



Submission to
Senate Education, Employment and Workplace Relations
Committee

Inquiry into *Building and Construction Industry*
(*Restoring Workplace Rights*) Bill 2008

Master Builders Australia

October 2008

Master Builders Australia Inc ABN 701 134 221 001

building australia



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1 INTRODUCTION

- 1.1 This submission is made by Master Builders Australia Inc (Master Builders).
- 1.2 Master Builders represents the interests of all sectors of the building and construction industry. The association consists of nine State and Territory builders' associations with over 31,000 members.

2 PURPOSE OF THIS SUBMISSION

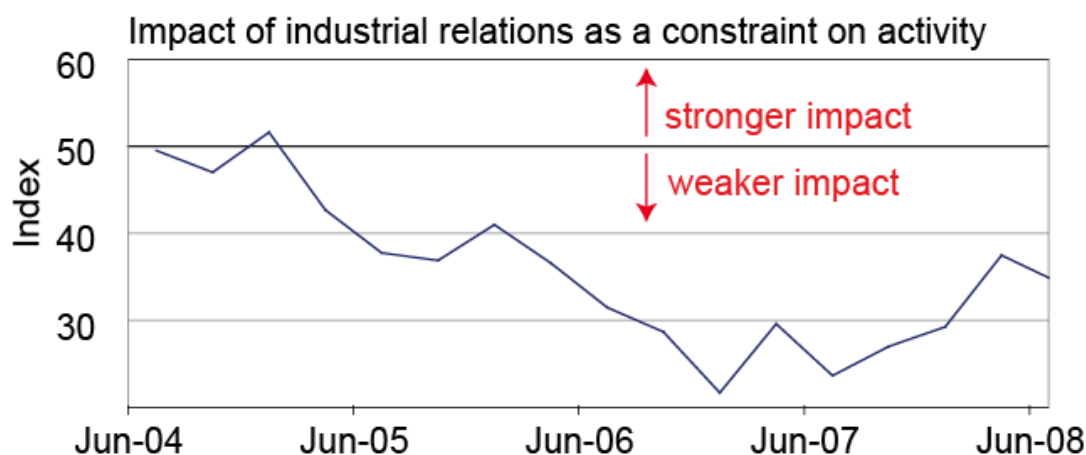
- 2.1 On 3 September 2008, the Senate referred the provisions of the *Building and Construction Industry (Restoring Workplace Rights) Bill 2008* (the Bill) to the Senate Standing Committee on Education, Employment and Workplace Relations (the Committee). The Bill, introduced by Senator Rachel Siewert of the Greens Party (Greens), seeks to repeal the *Building and Construction Industry Improvement Act, 2005* (BCII Act) and the *Building and Construction Industry Improvement (Consequential and Transitional) Act 2005* in their entirety. A consequence of the repeal of the BCII Act is the abolition of the Office of the Australian Building and Construction Commissioner (ABCC) and the abolition of the Office of the Federal Safety Commissioner (FSC), although the latter consequence has not been addressed by the Greens or in the material produced on the Committee's web site.
- 2.2 This submission highlights that the Bill is premature and unwarranted. Its passage would produce adverse economic consequences and unwanted industrial disruption during a time of economic turbulence. The Bill is fundamentally flawed and misnamed. It misses the point of building and construction industry workplace reform. It appears to epitomise some of the misrepresentation around the issue of the ABCC and its powers that is currently the subject of media advertising and a concerted campaign by unions.

3 BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT ACT, 2005 – BACKGROUND

- 3.1 The building and construction industry is undergoing a period in which industrial relations has not been the predominant and negative influence that it has been in the past. As is shown below, this change in the way workplace relations is conducted has benefited all parties in the industry, including workers.
- 3.2 This upsurge of good relations goes hand in hand with the exercise of the ABCC's powers. The ABCC has been highly influential in curbing behaviour that is unacceptable, akin to the "law of the jungle" rather than the rule of law which operates in Australian society. Unfortunately elements of unacceptable behaviour still remain, as is evident from the threats and intimidation that have occurred in relation to the dispute in

Melbourne concerning Bovis Lend Lease and the CFMEU where in proceedings witnesses leaving the Australian Industrial Relations Commission were subjected to what the Senior Deputy President presiding labelled as “some comment or arguably abuse” as they left the proceedings.¹ This sort of abuse is, unfortunately, commonplace.

- 3.3 The startling report from the Melbourne Age of 10 September 2008² reveals that an executive of Bovis Lend Lease has received death threats and the relevant Australian Industrial Relations Commission Senior Deputy President has issued a number of formal warnings concerning intimidation of witnesses.³ However, incidents of this kind are now much less prevalent than in the past, although they remain sufficiently common for there to be quite palpable indications that there is a great deal more to be done in cultural change. Unfortunately, this is the dark side to the industry - an ugly and turbulent industrial relations history involving physical violence, intimidation, thuggery, union in-fighting and criminal activities.
- 3.4 Master Builders conducts regular surveys of members, including measuring industrial relations as a constraint on activity.⁴ As indicated in the following graph, a dramatic fall in the index occurred in 2005 and 2006 associated with the introduction of the BCII Act and establishment of the ABCC. Notwithstanding this, in the past year or so it appears that industrial relations may be becoming more of an issue as a constraint on activity.



¹ M Skulley *Union Rallies to the Defence* Australian Financial Review 12 September 2008

² Ben Schneiders, *Death Threat for Bovis Boss* The Age 10 September 2008 p 3

³ Id

⁴ See Master Builders Australia *National Survey of Building and Construction* June quarter 2008 for the latest published result. The question asked of respondents in the survey was: “What effect are industrial relations having on activity?” Respondents were asked to select from a response of: ‘No effect’, ‘Slight’, ‘Moderate’, ‘Large’, ‘Critical’, ‘N/A’.

- 3.5 The Royal Commission into the Building and Construction Industry in 2003 (the Cole Royal Commission)⁵ comprehensively documented the workplace relations woes of the industry, specifically focusing upon unacceptable and unlawful behaviours of unions in the commercial sector. The findings of the Cole Royal Commission were supported by the work of the Interim Building Industry Taskforce which became the Building Industry Taskforce (the Taskforce) and then the ABCC. Both taskforces published reports that documented the unacceptable face of the building and construction industry.⁶ In addition, the ABCC has published four reports on its compliance activities⁷ as well as a number of other reports that highlight the need for continuing action to curb unacceptable behaviour.
- 3.6 The September 2005 Taskforce report⁸ highlighted the rationale for specific building industry workplace reform. It found that the industry norm was to disregard the *Workplace Relations Act 1996* (Cth) (WRA) and adhere instead to ‘the law of the jungle’, hence the use of that expression in paragraph 3.2 of this submission. The Taskforce reported that incidences of inappropriate industrial pressure, sometimes involving violent and thuggish behaviour, contributed to the lawless culture that has plagued the industry for decades and which in September 2008 came again to the surface as indicated in paragraph 3.2.
- 3.7 The Government emphasised that the specific reforms for the building and construction industry were introduced to transform the unacceptable culture identified by the Cole Royal Commission. It was the singularity of the poor standard of industrial behaviour that led to the introduction of industry specific reform. A reversal of that behaviour and the heralding of a new culture has long been the objective of Master Builders and a task that is not yet finished. The necessity is for the rule of law to be applied, and then to become ingrained, on building sites.

⁵ Commonwealth of Australia, *Final Report of the Royal Commission into the Building and Construction Industry February 2003*, www.royalcombcgi.gov.au, accessed 9 September 2008

⁶ Commonwealth of Australia, Interim Building Taskforce, *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce*, March 2004 and Commonwealth of Australia, Taskforce, *Upholding the Law – Findings of the Building Industry Taskforce*, September 2005

⁷ Commonwealth of Australia, Office of the 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; Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 31 August 2007; Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 31 December 2006; and Exercise of compliance Powers by the ABCC for the period 1 October 2005 to 30 June 2006*, <http://www.abcc.gov.au/abcc/Reports/LegalReports/>, accessed 9 September 2008

⁸ Note 6

3.8 The BCII Act was passed on 7 September 2005 and received Royal Assent on 12 September 2005. It was changed in a number of respects by the March 2006 amendments to the WRA⁹ but it is not a product of WorkChoices: it arises from the Cole Royal Commission's findings.¹⁰ Despite attacks on the Commission through ill informed comment by those who opposed and continue to oppose its findings,¹¹ the unassailable fact is that a Royal Commission is the highest form of inquiry in the legal system and there was a formal process which uncovered highly unacceptable conduct. The pattern of that conduct was not limited in time and was shown to be systemic, with its low point being represented by the federal de-registration of the Building Labourers Federation in 1986. This characterised the industry as unique, requiring industry specific responses that are encapsulated in the passage of the BCII Act.

3.9 Findings derived from such an inquiry are of vital community interest and should be and were acted upon by government; the large majority of the Cole Royal Commission recommendations were translated to law in the provisions of the BCII Act. However, Cole was not the first Royal Commission to make adverse findings about the industry's industrial relations practices. The 1992 New South Wales Gyles Royal Commission¹² also found systemic problems in industrial relations:

*The public and confidential submissions received by the Commission, with very few exceptions, identify and complain about various aspects of union militancy. The complaints were from so many disparate sources and are so consistent that they amount to a powerful body of evidence in themselves to establish the proposition that the conduct of the members and the officials of the former BWIU (New South Wales branch) very severely affect productivity and efficiency of the industry in this State, both because of the persistent disruption of projects and businesses and because of the restrictive work practices instituted and defended whilst work is actually proceeding.*¹³

⁹ *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) amended the WRA

¹⁰ See N Ruskin and M Huntington "Cole Royal Commission Reform is Back on the Agenda" (2005) 16(1) *Australian Construction Law Bulletin* 126

¹¹ "The Hottest Seat in Town" *Workers Online* Issue No. 139, 2002, "Touch One, Touch All", *Workers Online* Issue No. 140, 2002; "Grumpy Old Men", *Workers Online* Issue No. 150, 2002; "Royal Commissioner reserves decision on bias until Friday: Commissioner in difficult position says union" press release by CFMEU of 2 September 2002; "Commissioner agrees to hear application to stand aside on issue of bias in Melbourne on Monday – Union to challenge Commissioner on bias in Federal Court" press release by CFMEU of 29 August 2002; "Ever wondered what a Royal Commissioner gets paid?" press release by CFMEU of 2002; "Union disbelief at Commission directions" press release by CFMEU of 10 October 2001; Speech by National Secretary, CFMEU Construction Division to National Press Club of Thursday, 10 October 2002; "Cole's statement on bias 'defies logic and any ordinary sense of fairness', says CFMEU" press release by CFMEU of 6 September 2002; "A Sorry Anti-Union Tale from Start to Finish" Analysis and Case Studies exposing the bias of the Cole Royal Commission, CFMEU Victorian Branch; "CFMEU overcomes first hurdle in Federal Court Cole Commission" CFMEU Press Release of 30 August 2002. Letter of 12 September 2002 from CFMEU to Commissioner Cole; Site News Secretary's Report, May 2002

¹² Final Report of Royal Commission into Productivity in the Building Industry in New South Wales, Sydney 1992

¹³ *Id* at p 18

3.10 Following the Gyles Royal Commission, an entity known as the Building Industry Taskforce was established in New South Wales. In late 1995, the Taskforce was abolished and, in the wake of its abolition, industrial disruption increased. The pattern of Taskforces and other official bodies operating for a short period with no long term effect should not now become a feature of the federal system. Master Builders does not want a return to the situation where an entity or Task Force is in place for a short space of time but then, following its abolition, unlawful and adverse practices are re-introduced, with consequent retribution and a return to unacceptable practices.

4 BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT ACT, 2005 – BENEFITS ASSOCIATED WITH WORKPLACE RELATIONS AND PRODUCTIVITY

4.1 Since the introduction of the BCII Act the industry has experienced benefits that apply to all industry participants, including employees. These are both qualitative and quantitative. The qualitative material is not able to be fully documented, although there has been a report that seeks to assess these matters¹⁴ which we would commend to the Committee. There is, however, a great deal of evidence that all parties on building sites have been engaging in a more co-operative manner.

4.2 The most comprehensive quantitative analysis of the improvements that have occurred in the industry was recently documented in an independent economic report by the consulting firm Econtech.¹⁵

4.3 The Econtech report shows that there have been significant improvements across a range of productivity measures since the passage of the BCII Act:

- 7.3 per cent productivity gain in commercial building relative to residential building since 2004;
- 10 per cent addition to labour productivity in the construction industry due to the ABCC and associated reforms; and
- 10.5 per cent out performance in construction industry labour productivity compared to predictions based on historical performance to 2002.

4.4 Econtech modelling estimates the following broader impacts:

- GDP is 1.5% higher than it otherwise would be;
- the CPI is 1.2% lower than it otherwise would be;

¹⁴ Australian Constructors Association Four Years On: A report on changes following reforms flowing from the Building & Construction Industry Royal Commission as observed by managers, superintendents and sub-contractors (August 2007) <http://www.constructors.com.au/Home/> accessed 10 September 2008

¹⁵ [Economic analysis of building and construction industry productivity: 2008 Report](http://www.abcc.gov.au/abcc/reports/operationalreports) Cth of Australia, ABCC at <http://www.abcc.gov.au/abcc/reports/operationalreports> accessed 10 September 2008

- the price of dwellings are 2.5% lower than they otherwise would be; and
- consumer living standards have improved reflected in an annual economic welfare gain of \$5.1 billion.

4.5 This latter figure highlights that the entire community benefits from the operations of the ABCC. Passage of the Bill would therefore have a detrimental economic effect at least equivalent to \$5.1 billion per year, particularly having regard to the current global economic environment. That in itself is sufficient reason to not pass the Bill.

4.6 Workers have also benefited from the improved industrial relations environment. Construction wages are increasing at a rate that is in excess of wage increases in other sectors, as demonstrated in Table 1 below. Further, with the decreased levels of industrial disputation in the industry, Master Builders calculates that construction industry employees have increased aggregate earnings by close to \$18 million per annum via the benefits of fewer working days lost in a more harmonious industrial relations environment.

Table 1: Construction Price Indices

	Labour Price Index		Implicit Price Deflator	
	Construction	Total Aust	Construction	Total Aust
1998-99	3.3	3.2	2.2	1.3
1999-00	2.9	2.9	4.3	1.6
2000-01	4.4	3.4	6.8	4.5
2001-02	3.4	3.3	1.4	2.5
2002-03	3.5	3.4	3.5	2.1
2003-04	3.7	3.6	5.9	1.3
2004-05	5.2	3.8	6.9	2.3
2005-06	5.0	4.1	5.6	2.7
2006-07	4.7	4.0	7.0	3.0
2007-08	4.6	4.2	5.2	2.8

Source: ABS Cat No 6345.0, 8782.0.65.001, 5206.0 Labour Price Index: Total hourly rates of pay excluding bonuses. Domestic Demand used as Implicit Deflator for Total Australia.

5 BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT ACT, 2005 – BENEFITS ASSOCIATED WITH OCCUPATIONAL HEALTH AND SAFETY

- 5.1 The Cole Royal Commission placed a great deal of emphasis on occupational health and safety. The Royal Commissioner stated that the Commission examined no more important subject than occupational health and safety.
- 5.2 The Federal Safety Commissioner (FSC) was established in 2005 as a direct result of the recommendations of the Cole Royal Commission. The BCII Act establishes the FSC with section 30 outlining the functions of the FSC.¹⁶ Master Builders supported the creation of this role and continues to support the work of the FSC as an important component of improving occupational health and safety outcomes in the building and construction industry.
- 5.3 The Royal Commissioner stated that in his view, what was needed above everything else was cultural and behavioural change in the industry,¹⁷ matters that affect OH&S as well as industrial relations. The primary measure introduced to achieve the necessary cultural change is the Australian Government Building and Construction OH&S Accreditation Scheme (the Accreditation Scheme). The Accreditation Scheme applies to construction projects of \$3 million or more where the project is directly funded by the Australian Government, and to projects indirectly funded by the Australian Government where the Australian Government contribution is at least \$5 million and at least 50 per cent of the total project value or is \$10 million or more. The Accreditation Scheme is underpinned by the BCII Act.
- 5.4 Passage of the Bill would have adverse effects on the industry's OH&S as it would completely repeal the legislation, thus abolishing the FSC and the Accreditation Scheme. That is a consequence which must be avoided and the Bill should not be passed.

¹⁶ Section 30 is as follows: The [Federal Safety Commissioner](#) has the following functions: (a) promoting occupational health and safety in relation to [building work](#); (b) monitoring and promoting compliance with the [Building Code](#), so far as the Code deals with occupational health and safety; (c) disseminating information about the [Building Code](#), so far as the Code deals with occupational health and safety; (d) performing functions as the accreditation authority for the purposes of the [accreditation scheme](#); (e) promoting the benefits of the [accreditation scheme](#) and disseminating information about the [accreditation scheme](#); (f) referring matters to other relevant agencies and bodies; (g) any other functions conferred on the [Federal Safety Commissioner](#) by this Act or by another Act; (h) any other functions conferred on the [Federal Safety Commissioner](#) by the regulations.

¹⁷ Supra note 5, Volume 6, page 35

6 ALLEGATIONS OF “UNUSUAL” POWERS

6.1 Table 2 outlines each of the powers exercised by the ABCC with the rationale for their use and an indication of where other agencies have similar powers. The table illustrates that the powers are not unusual and are required. The ABCC in its previous form as the Building Industry Taskforce did not possess such powers, particularly the power to compel persons with information or documents about a building industry investigation to provide that material. The result was that the majority of complaints were not taken further:

A survey conducted on a number of clients who withdrew their complaint found that 52% had done so for fear of the ramifications they may face should they pursue the matter.¹⁸

6.2 Table 2 shows that the powers are not unusual and are not unique to the ABCC. The ABCC’s compliance power is modelled on that used by the Australian Consumer and Competition Commission (ACCC) and is similar to the power used by the Australian Securities and Investment Commission (ASIC). However, in relation to the ABCC’s compulsory powers, it should be emphasised that such powers are exercised only at the level of Commissioner and Deputy Commissioner. The other organisations, such as ACCC or ASIC, utilise the powers much more readily and at a much lower organisational level. Section 13(2) BCII Act stipulates that the powers or functions under section 52 may only be delegated by the ABC Commissioner to a Deputy ABC Commissioner.

¹⁸Cth of Australia, Building Industry Taskforce, *Upholding the Law – Findings of the Building Industry Taskforce*, September 2005 p 11

Table 2: Powers of the Australian Building and Construction Commissioner

Sections of the BCII	What is the power	How and when used	Why	Reason to be retained
<i>Australian Building and Construction Inspectors (ABC Inspectors)</i>				
59(3)	may, without force, enter premises	<p>To inspect building sites and obtain information that is relevant to an investigation.</p> <p>Before entering premises, an ABC Inspector must announce that they are authorised to enter and produce their identity card to the occupier for inspection.</p>	<p>For compliance purposes</p> <p>That is, ascertaining whether:</p> <ul style="list-style-type: none"> ▪ the BCII ▪ the WRA; ▪ the <i>Independent Contractors Act</i> 2006 (Cth); ▪ an order of the Australian Industrial Relations Commission; or ▪ a Commonwealth industrial instrument; <p>has or is being complied with, by a building industry participant.</p>	<p>Powers are equivalent to those given to 'workplace inspectors' under section 169 of WRA.</p> <p>Without these powers, ABC inspectors would be unable to attend sites unless invited on, and would have virtually no evidence gathering capability.</p>
59(9)	may, without force, enter business premises			
59(5)(a)	may inspect, any work, material, machinery, appliance, article or facility			
59(5)(b)	may take samples of goods or substances			
59(5)(c) & 59(11)	may interview any person (voluntarily)			
59(5)(d)	may inspect, and make copies of, any document on the premises			
59(5)(e)	may require that documents be produced			
59(6)	may, by written notice, require that documents be produced			

Sections of the BCII	What is the power	How and when used	Why	Reason to be retained
ABCC or Deputy ABCC ONLY				
52(1)(c)	Require a person by written notice to give the information	To obtain information when unable to do so using the powers available under section 59.	If the ABCC believes on reasonable grounds that a person: <ul style="list-style-type: none"> has information; has documents; or is capable of giving evidence; that is relevant to an investigation. 	Without section 52 there is no way of compelling information or evidence (see also ABCC Examinations report). Same powers as: <ul style="list-style-type: none"> Australian Competition and Consumer Commission (Section 155 <i>Trade Practices Act</i> 1974 (Cth)); Australian Taxation Office (Section 353 <i>Taxation Administration Act</i> 1953 (Cth)); and Australian Securities and Investment Commission (Section 19 <i>Australian Securities and Investment Commission Act</i> 2001 (Cth)).
52(1)(d)	Require a person by written notice to produce the documents			
52(1)(e)	Require a person by written notice to attend and answer questions			
ABCC ONLY				
67	The ABCC may publish details of non-compliance with the: <ul style="list-style-type: none"> BCII; WR; or <i>Independent Contractors Act</i>. 	If the ABCC considers that it is in the public interest to do so he/she may publish details of non-compliance, including the names of participants who have failed to comply.	The ABCC must apply the public interest test having regard to his/her functions and the purposes set out in the BCII.	This is an important option. It enables the ABC Commissioner to use alternative methods (to court proceedings) to address non-compliance, when it is in the public interest to do so. To date this power has been used once.

7 ALLEGATIONS ABOUT DENIAL OF RIGHTS

7.1 In the Second Reading speech concerning the Bill Senator Siewert stated that:

Building and construction workers are being denied basic democratic rights to procedural fairness and natural justice that the rest of us take for granted. These workers - who have not been charged with anything and may only be suspected of knowing about an offence committed by someone else - are being treated with fewer rights than someone who has committed a very serious criminal offence. It is not appropriate to regulate the relationship between employers and employees in a quasi-criminal way. If there is criminality on a building site it should be dealt with by the criminal law.¹⁹

7.2 Master Builders submits that the allegation of the denial of “basic democratic rights” is not correct. There are protections in the BCII Act preventing the information that is gathered using the ABCC’s power to compel a person to give evidence and information from being used in any other proceedings, save for some limited exceptions. This includes where a person has provided false or misleading information or documents or where a Commonwealth official has been obstructed. Sections 53 and 54 BCII Act cannot be ignored. Persons who provide information to the ABC Commissioner will have protection against civil or criminal proceedings in relation to the provision of the particular information.

7.3 There are in fact two protections conferred by sections 53 and 54. First, under section 53(2) where a person provides information, documents or answers under a section 52 notice, these are only admissible in proceedings for an offence under section 52 and the offences under the criminal code mentioned in section 52. Secondly, section 54 then sets out that persons who in good faith provide documents or answer questions where section 52 applies are protected from liability if they have contravened another law and they are protected from civil liability where loss or damage has been suffered by another person.

7.4 In other words, even though there is a limited intrusion on the common law right to silence, there are very important statutory protections reinforcing the doctrine known as the privilege against self incrimination. The doctrine protects persons from being convicted of an offence on the basis of their own evidence.

7.5 Commentators have emphasised that it is this protection against self incrimination that is at the nub of human rights not the right to silence.²⁰

¹⁹ Senate Hansard 28 August 2008

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=:db=:group=:holdingType=:id=:orderBy=:page=:query=BillId_Phrase%3As636%20Dataset%3Ahansardr,hansards%20Title%3A%22second%20reading%22;querytype=:rec=0;resCount=
accessed 11 September 2008

²⁰ Cf view put by Belinda Neal *Media Chip Away at a Cornerstone of our Rights* Sydney Morning Herald 11 September 2008

*The privilege in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them.*²¹

- 7.6 In the context of the ABCC's powers that basic right is reinforced, not taken away. Master Builders finds it extraordinary that this is a matter that was not addressed at all by Professor Williams in a recent paper where he is scathing of the ABCC's powers.²² The fact is that those who provide evidence to the ABCC under compulsion are given extensive rights that exceed the common law protections.
- 7.7 It is also incorrect to label the powers that the ABCC possesses as "criminal" or quasi-criminal." There is no "regulation" of the employment relationship via the criminal law. This seems a misplaced statement on the part of the Senator. However, a number of the behaviours to which the work of the ABCC can be directed are criminal matters, inclusive of the issue of death threats mentioned in paragraph 3.3 of this submission. Criminal matters uncovered are referred to the police by the ABCC. Whilst section 52(6) of the BCII Act sets out a penalty of up to six months imprisonment where after notice a person fails to provide information documents and the like to the ABCC, the ABCC itself does not and cannot impose a penalty and the Director of Public Prosecutions would need to bring any proceedings to prosecute the offence. It would be unlikely that a court would impose the maximum penalty for a first offence, with the ability of the court to impose a fine instead of a jail term pursuant to section 4B(2) *Crimes Act 1914 (Cth)*.
- 7.8 It is true that individuals, unions and employers have been prosecuted for breaches of the BCII Act. Prosecutions are not the entirety of efforts to change culture, the necessity for which was discussed in section 3 of this submission, but they feature as indicators of the necessary deterrents to stop unacceptable industrial conduct. But it should be clear that the prosecutions are not as to matters of criminality – they are civil penalty proceedings. The prevalence of civil penalty regimes in this country has been noted by the Australian Law Reform Commission and, again, their presence in the BCII Act is not at all extraordinary:

*Civil pecuniary penalties are most extensively found in more recent legislation such as the Corporations Act 2001 (Cth), the Trade Practices Act 1974 (Cth) and the Environmental and Biodiversity Conservation Act 1999 (Cth), although they have also been present in the Customs Act 1901 (Cth) since its enactment in 1901.*²³

²¹ Queensland Law Reform Commission *The Abrogation of the Privilege Against Self Incrimination Report 59*, December 2004 p2

²² Professor George Williams *The Australian Building and Construction Commission: An Appropriate Use of Public Power?* Forum on Industrial Laws Applying in the Australian Construction Industry 25 August 2008

²³ Australian Law Reform Commission Discussion Paper 65 *Securing Compliance Civil and Administrative Penalties in Australian Federal Regulation* at para 3.45 http://www.austlii.edu.au/au/other/alrc/publications/dp/65/03_Types_of_penalty.html#Heading17 accessed 12 September 2008

7.9 In the context of enforcing the rule of law, the ABCC has stated:

*Prosecutions (in the sense of civil penalty proceedings) have centred on recurring issues in the building industry, such as coercion, strike pay and unlawful industrial action. The ABCC is prepared to take on unlawful aspects of the ingrained culture within the building and construction industry. Apart from the immediate impact, prosecutions highlight to the industry that the law will be enforced on building sites.*²⁴

7.10 Master Builders notes that it is actions of the ABCC to curtail unlawful industrial action that has brought the benefits earlier outlined. The abolition of the ABCC would see a reversal of the progress made to date, to the detriment of the industry and to the Australian nation.

8 GOVERNMENT'S AGENDA

8.1 The Government is acting to implement its *Forward with Fairness* agenda. *Forward with Fairness* is comprised of two policy documents that were published in the lead up to the November 2007 election. The first was released in April 2007. It is entitled *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*.²⁵ The second is entitled *Forward with Fairness: Policy Implementation Plan*.²⁶

8.2 The Government has been meticulous in adhering to its pre-election promises, as the Deputy Prime Minister made plain to Master Builders in a recent speech:

*Before last year's election, we made a number of commitments about the workplace relations reforms we would introduce to establish a fair and balanced workplace relations system for all. And we have stuck scrupulously to those commitments – something the MBA has publicly acknowledged.*²⁷

8.3 The Government has made it clear as part of its *Forward with Fairness* plans that the ABCC will be superseded as of 31 January 2010. The shape and form of the laws and the bureaucratic entity (a specialist division of a new body called Fair Work Australia) that will administer them following the closure of the ABCC is not clear. The matter of the successor body and its powers is subject to an inquiry that is currently underway, the Wilcox Inquiry.²⁸ However, one of the essential platforms of the Government's plan for industrial relations is that there be in place an industry specific inspectorate to deal with the unique matters identified in the Cole Royal Commission. The Government has made it clear that:

²⁴ Note 7 at page 32.

²⁵ Available at <http://www.alp.org.au/download/now/forwardwithfairness.pdf>, accessed 19 August 2008

²⁶ Available at http://www.alp.org.au/download/070828_dp_forward_with_fairness_policy_implementation_plan.pdf, accessed 19 August 2008

²⁷ Deputy Prime Minister Speech to Master Builders Industry Dinner 29 May 2008 available at <http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/TheMastersBuildersAustraliaIndustryDinner.htm>, accessed 19 August 2008

²⁸ Final terms of reference for the inquiry were released on 24 July 2008 see media statement by the Deputy Prime Minister *Wilcox Terms of Reference* available at <http://www.alp.org.au/media/0708/msewr240.php> accessed 20 August 2008

*The principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue, as will a specialist inspectorate for the building and construction industry.*²⁹

- 8.4 In the light of this Government plan to objectively examine the future “strong cop on the beat”³⁰ to use the Deputy Prime Minister’s words, the Bill is premature and would lead the Government to break an election commitment of huge community importance with the negative economic consequences which would flow from the breach of the promise being highlighted in section 4 of this submission. To date, despite strong internal pressures³¹ the Government has held fast to this election promise.
- 8.5 If the ABCC were abolished now, there would also be a period in which no active scrutiny of unlawful industrial action was undertaken. That proposition is made assuming that the promised specialist inspectorate would proceed if the step was taken to abolish the ABCC now by way of repeal of the BCII Act. This would be an unacceptable gap in the enforcement of the law as well as throwing Commonwealth contracts into disarray, given the importance of the ABCC in administering the National Code of Practice and related Implementation Guidelines.³²

9 CONCLUSION

- 9.1 The Bill is an inappropriate legislative step based upon fundamental misconceptions. It should not be passed. The current process for investigating a successor organisation to the ABCC should run its course and there should always be, as the Government has promised, a “tough cop on the beat.” This is necessary to meet the unique circumstances of the building and construction industry.
- 9.2 Master Builders commends to the Committee the words used by the Australian Mines and Metals Association in a recent report,³³ as follows:

Now is not the time to derail the improvements being experienced in the building and construction industry by establishing a specialist division within Fair Work Australia that is all talk and no action.

Master Builders reinforces these words in the current context. Now is not the time to pass the Bill. Never is the time to pass the Bill.

²⁹ Supra note 2 ALP *Forward with Fairness – Policy Implementation plan* August 2007 p 24

<http://www.alp.org.au/media/0807/msdlopoo280.php> accessed 20 August 2008

³⁰ See transcript of *Insiders* programme broadcast 17 June 2007 <http://www.abc.net.au/insiders/content/2007/s1953405.htm>

³¹ Steven Scott *Gillard Dodges ABCC Caucus Rift* The Australian Financial Review 23 September 2008 p8

³² See R M Calver *Workplace Reform: The Contribution of the National Code of Practice and Implementation Guidelines* Australian Construction Law Newsletter 118 January/February 2008 26 esp at p 30

³³ AMMA, *The building industry regulator – A tough cop or a transition to a toothless tiger*, paper by AMMA, 9th September 2008, p48