out reasons for that position and, if possible, provide references or factual information supportive of those reasons.

Submissions will be published on the consultations website[2] and thus become available for rebuttal by others. However, there may be rare cases where publication of a name, or other identifying material, will cause a significant problem. In such cases, on application, I will consider use of a pseudonym and masking material.

It is important to note that this paper does not purport to express the views of the Government, the Minister or the Commonwealth. They are my views alone; even then only tentatively so. I am deliberately provocative on some issues and open to persuasion on them all.

3 October 2008,

Murray Wilcox

THE NATURE OF THE BEAST

Many people, especially in the union movement, believe there is no need for a special body to police the building and construction industry. They argue building workers and building employers should be subject to the same set of rules as their colleagues in other industries; no more and no less. They say special laws, especially coercive laws, are inherently discriminatory. They contend that, if there is a need to tighten the enforcement of workplace laws, that should occur across the board; the tightening applying to all employers and employees.

I will, in my report, convey to the Minister my perception of the degree of support for this view. However, it is important to recognise that, for me, there is no question as to whether or not there will be a Specialist Division of the FWA Inspectorate. Consistently with the Government's pre-election policy statements, my Terms of Reference assume there will be such a division: see page 2. Of course, the argument about discrimination is important to consideration of the law relating to the proposed Specialist Division of FWA, and its functions and powers. I will consider it in that context.

While I must assume there will be a Specialist Division, that is the only given. The form, functions and powers of the Specialist Division are all open to debate. Also open to debate is the law that the Specialist Division will be required to enforce. For example, should it continue to be the case that building workers automatically expose themselves to significant civil penalties (fines) if they engage in any industrial action, other than narrowly defined "protected action" or on health and safety grounds?

During my first round meetings, I detected a tendency for many people, on both sides of the employment divide, to assume any new Specialist Division would be much like the ABCC; the ABCC rebadged. However, as the song says, "It ain't necessarily so." Such an outcome would be consistent with the assumption underlying my Terms of Reference, but so would many other outcomes. Like the ABCC, a Specialist Division would enforce any special rules relating to the building and construction industry. Unlike the ABCC, it might also enforce, within that industry, the general laws that are enforced, in other industries, by another FWA division; possibly including recovery of unpaid employee entitlements. Desirably, it would carry out educational work, within the building and construction industry, about participants' rights and obligations. Would it be useful, and appropriate, for it also to carry out other functions, such as determination of safety issues? All options are open for consideration. I ask commentators to think imaginatively, not being bound to the present situation.

BACKGROUND

(1) The Cole Report

1. On 29 August 2001, the then (Coalition) Government appointed the Honourable TRH Cole RDF, QC, a former judge of the Supreme Court of New South Wales, to conduct a Royal Commission into certain matters relating to the Australian building and construction industry. The Commission took evidence in all states and the Northern Territory. Public hearings were conducted on 171 days and private hearings on parts of 22 days.[3]
2. On 24 February 2003, the Royal Commissioner delivered a 23 volume report in which he made numerous findings and recommendations. He suggested four areas of structural reform: [4]
   (a) changes to ensure bargaining only at enterprise level, eliminating "pattern bargaining";
   (b) mechanisms to "ensure that any participant in the industry causing loss to other participants as a result of unlawful industrial action is held responsible for that loss";
   (c) mechanisms to ensure that disputes are settled in accordance with legislated or agreed dispute resolution procedures "rather than by the application of industrial and commercial pressure"; and
   (d) creation of an independent body that will ensure "that participants comply with industrial, civil and criminal laws applicable to all Australians....as well as industry specific laws applicable to this industry only."
3. The Royal Commissioner also called for cultural change, in four respects: [5]
   (a) recognition by all participants that "the rule of law applies within the industry";
   (b) "recognition, principally by the unions but also by the major contractors and subcontractors, that in Australia there exists freedom of choice to either join or not join an association of employees";
   (c) "an attitudinal change of participants regarding management of building and construction projects"; that is, control should be exercised by head contractors and major subcontractors, not by unions; and
   (d) an attitudinal change to safety by all participants: "governments, clients, contractors, subcontractors, unions and workers."
4. The Royal Commissioner identified 25 practices which he regarded as unlawful or inappropriate, leading him to brand the industry as one "which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy." He said: "They mark the industry as singular. They indicate an urgent need for structural and cultural reform." He went on to itemise many "types of inappropriate conduct" revealed by the evidence before him. He thought this stemmed from "a clash between the short-term project profitability focus of the providers of capital, clients, head contractors and subcontractors on the one hand, and the long-term aspirations of the union movement, especially the Construction Forestry Mining and Energy Union, to dominate, control and regulate the industry for its benefit, and what it perceives to be the benefit of its members, on the other hand." [6]
5. The Royal Commissioner thought this clash usually resulted "in those with the short-term focus surrendering to those with the longer-term objective." He said:

   quick fix solutions driven by commercial expediency supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies. Those with longer-term objectives know that those with a short-term focus are vulnerable to delay and cost. There is thus an inequality of bargaining power, when conflict occurs.[7]

CHRONOLOGY

31 December 1996	Commencement of workplace relations legislation - *Workplace Relations Act 1996* ("the WR Act").
22 September 1997	Commencement of Commonwealth-State-Territory *National Code of Practice for the Construction Industry* ("the Code").
February 1998	Commencement of the *Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry* ("the Guidelines"). Application limited to Commonwealth projects.
29 August 2001	Establishment of Cole Royal Commission.
1 October 2002	Establishment of Building Industry Taskforce ("BIT").
24 February 2003	Commissioner Cole delivers Royal Commission report.
6 November 2003	Building and Construction Industry Improvement Bill ("the 2003 Bill") introduced into the House of Representatives.
December 2003	The Guidelines are revised so as to transfer enforcement responsibility to BIT and extend their operation to projects funded (directly or indirectly) by the Commonwealth.
21 June 2004	Senate committee tables its report recommending rejection of the 2003 Bill. (The Bill subsequently lapsed on the prorogation of Parliament for the 2004 election.)
13 July 2004	Commencement of the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* which provided coercive information gathering powers to BIT.
9 October 2004	Federal election at which Coalition Government gains control of the Senate, as from 1 July 2005.
9 March 2005	New Building and Construction Industry Improvement Bill ("the 2005 Bill") introduced into House of Representatives.
12 September 2005	The 2005 Bill becomes law as the *Building and Construction Industry Improvement Act 2005* ("the BCII Act").
1 October 2005	The Office of the Australian Building and Construction Commissioner ("the ABCC") commences operation.
1 November 2005	Further amendment of the Guidelines (released September 2005) so as to extend their application to private projects of contractors interested in undertaking Australian Government work took effect.
27 March 2006	*Workplace Relations Amendment Act 2006 (Work Choices)* took effect.
1 June 2006	Amendment of Guidelines to adopt WorkChoices reforms.
30 April 2007	ALP workplace relations policy announced, including plan to establish Fair Work Australia ("FWA") with a specialist building and construction division.
24 November 2007	Australian Labor Government elected.
22 May 2008	Deputy Prime Minister explains proposed consultation process regarding Specialist Division and issues draft Terms of Reference.
21 July 2008	Consultation Terms of Reference finalised. [8]

6. The Royal Commissioner identified factors that he thought made the industry unique, justifying special legislation: [9]

> *The unwillingness and incapacity of head contractors to respond to unlawful industrial conduct causing them loss is due, principally, to two structural factors. The first relates to their desire to be long-term participants in the industry. To be so, having regard to the competitive nature of the industry and the low profit outcomes, requires them not only to address the short-term focus on profitability of a given project, but to consider the long-term relationship with union participants. They know that unless there is significant acceptance of union demands, there will be continuous industrial disruption on other current and future projects. Clients, including governments, who are major participants in the industry, will not select contractors who are unable to deliver projects on time and within budget. The prospect of industrial disruption is a disqualifying feature for the obtaining of future work, and thus being a long time participant in the industry. This is well understood both by the contractors, and by the unions. It places enormous power in the hands of unions. It encourages unions to use that power to obtain otherwise unattainable outcomes. The threat of the use of power is as effective as its exercise. Each of the unions and the contractors know this and factors this circumstance into their relationships.*
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> *The second structural factor is the weakness in the mechanisms for enforcing laws of general application, including the criminal law, the industrial law, especially the* Workplace Relations Act 2006, *and the civil law for recovery of loss caused by unlawful action. The industrial tribunals and court mechanisms are too cumbersome, too uncertain and too expensive. This results in the mechanisms being underutilised. Further, there is no entity whose function it is to ensure that the industry operates within the law.*
>
> *Financiers and clients, be they government or private sector, do not wish to accept risks of delayed construction. They usually require that risk to be accepted by the head contractor. Head contractors are thus liable for heavy liquidated damages for delayed completion. In addition, delays result in additional standing and overhead charges being incurred. Accordingly, head contractors seek to avoid a delayed construction process. They know, as does the union, what the costs of those delays are. Head contractors seek to assign the risk of delay to subcontractors. Subcontractors normally provide 90 per cent to 95 per cent of the labour to do the construction work. Head contractors provide little labour, but manage the construction process. The assignment of risk to subcontractors means that they also are vulnerable to liquidated damages for delay in their subcontract work.*

7. Commissioner Cole recommended the enactment of special legislation to govern the building and construction industry. This would include the creation of a statutory Commission, comprising about six members, which would be "responsible for monitoring conduct in the industry, and prosecuting unlawful industrial action, breaches of freedom of association laws, and addressing all complaints of unlawfulness in the industry." The Commission's functions would include monitoring of compliance with the Code and Guidelines.
8. The Cole Royal Commission is, and always has been, controversial. In a detailed appraisal, the Senate Committee majority that recommended opposition to the 2003 Bill was critical both of the conduct of the Royal Commission and its findings.[10] These criticisms reflected a widespread view in the union movement that the establishment of the Commission was unnecessary and politically-motivated and that the Royal Commission was conducted in an unsatisfactory way. Critics claim the Royal Commissioner, and counsel assisting, focussed their attention on the supposed sins of unions and employees, ignoring those of employers (tax avoidance, occupational health and safety irregularities and failures to meet legal obligations to employees), that unions were unduly restricted in their cross-examination of witnesses and introduction of evidence and that the report grossly exaggerated union and employee lawlessness. In a submission to the

INDUSTRY OVERVIEW

In both economic and social terms, building and construction is one of Australia's most important industries.

The Cole Commission reported that in 2001-02, the industry's total production amounted to $59.7 billion. The industry contributed 5.5 per cent of Australia's gross domestic product and provided 7.5 per cent of Australian jobs. [11]

Unsurprisingly, given the "resources boom", more recent estimates contain much higher figures. The Australian Bureau of Statistics ("ABS") estimated the total value of construction work in 2006-07 to be $71.2 billion. [12]

In August 2007, the Reserve Bank estimated that the industry then accounted for about 7.5 percent of gross domestic product and provided about 940,000 jobs. [13]

This present inquiry is not concerned with all that activity. The mandate of the ABCC extends only to about two-thirds of the total industry: "commercial" building, including multi-unit residential accommodation, but not including projects involving less than five dwellings.[14] Nonetheless, if the Specialist Division of FWA is to cover the same segment of the industry as does the ABCC, that Division will be charged with responsibilities in respect of construction work currently running at something like $50 billion each year; that is, about two-thirds of about $75 billion total construction work.

Of course, the building and construction industry is not only economically important. The industry underpins our standard of living and lifestyle, which rely heavily upon the use, and therefore maintenance and supplementation, of physical infrastructure. It is essential to maintain, and further improve, the productivity of the industry.

International Labour Organisation ("ILO") dated 14 September 2007, the Australian Council of Trade Unions ("ACTU") commented that, although the Royal Commission identified what it claimed to be "392 instances of unlawful conduct", the Commonwealth Attorney-General made only 98 referrals to prosecution authorities, in relation to 92 of the 392 instances. Only 26 of the 92 instances were said to be breaches of the criminal law. As at February 2006, three years after the Cole Report, 95 of the 98 referrals had been finalised without legal action. The fate of the remaining three matters had not been disclosed. No prosecution action has yet flowed from the Cole Report.[15]

9. It is not my function to review either the conduct or the findings of the Cole Royal Commission. Nor do I have the time or resources to do this. So I express no opinion about most of the controversial matters. However, there can be no doubt that the Royal Commissioner was correct in pointing to a culture of lawlessness, by some union officers and employees, and supineness by some employers, during the years immediately preceding his report. The evidence summarised in the report is too powerful to permit any other view.
10. This does not necessarily mean I agree with all the recommendations of the Royal Commissioner or the enactment of the *Building and Construction Industry Improvement Act 2005* (the BCII Act). It is not necessary for me to form opinions about those matters; my task is not to consider what ought to have been done in 2003, but what should be the position in 2010.
11. I have set out Commissioner Cole's views, not because I adopt them, but because his views were the catalyst for the enactment of the BCII Act. This did not happen immediately. As the Chronology (page 5) shows, there was an earlier Bill, the 2003 Bill, but it failed to pass the Senate.

THE BCII ACT AND THE ILO

The ILO is the oldest existing international body, having been formed in 1919. It presently comprises 182 member States, each of which is represented on the Governing Body by three representatives, one nominated by the relevant national government, one appointed by employer interests and one appointed by the unions in that country. Australia was a founding member of the ILO.

The ACTU complained to the ILO that the BCII Act, read with the WorkChoices provisions of the WR Act, breaches two ILO Conventions that Australia has ratified. The former Coalition government disputed this claim. If the ACTU's argument is correct, it may provide a powerful reason for recommending against inclusion, in the new legislation, of similar provisions. As a general principle, it seems to me, Australia should honour obligations it has voluntarily incurred in the international arena.

The *Freedom of Association and Protection of the Right to Organise Convention, 1948* (ILO 87) includes Articles 2 and 3, as follows:

Article 2. *Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.*

Article 3. *(1) Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*

(2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 8 requires that, in exercising rights under the Convention, workers and employers, and their respective organisations, "shall respect the law of the land." However, that law "shall not be such as to impair, nor shall it be applied as to impair, the guarantees provided for in this Convention."

Article 11 requires each ILO member to "take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."

Article 1 of the *Right to Organise and Collective Bargaining Convention*, 1949 (ILO 98) requires workers to be given "adequate protection against acts of anti-union discrimination in respect of their employment." By Article 2, workers' and employers' organisations are to enjoy protection against interference, by each other or their agents, in their establishment, functioning or administration.

Article 4 requires measures to be taken, presumably by ratifying countries, "to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

After considering submissions from both the ACTU and the former government, the ILO Committee on Freedom of Association ("the CFA"), in November 2005, published a report about the BCII Act, and the earlier 2003 Bill, in which it expressed concern that many WR Act provisions breached these Conventions. Their concern was heightened by sections 37 and 38 of the BCII Act:

> *Whereas the concept of "protected action" under the WRA implies that trade unions might be divested of immunity and incur liability in tort in case of industrial action taken in contravention of the conditions*

specified in the WRA, the concept of "unlawful action" in the 2005 Act implies not simply liability vis-a-vis the employer, but a wider responsibility towards third parties and an outright prohibition.

The CFA also said it:

observes with concern that, in addition to the restrictions on collective bargaining and industrial action imposed as a result of the 2005 Act, this Act also gives considerable investigatory powers to the ABCC without sufficient safeguards against interference in trade union activities. The Committee notes that the ABCC has the power to enter premises, take possession of documents "for as long as necessary", keep copies, and interview any person for "compliance purposes", that is to say, in the absence of any suspected breach of the law. Moreover, there is no reference in the 2005 Act to the possibility of lodging an appeal before the courts against the ABCC's notices. The Committee further notes that there is no consideration in the 2005 Act for the need to ensure that penalties are proportional to the offence committed, given that serious sanctions can be incurred in case of failure to comply with a notice by the ABCC to give information or to produce documents.

The CFA made several recommendations to the ILO Governing Body, including that it should request the Australian Government to:

- modify sections 36, 37 and 38 of the BCII Act "so as to ensure that any reference to unlawful industrial action in the building and construction industry is in conformity with freedom of association principles" and adjust sections 39, 40 and 48-50 "so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry";
- revise section 64 of the BCII Act "to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law," or the decision, or case law, of the administrative labour authority;
- take steps to promote collective bargaining, as provided by ILO 98. "In particular, the Committee requests the Government to review…the provisions of the Building Code and the Guidelines so as to ensure that they are in accordance with freedom of association principles."
- "introduce sufficient safeguards into the BCII Act so as to ensure that the functioning of the ABC Commissioner and inspectors does not lead to interference in the internal affairs of trade unions and, in particular, … introduce provisions on the possibility of lodging an appeal before the courts against the ABCC's notices prior to the handing over of documents."

The Governing Body adopted these recommendations in November 2005. However, Australia did not comply with any of the ILO requests.

After considering further submissions, from both the Australian Government and the ACTU, the CFA re-affirmed its position in each of the following two years, again with the support of the Governing Body.

The problem perceived by the CFA is that ILO 87 and 98 are both concerned with the right of workers to organise themselves into a collective body that can negotiate on their behalf. Although neither Convention talks about strike action, the CFA regarded the right to strike as an essential concomitant to the right to negotiate collectively. The Committee was concerned about those sections of the BCII Act that imposed pecuniary penalties on strikers for unlawful industrial action. It thought the investigatory provisions of the BCII Act increased the weight of those sections. It may follow that the question whether the new legislation affecting building workers will breach either of the ILO Conventions will depend as much upon the rules concerning strike action in the industry as upon the nature of the relevant investigatory powers. Nonetheless, the CFA's comments about the need for review of the exercise of the powers given to the ABCC may warrant attention in the design of the Specialist Division.

(2) THE BCII ACT

12. The BCII Act closely followed the recommendations of Commissioner Cole. The only significant exception seems to be in relation to the structure of the ABCC. Whereas Mr Cole envisaged a statutory Commission, constituted by several Commissioners, section 9 of the BCII Act provides for a more hierarchical structure: a Commissioner and one or more Deputy Commissioners, all appointed by the Minister. All others, including the Assistant Commissioners, are to be public servants engaged by the Commissioner: see section 25.
13. In reading the BCII Act, it is important to bear in mind the definition of "building work" contained in section 5. The definition excludes work related to a single dwelling-house, unless it is part of a project involving at least five single dwelling-houses. Only persons engaged in "building work" are "building industry participants" and, therefore, of interest to the ABCC. The ABCC is not concerned with the many projects that comprise the erection, renovation and/or extension of single dwelling houses.
14. The functions of the ABCC are set out in section 10 of the BCII Act; principally:
    (a) "monitoring and promoting appropriate standards of conduct by building industry participants", including compliance with the BCII Act itself, the WR Act and a Building Code envisaged to be issued by the Minister under section 27 of the BCII Act;
    (b) investigating suspected contraventions, by building industry participants, of the BCII Act, the WR Act, an industrial instrument or the proposed Building Code;
    (c) instituting, or intervening in, legal proceedings; and
    (d) providing assistance, advice, information and representation to building industry participants.
15. The functions of the ABCC are not confined to the conduct of employees and unions. They cover the conduct of building industry employers and contraventions by them of the BCII Act, the WR Act or an industrial instrument such as an award or certified agreement. It is open to the ABCC itself to investigate and prosecute alleged employer misconduct, such as short-payment of wages or denial of award entitlements; rather than, as is its practice, simply to hand these cases on to the Workplace Ombudsman.
16. No section 27 Building Code has yet been issued.
17. The statutory functions of the ABCC do not extend to monitoring compliance with the 1997 National Code of Practice or the Guidelines; although in practice the ABCC does this, apparently pursuant to contractual provisions imposed on parties by clause 4.2.4 of the current Guidelines.
18. The ABCC is subject to Ministerial direction in some respects, but not in relation to a particular case (section 11), and must report annually to Parliament (section 14).
19. Chapter 5 of the BCII Act is unusual, if not unique, in that it imposes substantial monetary penalties upon people in a particular industry who engage in *any* particular industrial action. Chapter 5 imposed that burden retrospectively, to the date when the 2005 Bill was introduced into Parliament.
20. The critical provision in Chapter 5 is section 38. It says: "A person must not engage in unlawful industrial action". Section 37 explains that "unlawful industrial action" is "building industrial action" which is "industrially-motivated", "constitutionally-connected" and not "excluded action."
21. Each of these terms is defined in section 36. Put simply, the section provides that the offence will be committed if, amongst other things, a person takes action in the building industry that adversely affects a corporation, or relates to work that is regulated by an award or certified agreement, and is not:
    (a) "protected action" under the WR Act: that is, action in a notified bargaining period in support of a new certified agreement; (by section 40, particular industrial action loses its protection if it involves "extraneous participants" such as an officer or employee of a union that is not itself a "negotiating party" to the relevant proposed agreement); or

(b) action taken by an employee out of his/her "reasonable concern…about an imminent risk" to his/her own health or safety and the employee did not unreasonably fail to comply with a direction to work elsewhere; (by section 36(2), the employee has the burden of proving these facts).

22. A contravention of section 38 attracts a "civil penalty" (fine) up to $110,000 for a corporation, including a union, and $22,000 for an individual. It may also result in an order to pay compensation to any person who suffered damage as a result of the contravention: see section 49. Also, by section 39, various courts are empowered to make an injunction restraining the industrial action, breach of which would be punishable as a contempt of court.

23. Section 52 is a particularly contentious feature of the BCII Act. This section allows the ABC Commissioner, or a Deputy Commissioner,[16] if he or she "believes on reasonable grounds" that a person has "information or documents relevant to an investigation", or is capable of giving relevant evidence, to give a notice to that person requiring him or her to give information, or produce a document, to the ABCC or 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." The term "assistant" includes any assisting ABCC staff member: see section 52(8). The section makes no provision for payment of a witness' expenses or lost wages.

24. By section 52(3), a summonsed person is entitled to be legally represented at the hearing, although the person conducting the hearing may refuse to allow a particular lawyer to appear (*Bonan v Hadgkiss* (2006) FCA 1334; (2007) FCAFC 113). There is no provision requiring the ABCC to meet the person's legal expenses.

25. It is an offence, punishable by up to six months' imprisonment, for a notified person to fail to comply with the notice, to fail to take an oath or make an affirmation, when required to do so, or to fail to answer questions relevant to the investigation. However, neither the information, answers and documents given or produced by the person, nor "any information, document or thing obtained as a direct or indirect consequence of giving the information or answer or producing the document" may be used in evidence against that person, other than in a prosecution for false swearing: see section 53(2).

26. Wide powers of entry are conferred on ABC inspectors (sections 57-59) and Federal Safety Officers (sections 60-63).

27. Three further provisions of the BCII Act warrant mention. First, section 64 makes unenforceable, to the extent that it relates to building employees, any uncertified agreement that applies to employees of more than one employer; that is, any project agreement. Second, section 67 provides that, if the ABC Commissioner thinks it is in the public interest to do so, he/she may publish details (including the names of alleged offenders) of non-compliance with the section 27 Building Code, the BCII Act or the WR Act. The BCII Act contains no requirements for prior notice to an affected person or for ensuring that person has the opportunity to present a defence. Third, section 69 extends, beyond the common law rules, the liability of an association of building employees (a union) for the actions of its members.

(3) The Code and the Guidelines

The Code

28. The Code has no legislative force. It was issued in 1997 by the Commonwealth, with the agreement of the states and territories, to state principles that would apply to future construction business with governments. It defines the "construction industry" in wide terms, so as to include "all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering."
29. The Code covers eight subjects: the client's rights and responsibilities; business relationships; competitive behaviour; continuous improvement and best practice; workplace reform; occupational health, safety and rehabilitation; industrial relations; and security of payment.
30. The industrial relations section provides for the following:
    (a) compliance with awards and approved agreements;
    (b) no pressure or coercion in respect of the making, variation or termination of workplace arrangements;
    (c) overaward payments to be determined by the individual employer, free from coercion or pressure;
    (d) permissibility of project agreements, incorporating site-wide payments, conditions or benefits, but only for "major projects", that are authorised by the principal, maintain the integrity of individual enterprise agreements and do not "flow on" to other projects;
    (e) application of freedom of association principles;
    (f) dispute settlement at enterprise level, in accordance with agreed procedures; and
    (g) no strike pay unless legally required or authorised by an industrial tribunal.
31. In my first-round meetings, nobody suggested the Code caused them problems.

The Guidelines

(a) Application

32. In early 1998, the Commonwealth Government issued separate Commonwealth Industry Guidelines and Commonwealth Implementation Guidelines.
33. The Implementation Guidelines were subsequently revised and reissued on three occasions, each time by extending their application or tightening their requirements. The latest version, revised in September 2005 and reissued in June 2006, abolished the previous division between Industry and Implementation Guidelines, with one set of Guidelines ("the Guidelines") being now used by Government agencies, tenderers, contractors and other building and construction industry participants.
34. Many aspects of the Guidelines are uncontentious. However, during the first-round meetings, numerous people expressed concern about some provisions, these being directly relevant to their operations.
35. As now framed, the Guidelines have an extremely wide application: see section 2.1.
36. First, they pick up the wide definition of "construction work" used in the Code, but add to it: "building refurbishment or fit out, installation of building security systems, fire protection systems, air-conditioning systems, computer and communication cabling, building and construction of landscapes."
37. Second, the Guidelines apply to some work that is performed well away from any construction site. They cover "material supply contracts where the supplied material is integral to the construction of the project or to the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on site or off site."

38. Third, the Guidelines extend beyond Commonwealth projects. They not only apply to all construction projects indirectly funded by the Commonwealth, above minimum amounts, but also require "parties interested in undertaking Australian Government construction work" to comply with the Code and Guidelines on all their privately-funded, Australian-based construction projects commenced after 1 November 2005. This latter extension applies even to consultants and material suppliers and the "related entities" of interested parties.

39. Section 3.2 of the Guidelines requires that, from 1 November 2005, "all entities tendering for or expressing interest in construction projects directly or indirectly funded by the Australian Government must be compliant with the Code and Guidelines at the time they lodge an expression of interest or tender" and comply with the Code and Guidelines on their privately-funded projects.

(b) Workplace relations provisions

40. It is not necessary to refer to the administrative provisions contained in sections 4 to 7 of the Guidelines. However, it is desirable to note aspects of section 8.

41. Section 8.1 requires tenderers to comply with unregistered industrial agreements, but prohibits unregistered agreements that provide for a site allowance or contain matters that would be "prohibited content" under the WR Act.

42. Section 8.2 picks up the Code's reference to "workplace arrangements", but adds a requirement that parties "ensure that implementation of the Code supports a direct relationship between employees and employers and contractors/subcontractors, with a reduced role for third party intervention in workplace arrangements."

43. Section 8.4 deals with project agreements. It does not ban them, but significantly restricts the circumstances in which they may be used. Additional administrative requirements are imposed, including notification to the funding agency's Minister. Section 8.4.3 states: "Mirror pattern agreements and agreements that seek to apply common terms and conditions across a site are inconsistent with the Code and Guidelines."

44. The freedom of association provision (section 8.5) sets out some, probably uncontentious, general principles. However, it goes on to prohibit certain particular practices. Some of these prohibitions, or their interpretation by the ABCC, have evoked criticism. They include prohibitions on:

    (a) employers providing to unions the names of new staff, job applicants, contractors or subcontractors;

    (b) signs or notices "that imply that union membership is anything other than a matter for individual choice";

    (c) "show card" days;

    (d) employers encouraging or discouraging employees to join a union;

    (e) any requirement for an employer to hire an individual nominated by a union as a non-working shop steward or job delegate;

    (f) pressuring subcontractors to join employer associations;

    (g) using induction forms to require employees to reveal their union status;

    (h) using forms requiring employers or contractors to identify the union status of their employees or subcontractors;

    (i) requirements for employers to apply union logos, mottos or other indicia to company-supplied property, including clothing;

    (j) any requirement for an employee to be exclusively represented by a union in a dispute settlement procedure; and

    (k) any requirement in an industrial instrument for a person to pay a fee to an organisation of which he or she is not a member, e.g. a "bargaining fee".

45. Section 8.6 requires "strict compliance" with the WR Act's limitations on union right of entry and prohibits attempts to avoid those requirements "by allowing delegates or shop stewards to perform a similar function". It also bans an industrial instrument allowing "a person or entity that is not a party to the instrument to monitor its operation." This means that, if a union is not itself a party to an industrial agreement, it cannot monitor its implementation, even at the request of union members who are parties.

46. Section 8.7 requires dispute settlement "to be dealt with at the workplace between the appropriate level of management, employees and where applicable, union representatives." This provision may result in inconsistency with state industrial laws and Notional Agreements Preserving State Awards; mandatory union encouragement clauses are often required in certain state agreements or awards. Section 8.7 seems to have precluded some unincorporated potential tenderers bound by non-compliant instruments from tendering for projects caught by the Guidelines. If this effect is widespread, it may seriously be affecting competition in the construction industry, including amongst material suppliers.

47. Section 8.10, relating to "Workplace reform", makes industrial instruments containing a variety of provisions non-compliant with the Guidelines. Concern has been expressed about the prohibition of restrictions on an employer's choice of labour categories, on the ground that it bars any attempt by employees or their union to ensure employers take on a reasonable number of apprentices. However, in practice, the impact of this provision relates more closely to "casual conversion" clauses, with apprenticeship ratios considered compliant with the current Guidelines on the basis that ratios of apprentices to workers on site is an occupational health and safety and training issue, rather than a restriction on labour.

48. More generally, in its response to the ACTU complaint about the BCII Act, the ILO CFA (see page 8 box) made this comment regarding section 8.10:

> *…the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference, which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organisations should have the right to organize their activities and to formulate their programmes.*

(c) Enforcement

49. Section 9 of the Guidelines details processes for monitoring and reporting on compliance with the Code and Guidelines, and for determining whether a sanction should be imposed on a party for a breach. The section envisages that a Code Monitoring Group (the "CMG"), which is supported by a Working Group and Secretariat, will deal with Code related issues including alleged breaches. In practice, if a question of non-compliance arises, the CMG notifies the affected person and considers whatever submission that person might make in relation to the alleged breach. If the CMG is not satisfied with the explanation, it may deliver a formal warning to the alleged offender or recommend to the Minister that the person be precluded from tendering for Australian Government work for a particular time and within a particular geographical area.

50. Section 9.5 of the Guidelines provides for review of a CMG decision by the Secretary of the Department of Employment and Workplace Relations (now Department of Education, Employment and Workplace Relations). It also recognises the availability of the jurisdictional writs provided by section 75(v) of the Commonwealth Constitution. However, those writs would not usually allow a court to resolve a dispute as to the interpretation of the Guidelines or their application to the particular case, and certainly not a dispute as to the facts of the case. The clause specifically excludes judicial review under the *Administrative Decisions (Judicial Review) Act 1977* and merits review by the Administrative Review Tribunal ("AAT").

(d) Submissions invited

51. There is a question whether the content of the Guidelines falls within my Terms of Reference. The Terms of Reference do not explicitly refer to the Guidelines. However, they do require me to report "on matters related to the creation of the Specialist Division." These matters are "not limited to" the subjects listed in the dot points. Some have argued that, given that the Specialist Division will replace the ABCC, which spends much of its time policing Guideline compliance, the content of the Guidelines is related to the creation of the Specialist Division.

52. I see no point in a semantic debate about this matter. I am prepared to receive, and pass on to the Minister, any submissions that people wish to make about the Guidelines. It will be for the Minister to determine what course she should take in relation to them. Accordingly, I invite you to consider, and indicate to me:

    (a) whether or not you favour the retention of the Guidelines, in addition to the 1997 Code;

    (b) if the Guidelines are to be retained, how they may be improved; either by adding desirable provisions or amending or removing undesirable provisions;

    (c) why you have that opinion; and

    (d) what factual information supports your view.

BUILDING INDUSTRY PRODUCTIVITY

During each of the last two years, the ABCC has commissioned Econtech Pty Ltd, an economics researcher, to report on productivity changes in that part of the construction industry that lies in the ABCC's domain, the "commercial" sector. For each report, Econtech decided to measure the changes by examining the differential between the cost incurred by "commercial" builders, on the one hand, and single dwelling builders, on the other, for eight selected building items. Apparently, it is usual for the cost of an item provided to dwelling house builders to be lower than the cost of the same item supplied to "commercial" builders. Costs were obtained from the relevant year's edition of *Rawlinsons Australian Construction Handbook*. An edition is published each January, reflecting costs as at the end of the preceding year.

In 2007, Econtech calculated the differential, in respect of the sum of the eight items, for each of the years 1994 to 2007 in each mainland state; also the five-state ("Australian") average. Purportedly on this basis, Econtech said the Australian 1994-2003 average differential was 10.7 per cent, that it was 17.2 per cent in 2004, 14.3 per cent in 2005 and 11.4 per cent in 2006, and fell to 1.7 per cent in 2007. Using those figures, Econtech went on to calculate the boost to the Australian economy that had been achieved by reform of the "commercial" building sector. [17]

This result was widely publicised. However, some people doubted the 1.7 per cent figure. It would mean the differential had dropped by 85 per cent in one year. It seems 1.7 per cent was, indeed, incorrect. The figure was not the average of the five states' 2007 figures that were set out in the relevant Table; nor was its provenance otherwise explained in the report.

In the 2008 report, which was limited to the years 2004-08 and used adjusted *Rawlinsons* data, 2004 is still the spike year, but the reduction from 2004 to 2008 is less steep. Comparison between costs in January 2006 (three months after the start of the BCII Act and the establishment of the ABCC) and January 2008 reveals a differential drop of only 6.75 per cent, over the two years (16.3 per cent to 15.2 per cent). [18]

Because of Econtech's adjustments to *Rawlinsons*' figures, it is difficult to be sure, but the 2008 differential (15.2 per cent) seems to be higher than for the 1994-2003 average and for all but one of those 10 years.

The lack-lustre result reported by Econtech in 2008 is perplexing. Over the period 1996-2007, there was a significant reduction in time lost in the construction industry due to industrial disputes. If only for this reason, one would expect significant productivity gains to show up in any study. Perhaps the explanation of their non-appearance in the 2008 report is that, contrary to Econtech's assumption, the suppliers of the eight selected items did not pass on all their productivity gains in lower prices.

In August 2007, the Allen Consulting Group ("Allen") provided a report to the Australian Constructors Association concerning the economic impacts of a ten percent decrease in multi-factor productivity in the non-residential construction industry. In the Executive Summary of the report, Allen said: [19]

> *With the exception of a fall in 2001, which was most likely associated with the introduction of the GST, construction industry labour productivity has consistently exceeded labour productivity of the economy as a whole. Multi-factor productivity in the non-residential construction industry has displayed similar trends to those of labour productivity. The multi-factor productivity index measures industry gross value added per unit of capital and labour input. Multi-factor productivity increased strongly throughout the 1990s and peaked just prior to the introduction of the GST. Following a short but sharp fall in productivity following the introduction of the GST, multi-factor productivity rebounded quickly and has been increasing since 2001.*

ABS statistics for 1996 to 2007 inclusive reveal that time lost in the construction industry—that is, the whole industry, not just the "commercial" sector—was as follows (thousands of working days lost): 1996, 334.7; 1997, 107.8; 1998, 210.9; 1999, 165.4; 2000, 108.8; 2001, 120.7; 2002, 101.6; 2003, 123.3; 2004, 120.1; 2005, 89.4; 2006, 15.2; and 2007, 6.8. [20] This is a dramatic fall. However, two comments seem appropriate.

First, the 1996-2007 reduction is not necessarily attributable to the BCII Act and the ABCC; or not all of it anyway. ABS statistics [21] also show substantial reductions in lost time in other industries. For example, the figures in the relevant 12 years for the coal mining industry were: 160.8; 95.7; 60.4; 26.0; 37.4; 19.3; 6.9; 7.8; 5.6; 12.4; 2.9; and 3.4. The figures for all manufacturing were 103.3; 145.6; 95.4; 184.5; 146.3; 195.4; 87.9; 116.8; 47.7; 55.0; 45.8; and 15.1. The decline is even steeper in the All Industries table: 928.7; 534.2; 526.4; 650.7; 469.1; 393.1; 259.1; 439.5; 379.8; 228.2; 132.7; and 49.7. Community-wide factors may be responsible for most, if not all, of the reduction, over these 12 years, of lost time in the construction industry.

Second, the Allen report shows that 1996 was an abnormal year. In the five years preceding 1996, lost time in the construction industry was less than in the period 2001-2007. In paragraph 2.6 of its report, Allen summarised the position thus:

> *The number of industrial disputes in the construction industry has been very low since 2000, and particularly low in the past year…The late 1980s were characterised by a significant number of disputes. There were comparatively few disputes through the first half of the 1990s. 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.*

The only possible justification of having specially restrictive rules for the building and construction industry must be that this is necessary to provide industrial peace and an acceptable level of productivity. Many people assert that the industry's present happy position, in these respects, is attributable to the BCII Act and the activities of the ABCC. Is there any hard evidence that supports that assertion?

(4) The ABCC in operation

53. Two ABCC annual reports have, so far, been tabled in Parliament (2005-06 and 2006-07). During both those years, there were, in addition to the Commissioner, two Deputy Commissioners and three Assistant Commissioners. All these people have individual areas of responsibility, but they also meet fortnightly with the Commissioner to determine the ABCC's operational, legal and corporate strategies. [22]

54. According to the two annual reports, in its 21 months operation to 30 June 2007, the ABCC finalised 111 investigations. At 30 June 2007, another 112 were ongoing.

55. In the 21 months to 30 June 2007, the ABCC issued 49 notices under section 52 of the BCII Act. The 2005-06 report does not break up the recipients of notices issued in the nine months covered by that report but the 2006-07 report states that, of the 20 notices issued during that year, 15 went to employees, four to union officials or delegates and one to management. The 2006-07 report says:

    The compliance powers have continued to be a particularly effective method of obtaining information from reluctant witnesses. The use of these powers has assisted investigations which would otherwise have stalled. It enables the ABCC to make fully informed decisions as to whether or not the evidence warrants prosecution for a civil penalty.

56. The 2006-07 report reveals the subjects of investigation in each of the two financial years: trade unions, 61 per cent and 73 per cent respectively; employees 16 per cent and 11 per cent; head contractors 13 per cent and 7 per cent; subcontractors 4 per cent and 4 per cent; employers and employer associations 3 per cent and 3 per cent; others 5 per cent and 3 per cent.

57. The main matters investigated were: unlawful/unprotected industrial action 27 per cent and 25 per cent; coercion 17 per cent and 18 per cent, freedom of association/discrimination 9 per cent and 11 per cent; breach of permit/right of entry rules 6 per cent and 18 per cent; agreement/dispute resolution 13 per cent and 8 per cent; strike pay 7 per cent and 5 per cent; and compliance with AIRC orders 5 per cent and 3 per cent. Alleged criminal activity accounted for only 1 per cent and 3 per cent, respectively, in the two years.

58. It appears that the ABCC makes many site visits, mainly for educative purposes. However, in the 21 month period, there were also 21 "site inspections" and 33 "audits". The 2006-07 report explains what the ABCC means by these terms:

    Site inspections focus on practical on-site behaviours which may contravene the principles of the Code. The aim of these inspections is to assist the site in becoming Code compliant and also enable the ABCC to identify if there is a need for a more detailed audit.

    Audits are more in-depth examinations of business systems and practices to ensure they are consistent with the Code and Guidelines. They include on-site visits, detailed review of documents and formal interviews.[23]

59. The reports list the legal proceedings taken during each of the financial years. In 2005-06, the ABCC had 26 penalty proceedings before the courts, 19 of which were inherited from the BIT. They included strike pay (34 per cent), coercion (31 per cent), unlawful industrial action (11 per cent), right of entry (11 per cent) and freedom of association (8 per cent). Nine new proceedings were instituted in 2006-07.

60. The ABCC has power, under section 72 of the BCII Act, to intervene in proceedings before the Australian Industrial Relations Commission ("the AIRC") that arise under the WR Act and involve a building industry participant or building work. The annual reports reveal that the ABCC exercised this power 21 times in 2005-06 and 34 times in 2006-07. The later report states that the "vast majority of cases were resolved quickly and on a satisfactory basis."

61. The 2006-07 report also says: "Anecdotal evidence from building industry participants suggests that the ABCC's power to intervene has been a positive force in this regard." However, no hard evidence of the utility of intervention is offered.

(5) Occupational health and safety

62. No aspect of the building and construction industry is more important than occupational health and safety ("OHS"). On this aspect, the interests of employers and employees (and governments) converge.

63. During the first-round discussions, some (inconsistent) assertions were made about the effect on OHS of the WR and BCII Acts. On the one hand, it was said by some employers, and their representative organisations, that the greater employer control these statutes provide has meant that management now takes a more proactive role in maintaining high standards of OHS on building sites. It was asserted this has meant a reduction in work-related deaths and injuries. On the other hand, some union leaders claimed the WR Act's tight restrictions on union officials right of entry, coupled with the ABCC's zealous enforcement of those restrictions, has prevented union officials from carrying out their historic role of detecting potential site dangers and influencing management to take remedial action before an accident occurs.

64. The building and construction industry should not be regarded as homogeneous. No doubt there are responsible employers and irresponsible employers, conscientious and reasonable union officers and some who are not. So it is possible that both assertions are correct, depending upon which building or construction site is being considered. Nevertheless, I have thought it useful to look at such relevant statistics as are available. Unfortunately, they are not very recent.

65. In June 2008, the Australian Safety and Compensation Council ("ASCC") published *Compendium of Workers' Compensation Statistics Australia 2005-2006*. This reveals that, in 2005-06, Australia-wide and covering all industries, there were 15.6 serious workers' compensation claims per 1000 employees. That figure was down from 20.8 in 1997-98 and 16.8 in 2004-05, itself a drop of 19.2 per cent over the eight year period. During the same period, the frequency rate (serious claims per million worked hours) fell from 12.2 to 10.1 (17.2 per cent).[24]

66. In terms of number of serious claims, construction has ranked third or fourth in each of the eight years 1997-98 to 2004-05, the number of claims being higher in the last two of these years than in the first. However, in terms of both the incidence rate and the frequency rate, there was a steady improvement. The incidence rate figures are 37.2; 33.2; 30.9; 33.1; 30.2; 29.9; 29.2 and 27.1; a drop of 27.15 per cent over the eight years. The frequency rates figures show a similar pattern: 18.4; 16.5; 15.3; 16.8; 15.6; 15.2; 14.9 and 13.9, an overall drop of 24.45 per cent. [25]

67. When self-employed workers are excluded, the construction sector improvement is less pleasing. There are no frequency rate figures that exclude self-employed workers. However, the incidence rate improvement is 19.29 per cent and 17.40 per cent, for employed building construction workers and non-building construction workers respectively. These figures are much the same as those for all employees in all industries. [26]

68. My first reaction to the ASCC statistics is that they do not give much support to either side's argument concerning the effect on safety of the WR and BCII Acts. However, I invite submissions about that matter, and also any other statistical material that may be instructive.

(6) The Workplace Ombudsman

69. On 27 March 2006, the Coalition Government established the Office of Workplace Services ("OWS") as an executive agency. OWS was replaced, on 28 June 2007, by a statutory authority, the Workplace Ombudsman ("WO"). The task of the WO, like the OWS before it, was described in the WO's Annual Report 2006-07 as being to "protect the workplace rights of employers, employees and their representatives". The report claims this has been achieved "through a strong mix of targeted compliance and education activities; the use of voluntary compliance activities and, where the circumstances warrant, through in-depth investigations and prosecutions." [27]

70. To facilitate investigations and prosecutions, the WR Act confers certain powers. By section 167 of that Act, the WO may appoint workplace inspectors who are invested (by section 169) with special powers. These powers are to be exercised for the purpose of determining observance of workplace agreements, awards, minimum legal standards and the WR Act. The powers are to enter, without force, any premises in which the inspector has cause to believe relevant work is being performed or there are relevant records; to inspect any work, material, machinery, appliance, article or facility; to take samples of goods or substances; to interview any person and to require the production of any relevant document. By section 819 of the WR Act, it is an offence, punishable by up to six months' imprisonment, for a person to contravene a requirement to produce a document. However, there appears to be no penalty for failure, in other ways, to cooperate with an inspector. In particular, there is no mechanism for compulsory interrogation, as under section 52 of the BCII Act.

71. Notwithstanding the lack of a compulsory interrogation power, OWS and WO have, in a short time, notched up an impressive record. In the 2006-07 financial year, they recovered from employers, on behalf of over 9,600 employees, entitlements worth $13.5 million. 99.3 per cent of this money was recovered without resort to litigation, but 41 underpayment court proceedings were brought. Court determinations were made in 19 matters, with the courts ordering defendant employers to pay $86,447 in underpaid wages and $409,155 in penalties.[28]

72. For present purposes, what is the significance of this success?

73. Under the new workplace legislation, the WO will be folded into FWA.[29] FWA will have an Inspectorate, whose inspectors will apparently have functions and powers like those of WO inspectors. Some may think, in that case, there is no need to give a specialist building and construction division any additional investigation or enforcement functions or powers; the WO already may investigate and, if appropriate, prosecute any breaches of workplace law. Others may argue that, even if the Specialist Division is to be given investigative and enforcement responsibilities in the building and construction industry, the WO's success shows there is no need for powers of compulsory interrogation, such as those conferred by section 52 of the BCII Act. Still other people may argue that the WO's success is irrelevant; recovery of unpaid entitlements, with the benefit (presumably) of willing evidence from the short-paid employee and access to the employer's documents, says nothing about the need to compel disclosure of information about substantially undocumented events on or near building sites.

74. Comment on this question is invited.

DIFFERENT RULES

The basis for the complaint by the building unions about section 38 of the BCII Act is that it treats industrial action by building workers much more harshly than industrial action by other workers. This includes the circumstances under which industrial action attracts penalties, the size of penalties, the BCII Act provision of statutory remedies against employees and unions and the reverse onus of proof concerning an imminent threat to safety.

Penalties under the WR Act for unprotected action are limited to specific circumstances, most notably where there is an agreement (collective or individual) in place that has not passed its nominal expiry date. Outside of these circumstances, and some other limited circumstances (e.g. where the unprotected action is taken for a reason that would breach the freedom of association provisions or the coercion in relation to agreement making provisions), unprotected industrial action is not automatically subject to any civil penalties. So generally speaking, if there was no agreement in place, or any agreement had passed its nominal expiry date, then there would be no penalty under the WR Act for unprotected action. This contrasts with the BCII Act, where such action would be unlawful (providing it satisfied the other requirements to be unlawful action in section 37) and subject to the range of sanctions under that Act.

The penalty provided for breach of section 38 of the BCII Act, for an individual, is up to 200 penalty units ($22,000), while the penalty for an individual under section 494 of WR Act is up to 60 penalty units ($6,600).

Unlawful action taken by individuals in the building industry exposes them to statutory remedies for compensation for damage resulting from the unlawful industrial action, as well as civil penalties. Damages are not available under the WR Act provisions, although it would be open for an affected party to seek damages through an action in tort.

Under the BCII Act, if an individual is concerned about a safety matter, the onus of proof rests on the individual to prove there was an imminent threat to safety. There is no similar onus under the WR Act.

CONTENT OF THE LAW ENFORCED BY THE SPECIALIST DIVISION

(1) The purposes of the BCII Act

75. Before turning to the detailed matters mentioned in my Terms of Reference, it is desirable to say something about the possible content of the law that the Specialist Division will be expected to enforce.

76. The Government has apparently not yet decided whether, assuming there are elements of the BCII Act which it would wish to retain, it should keep that Act in existence, with appropriate amendments, or place the desired elements in a different Act. Perhaps this does not much matter. The more important question is: what elements of the BCII Act should continue to exist? In addressing that question, it is helpful to keep in mind the two main purposes of the BCII Act. They are entirely separate. It is possible, theoretically at least, to retain either of these purposes without the other; or, of course, both or neither of them.

(2) Penalisation of unprotected industrial action

77. The first main purpose of the BCII Act is to impose on participants in the building industry penalties in respect of unprotected industrial action. This purpose is achieved by Chapter 5 of the Act, in particular by section 38. It will be recalled that this section imposes a substantial monetary penalty upon any person in the building industry who engages in "unlawful industrial action"; in practical terms, any industrial action other than "protected action" or action based on a reasonable concern for the employee's health or safety.

78. The building unions argue that Chapter 5 is discriminatory. They are correct, in the sense that the Chapter imposes rules on participants in the building industry that do not apply to participants in other industries: see (the box on page 21).

79. Many employers accept that Chapter 5 is discriminatory, in the sense mentioned above. However, they argue the discrimination is justified. They assert the building and construction industry has a deplorable track record, one that cannot be compared with that of any other industry, and that a provision like section 38 of the BCII Act is essential to ensure an acceptable level of industrial harmony and productivity. An example of this approach is to be found in a paper recently published by the Australian Mines and Metals Association ("AMMA").[30] That paper asserts there has been insufficient cultural change in the building and construction industry to justify abandoning section 38 (and the present powers of the ABCC). In particular, at pages 30-32, the paper lists seven court or AIRC decisions that unlawful industrial action had occurred, or was likely to occur. On its face, the list makes a strong case against any abandonment, at this stage, of Chapter 5. However, is the AMMA list correct? Is the incidence of unlawful industrial action in the building and construction industry higher than in other heavy industries? If there is a case for continuing Chapter 5, should this be on an interim basis or indefinitely? AMMA suggests a review of the situation after five years. Is this an appropriate time? I would like to have comments about all these matters, from people on both sides of the debate. In particular, I am interested to receive comment from those who would abolish section 38 about the seven cases mentioned by AMMA.

80. In considering the desirability of continuing Chapter 5, it is necessary to bear in mind the general provisions of the new legislation that will apply to building employees in company with all other employees.

81. On 17 September 2008, the Deputy Prime Minister released further information about the proposed new general legislation.[31] She confirmed that the Government will retain the concept of "protected action", this being industrial action undertaken only within a collective bargaining period and, even then, only after a secret ballot of affected employees and three days notice to the employer. Presumably, there will be a health and safety exception, but the criteria are tight. Ms Gillard said that "unprotected industrial action will not be tolerated under any circumstances", that the FWA will be empowered to order a resumption of work, and,

perhaps more importantly, it will be unlawful for an employee to demand, or an employer to pay, strike pay for a period of unprotected action. Presumably, any breach of the strike pay prohibitions will attract a significant penalty. There will be a mandatory loss of four hours pay, even if the unprotected action ends in less time than that.

82. Under these circumstances, some people may argue, there is no need to retain special provisions, unique to the building industry, in respect of unprotected action. Unprotected action will already attract the automatic penalty of loss of wages for the duration of the action, with a minimum four hours' lost wages. Why double up the penalty, especially in a discriminatory way? Is this argument correct?

83. Are there other ways of tackling the problem of unlawful industrial action? For example, would it be possible to penalise a union which is involved in unlawful industrial action by withdrawing that union's right of entry to the site for a period of time; or even its right to represent workers on that site? If so, would a combination of that penalty and the automatic loss of wages by employees be sufficient to discourage unlawful industrial action?

(3) The ABCC

84. The second main purpose of the BCII Act is to create and empower a special building and construction investigatory and enforcement body, the ABCC. The relevant parts of the Act are summarised in paragraphs 12 to 27 above. The question whether it is appropriate to take similar provisions into the new legislation is discussed below.

(4) The Guidelines

85. In considering the future desirability of provisions like those now contained in the BCII Act, it is desirable to think about the enforcement role that might be played by revamped Guidelines. The current Guidelines have no statutory force. They are amendable at the whim of the Minister of the day, without the necessity (legally, at least) for consideration by Cabinet or the Parliament. The current Guidelines are not a disallowable instrument, meaning that neither House of Parliament has power to set them aside. Thus there is no Parliamentary supervision of the content of a body of rules whose application may have a profound effect upon a building participant's business. And it is doubtful there would be any way in which a court could intervene effectively to protect a person against a perverse interpretation or application of the Guidelines. There would appear to be a strong case, if the Guidelines are to be retained, for putting them on a more formal basis, at least to the extent of providing for them to be a disallowable instrument and providing effective recourse to the courts in respect of any legal dispute—for example about their interpretation or application—and the AAT for review of the merits of particular decisions.

86. A number of the people with whom I have consulted have criticised the wording of the current Guidelines. They say they are unnecessarily wordy and contain too many ambiguities. If there is force in these criticisms, it would seem desirable for them to be revised before they are converted into a disallowable instrument.

87. If the Guidelines are to be retained, there is an opportunity to expand their area of application. Although the current Guidelines cast a wide net, they do not catch employers who have no interest in carrying out federally-funded work. Yet, if the Guidelines set out rules that are necessary in order to maximise harmony and productivity in the building and construction industry, why stop there? Legally, it would be possible to extend the application of the Guidelines (whatever they might then be called) to all corporate employers, thus catching all but the smallest employers. Of course, in order to do this, it would be necessary to give the Guidelines a statutory underpinning, but that is desirable in any case. In order to provide a worthwhile sanction against employers who are not interested in federally-funded work, it would also be necessary to provide for a civil or criminal penalty.

88. I am not presently suggesting the Government should take the course mentioned in the preceding paragraph. I merely throw it out as an option for consideration. Some people might see stronger Guidelines as an opportunity to ensure employers will not yield to inappropriate employee demands. They might argue that, once it is known that employers cannot yield, inappropriate demands will cease. Would there be any merit in such an argument?

STRUCTURE, ACCOUNTABILITY AND INDEPENDENCE

89. It is convenient to discuss together the first two items in my Terms of Reference:

    (a) The operational structure of the Specialist Division and its relationship with other parts of Fair Work Australia; and

    (b) The independence and accountability of the Specialist Division.

    I will confine discussion in this section to accountability within FWA, as distinct from external monitoring, which is mentioned in the third term of reference.

90. On 17 September 2008, the Deputy Prime Minister stated [32] that FWA will consist of a President, Senior Members and Members. There will be a Chief Executive Officer and administrative staff. Ms Gillard also confirmed that the new FWA will be a "one-stop shop", subsuming a number of federal authorities: the AIRC, the Australian Industrial Registry, the Australian Fair Pay Commission and Secretariat, the Workplace Authority and the Workplace Ombudsman, as well as the ABCC. It will be a large organisation.

91. No doubt the President will be the public face of FWA. It is not yet clear to what extent (if any) he/she will have overall responsibility for the organisation; but it is obviously not intended that the President will make or control all its decisions and actions. Nor would this be practicable. The Senior Members and Members will each have responsibility for their own decisions and the Chief Executive Officer will presumably have overall administrative responsibility, possibly subject to any direction of the President.

92. The Deputy Prime Minister made clear there will be an Inspectorate within FWA. This will be an investigation and prosecution unit, headed by a Director who will appoint Fair Work Inspectors.

93. The Terms of Reference indicate the Specialist Division will be a division of the Inspectorate. The Specialist Division will not exercise rights-making functions, as the AIRC traditionally has done. Its duties will be limited to investigation and enforcement. But of what laws? That is the issue just discussed.

94. As FWA is to be a single entity, it will be necessary for the Chief Executive Officer to be administratively responsible for the Inspectorate. Similarly, as the Specialist Division is to be part of the Inspectorate, the Director will have a degree of responsibility for the Specialist Division. However, there is a question as to the extent to which the Specialist Division should be under the direction of the Director.

95. No doubt it will be essential for the Director, and even the Chief Executive Officer, to be involved in financial, personnel and other administrative decisions concerning the Specialist Division. It does not follow that either of these people should be made responsible for each discretionary decision taken on behalf of the Specialist Division; for example, whether to undertake a particular investigation or whether to exercise a particular power. Subject to any requirement for concurrence, it might be best to allow such decisions to be made at a divisional level. An analogy is to be found in the court system. Each of the Australian federal courts has a one-line budget appropriation that is administered by the Chief Justice of the court, with the aid of a Registrar/Chief Executive Officer. The judges of each court play a role in its administration, but ultimate responsibility is vested in the Chief Justice alone. However, the Chief Justice has no role in other judges' judicial decisions. Determination of the outcome of a particular case is the independent, personal responsibility of the judge or judges assigned to the case. It is reviewable only on appeal to any available higher court.

96. Judges in the federal courts exercise the judicial power of the Commonwealth, whereas the specialist building and construction division would exercise administrative power. This does not undermine the analogy; members of the AIRC exercise Commonwealth administrative power but nonetheless have independence, and personal responsibility, for their decisions, which are reviewable only on appeal. Presumably, it is intended that Senior Members and Members of FWA will be in a like position.

97. I see no difficulty in fitting a specialist building and construction division into the Inspectorate. That division would need a leader, whom I will call "the Divisional Manager", who would presumably report to the Director. However, there might be a case for the Divisional Manager to share responsibility with a divisional supervisory board. Much will depend upon the functions and powers given to the Specialised Division. It might be argued that, the more significant its functions and draconian its powers, the greater the need for a divisional supervisory board, not just an executive head. This seems to have been the thinking of Commissioner Cole, in recommending a statutory Commission on which there would be room, at any one time, for a variety of people, drawn from most, if not all, the states and territories.

98. I envisage that any divisional supervisory board would comprise some five to seven people, drawn from a variety of backgrounds and based in various states and territories. These people might be appointed, on a part-time basis, for a term of years: thereby obtaining a measure of independence from the government of the day. The divisional board would be responsible for determining the Specialist Division's policies and programs, leaving day-to-day implementation of them to the Divisional Manager.

99. If there is to be a divisional supervisory board, it might be advisable to give that board the task of reviewing any decision by the Divisional Manager to undertake a particular investigation and/or compulsorily interrogate a particular person. It would be important to avoid making the decision-making procedure too cumbersome or slow; however, in the age of email and telephone conferencing, that need not be a problem. Is a supervisory board a good idea or not? If so, what ought to be its role?

100. There is a question whether inspectors should work only within the Specialist Division or assist in other divisions as well. A pragmatic approach might be best. In a place where there is considerable building and construction activity, it might be advantageous to deploy an inspector only on that work; but to allow overlap with other industries where there is insufficient building and construction activity to keep the inspector fully occupied. I would welcome comment on this point.

101. There is also a question about the role of the Specialist Division. Should it follow the lead of the ABCC and confine itself to alleged transgressions by unions and employees, concerning itself with employers only to the extent that they are alleged to be involved in those transgressions; or should it investigate other alleged breaches by employers; for example non-payment of employee entitlements? And should the Specialist Division carry out educative activities and/or OHS inspections and prosecutions?

102. A further issue is the extent to which the Specialist Division will be independent of government. To some extent that might depend on the independence of FWA generally. However there may be a particular concern about independence if the Specialist Division is granted coercive interrogation powers. It will be recalled that section 11 of the BCII Act allows the Minister to direct the ABC Commissioner regarding the exercise of the ABCC's powers and functions under the Act, but not in relation to a particular case. Does this provision strike the right balance for the Specialist Division? Or does it give the Minister too much, or too little, control?

THE SCOPE OF INVESTIGATION AND COMPLIANCE ACTIVITIES

103. The fourth dot point in the Terms of Reference requires me to consider what should be the scope of the Specialist Division's investigation and compliance activities.

104. The ABCC's functions are stated at paragraph 14 above. It would be possible to give the new Specialist Division exactly the same functions as those of the ABCC. Bearing in mind that those functions include the investigation and prosecution of employer breaches, such as non-compliance with awards and certified agreements, is there need for anything more?

PROFESSOR WILLIAMS' VIEW ON POWERS

At a forum in Canberra on 25 August 2008, [33] Professor George Williams criticised the ABCC's coercive and investigatory powers, which he described as "exceptional and unwarranted".

He said the power conferred on the ABCC by section 52 of the BCII Act could be used to require a person to:

- *Reveal all their phone and email records, whether of a business or personal nature.*
- *Report not only on their own activities, but those of their fellow workers.*
- *Reveal their membership of an organisation, such as a union.*
- *Report on discussions in private union meetings or other meetings of workers.*

The provisions can be applied not only to a person suspected of breaching the law, but to:

- *Workers in the building industry not in any way suspected of wrong doing.*
- *Innocent bystanders.*
- *The families, including children of any age, of workers in the industry.*
- *Journalists and academics (or even, to take what might seem a farfetched example, a priest regarding what someone has told them in the confession box).*

Professor Williams explained he was not saying the law has often or will be used in this way, "but the problem is that the law permits this to occur. It is a basic principle of the rule of law that a statute should go no further than its justified use. The proper scope of the law should not depend upon the discretion and goodwill of the holder of the power."

The professor said section 52(7) of the BCII Act "is remarkable in further overriding secrecy provisions in other laws. Section 52(7) has the potential to even override national security laws relating to ASIO. Even if information must be kept secret to protect the community or the national interest, it may need to be revealed under the ABCC Act. The possibility puts the ABCC law at a higher level than the national security laws themselves."

Professor Williams went on to speak of the "low threshold for the use of the ABCC's powers." After citing some of the BCII Act's definitions, he said:

Hence the ABCC's powers extend beyond criminal activity to the most minor or petty award breaches. In aid of this, confidentiality and secrecy can be overridden and the Commission can compel someone to provide incriminating evidence. Even then the information sought need not be necessary for the investigation of the breach, it need only be 'relevant to an investigation'.

After referring to the penalties provided by the BCII Act, the professor noted the lack of safeguards against abuse of the powers conferred on the ABCC:

The ABCC has been given extraordinary powers that exceed even those given to police in investigating major crimes. The ABCC's powers cannot even be described as police powers because they go far beyond what the police have been given.

Professor Williams conceded that similar powers were to be found in other statutes. But he thought the context was important:

> *A power appropriately given to ASIC to catch corporate criminals may be inappropriate when given to a body dealing with industrial disputes. In any event, the ABCC regime is different, and more problematic, because:*
>
> - *Other regimes do not operate in such a discriminatory manner (for example, a body like ASIC is not given coercive powers for, say, just the automotive industry).*
> - *Other regimes do not suffer from the same problems of over-wide definitions and low thresholds for the use of power, let alone such an absence of safeguards and oversight.*
> - *The ABCC law applies a criminal investigatory model to a non-criminal, industrial context (indeed the only imprisonment under the Act is for not complying with the ABCC's powers)...*
> - *The ABCC law normalises extraordinary powers that should not have been taken out of their criminal context. This creates a precedent that may make common place what should be limited and exceptional. The model could be extended to other industries and out of the industrial context to other fields.*
>
> *These powers should have no place in a body directed at preventing unlawful industrial action whose remit includes minor award breaches. These powers could not be justified when policing breaches of the criminal law, let alone industrial disputes.*

Finally, the professor asked whether "the law could be fixed by greater oversight?"

He thought not:

> *Could the law be fixed by greater oversight? I believe not as we are dealing with a law that should not, in this form, be on the books at all. It has no place in a modern, fair system of industrial relations, let alone one of a nation that prides itself on its political and industrial freedoms.*

POWERS AND RESPONSIBILITIES OF OFFICERS OF THE SPECIALIST DIVISION AND THE RIGHTS OF AFFECTED PERSONS

(1) Powers to enter, inspect and copy

105. The fifth, sixth and seventh dot points in my Terms of Reference concern the powers and responsibilities of officers of the Specialist Division and the rights of persons who are subject to the investigation and compliance activities of the division. These matters should be considered together.

106. The Deputy Prime Minister has already indicated that the FWA Inspectorate will be given "strong and effective investigative powers, including the power to inspect and copy documents and records on an employer's premises."[34] Unless there is a specific contrary provision, these powers will be available to inspectors within the Specialist Division. Presumably the powers will be similar to those conferred on ABCC inspectors by section 59 of the BCII Act. Is there any problem about Specialist Division inspectors having those powers?

(2) Power to summons for interrogation

107. In discussions with me, all union leaders strongly opposed the idea of conferring on the new Specialist Division power to summons a witness for compulsory interrogation. With a few exceptions, employer representatives expressed the opposite view, usually equally strongly. The state government officers expressed mixed views.

108. As I have indicated, some people see this as a human rights issue. They say it amounts to discrimination against workers (more correctly, participants) in the building industry.

109. It is true that similar powers are not available against most other workers. There are exceptions, notably police officers in those states where police integrity or general public corruption commissions have been established, and public servants generally in the latter. There are also statutory bodies, at both federal and state level, that investigate criminal or other illegal behaviour and which have the power to compel people to attend to give evidence.

110. Well-known Commonwealth examples include the Australian Taxation Office ("ATO"), the Australian Competition and Consumer Commission ("ACCC"), the Australian Securities and Investments Commission ("ASIC"), the Australian Crime Commission ("ACC") and the Inspector-General of Intelligence and Security ("IGIS"). Each of these agencies has power, not only to require production of documents, but also to compel people to submit to interrogation, refusal being a criminal offence. [35]

111. There are currently three state corruption-investigation Commissions: the Independent Commission Against Corruption (NSW) ("ICAC"), the Crime and Misconduct Commission (Qld) and the Corruption and Crime Commission of Western Australia. All three organisations have power to compel the attendance of witnesses, failure to attend or to give evidence being a criminal offence. [36] The same statement is true of the two police commissions, the (New South Wales) Police Integrity Commission ("PIC") [37] and the (Victorian) Office of Police Integrity ("OPI"). [38]

112. On another level, inspectors employed by WorkSafe Victoria have power to enter premises believed to be a workplace, at any time during business hours, for inspection purposes. Inspectors have the right to demand the production of documents and answers to questions, it being a punishable offence to refuse or fail to comply with their demand. [39] Similar powers are available to OHS inspectors in other states.

113. Leaving aside these administrative bodies, it is commonplace for unwilling witnesses to be subpoenaed to give evidence in, or produce documents to a court. The power to issue a subpoena is fundamental to the operation of courts. To my knowledge, it has never been considered to raise a human rights issue.

114. Power to compel attendance may actually assist a witness. Some people, who are not unwilling to give evidence, ask to be served with a subpoena in order to avert criticism, even ostracism, by others.

115. Notwithstanding all the above, it 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. Unlike most of those summoned by the statutory bodies to which I have referred, the people who are interrogated by the ABCC are usually not people under suspicion of misconduct: they are ordinarily mere witnesses, summonsed in order to enable the ABCC to determine whether there is a case against someone else and, if so, to provide the evidence the ABCC hopes will lead to a conviction. Unlike persons subpoenaed to give evidence in court, court action has not yet been commenced; it may never be commenced.

116. As I have indicated, some employers, and employer associations, acknowledge what the unions call "discrimination" against building workers. But they argue the present powers are essential, if the building and construction industry is not to slip back into the "lawlessness" detected by Commissioner Cole. Those people tend to ascribe the current level of industrial harmony and productivity on building sites to the existence of those powers. Are they correct? If so, that may justify maintenance of the special powers. What is the evidence of a causal connection between the existence of these powers and increased productivity?

117. If the compulsory interrogation power is to be retained, a question arises as to the safeguards that ought to be built into the legislation to reduce the possibility of inappropriate exercise of those powers. Safeguards are of prime importance. However desirable it may be for the new legislation to include the compulsory interrogation power, in the interests of industrial peace and productivity, exercise of the power will usually cast a burden on the recipient of the summons. It must normally be distressing for a person to receive a summons requiring him or her to attend a formal interrogation, upon pain of a gaol sentence for failure to attend or answer questions, about events at work that involve one's workmates. No doubt this is particularly the case if the recipient is not a confident personality and/or is inexperienced in the ways of the law and the bureaucracy. Moreover, at least so far as the Act is concerned, the recipient is left to bear any lost wages and the expense of obtaining legal assistance.

118. Monitoring, and subsequent review, of the exercise of the power can be a useful safeguard; but it is even more important to reduce the likelihood of any inappropriate exercise of the power before it occurs.

119. The precondition for the exercise of power under section 52 of the BCII Act, including the issue of a summons to attend for interrogation, is that the ABC Commissioner, or a Deputy Commissioner, "believes on reasonable grounds" that the relevant person "has information or documents relevant to an investigation" or "is capable of giving evidence that is relevant to an investigation". No doubt, it is necessary for the investigation to fall within the description in section 10 (b) of the Act; that is, it must relate to a suspected contravention, by a building industry participant, of the BCII Act, the WR Act, an award or certified agreement or an order of the AIRC. However, the issuing officer is not required to make a judgment as to the need to make that investigation, having regard to the nature and seriousness of the suspected contravention, nor the importance to the investigation of having evidence from this particular person.

120. I assume the ABC Commissioner, and any Deputy who is called upon to consider exercising the power, always considers these matters; nonetheless, it might be desirable for the legislation relating to the FWA Specialist Division to impose an express obligation to that effect upon any person empowered to issue a summons on behalf of the division. If the statute sets out the obligation, these matters are less likely to be overlooked. It might also be desirable to require another person, not being a subordinate of the person who is to issue the summons, to concur in its issue. The law has long required police to obtain a search warrant from a magistrate before entering and searching private property; the decision to take that step is not left to the investigating police. Similarly, telephone tap warrants must be issued by an independent judicial or AAT officer. The rationale of these requirements is that the person in charge of an investigation is not necessarily the person best placed to weigh its potential burden on others; an independent "second look" is a useful safeguard.

121. If there is to be a Specialist Division supervisory board, it could be the rule that the person called upon to consider the issue of a summons must obtain the concurrence of that board. If there is not to be a supervisory board, it might be appropriate to require concurrence by the FWA President, or his/her deputy.

(3) Admissibility of documents

122. I mentioned in paragraph 25 above that section 53 of the BCII Act makes inadmissible in proceedings against a person any document or thing produced by that person pursuant to a notice given under section 52 of that Act. Moreover, any information, document or thing that is obtained as an indirect result of giving the information, document or thing is also inadmissible. Does this go too far? What may be widespread distaste about the idea of penalising a person on the basis of statements made by him or her under compulsion to answer may be less applicable to production of documents. There may not be the same infringement of human dignity.

123. Also, it seems anomalous to make a different rule about documents produced by people pursuant to a section 52 notice and documents inspected and copied by an inspector exercising the right of entry conferred by section 59 of the Act. In each case, the affected person is an involuntary player in an exercise of a statutory power. Why should it make any difference which power is used?

THE OPI MODEL

Legislation governing the Victorian OPI provides a possible model in respect of the proposed Specialist Division.

The function of OPI is to investigate concerns about the conduct of members of Victoria Police. The Director of OPI has power, for that purpose, to summon any person to attend, and give evidence at, a hearing (public or private, as the Director decides) or to produce documents. Similar to the position under section 52 of the BCII Act, it is an offence to fail to attend the hearing or to refuse to take the oath or make an affirmation. (Unlike the section 52 situation, it is also an offence, subject to specified exceptions, for a summonsed person to disclose to another person the fact or terms of the summons.)

Unlike the BCII Act, the Victorian police legislation provides for an external monitor of the OPI's exercise of power, the Special Investigations Monitor ("the SIM"). The current SIM is a former judge. He is not limited to investigation of complaints; the SIM has the continuous role of assessing the questioning of persons attending hearings, and the Director's requirements for production of documents, in relation to both relevance and appropriateness.

In order to enable the SIM to do this, the Director is obliged:

(a) within three days of the issue of a summons or warrant, to make a written report about it to the SIM, giving reasons; and

(b) as soon as possible after a person attends to give evidence, to report the reasons for the attendance, the names of the persons present at that time, the relevance of the attendance to the investigation, and information about any certificate protecting the person from self-incrimination. The report must include a video recording of the hearing and a copy of any written transcript.

A person who has attended to give evidence has the right to complain to the SIM that he or she "was not afforded adequate opportunity to convey his or her appreciation of the relevant facts to the Director." Witnesses are informed of this right before leaving the hearing room. Unless the SIM considers the subject-matter of a complaint to be trivial, or the complaint vexatious or lacking in good faith, the SIM is obliged to investigate it.

Even if there is no complaint, the SIM may, at any time, make recommendations to the Director as to any action the SIM thinks should be taken. The recommendation may be for steps to prevent particular conduct occurring in the future or to remedy harm or loss that has already arisen.

The SIM has extensive investigatory powers. He/she is obliged to submit an annual report to Parliament dealing with the manner in which the Director's powers have been exercised in the preceding year and may make a special report at any time.

The Director is not obliged to adopt a recommendation of the SIM. However, the SIM may require the Director to make a written response, giving the SIM the opportunity, if appropriate, to report the disagreement to the Parliament.

The primary advantage of the SIM procedure is immediacy. Investigations conducted by OPI are subject to very prompt scrutiny, whether or not there is a complaint. Although totally independent of the Director and OPI staff, the SIM knows the purpose and nature of the investigation and the relevance of the witness' evidence and sees everything that happened at the hearing. The SIM looks over OPI's shoulder throughout. This imposes a powerful discipline on OPI's exercise of its considerable powers.

EXTERNAL MONITORING

124. The topics mentioned in the third, eighth and ninth dot points in my Terms of Reference raise questions about external supervision of the conduct of the proposed Specialist Division. There is no significant external supervision of the ABCC.

125. A person who is unhappy about the way in which he/she has been treated by the ABCC can complain to the Commonwealth Ombudsman. However, the complaint will be just one of the thousands of complaints, involving the full range of Commonwealth agencies, that the Ombudsman receives each year. If the complaint is upheld, the Ombudsman can discuss it with the ABCC and/or mention it in the Ombudsman's annual report; but these would be actions after the event, designed to prevent repetition, rather than to relieve the position of the complainant.

126. Where a person is in dispute with the ABCC in respect of a legal issue, it might be useful, if expensive, for the person to take the matter to the Federal Court. This course was taken in *Bonan v Hadgkiss*, where it was determined that the ABCC had a discretion to refuse to allow the appearance of a lawyer who had previously represented another person summoned for interrogation in respect of the same incident.

127. However, the limits of useful court action are demonstrated by another Federal Court case, *Washington v Hadgkiss (2008) FCA 28*. That was a challenge to a proposed investigation by an ABCC Deputy Commissioner, Mr Nigel Hadgkiss, allegedly in relation to a suspected breach of section 816 of the WR Act. Counsel for the applicants contended this was not the true purpose of the investigation, as was demonstrated by changes in the wording of the initiating notices and other surrounding circumstances. Mr Hadgkiss did not give evidence; nonetheless the challenge failed. Marshall J applied High Court authority in holding that impropriety of purpose "will not lightly be inferred and, by application of a principle of regularity, will only be inferred if the evidence cannot be reconciled with the proper exercise of the power." Marshall J followed established law. However, his decision illustrates the unsatisfactory nature of that law. The principle of regularity (really a presumption) was developed, many years ago, to cover situations where satisfactory evidence of the circumstances surrounding the official act was unavailable or difficult to obtain; for example, because of the effluxion of time or geographical remoteness. In cases where direct evidence about the circumstances is readily available, but withheld from the court, the presumption serves only to save the official act from proper judicial scrutiny.

128. In a report dated 1 May 2008, *The Coercive Information-Gathering Powers of Government Agencies*, the Administrative Review Council, offered 20 principles "as a guide to government agencies, to ensure fair, efficient, and effective use of coercive information-gathering powers." The principles contained no reference to external review, possibly because, so it seems, no Commonwealth agency that exercises coercive information-gathering powers is currently subject to any more effective external scrutiny than the ABCC. However, some state agencies are subject to external review, to a greater or lesser extent. The ICAC legislation provides for appointment of an Inspector of the Independent Commission Against Corruption,[40] who is empowered to audit the Commission's operations and deal with complaints about its conduct. The Inspector may act on his/her own initiative but there is no requirement that the Commissioner automatically supply information to the Inspector. The PIC position seems to be similar.

129. If the proposed Specialist Division of FWA is to be granted coercive powers, such as those now enjoyed by the ABCC, it seems essential to subject it to external monitoring. A requirement of prior concurrence would be a useful safeguard against inappropriate invocation of the power, but it would still remain important to have the power's actual use monitored by a high status independent person.

130. The most rigorous current Australian monitoring regime is that which applies to the Victorian OPI. This regime involves the appointment, as a monitor, of somebody who holds the office for a specific term. Having regard to the number of compulsory interrogations that have been conducted by the ABCC, it would seem sufficient to have a part-time appointee. With contemporary communication facilities, the monitor could be located anywhere in Australia. The cost would be modest.

131. I throw out, for comment, the suggestion that a monitoring system like that of the Victorian OPI should be part of any new legislation that retains compulsory interrogation.

LITIGATION BY THE SPECIALIST DIVISION

132. The ABCC has power both to initiate certain litigation in its own name (section 73 of BCII Act) and to intervene, as of right, in any matter before the AIRC that arises under the WR Act and involves a building industry participant or building work (section 72). Presumably, the proposed Specialist Division should have similar powers. However, it may be thought undesirable, as a matter of general principle, that parties who come to court to resolve a particular issue should find their case "hijacked" by an intervenor who wishes, perhaps, to resolve a point that is of little concern to them but whose resolution will cause them additional costs and delay. Should intervention be by leave, in order to allow the court to control the extent and terms of the intervention?

USE OF INFORMATION AND INTERACTION WITH OTHER AGENCIES

133. Section 65 of the BCII Act imposes criminal sanctions on the misuse of information gathered by an ABCC officer in the course of his/her employment. Given the invasive nature of the ABCC's powers and the likely sensitivity of much of the material it collects, this seems correct, and appropriate to be reproduced in the new legislation governing the Specialist Division. However, some people may think section 65 goes too far, or not far enough. Submissions on the point are invited.

134. Perhaps one permissible use of gathered information might be transmission to other government agencies, being agencies concerned with the investigation of unlawful conduct of the type that appears to be indicated by the transmitted material. The relevant agency might be one of the Commonwealth agencies mentioned in the twelfth dot point in the Terms of Reference (ASIC, ATO and ACCC). But what about another Commonwealth agency? What about state agencies, such as police, crime or corruption commissions, etc? Is there a legitimate concern that to permit the transmission of information to these agencies would be to go too far, that the Specialist Division would end up being a warrantless information-gatherer for agencies that would ordinarily require warrants to obtain the information for themselves? As is so often the case, there may be a need to choose between administrative efficiency, on the one hand, and private rights on the other.

RESOURCES, PERSONNEL AND TRANSMISSION

135. The last three dot points in my Terms of Reference concern logistic matters, in setting up the proposed Specialist Division. They are all important matters, but probably not contentious at this time. However, if anybody wishes to say anything about any of those matters this would be welcome.

FURTHER CONSULTATIVE ACTION

136. As mentioned in the introduction, submissions are sought by 5 December 2008, at the latest. Without wishing to limit anyone, it would assist me to analyse and compare the submissions if everybody set out their material under the headings used in the checklist on the back cover.

137. Submissions should be sent to:

    Wilcox Consultations Secretariat
    Department of Education, Employment and Workplace Relations
    Location code 10M32
    GPO Box 9879
    Canberra ACT 2601
    Email: **fwa_building@deewr.gov.au**

138. All submissions will be subject to the *Freedom of Information Act 1982*. Submissions will also be made public on the consultation's web site unless marked as confidential. **www.workplace.gov.au/wilcox**

139. If any person wishes to put *new* information or arguments, in response to someone else's submission, they may do so by 23 January 2009.

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31. The Hon Julia Gillard MP, Minister for Employment and Workplace Relations - *Speech to the National Press Club 17 September 2008*; and Department of Education, Employment and Workplace Relations, *Fact Sheet 10: Clear, tough rules for industrial action*. **www.workplace.gov.au**.
32. The Hon Julia Gillard MP, Minister for Employment and Workplace Relations - *Speech to the National Press Club 17 September 2008*; and Department of Education, Employment and Workplace Relations, *Fact sheet 2: Fair Work Australia institutions – A one stop shop*, **www.workplace.gov.au**.
33. Williams G, *The Australian Building and Construction Commission: An Appropriate Use of Public Power?* Forum on Industrial Laws Applying in the Australian Construction Industry – National Press Club, Canberra, 25 August 2008.
34. The Hon Julia Gillard MP, Minister for Employment and Workplace Relations - *Speech to the National Press Club 17 September 2008*; and Department of Education, Employment and Workplace Relations, *Fact Sheet 10: Clear, tough rules for industrial action*. **www.workplace.gov.au**.
35. Sections 9 - 13F *Taxation Administration Act 1953 (Cth);* section 155 *Trade Practices Act 1974(Cth);* sections 19 and 63 *Australian Securities and Investments Act 2001 (Cth);* sections 28 - 35 A*ustralian Crime Commission Act 2002 (Cth);* and section 18 *Inspector-General of Intelligence and Security Act 1986 (Cth)*.
36. Section 86 *Independent Commission Against Corruption Act 1988 (NSW);* section 72 *Crime and Misconduct Act 2001 (QLD);* and sections 48 - 50, 94 - 99 and 165 *Corruption and Crime Commission Act 2003* (WA).
37. Sections 25 - 26 *Police Integrity Commission Act 1996 (NSW)*.
38. Section 53 and 113 *Police Integrity Act 2008 (Vic)*.
39. Sections 99 - 100 *Occupational Health and Safety Act 2004 (Vic)*.
40. Part 5A *Independent Commission Against Corruption Act 1988 (NSW)*.

A CHECKLIST OF QUESTIONS

Content of the law enforced by the Specialist Division

1. Is it desirable to maintain:
   (a) the special building and construction industry penalty for unprotected industrial action, as now provided by Chapter 5 of the BCII Act?
   (b) the power of coercive interrogation, as in section 52 of the BCII Act? In each case, please give reasons for your answer, with reference to evidence.
2. Should the Code and/or Guidelines be retained? If so:
   (a) do they need amendment? In what way?
   (b) should either document be put on a more formal basis, with provision for disallowance by Parliament and/or access to judicial review and the AAT?
   (c) is it feasible to use the Guidelines to provide the control of the industry now sought to be obtained by the BCII Act?

Structure, accountability and independence

3. Should the Specialist Division be subject to direction from the Director of the Inspectorate? If so, to what extent?
4. Should there be a divisional supervisory board for the Specialist Division? If so, how should it be constituted? What should be its role?
5. Should inspectors within the Specialist Division work only within that division?
6. What should be the role of the Specialist Division?
7. What power should the Minister have to direct the manner of exercise of the Specialist Division's powers?

Scope of investigation and compliance activities

8. Are the ABCC functions set out in section 10 of the BCII Act appropriate for the Specialist Division? If not, what functions ought to be added or omitted?
9. Should documents obtained pursuant to entry and inspection powers be admissible as evidence in other proceedings?
10. In practice, should the Specialist Division concern itself with building employer breaches, such as non payment of employee entitlements; or leave this to the Workplace Ombudsman?

Specialist Division powers and affected persons' rights

11. What should be the criteria for the issue of a summons to attend for compulsory interrogation, if this power is to be retained?
12. What safeguards are necessary to guard against inappropriate use of the compulsory interrogation power? Is prior concurrence desirable? If so, by whom?
13. Should FWA reimburse summonsed people their expenses and lost wages?

External monitoring

14. Should the new legislation provide for external monitoring of the Specialist Division's exercise of its coercive powers? If so, how and by whom? Do you favour the OPI model? If not, why not?

Litigation by the Specialist Division

15. Should the Specialist Division be able to bring legal actions in its own name to enforce workplace laws governing the building and construction industry?
16. Should the Specialist Division be able to intervene in other parties' litigation? If so, should this be as of right or only by leave of the court or relevant tribunal?

Use of information and other agencies

17. Should the Specialised Division be able to pass on information to other agencies? If so, to whom and under what circumstances?

Resources, personnel and transmission

18. Do you wish to comment on:
    (a) the likely resources to be required by the Specialist Division and the ways of ensuring those resources are efficiently and effectively allocated;
    (b) the best ways of ensuring high quality personnel are recruited to and retained by the Specialist Division and are properly trained and supervised; and
    (c) the best manner of ensuring an orderly transition between the Australian Building and Construction Commissioner and the Specialist Division.