



Senate Education, Employment and Workplace Relations Committee

Building and Construction Industry (Restoring Workplace Rights) Bill 2008

Submitter:	Christopher Platt
Organisation:	AMMA
Address:	Level 10, 607 Bourke Street Melbourne 3000
Phone:	03 96144777
Fax:	03 9614 3970
Email:	christopher.platt@amma.org.au

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Executive Summary

This submission addresses the Senate's inquiry into the Building and Construction Industry (Restoring Workplace Rights) Bill 2005, which will repeal the *Building and Construction Industry Improvement Act 2005* (BCII Act) and consequently abolish the Office of the Australian Building and Construction Commissioner (ABCC).

In September 2008 AMMA released a discussion paper titled *The building industry regulator: a tough cop or a transition to a toothless tiger?* This paper discussed the findings of the Cole Royal Commission into the Building and Construction Industry, the operation of the Australian Building and Construction Commission (ABCC) and called on the government to transfer the powers of the ABCC to the new specialist inspectorate of Fair Work Australia.

AMMA opposes the repeal of the BCII Act and the abolition of the ABCC. In particular, AMMA makes the following comments:

1. The BCII Act prohibits unlawful industrial action and a range of coercive and discriminatory conduct within the building and construction industry. It establishes the ABCC with the responsibility of enforcing the BCII Act and the National Code of Practice for the Construction Industry. The National Code and accompanying Implementation Guidelines establish a set of principles and standards of behaviour for the building and construction industry that promotes best practice workplace relations. Compliance with the National Code is a precondition of tendering for Australian government projects; and its continued application to subsequent projects, whether private or public projects, is a necessary measure to effect cultural change in the industry. Together, the BCII Act, ABCC and the National Code provide a solid regulatory system for the building and construction industry.
2. AMMA submits that the findings of the Cole Royal Commission into the Building and Construction Industry (Royal Commission) tabled in Parliament in 2003, are important to understanding the current regulatory arrangements in the building and construction industry and the necessity for its continuation. The ABCC was established under the BCII Act following the recommendation of the royal commission in its 2003 *Final Report*. Based on evidence

presented to the Royal Commission during its extensive twelve month inquiry, the royal commission reached the following conclusions:¹

- That there was widespread disregard for the rule of law in the building and construction industry, evident in over 100 examples of unlawful and inappropriate behaviour;
 - That the industry had developed a deeply embedded culture that the law does not apply, including orders of industrial tribunals and the courts. Compliance with the law in this industry was considered optional on the knowledge by industry participants that regulatory bodies such as the Office of the Employment Advocate did not have the capacity or resources to enforce the law;
 - That the culture was a 'closed culture' such that industry participants by their conduct or silence condoned the unlawful and inappropriate practices that were widespread in the industry; and
 - That an independent regulatory body be established and be given coercive powers to enable it to require the provision of information, production of documents and attendance to answer questions, in order to overcome the 'closed culture' of the industry that would otherwise frustrate investigations.
3. AMMA contends that the coercive powers are adequately balanced by the protections afforded to persons under the BCII Act, including the right to legal representation and inadmissibility of any evidence given or information obtained against a person in future proceedings. Reasonable grounds must exist before a person can be subject to the coercive powers of the ABC Commissioner.
4. AMMA contends that the coercive powers of the ABCC and risk of significant penalty for breach have been instrumental in effecting change in the building and construction industry. Since the commencement of the ABCC and BCII Act the building and construction industry has experienced the following improvements:

¹ These findings are contained within the Royal Commission's 23 volume report: Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003). Available at www.royalcombici.gov.au

- A productivity gain of approximately 10 percent – 10.5 percent higher than predicted based on historical performance;²
 - A reduction in construction costs due to a reduction in the ‘cost penalty’³ from approximately 19 percent in 2004 to 15 percent in 2008. This has also lead to a 1.8 percent cost saving in the mining industry;⁴ and
 - A significant reduction in days lost due to industrial action, from 882.2 days per thousand employees in 1997 to just 10.1 in 2007.⁵
5. AMMA contends that despite the improvements achieved in the building and construction industry, the ABCC has been operating for an insufficient amount of time to effect a permanent change in the culture of the industry. Industry participants are continuing to engage in unlawful and inappropriate conduct and are subject to continued investigations and court proceedings initiated by the ABCC. AMMA submits that the experiences in Western Australia and New South Wales following the abolition of their respective Building Industry Taskforces (i.e. the re-emergence of inappropriate and unlawful practices⁶) should be given consideration.
 6. AMMA contends that the abolition of the BCII Act and ABCC will undermine current ABCC investigations and matters currently before the courts. Existing regulatory bodies are not adequately resourced or capable of continuing the work of the ABCC.
 7. AMMA contends that the abolition of the BCII Act and ABCC will put at risk the improvements achieved in the building and construction industry’s industrial environment and will adversely impact billion dollar investment decisions for 244 major minerals and energy projects at feasibility stage, many of which will have five year construction lives and will require continued industrial certainty.

² Econtech Pty Ltd, *Economic analysis of building and construction industry productivity*, report prepared for the Australian Building and Construction Commission, 16 July 2007; Econtech Pty Ltd, *Economic analysis of building and construction industry productivity*, report prepared for the Office of the Building and Construction commissioner, 30 July 2008.

³ The ‘cost penalty’ is the difference in cost for commercial building compared to residential building.

⁴ Ibid.

⁵ Australian Bureau of Statistics, *Industrial Disputation*, Table 2b Working Days Lost per Thousand Employees - Industry, Cat. No 6321.0.55.001, ABS, Canberra.

⁶ Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 39.

Australian Mines and Metals Association (AMMA) Profile

AMMA is the national employer association for the mining, hydrocarbons and associated processing and service industries, including significant numbers of construction and maintenance companies in the resources sector. It is the sole national employer association representing the employee relations and human resource management interests of Australia's onshore and offshore resources sector and associated industries.

AMMA member companies operate in the following industry categories:

- Exploration for minerals and hydrocarbons
- Metalliferous mining, refining and smelting
- Non-metallic mining and processing
- Hydrocarbons production (liquid and gaseous)
- Associated services such as:
 - Construction and maintenance
 - Diving
 - Transport
 - Support and Seismic Vessels
 - General Aviation (Helicopters)
 - Catering
 - Bulk Handling of Shipping Cargo

AMMA is in a unique position in that it is able to articulate a view on the workplace relations legislative reform needs of the resources sector.

Resources Sector Profile and Construction Activity

The Australian resources sector is a significant contributor to Australia's wealth and prosperity, underpinning critical supply and demand relationships with the Australian manufacturing, construction, banking and financial, process engineering, property and transport sectors.

Over the past 20 years the resources sector has contributed over \$500 billion to Australia's wealth.⁷ Currently, the resources sector:

- Accounts for 8 percent of Australia's gross domestic product.⁸
- Directly employs 172,000 employees – an approximate 22.5 percent rise in the past 12 months;⁹ and
- Is forecast to contribute \$180 billion in minerals and energy exports in 2008-09, a 52 percent rise from the previous year.¹⁰

The continued growth of minerals and energy exports is supported by large capital expenditure programs in the resources sector, both on the expansion of existing projects and development of new projects. Construction in the resources sector provides strong employment growth in local communities, either directly or 'indirectly through local service industries such as catering, cleaning and maintenance';¹¹ and it 'can result in improved local infrastructure including roads, schools,

⁷ Australian Bureau of Statistics, 'Sustaining mineral resources industry – overcoming the tyranny of depth', *Yearbook*, 2008, Cat No 1301.0, ABS, viewed 30 September 2008, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/1301.0Feature%20Article18012008?opendocument&tabname=Summary&prodno=1301.0&issue=2008&num=&view=> .

⁸ Australian Bureau of Statistics, 'Sustaining mineral resources industry – overcoming the tyranny of depth', *Yearbook*, 2008, Cat No 1301.0, ABS, viewed 30 September 2008, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/1301.0Feature%20Article18012008?opendocument&tabname=Summary&prodno=1301.0&issue=2008&num=&view=>

⁹ Australian Bureau of Statistics, *Australian Labour Market Statistics*, Table 2.2 Employed Persons Industry and Subdivision – Original, Cat No 6105.0, ABS viewed 3 October 2008, [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/C13A89556EEE7941CA25747A00116F59/\\$File/61050_jul%202008.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/C13A89556EEE7941CA25747A00116F59/$File/61050_jul%202008.pdf). This figure is the result of a comparison between the number of mining employees in May 2007 and May 2008.

¹⁰ Australian Bureau of Agricultural and Resource Economics, 'Export earnings to reach new record', Media Release, Australian Government, viewed 29 September 2008, http://www.abare.gov.au/corporate/media/2008_releases/22sept_08.html

¹¹ Australian Bureau of Statistics, 'A century of mining in Australia 1988-1999', *Australian Mining Industry*, Cat No. 8414.0, ABS.

community leisure and health facilities.¹² Infrastructure development since 1967 includes the construction of 26 towns, 12 ports and additional port bulk handling infrastructure at many existing ports, 25 airfields and over 2,000 km of railway line.¹³

Actual capital expenditure of \$27.35 billion in the mining industry was the driving growth of all new capital expenditure in 2007-08.¹⁴ This is estimated to increase to approximately \$40 billion in actual capital expenditure in 2008-09.¹⁵ This correlates with the record listing of 341 major minerals and energy development projects identified by the Australian Bureau of Agricultural and Resource Economics (ABARE).¹⁶ Significantly, 244 of these minerals and energy projects, with an estimated total capital expenditure of \$184 billion, are undergoing feasibility studies.¹⁷ These are projects with no definite decision on development and therefore are vulnerable to changing conditions that will impact on when and if they proceed.¹⁸ Likewise projects that have reached the committed stage 'may be deferred, modified or even cancelled if economic or competitive circumstances change significantly.'¹⁹

According to ABARE, '[a] further 97 projects are at an advanced stage with projected capital expenditure of \$70.5 billion.'²⁰ The map overleaf illustrates the number and location of advanced minerals and energy projects in Australia.

¹² Australian Bureau of Statistics, 'A century of mining in Australia 1988-1999', *Australian Mining Industry*, Cat No. 8414.0, ABS.

¹³ Minerals Council of Australia, *2004 Annual report: creating value through commitment and performance*, 2004, MCA, 5.

¹⁴ Australian Bureau of Statistics, *New capital expenditure*, Cat No. 5625.0, ABS.

¹⁵ Australian Bureau of Agricultural and Resource Economics, *Major Development Projects – April 2008 listing*, Australian Bureau of Agricultural and Resource Economics, Resources and Energy Branch, ABARE, 4, viewed 29 September 2008, http://www.abare.gov.au/publications_html/energy/energy_08/ME08_April.pdf

¹⁶ *Ibid*, 15.

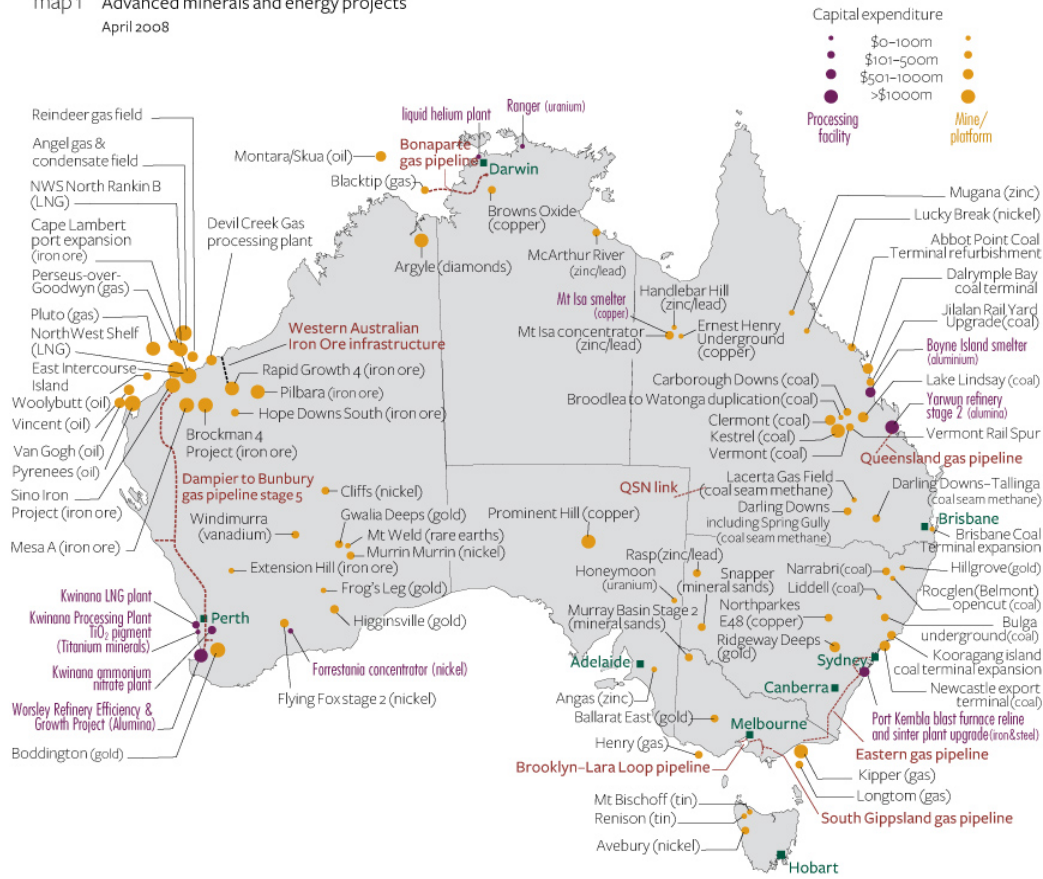
¹⁷ *Ibid*, 17, 15. Abare advises that potential capital expenditure for these projects should be used as a guide only. Data for early projects is either not available or is likely to change significantly if it proceeds to development. Most will often proceed to development in the medium term.

¹⁸ *Ibid*, 15.

¹⁹ *Ibid*.

²⁰ *Ibid*, 1.

map 1 Advanced minerals and energy projects
April 2008



Source: ABARE

The following table extracted from ABARE’s major minerals and energy projects listing, identifies selected key projects and their status, expected date for commencement of operations following completion of the construction stage, estimated capital expenditure and employment figures, where available.²¹ This table and the earlier discussion of the contribution of the resources sector to the Australia economy highlights the enormous significance of the resources sector, both in terms of export revenue and domestic capital investment. Consequently, the resources sector has a strong interest in workplace relations legislative reform in the Australian building and construction industry.

²¹ Abare advises that most information come from publicly available sources and is sometimes supplemented from information direct from the company.

Project	Company	Status	Expected Startup	Capital Expend.	Additional employment
Kestrel	Rio Tinto	Expansion, under construction	2012	\$1.14b	na
Angel gas and condensate field	Woodside/BHP Billiton/BP/Chevron Texaco/Shell/Japan Australia LNG	New project, under construction	late 2008	\$1.38b	na
Kipper gas project (stage 1)	Esso/BHP Billiton/ Santos	New project, committed	2011	\$1.26b	na
North West Shelf project extension (fifth train)	Woodside Energy/ BHP Billiton/ BP/Chevron/ Shell/Japan Australia LNG	New project, under construction	late 2008	\$2.6b	1500
Pluto (train 1)	Woodside Energy	New project, under construction	late 2010	\$12b	2000
Prominent Hill	Oxiana	New project, under construction	late 2008	\$1.08b	850
Pilbara Iron Ore project (stage 1)	Fortescue Metals Group	New project, under construction	mid-2008	\$3.1b (incl port, rail, mine and handling facility)	2500
Western Australian Iron Ore Rapid Growth Project 4 (RGP4)	BHP Billiton	Expansion, under construction	2010	\$2.47b	na
Cape Lambert port expansion	Rio Tinto/ Robe River	Expansion, under construction	late 2008	\$1.09b	450
Argyle underground development (diamonds)	Rio Tinto	New project, under construction	2009	\$1.7b	250
Worsley refinery Efficiency and Growth project	BHP Billiton/ Japan Alumina/ Sojitz Alumina	Expansion, committed	2011	\$2.54b	4000
Yarwun alumina refinery expansion (CAR Stage 2)	Rio Tinto Aluminium	Expansion, under construction	2011	\$2.07b	2200
Olympic Dam expansion	BHP Billiton	Expansion, prefeasibility study under way	2013	(\$7 billion)	3000
Tarrum	Apache	New project, FEED studies underway	2011-12	\$2b	na

Building and Construction Industry (Restoring Workplace Rights) Bill 2008

The Building and Construction Industry (Restoring Workplace Rights) Bill 2008 proposes to repeal the *Building and Construction Industry Improvement Act 2005*, the *Building and Construction Industry (Consequential and Transitional) Act 2005* [together, the BCII Act] in their entirety and result in the abolition of the Office of the Australian Building and Construction Commissioner (ABCC).

AMMA opposes the repeal of the BCII Act and abolition of the ABCC.

The following points are made in support of AMMA's position:

1. The findings and recommendations of the Cole Royal Commission into the Building and Construction Industry (the Royal Commission), contained within its 23 volume report tabled in Parliament in 2003, are important to understanding the current arrangements in place in the building and construction industry.
2. The Royal Commission inquiry was comprehensive and conducted over 12 months (there were 171 public sitting days, 16,000 pages of transcript, 765 witnesses, 1900 exhibits, and 29 general submissions).²²
3. The Royal Commission's final report revealed widespread disregard for the rule of law and documented over 100 types of unlawful and inappropriate conduct occurring in the building and construction industry.²³
4. The Royal Commission recommended that separate industry regulation and an independent regulator be established to address unlawful and inappropriate behaviour in the building and construction industry. The BCII Act and the ABCC commenced in 2005.

The Royal Commission's findings document the existence of an embedded culture of unlawful and inappropriate behaviour in the industry. The findings were made less than 10 years ago.

²² Tony Abbott MHR, Ministerial Statements: Royal Commission into the Building and Construction Industry, 26 March 2003, viewed 2 October 2008, <http://www.tonyabbott.com.au/Pages/Article.aspx?ID=87>

²³ Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 4-5.

AMMA contends that the findings of the royal commission remain relevant considerations and highlight the necessity of retaining the BCII Act and ABCC as a measure to achieve enduring cultural change in the building and construction industry.

5. Prior to the establishment of the ABCC, the Royal Commission considered that existing regulatory bodies (e.g. the Office of the Employment Advocate (OEA)) lacked the power to adequately enforce the law in the building and construction industry.²⁴ Investigations by the OEA were frustrated due to the inability to require persons to answer questions.²⁵

6. Based on its findings, the Royal Commission stated that

[t]he culture in the industry is that the criminal law does not apply because industrial circumstances are involved. The attitude is that the applicability of industrial law is optional because there is no body whose function it is to enforce it, or which has the will, capacity and resources to do so. Orders of industrial tribunals, and even courts, are disregarded if such orders are contrary to the views or interests of a participant.²⁶

...

In view of...the problems for Australian Building and Construction Commission investigations posed by the closed culture of the industry, the Australian Building and Construction Commission will not be able to adequately to perform its functions unless it has the power to enter upon premises, inspect any relevant premises or documents found on premises, take copies of documents or of an extract from documents, summon witnesses and documents and be able to require a person to provide a written statement specifying answers to questions posed by it.²⁷

7. The Royal Commission also stated that

The ABCC can be expected to face considerable lack of co-operation and, indeed, opposition if the conduct of my Commission is any guide.²⁸...[V]ery few industry participants volunteered to the Commission material addressing the detail of the industry as it actually operates, especially in relation to unlawful conduct. There was, plainly, a deliberate decision by a number of influential persons in the industry, in both the employer and the union camps, not

²⁴ Ibid, 11.

²⁵ Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 31.

²⁶ Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 1, 155.

²⁷ Ibid, 159.

²⁸ Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 11, 36.

to assist the Commission, as well as many persons who, by their conduct and silence, condoned the unlawful or inappropriate practices and conduct that the Commission has uncovered. ... The ABCC can likewise be expected to confront serious obstacles gaining information that it needs to perform its functions.²⁹

8. Section 52 of the BCII Act empowers the ABCC to compel a person to attend to answer questions at an examination, provide information and produce documentation as part of its investigations. However, there are significant qualifications to these powers contained in sections 52 and 53 of the BCII Act:

- Only the ABC Commissioner can make a request under section 52;
- The ABC Commissioner must have reasonable grounds to believe a person has information or documents, or is capable of giving evidence relevant to an investigation before using its coercive powers;
- A person attending before the ABC Commissioner may choose to be legally represented; and
- Any evidence given or information obtained by the ABCC is inadmissible against the witness in future proceedings.

9. While serious penalties accompany any act of non-compliance with a direction of the ABCC, these are required to ensure that investigations are taken seriously (i.e. to overcome the difficulties faced by the OEA, discussed above) and that there are no barriers to addressing unlawful and inappropriate conduct. The ABCC has stated that the evidence of 17 witnesses, who were compelled to attend and answer questions between 1 October 2005 and 31 March 2008, was critical to its court proceedings.³⁰

10. These powers are not unique to the ABCC. Occupational health and safety inspectorates in each state and territory also have extensive powers to provide information, produce documents and appear before an inspector to give evidence.³¹

²⁹ Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 11, 36-37.

³⁰ Australian Building and Construction Commissioner, *Report on the exercise of compliance powers by the ABCC for the period 1 October 2005 to 31 March 2008*, ABCC, Australian Government viewed 2 September 2008, <http://www.abcc.gov.au/NR/rdonlyres/4CB84879-678F-4E2C-94CD-F46DEE7E6B48/0/CPowersReportMar08.pdf>

³¹ See for example, *Occupational Health and Safety Act 2004* (Victoria) s 100.

11. The ABCC is continuing to investigate and initiate proceedings against persons for conduct in breach of the BCII Act and the *Workplace Relations Act 1996*. A number of matters are currently before the courts.³² These investigations and court proceedings must not be undermined.

AMMA contends that the repeal of the Building and Construction Industry (Restoring Workplace Rights) Bill 2005 will result in a gap in enforcement in the building and construction industry. Existing regulatory agencies do not have adequate resources to continue the investigations of the ABCC or sufficient powers to overcome the ‘closed culture’ of the industry identified by the Royal Commission.

12. The National Code of Practice for the Construction Industry is a requisite element of the regulatory environment in the building and construction industry and has a significant role in changing the culture of the industry. The National Code sets out the principles and standards of behaviour to be met by industry participants who wish to tender for government work, ensuring that workplace relations laws are complied with. The National Code can prevent anti-competitive conduct that arises through collusive tendering practices that deny opportunity to others. Its continued application to companies for all subsequent projects, whether public or private projects, is an important factor in ensuring that a new culture takes hold in the industry.

13. Since the commencement of the BCII Act and ABCC (including the ABCC’s predecessor the Building Industry Taskforce) the building and construction industry has experienced:

- A productivity gain of approximately 10 percent – 10.5 percent higher than predicted based on the industry’s historical performance;³³
- A reduction in construction costs due to a reduction in the ‘cost penalty’ from approximately 19 percent in 2004 to 15 percent in 2008.³⁴ This has also lead to a 1.8 percent cost saving in the mining industry.³⁵ Based on total capital expenditure of \$19.1

³² Particular matters currently before the courts are detailed on the ABCC website at <http://www.abcc.gov.au/abcc/Prosecutions/CurrentCourtCases/>

³³ Econtech Pty Ltd, *Economic Analysis of Building and Construction Industry Productivity: 2008 Report*, Report prepared for the Office of the Building and Construction Commissioner by Econtech Pty Ltd, 30 July 2008, ii, 5.

³⁴ Ibid, 9.

³⁵ Ibid.

billion in the mining industry (the total capital expenditure on 51 completed minerals and energy projects between April 2007 and April 2008³⁶) this represents a saving of \$343.8 million; and

- Significant reduction in days lost due to industrial action, from 882.2 days per thousand employees in 1996 to 10.1 in 2007.³⁷ In the March 2008 quarter, the construction industry lost just 2.9 days per thousand employees – lower than the all industry figure of 4.6 days per thousand employees.³⁸

14. The Royal Commission noted that previous attempts by all Australian governments to effect cultural change in the industry had been unsuccessful.³⁹ After the abolition of the Western Australian Building Industry Taskforce, which operated for seven years, the Royal Commission reported that

[p]ractices which had not been prominent have re-emerged. They include 'no ticket no start' practices, 'no pattern EBA no start' practices, threats of industrial action, entering premises irrespective of right, re-emergence of intimidatory, coercive and threatening behaviour in pursuit of industrial demands, and effective compulsory unionism on CBD sites.⁴⁰

15. The work of the ABCC is not yet complete. Unlawful and inappropriate conduct is still occurring in the building and construction industry and proceedings are being launched against offending parties.⁴¹

The ABCC has been operating for approximately three years. This is insufficient time for the required cultural and attitudinal change to become embedded to the point that there can be confidence that improvement in the construction and building industry's industrial

³⁶ Australian Bureau of Agricultural and Resource Economics 2008, *Minerals and Energy: Major development projects*, 9.

³⁷ Australian Bureau of Statistics, *Industrial Disputation*, Table 2b Working Days Lost per Thousand Employees - Industry, Cat. No 6321.0.55.001, ABS, Canberra.

³⁸ Australian Bureau of Statistics, *Industrial Disputation*, Table 2b Working Days Lost per Thousand Employees - Industry, Cat. No 6321.0.55.001, ABS, Canberra.

³⁹ Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 36.

⁴⁰ Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 39.

⁴¹ Australian Building and Construction Commissioner, *Stuart v AWU, Lee, CEPU, Mooney, AMWU & Dodd*, ABCC Media Backgrounder, 1 October 2008. Australian Building and Construction Commissioner, *Cozadinos v Dempster and Henry*, ABCC Media Backgrounder, 12 August 2008; Australian Building and Construction Commissioner, *Stuart v Pitt, Mates and CFMEU*, ABCC Media Backgrounder, 14 May 2008.

environment will continue without specific industry laws and a regulatory body with the powers of the ABCC. AMMA contends that the abolition of the BCII Act, ABCC and the National Code will put at risk the improvements achieved in the building and construction industry's industrial environment. This will compound the uncertainties arising from the turbulent world financial market and unknown costs associated with implementing the proposed Emissions Trading Scheme that is already impacting on billion dollar investment decisions for minerals and energy projects, many of which will have a five year construction life.