The building industry regulator

A tough cop or a transition to a toothless tiger?

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EXECUTIVE SUMMARY

In 1986 the Hawke Government with the support of Victorian Premier John Cain deregistered the Builders Labourers Union in an attempt to address corruption and violence in the building and construction industry.

In 1992 the Gyles Royal Commission revealed the extent of unlawful practices in the building industry in New South Wales

In 2001 the Cole Royal Commission was commissioned to investigate reports of widespread unlawful activity in the building industry.

In evidence before the Royal Commission the Assistant State Secretary of the CFMEU Western Australian Branch stated that 'it was my intention to try and close that site down if everyone wasn't a financial member of the union'.[1] An employee relations manager reported being told by a CFMEU organiser '[y]ou guys just don't understand. We rule the site and we will do what we want to do'.[2]

Although derided a political witch hunt, the 2003 Royal Commission's report exposed to the Australian public what the industry already new. The Building and Construction industry was characterised by intimidation, coercion, unlawful industrial action and union interference. Without fear of repercussion, unions exerted significant control over projects, dictating who companies could employ, which subcontractor to engage and which workplace arrangements to enter into.

In this industrial environment the completion of a construction project on time and on budget was unheard of and it was common practice to factor in an additional 20 percent for expected lost time when tendering for jobs. Productivity in the industry suffered and after ten years of volatility, productivity declined sharply in 2000-01 to below 1990 levels. Costs in the construction industry also became disproportionate as compared to the residential building sector, and were inevitably borne by the public as end user.

This lawless culture of the building and construction industry has proved hard to penetrate and transform despite previous attempts by some state governments such as Western Australia, whose own industry regulator showed promising results until its effective means of enforcement were removed. What has become apparent is that an industry regulator with strong powers to ensure the rule of law is observed is

[1] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 5.
[2] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 21, 269.

necessary to overcome the culture of silence and intimidation and the unions' stronghold over the way business is done in the building and construction industry. Polite requests for information won't cut through the code of silence.

The introduction of tougher laws concerning unlawful industrial action by the Howard Government in 1996 together with their monitoring and enforcement role of the Australian Building and Construction Commission has proved to be a successful combination. In the time since the tough cop has been on the beat, productivity has improved 10 percent, end user costs have reduced by 4 percent and lost time due to industrial disputes has plummeted. Econtech recently valued the ABCC's contribution to the economy at $5.1 billion.

The improvements are much welcomed by the resources sector, which is investing tens of billions of dollars in 341 minerals and energy construction projects.

After re-examining the findings of the Cole Royal Commission and reviewing the operation and impact of the ABCC, *Building and Construction Industry Improvement Act 2005* (BCII Act) and the *Workplace Relations Act 1996*, AMMA argues that the specialist division of Fair Work Australia needs to have the same compliance and enforcement powers currently held by the ABCC. To do otherwise would be to transition to a toothless tiger.

The fact that ACTU President Sharan Burrow, CFMEU National Secretary John Sutton , CFMEU Western Australian Branch Secretary Kevin Reynolds, ETU State Secretary Dean Mighell and parliamentary sympathisers are pressuring the government to break its election promise and abolish the ABCC prior to 1 February 2010, should be seen as a ringing endorsement of the success of the ABCC in its current form. AMMA sees these calls as futile as the government has repeatedly stated to AMMA, unions and others that the ABCC and its current powers will be retained until 1 February 2010. The focus of this paper and the concern of the resources sector is what will be in place after February 2010.

The union movement want to disarm the tough cop by allowing witnesses to refuse to co-operate and hiding documentary evidence. Such practises are prohibited when people do not observe laws in the financial industry, so why should it be any different in the building and construction industry?

The special powers give employers and employees the protection to speak out about unlawful and inappropriate behaviour that they otherwise would not freely give for fear of reprisal. This is the only way to break the culture of intimidation and silence that has hold of the industry.

Now is not the time to disrupt the improvements being experienced in the building and construction industry by establishing a specialist division of Fair Work Australia that lacks the requisite power and authority to continue the much needed cultural change in the building and construction industry.

What we need is a tough cop not a transition to a toothless tiger.

INTRODUCTION

In July 2007, AMMA released a discussion paper titled *Constructing Lawful Workplaces: the need to maintain Australia's economic success by retaining a strong industrial action compliance regime (Constructing Lawful Workplaces)*. In that paper, AMMA extolled the benefits of retaining the measures introduced by the 1996 and 2005 workplace relations legislative reforms and specific legislative reform in the building and construction industry.

While AMMA had the benefit of reviewing the government's first *Forward with Fairness* policy document when writing *Constructing Lawful Workplaces*, at that time the policy did not address critical aspects of the proposed compliance regime. AMMA raised concerns that the legislation under the government's proposed policy would not deal effectively with unlawful conduct by industrial parties. The following questions were raised:

- Will employers be required to seek a certificate from the Australian Industrial Relations Commission (the Commission) before seeking court orders to stop or prevent unprotected industrial action?

- Will the current secondary boycott arrangements be retained in the *Trade Practices Act 1974*?

- Will an appropriate balance be struck in right of entry laws?

- Will the Office of the Australian Building Construction Commissioner (ABCC) continue until the establishment of a Fair Work Australia?

- Will the proposed 'specialist division' of Fair Work Australia have the same enforcement and compliance powers as the current ABCC to enforce the rule of law in an industry with a reputation for operating by the 'law of the jungle'?

- How will the workplace relations legislation deal with action that interrupts normal business but which is taken by third party activist groups like Union Solidarity?

Some of these questions have been satisfactorily answered with the release of the *Forward with Fairness - Policy Implementation Plan*. However a number of questions remain unanswered. The need for an appropriate compliance regime in the building and construction industry is crucial when consideration is given to what is at stake.

The resources sector's contribution to Australian commodity export earnings in 2007-08 is forecast to be $178 Billion[3] (or 84 percent). The resources sector's increasing share is partly driven by increased commodity prices but also by an increase in export volumes.[4]

In the period since 1996 Australia has shaken its reputation as a strike prone country and offers businesses greater confidence that we can deliver a quality product on time and on budget. One of the consequences of the investor confidence inspired by high demand, high commodity prices and our improved industrial record, is substantial in the growth of the resources sector. Recent reports record an investment of $70.5 billion in 97 advanced stage mining projects as at April 2008.[5]

The construction of new mines and redevelopment of existing operations will be the key driver in ensuring the continuation of the Australian resources sector's stellar performance. The performance of the building and construction industry is critical to the continued growth of the resources sector.

The building and construction industry has experienced significant productivity improvements and staggering declines in industrial disputation since the implementation of the recommendations of the Royal Commission into the Building and Construction Industry (Royal Commission).

The ABCC, with the support of the compliance regimes contained in both the *Workplace Relations Act 1996* and *Building and Construction Industry Improvement Act 2005* (BCII Act), has had a demonstrable impact on behaviour in the industry. The task that remains is to shift the culture of the industry from the law of the jungle to a respect for the rule of law. At present some of the industrial parties are seeking to regress into the past with a focus on removing the independent regulator who is responsible for ensuring the rule of law applies.[6]

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[3] Australian Bureau of Agricultural and Resource Economics, *Australian Commodities*, Vol 15, No 2, June Quarter, viewed 18 July 2008, http://www.abareconomics.com/publications_html/ac/ac_08/ac08_June.pdf

[4] Australian Bureau of Agricultural and Resource Economics, Record commodity export earnings in sight, *Media Release*, 23 June 2008, viewed 18 July 2008, http://www.abareconomics.com/corporate/media/2008_releases/23june_08.html

[5] Australian Bureau of Agricultural and Resource Economics, Record $70.5 billion investment in advanced minerals and energy projects, *Media Release*, 21 May 2008, viewed 17 July 2008, http://www.abareconomics.com/corporate/media/2008_releases/21may_08_2.html

[6] See for example, ACTU, Building workers should have same rights as the rest of the workforce, *Media Release*, 30 July 2008, ACTU, viewed 2 September 2008, http://www.actu.asn.au/Media/Mediareleases/Buildingworkersshouldhavethesamerightsastherestoftheworkforce.aspx

A HISTORY OF LAWLESS BEHAVIOUR IN THE CONSTRUCTION INDUSTRY

Following a report by the Employment Advocate in 2001, which declared that the building and construction industry was plagued by 'corrupt conduct' and 'widespread coercive and collusive practices'[7], a Royal Commission was established to report on the 'nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct'.[8] The inquiry considered multi-unit and high rise residential developments, non-residential buildings, such as office blocks, shopping centre, retail premises, educational institutions, and hospitals, and engineering construction work.[9]

The nature of the practices and conduct in engineering construction work is of particular interest to the resources sector, which is engaged heavily in capital intensive construction projects.

Demand for Australia's resources has resulted in a continued and significant expansion of the resources sector. There are 341 projects at various stages of planning on the ABARE projects list – 109 projects were added in just six months.[10] In those same six months, '22 major minerals and energy projects, with a total capital expenditure of $11.3 billion, were completed.'[11]

As at April 2008, there were 97 minerals and energy projects at advanced stages of development with a total capital expenditure of $70.5 billion.[12]

Some of the planned major mining construction projects include:[13]

- Woodside's Pluto LNG project, with a capital cost of $12 billion. It 'is the largest commitment to a single project in Australia's mining and energy industry'[14];
- Rio Tinto's Kestrel expansion project currently under construction, with capital expenditure of $1.14 billion and creating up to 250 jobs;
- North West Shelf LNG Venture's $1.6 billion development of the Angel gas and condensate field;

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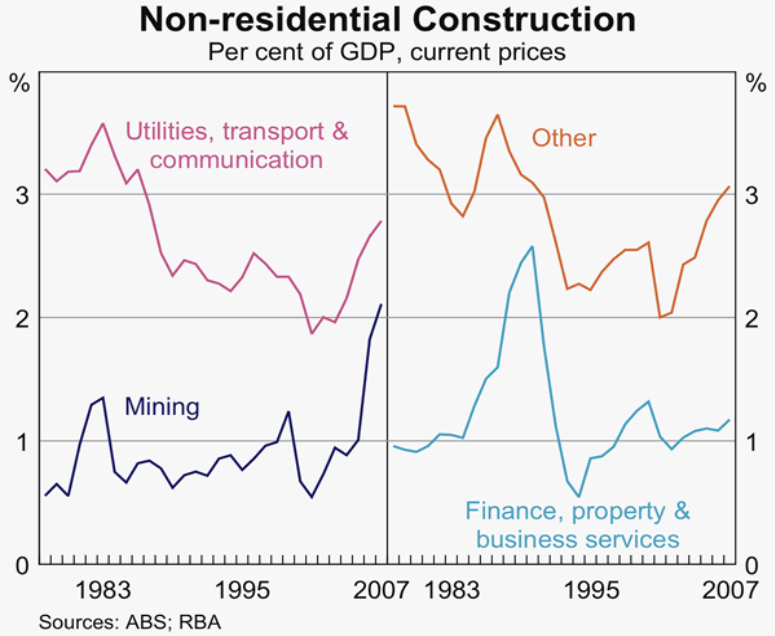
[7] Prime Minister, Royal Commission to Investigate Building Industry, *Media Release*, Australian Government, viewed 24 July 2008, http://pandora.nla.gov.au/pan/10052/20011121-0000/www.pm.gov.au/news/media_releases/2001/media_release1133.htm
[8] Ibid.
[9] Ibid, 4.
[10] Ibid, 15. 244 of these projects remain uncommitted.
[11] Ibid.
[12] Australian Bureau of Agricultural and Resource Economics, *Minerals and Energy: Major development projects*, April 2008 listing, 9, viewed 15 July 2008, www.abare.gov.au
[13] Ibid.
[14] Ibid.

- Ozminerals' Prominent Hill copper mine, with a capital expenditure of $1.8 billion. Construction is in progress with production expected to commence in the second half of 2008;
- Consideration of BHP Billiton's Olympic Dam expansion project, currently in feasibility stage, with a capital expenditure of approximately $7 billion forecasted;
- Chevron, ExxonMobil and Shell's $20 billion[15] Gorgon Project, creating 11,000 new jobs;
- Fortescue Metals Group's stage 1 Pilbara Iron Ore project, which includes rail, port, mine and handling facility, with a capital expenditure of $3.1 billion;
- BHP Billiton's Western Australian Iron Ore Rapid Growth Project 4 expansion project, currently under construction, with capital expenditure of $2.47 billion;
- Esso Australia Resources Pty Ltd, BHP Billion and Santos Ltd's joint venture $1.26 billion Kipper Gas Project;[16] and
- Bass Strait $2 billion[17] Turrum Project, part of the Gippsland Basin Joint Venture between Esso Australia Resources Pty Ltd and BHP Billiton Petroleum (Bass Strait) Pty Ltd.[18]

The Reserve Bank of Australia's (RBA) graph[19] overleaf shows the contribution of construction in mining to the GDP, which according to the RBA is the 'largest increase in investment the past five years.'[20]

[15] Shane Wright, 'Carbon cost to companies unlikely to fuel exodus', *The West* (Western Australia) 28 July 2008, viewed 7 August 2008, http://www.thewest.com.au/default.aspx?MenuID=9&ContentID=87475.
[16] ExxonMobil, Kipper Gas Project Approved, *News Room*, 19 December 2007, viewed 7 August 2008, http://www.exxonmobil.co.uk/Australia-English/PA/Newsroom/NewsReleases/AU_NR_MR_2007_Kipper.asp
[17] Figure sourced from Australian Bureau of Agricultural and Resource Economics, *Minerals and Energy: Major development projects* (2008) 9.
[18] ExxonMobil, '$1.4 Billion Turrum Project Announced', *News Room*, 25 July 2008, viewed 7 August 2008, http://www.exxonmobil.com/Australia-English/PA/Newsroom/NewsReleases/AU_NR_MR_2008_Turrum.asp
[19] Reserve Bank of Australia, *Statement on Monetary Policy, Box B: Investment and the Productive Capacity of the Economy*, Graph B3, viewed 15 July 2008, http://www.rba.gov.au/PublicationsAndResearch/StatementsOnMonetaryPolicy/Feb2008/inv_prod_cap_econ.html
[20] Ibid.



In 2001-02 the building and construction industry accounted for 5.5 percent of Australia's GDP.[21] In 2005-06 the construction sector contributed $62.4 billion to the Australian economy, representing 6.4 percent of GDP.[22] In 2006-07 this contribution increased by $5 billion, representing 7.6 percent of the GDP.[23]

Between 2005-06 and 2006-07 the number of employees in the building and construction industry increased by nine percent to 917,000 persons.[24] Non-residential construction accounted for approximately 88 percent of the construction industry and 'has been the primary driver' of growth.[25]

Given the significant level of investment into mining and energy construction projects and the continued high level of demand for Australia's resources, it is essential that the industrial relations environment in the building and construction industry does not return to the law of the jungle. AMMA contends that if the building and construction industry returned to the industrial environment of the 1990s, project deadlines, budgets and contractual obligations would be put at risk, costs would escalate and investment confidence would deteriorate.

[21] Commonwealth Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 1, *3.*
[22] Australian Bureau of Statistics, *Australian System of National Accounts*, Cat, No 5204.0, ABS, Canberra.
[23] Ibid.
[24] Ibid.
[25] The Allen Consulting Group, *The Economic Importance of the Construction Industry in Australia*, Report to the Australian Constructors Association, 21 August 2007, viewed 21 July 2008, http://www.constructors.com.au/Research_Reports/ACA_2007_Economic_Importance.pdf

The Findings of the Cole Royal Commission

In 2001 the Honourable Terrence Cole was appointed as a Royal Commissioner to inquire into the conduct and practices of the building and construction industry. The Royal Commission's final report was delivered in 2003.[26] At this time, the building and construction industry was not separately regulated, but was subject to the *Workplace Relations Act 1996* and/or state and territory laws.

The Royal Commission found evidence of widespread disregard for the rule of law occurring in each state and territory[27] and that this culture was embedded in the building and construction industry despite previous attempts by all Australian governments to implement change.[28] The Royal Commission stated that:

> [t]he attitudes disclosed by the evidence…are similar to those the subject of prior Commissions, inquiries and reports. The culture has not changed.[29]

It is useful to remind ourselves of the specific findings of the Royal Commission based on the evidence presented. Specifically, the Royal Commission's inquiry revealed:

a. widespread disregard of, or breach of, the enterprise bargaining provisions of the *Workplace Relations Act 1996*;
b. widespread disregard of, or breach of, the freedom of association provisions of the *Workplace Relations Act 1996*;
c. widespread departure from proper standards of occupational health and safety;
d. widespread requirement by head contractors for sub-contractors to have union endorsed enterprise bargaining agreements before being permitted to commence work on major projects in state capital central business districts;
e. widespread requirement for employees of sub-contractors to become members of unions in association with their employer obtaining a union endorsed enterprise bargaining agreement;
f. widespread requirement to employ union-nominated persons in critical positions on building projects;
g. widespread disregard of the terms of enterprise bargaining agreements once entered into;
h. widespread application of, and surrender to, inappropriate industrial pressure;
i. widespread use of occupational health and safety as an industrial tool;
j. widespread making of, and receipt of, inappropriate payments;
k. unlawful strikes, and threats of unlawful strikes;

[26] The full report can be found at www.royalcombi.gov.au/hearings/report.asn
[27] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 4-5.
[28] Ibid, 35-36.
[29] Ibid, 36.

l. threatening and intimidatory conduct;
m. underpayment of employees' entitlements;
n. disregard of contractual obligations;
o. disregard of National and State codes of practice in the building and construction industry;
p. disregard of, or breach of, the strike pay provisions of the Workplace Relations Act 1996;
q. disregard of, or breach of, the right of entry provisions of the Workplace Relations act 1996;
r. disregard of Australian Industrial Relations Commission and court orders;
s. disregard by senior union officials of unlawful or inappropriate acts by inferior union officials;
t. reluctance of employers to use legal remedies available to them;
u. absence of adequate security of payment for subcontractors;
v. avoidance and evasion of taxation obligations;
w. inflexibility in workplace arrangements;
x. endeavours by unions, particularly the Construction, Forestry, Mining and Energy Union (CFMEU), to regulate the industry; and
y. disregard of the rule of law.[30]

There are too many examples of the types of inappropriate conduct identified in the Commission's 23 volume report to list here, but it is worthwhile providing a selection from the list of examples in the Royal Commission's final report:[31]

- industrial action, or threats thereof, on a site and other related or unrelated sites, if all subcontractors did not have a union-endorsed EBA

- stoppage of work by a union because a subcontractor would not enter into a union endorsed EBA;

- union officials restricting, or threatening to restrict, a subcontractor's opportunity to obtain work if it did not sign a union-endorsed EBA;

- the threat by union officials to prevent subcontractors with Australian Workplace Agreements (AWAs) from working on site;

- disregard by union officials of the wishes of employees, or their failure to consult with employees;

[30] Ibid, 4-5.
[31] Ibid, 8-10.

- the initiation of a bargaining period by a union, although uninvited to do so by employees, and where no employees were union members;

- interference by unions in industrial and safety issues where no employee had made a complaint and no employee was a union member;

- a union refusing to sign an agreement agreed by its members with their employer, despite the unanimous wishes of the members that it do so;

- unions insisting on the payment of a travel allowance to workers who did not travel in their work;

- union members engaging in sympathy action in support of matters not related to the site on which they are working;

- a union circulating 'approved subcontractor lists';

- union officials acting with the apparent belief that their right of entry was effectively unlimited;

- a union pressuring a head contractor to withhold payments from a subcontractor, in turn placing pressure on the subcontractor to accede to the union's industrial aims;

- union officials using abusive language and intimidatory behaviour;

- unions or head contractors applying pressure upon subcontractors in support of union membership on sites;

- disregard of the provisions of agreements entered into.

These findings demonstrate the incredularity of the CFMEU's statements that the Howard Government created a myth of corruption and lawlessness in the building and construction industry.[32] Rather, the Royal Commission considered that these findings were particular to the building and construction industry and that the industry was unique in this regard.[33]

[32] Construction, Forestry, Mining and Energy Union, *ALP needs to rethink its plan to delay abolishing the ABCC*, 1 June 2007, viewed 16 July 2008, http://www.cfmeu.asn.au/construction/research/pdfs/ALP%20is%20wrong%20to%20delay%20abolishing%20the%20ABCC%20OpEd%20by%20Dave%20Noonan.pdf

[33] Commonwealth,Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 5.

Incidences of inappropriate and/or unlawful conduct

During the Royal Commission's inquiry, particular incidents of inappropriate or unlawful conduct were given in evidence. A brief description of the findings of the Royal Commission about some of these incidents, which is representative of much of the behaviour by unions in the industry, is provided below:

- The CFMEU ignored a dispute settlement procedure contained in a collective agreement with Consolidated Constructions Pty Ltd and stopped work on the site. In evidence before the Royal Commission, Joe McDonald, Assistant State Secretary of the CFMEU Western Australian Branch stated that '[t]here was a need for militant action and militant action took place' and 'it was my intention to try and close that site down if everyone wasn't a financial member of the union'.[34]

- A roving CFMEU shop steward used inclement weather claims for industrial purposes against Wycombes Pty Ltd, which did not have a collective agreement with the union. The Royal Commission received evidence of a shop steward spitting on a cigarette and ordering employees to go to the site sheds on the basis that this justified closing the site down due to inclement weather. The contractor then signed a union collective agreement.[35]

- A statutory declaration presented to the Royal Commission alleged that during the Worsley Expansion Project, costing approximately $870 million, an employee relations manager was told by a CFMEU organiser: 'You guys just don't understand. We rule the site and we will do what we want to do'.[36] On a number of occasions union officials explained to the employee relations manager that disrupting work was a method for increasing membership.[37] This project suffered frequent strikes in attempts by the unions to reopen negotiations of the Worsley Project Agreement.[38] Six percent of available work time was lost due to unauthorised stop work meetings.[39] Cranes on the project were shut down 'on the pretence of safety issues' and evidence received by the Royal Commission stated that in reply to company questions, one organiser stated '[w]ithdraw the section 127 and

[34] Ibid, 23-24.
[35] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report*, (2003) vol 3, 216-217.
[36] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 21, 255-256.
[37] Ibid, 271.
[38] Ibid, 269.
[39] Ibid.

we will leave you alone.'[40] On the project, Thiess Pty Ltd lost 19,284 hours between April 1988 and October 1999 due to industrial action; Clough Engineering Ltd lost 9,375 hours; CBI Constructors Pty Ltd lost 69,226 hours; O'Donnell Griffin Pty Ltd lost 17,201 hours; and Downer RML lost approximately 5,440 hours.[41]

- Fluor Daniel Pty Ltd (Fluor Daniel) was head contractor on an $800 million contract for the $1.2 billion Murrin Murrin Nickel and Cobalt Construction Project (the Project). A site agreement was reached with the AMWU, the AWU, CEPU and the CFMEU. While issues arose due to the design of a kitchen on site, allegations were made to the Royal Commission that workers were seen deliberately ensuring that food served from the kitchens were infested with maggots, or other material such as nuts and bolts that resulted in a number of stoppages.[42] The relationship between Fluor Daniel and the CFMEU were also strained due to a belief by the CFMEU that the chief executive of the project had reneged on an agreement reached with the unions in return for the release of containers of specialist equipment held up by the MUA wharves dispute.[43] Evidence presented to the Royal Commission described the project as being marred by threats and acts of violence and arson, and made allegations that some workers assaulted due to working during a strike period or threatening to do so.[44] Demarcation disputes between the AWU and CFMEU also arose. A statutory declaration presented to the Royal Commission alleged that Joe McDonald threatened an AWU official that he would be 'removed in a body bag'.[45]

The Royal Commission's inquiry confirmed that the building and construction industry was a black spot on the industrial landscape.

[40] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 27.
[41] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 21, 273-279.
[42] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 20, 255-257.
[43] Ibid, 253.
[44] Ibid, 262.
[45] Ibid, 260.

Strong industry regulation – the only way to improve the industrial relations environment

It is hardly surprising that the nature and extent of the unlawful and coercive conduct in the building and construction industry has had a negative impact on productivity.

In November 2002, Tasman Economics released a paper titled *Productivity and the Building and Construction Industry* and reported that multifactor productivity in the industry was higher than the all industries index until the 1980s and 1990s.[46] However, between 1988-89 and 1999-2000, construction industry multifactor productivity increased only 4.3 percent compared to a 15.3 percent in all industries.[47] In addition a further sharp decline was observed in 2000-01 to levels below the all industry level.[48]

The Royal Commission attributed the below average productivity levels to union 'control over projects', 'rigidity', 'uniformity of wage and conditions outcomes', 'exploitation of safety disputes' and the threat and occurrence of industrial action.[49]

The Royal Commission called for the removal of lawlessness in the building and construction industry and improvements in productivity, which it believed could be achieved by the establishment of industry specific laws and an industry specific regulator[50] (the *Building and Construction Industry Improvement Act 2005* (BCII Act) and the industry regulator: the ABCC). This method of regulation was deemed necessary on the basis that the *Workplace Relations Act 1996* and the Office of the Employment Advocate (OEA) were incapable of adequately enforcing the law in the building and construction industry.[51]

In fact, attempts by the OEA to carry out investigations in New South Wales were undermined by the CFMEU, which advised workers to say nothing, contact the union and 'sit in sheds whenever an inspector was on site.'[52] Without powers to require persons to answer questions the OEA was a toothless tiger.

The BCII Act operates in conjunction with the *Workplace Relations Act 1996,* which provides the necessary grounding in the building and construction industry for

[46] Tasman Economics, *Productivity and the building and construction industry*, Report prepared for the Royal Commission into the Building and Construction Industry, 12 November 2002 in Commonwealth, Royal Commission into the Building and Construction Industry, Final Report (2003) vol 4, 10.
[47] Ibid.
[48] Ibid.
[49] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 31.
[50] Ibid, 42.
[51] Ibid, 11.
[52] Ibid, 12.

agreement making, union right of entry, pattern bargaining, freedom of association, secret ballots and prohibited content.[53] .

While the provisions of the *Workplace Relations Act 1996* are important, the success of the ABCC is highly dependent on the operation of the BCII Act, which gives 'a broader definition of unlawful industrial action',[54] has strong anti-coercion provisions, gives significant powers to the ABCC to investigate and enforce the law and imposes penalties on persons that fail to comply. From a policy perspective the protection of Australia's economic interests would on its own justify the tougher enforcement regime put in place as a result of the behaviour witnessed in the construction sector.

The Royal Commission considered that both strong regulation and a strong regulator are required to affect cultural change:

> [T]here needs to be a recognition by all participants that the rule of law applies within the industry. The rule of law requires that parties honour and implement agreements they have made. It requires that they abide by industrial, civil and criminal laws. At present, they do not.
>
> [T]here needs to be 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.
>
> It is the function of unions to represent, advance and protect the interests of their members in a variety of ways. It is not a function of unions to manage or control the operation of building and construction projects. [55]

Since the establishment of the Building Industry Taskforce in October 2002 and its replacement body, the ABCC in 2005, there have been significant improvements in the building and construction industry.

Econtech released an economic analysis of building and construction industry productivity in 2007 and 2008,[56] both prepared for the ABCC. In its report titled *Economic Analysis of Building and Construction Productivity: 2008 Report* Econtech

[53] Econtech Pty Ltd, *Economic Analysis of Building and Construction Industry Productivity*, Report prepared for the Australian Building and Construction Commissioner, 16 July 2007, Canberra, 13.
[54] Ibid, 13.
[55] Ibid, 4.
[56] Econtech Pty Ltd, *Economic analysis of building and construction industry productivity*, report prepared for the office of the building and construction commissioner, 16 July 2007, Canberra; 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.

asserts that the latest data confirms that the construction industry has experienced increased productivity:

> The latest information supports the conclusion in the 2007 Econtech Report that there has been a construction industry gain in productivity of about 10 percent due to the ABCC (and its predecessor the Building Industry Taskforce) in conjunction with the related industrial relations reforms. This conclusion is based on the three types of productivity comparisons – year-to-year, residential versus non-residential and individual projects.[57]

This is over and above the predicted productivity levels based on the industry's historical performance – for 2007, Econtech states that productivity in construction was 10.5 percent higher than predicted.[58] To provide further support for its findings, Econtech met with four construction companies to assess the impact of the ABCC and industrial relations reforms on their performance. Econtech listed the following impacts identified:

- Significant reduction in days lost in the industry due to industrial action.
- Less abuse of OH&S issues for industrial purposes.
- Proper management of OH&S issues.
- Proper management of inclement weather procedures.
- Improvement in rostering arrangements (additional flexibility in rostering has effectively increased the number of working days per annum).
- Cost savings stemming from the prohibition on pattern bargaining.[59]

Construction costs have reduced since both the operation of the Building Industry Taskforce but more so since the ABCC. Econtech states that the 'cost penalty' for commercial construction as compared to domestic residential building has fallen from 'around 19 percent in 2004…to be 15 percent in 2008.'[60] Improved construction costs have undoubtedly resulted in reduced end user costs, an attractive outcome given the government's infrastructure policy commitments.

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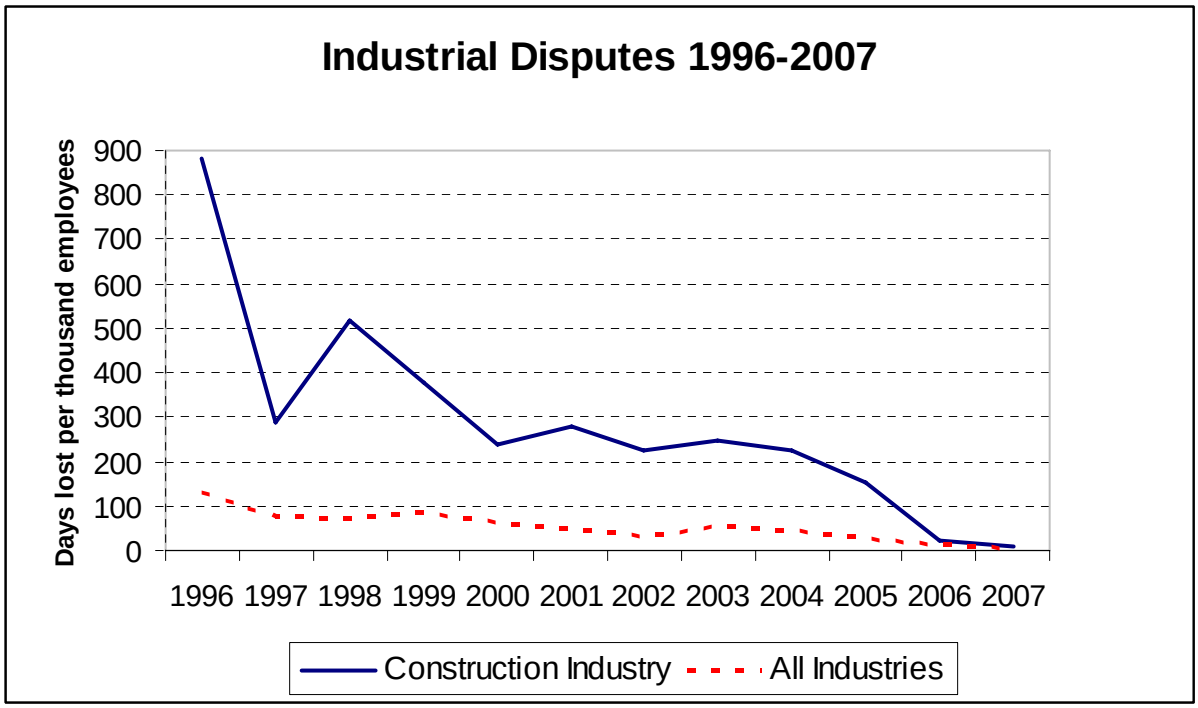
[57] Econtech Pty Ltd, *Economic Analysis of Building and Construction Industry Productivity: 2008 Report*, Report prepared for the Office of the Building and Construction Commissioner by Econtech Pty Ltd, 30 July 2008, ii.
[58] Ibid, 5.
[59] Ibid, 12.
[60] Ibid, 9.

Improved productivity and reduced construction costs have also caused a corresponding increase in efficiency in other industries. Mining experienced the greatest benefit with a 1.8 percent cost saving.[61] A 1.8 percent cost saving on a total capital expenditure of $19.1 billion (which was the total capital expenditure on 51 completed minerals and energy projects between April 2007 and April 2008[62]) represents a $343.8 million saving.

The improved productivity level in the construction industry is not surprising when consideration is given to the drop in industrial disputes in the sector in the past ten years, shown in the graph[63] overleaf:



There has been a dramatic decline in industrial disputation levels in the building and construction industry since 1996, which was marked by 882.2 days lost per thousand employees.[64] Days lost per thousand employees had fallen to just 153.8 in 2005 and to a remarkably low 10.1 in 2007[65], sitting at levels more likeable to the all industry experience. In fact, in the March 2008 quarter, the construction industry lost just 2.9 days per thousand employees compared to the all industries figure of 4.6 days per thousand employees.[66]

[61] Ibid, 24.
[62] Australian Bureau of Agricultural and Resource Economics 2008, *Minerals and Energy: Major development projects*, 9.
[63] Data sourced from Australian Bureau of Statistics, *Industrial Disputation*, Table 2b Working Days Lost per Thousand Employees - Industry, Cat. No 6321.0.55.001, ABS, Canberra.
[64] Ibid.
[65] Ibid.
[66] Ibid.

A study undertaken by the Australian Constructors Association in 2007 reported 'greater stability, fewer unnecessary disruptions and more cooperation' in the industry.[67] The most significant change identified in the study, which sought comments direct from managers, superintendents and sub-contractors, was the prevention of unannounced union access to the workplace, disruption and industrial action and that it has been legislative reform and the ABCC that has ensured this change.[68] The benefits identified in the study include:

- Management is spending less time managing industrial relations problems due to the decline in industrial disputes and more time engaging with their employees. This increases efficiency and allows for 'more effective planning';[69]

- Project costs are decreasing and tenders for projects are reflecting actual costs rather than inflated risk management prices due to industrial disputation.[70] At the height of lawlessness in the industry, businesses in Victoria would allow 20 or 30 percent lost time when bidding for jobs;[71]

- There is less control by unions over the type of agreement that must be entered, greater flexibility in agreements and the choice of subcontractor is not dictated by the union;[72]

- Relationships are less adversarial and businesses can engage their employees directly;[73]

- Employees are happier to be at work and earning money rather than 'sitting in the shed and not getting paid for two weeks.'[74]

[67] Jackson Wells Morris Pty Ltd, *Four Years On: A report on changes following reforms flowing from the Building and Construction Industry Royal Commission as observed by managers, superintendents and subcontractors*, Australian Constructors Association, August 2007, 3.
[68] Ibid.
[69] Ibid, 9.
[70] Ibid.
[71] Ibid.
[72] Ibid, 11.
[73] Ibid, 18.
[74] Ibid, 29.

The strength of the ABCC

The ABCC has a number of methods by which it seeks to improve industrial relations practices in the building and construction industry including:

- Educating employers, employees and unions to understand their rights and obligations;
- Promoting appropriate standards of conduct;
- Providing advice and assistance to building industry participants;
- Investigating possible contraventions of relevant laws, the National Code of Practice and industrial instruments.[75]

While all these measures are important, much of the impact of the ABCC on combating 'lawlessness' in the industry can be attributed to its strong enforcement and compliance powers. These powers allow the ABCC to require information or documents to be provided to it and to require persons to attend and answer questions as part of its investigations.[76] This is not an unlimited power, however, as the ABCC can only use its compliance powers if there are *reasonable grounds* to believe a person has information or documents, or is capable of giving evidence relevant to an investigation.[77] In addition, the ABCC states that these powers are used as a last resort, with preference given to relying on information provided voluntarily.[78]

The ABCC is not the only statutory body with extensive powers. Occupational health and safety (OH&S) inspectorates in each state and territory have extensive powers under their respective OH&S legislation. The inspectorates can conduct inspections of workplaces, investigate breaches of legislation and ensure obligations are met.[79]

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[75] Australian Building and Construction Commissioner, *Business Plan 2008-2009*, Australian Government, viewed 16 July 2008, http://www.abcc.gov.au/NR/rdonlyres/FF27A370-4CAE-4824-BD1B-FC84202C6EE4/0/BusinessPlan0809.pdf

[76] *Building and Construction Industry Improvement Act* 2005 s 52.

[77] Australian Building and Construction Commissioner, *Annual Report 2006-07*, Australian Government, 25.

[78] Ibid.

[79] Richard Johnstone, *Occupational Health and Safety Law and Policy*, Text and Materials, (2nd ed, 2004), 373.

Under the inspection and investigating powers provisions in the New South Wales *Occupational Health and Safety Act 2000,* (which are similar to those in other state and territory OH&S legislation[80]), an inspector can require a person to

- give information;[81]
- produce documents;[82]
- appear before the inspector to give evidence;[83] and
- state their full name and residential address.[84]

Unions are critical of the ABCC's powers and argue that workers' are denied basic rights of legal representation and the right to silence.[85] In respect to the first criticism, this appears to stem from a refusal by the ABCC to allow a lawyer to represent a witness at an examination because that lawyer had already represented another witness in the same matter.[86] It was considered by the ABCC that the representation of the lawyer of two separate witnesses would prejudice the investigation.[87] Importantly, the ABCC did not require the witness to proceed without any legal representation, in conformity with section 52(3) of the BCII Act which allows a person to choose to be legally represented. The examination was adjourned to a later date, during which time the witness obtained alternative legal representation.[88]

The ABCC's decision was disputed by the witness, who sought resolution in the Federal Court.[89] In his decision, Justice Besanko stated that the ABCC had 'the power to make orders and give directions which will ensure the integrity of the investigation.'[90] This does not mean, however, that the ABCC has an unfettered power to prevent witnesses from having legal representation. Whether it is properly exercised will depend on whether the direction is reasonable in the circumstances and whether allowing the representation 'will or may prejudice the investigation'.[91]

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[80] See *Occupational Health and Safety Act 2004* (Vic) ss 100; *Workplace Health and Safety Act 1995* (Qld) ss 108 (3) (h), 120-121; *Occupational Health, Safety and Welfare Act 1986* (SA) s 38; *Occupational Safety and Health Act 1984* (WA) s 43; *Workplace Health and Safety Act* (Tas) s 36.
[81] *Occupational Health and Safety Act 2000* (NSW) s 62 (1)(a).
[82] *Occupational Health and Safety Act 2000* (NSW) s 62 (1)(b).
[83] *Occupational Health and Safety Act 2000* (NSW) s 62 (1)(c).
[84] *Occupational Health and Safety Act 2000* (NSW) s 63 (1).
[85] Ewin Hannan, 'Unions warn of backlash if watchdog not put down', *The Australian*, 16 July 2008; Brad Norington, 'Building commission can ban legal reps', *The Australian*, 13 October 2006, viewed 22 July 2008, http://www.theaustralian.news.com.au/story/0,25197,20571589-2702,00.html
[86] Ibid.
[87] Australian Building and Construction Commissioner, Bonan v Hadgkiss, *ABCC Media Backgrounder*, 27 July 2007, viewed 2 September 2008, http://www.abcc.gov.au/NR/rdonlyres/81430A00-8017-4557-938C-3276EC422953/0/BonanvHadgkissBackgrounder30072007.pdf
[88] *Bonan v Hadgkiss* [2007] FCAFC 113.
[89] Bonan v Hadgkiss [2006] FCAC 1334.
[90] Ibid.
[91] Ibid.

Past intimidating and harassing conduct and behaviour in the construction industry show that the powers of the ABCC, particularly with respect to requiring information or documents or requiring a person to answer questions, are entirely appropriate. Without these measures the many investigations would not have come to fruition[92] and unlawful and inappropriate behaviour would have continued unaddressed. Legislative protections are also offered to witnesses, so that any evidence given or information obtained by the ABCC is inadmissible against the witness in future proceedings.[93] This provides significant protection to witnesses who are required to answer questions and does not put these individuals at risk of prosecution.

Between 1 October 2005 and 31 March 2008, the ABCC issued 96 notices to attend and answer questions and four notices requiring production of documents.[94] In its report on the exercise of compliance powers, the ABCC stated that six investigations involved the evidence of 17 witnesses obtained using its compliance powers, which was critical to its court proceedings.[95] The ABCC stated that,

- three witnesses gave evidence in a matter that supported a case against the AWU in respect to unlawful industrial action, resulting in a $40,000 penalty;[96]

- six witnesses provided evidence against the CEPU for a 'snap strike' where a CEPU official presided over a vote of workers to refuse to attend work, enabling the court to find that unlawful industrial action was taken and order the CEPU to pay an $11,000 penalty;[97]

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[92] 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*, Australian Government, 7, viewed 2 September 2008, http://www.abcc.gov.au/NR/rdonlyres/4CB84879-678F-4E2C-94CD-F46DEE7E6B48/0/CPowersReportMar08.pdf

[93] Australian Building and Construction Commissioner, *Annual Report 2006-07,* Australian Government, 25, viewed 2 September 2005, http://www.abcc.gov.au/NR/rdonlyres/96FBD622-DE68-4761-BA6F-6F684C7C1974/0/ABCCAR0607Pt2AcheivingtheOutcome.pdf. The protection does not apply to witnesses that give false testimony, who can then be subject to criminal proceedings.

[94] 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

[95] Ibid.

[96] *Furlong v Australian Workers Union & Others* [2007] FMCA 442, cited in 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*, Australian Government viewed 2 September 2008, http://www.abcc.gov.au/NR/rdonlyres/4CB84879-678F-4E2C-94CD-F46DEE7E6B48/0/CPowersReportMar08.pdf

[97] *Carr v CEPU & Harkins* [2007] FMCA 1526, cited in 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*, Australian Government, viewed 2 September 2008, http://www.abcc.gov.au/NR/rdonlyres/4CB84879-678F-4E2C-94CD-F46DEE7E6B48/0/CPowersReportMar08.pdf

- three witnesses provided crucial evidence that enabled the ABCC to commence proceedings against the CFMEU for unlawful industrial action by 288 workers at the Roche Mineral Sands Separation Plant. The CFMEU was penalised $35,000.[98]

Clearly the coercive powers are a useful tool in the investigation and prosecution of unlawful activities. Without these strong and effective compliance measures, it is unlikely that some industry participants would take the investigations of the ABCC seriously, reluctant witnesses may not cooperate if they cannot rely on the fact that they have been compelled to in the face of serious consequences, and intimidating and bullying behaviour aimed at thwarting investigations could continue unabated.

The BCII Act also imposes tough penalties on corporations and individuals that take industrial action that is considered unlawful under that Act. Individuals who engage in unlawful industrial action can face a monetary penalty of up to $22,000 and a body corporate can be penalised up to $110,000.[99] These significant penalties are required in order to act as a deterrent to unlawful industrial action that subjects companies to enormous costs. Penalties for individuals are necessary to ensure that action taken by employees against the advice of their union is not left unpunished and to ensure that unions do not use their members as 'human shields' to avoid the attribution of responsibility on the basis that their members will not be subject to penalties for contravening the law.

Already employers are being targeted by activist groups, such as Union Solidarity, whose purpose is to encourage its community of members to take 'industrial action' as a means of defeating workplace laws.[100] Union Solidarity has boasted on its website of shutting down CSR Construction site by '100 Union Solidarity activists from the western suburbs' on 25 July 2008,[101] and action taken in respect to various other employers. This sort of action by persons external to the workplace is contrary to the principles of enterprise bargaining and rules for industrial action supported by both political parties and is irresponsible and damaging to the Australia economy.

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[98] *Cruse v Construction Forestry, Mining and Energy Union & Anor* [2007] FMCA 1873, cited in 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*, Australian Government viewed 2 September 2008, http://www.abcc.gov.au/NR/rdonlyres/4CB84879-678F-4E2C-94CD-F46DEE7E6B48/0/CPowersReportMar08.pdf

[99] *Building and Construction Industry Improvement Act 2005* s 49. These penalties are in respect to Grade A penalty provisions, such as unlawful industrial action (BCII Act s 38).

[100] See www.unionsolidarity.org/

[101] Union Solidarity, *Assembly stands up for building workers rights*, 26 July 2008, viewed 31 July 2008, http://www.unionsolidarity.org/irnews.2008/07/csr-protest-why-union-solidarity.html

Keeping a tough cop on the beat

The ABCC is not a government bureaucracy with little to do – it plays an active and essential role in the building and construction industry. In 2006-07 the ABCC received 3541 inquiries, 2000 more than in 2005-06,[102] showing increased industry reliance on the regulator. It pursued 216 investigations and a further 367 reports were subject to preliminary investigation.[103]

It is the government's policy to abolish the ABCC and to empower a specialist division of Fair Work Australia to regulate the building and construction industry from 1 February 2010.[104] The government's policy stated that 'Fair Work Australia's inspectorate will have specialist divisions that can focus on *persistent or pervasive unlawful behaviour* in particular industries or sectors' [emphasis added].[105] This policy position comes despite a push by unions for the government to abolish separate regulation of the building and construction industry.[106] The government's continued support for separate industry regulation gives credence to the Royal Commission's view that the building and construction industry is distinguished from other industries.[107]

The government advised in June 2008 that the Honourable Murray Wilcox QC will be undertaking an extensive consultation process with building and construction industry stakeholders regarding the regulatory framework that should apply to the industry from 1 February 2010. AMMA has and will continue to provide comment on the regulatory framework as part of this consultation process.

Notwithstanding the consultation process being undertaken by the Honourable Murray Wilcox QC, any recommendation made as to the future regulatory framework in the building and construction industry is clearly a decision that has to be made by the government. Against this background, regard should be had to the Royal Commission's findings that the industry was characterised by widespread disregard for the law that necessitated separate industry regulation. The effectiveness of this

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[102] Australian Building and Construction Commissioner, Part 2 Performance, *Annual Report 2006-07*, ABCC, Australian Government, 54, viewed 2 September 2008, http://www.abcc.gov.au/NR/rdonlyres/A936B69F-AD13-496B-A2E0-090BCAD56404/0/ABCCAR0607Pt2PromotingAppropriateStandardsofConduct.pdf

[103] Ibid, 24.

[104] Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, *Forward with Fairness, Labor's plan for fairer and more productive Australian workplaces*, Australian Labor Party, April 2007.

[105] Ibid, 17.

[106] Thomson Australia, 'Wilcox terms of reference released', *Workforce*, 25 July 2008, Thomson Legal and Regulatory Limited.

[107] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 11, 4.

regulation was detailed in a report prepared by Econtech for the ABBC discussed earlier in this paper.

To date the government has rejected union calls to abolish the ABCC prior to 1 January 2010 and has begun consultations on the creation and operation of the specialist division of Fair Work Australia for the building and construction industry.[108] The question that is raised as a consequence of the government's policy, is what compliance and enforcement powers will the specialist division of Fair Work Australia have? In its feedback on the proposed Terms of Reference for the Wilcox consultation on The Transition to Fair Work Australia for Building and Construction Industry,[109] AMMA argued that

> [t]he weakening of the current compliance regime, overseen by a watered down and subservient specialist division of Fair Work Australia, is not in Australia's longer term interest.[110]

While the government has recognised the need for special regulation of the building and construction industry, it is imperative that Fair Work Australia be empowered with the same compliance and enforcement measures presently held by the ABCC. The Cole Royal Commission findings and the evidence of substantive improvements in the industry identified in the Econtech report make a compelling case for the continuation of the legislative framework in any new specialist division of Fair Work Australia.

New South Wales is a telling example of the need to allow sufficient time to achieve lasting cultural change in the building and construction industry. The Royal Commission into Efficiency and Productivity in the Building Industry in New South Wales delivered a report in 1992 which made findings of illegal practices, conduct, intimidation and violence[111] and recommended the establishment of a Building Industry Taskforce, not unlike the findings and recommendation of the Cole Royal Commission. The New South Wales Building Industry Taskforce operated from 1991 to 1995. Three months after it was abolished Royal Commissioner Gyles stated:

> In my view, what was required was no more or no less than a cultural change on the part of the major participants in the industry. A significant period of normality was

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[108] The Hon. Julia Gillard DPM, 'Transition to Fair Work Australia for building and construction industry', *Media Release*, 22 May 2008, viewed 17 July 2008, http://mediacentre.dewr.gov.au/mediacentre/gillard/releases/transitiontofairworkaustraliaforbuildingandconstructionindustry.htm

[109] See http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/ for more information about the inquiry.

[110] AMMA Letter on the Wilcox Consultation Terms of Reference, 30 Jun 2008.

[111] Green QC, Royal Commission into the Building and Construction Industry, *Opening Address: New South Wales* (2002) viewed 8 August 2008, http://www.royalcombci.gov.au/docs/Final_NSW_Opening_Address_Statement.pdf

> required where the law was observed and ordinary standards of commercial morality maintained. This would give a generation experience of working in an environment where concentration could be upon civilised arrangements between participants in the industry.[112]

The desired cultural change was not achieved in the short period that the New South Wales Building Industry Taskforce operated, with reports that the benefits obtained during its operation 'have petered out'.[113]

AMMA is concerned that the benefits in the building and construction industry identified in the Econtech report, and which have flow-on benefits to industries including the resources sector, will be lost if the powers of the regulator are removed or reduced before the required cultural change in the industry is evidenced.

This is particularly important as it does not appear that the required cultural and attitudinal change has become embedded to the point that there can be confidence that improvement in the construction and building industry's industrial environment will continue without specific industry laws and a regulatory body with the powers of the ABCC.

For example, there continue to be instances of some union officials abusing their right of entry. In August 2007, the Commission suspended CFMEU official Adrian McLaughlin's right of entry permit because he continually refused to produce his right of entry permit, did not comply with reasonable occupational health and safety requirements (by refusing to sign the visitor book and undertake a site induction) and disrupted work by holding a union meeting during work hours.[114]

There is also video footage of CFMEU official Assistant State Secretary Joe McDonald, National Secretary Dave Noonan and union organiser Michael Powell in 2007 refusing to leave a construction site despite repeated requests.[115] Powell subsequently directed a torrent of offensive language to a company representative including '"f***ing maggot", a "piece of ****", a "c***head" and a "f***ing idiot"'.[116] It was also reported that McDonald was heard to say to one builder that he was a '"f***ing,

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[112] Mr Gyles QC, 'The Commission Perspective', 4 September 1995, cited in Green QC, Royal Commission into the Building and Construction Industry, *Opening Address: New South Wales (2002)* viewed 8 August 2008, http://www.royalcombci.gov.au/docs/Final_NSW_Opening_Address_Statement.pdf

[113] Green QC, , Royal Commission into the Building and Construction Industry, *Opening Address: New South Wales* (2002) viewed 8 August 2008, http://www.royalcombci.gov.au/docs/Final_NSW_Opening_Address_Statement.pdf

[114] *Australian Building and Construction Commission* [2007] AIRC 717

[115] Tony Barrass and Paige Taylor, 'Union bullying of site manager taped', *The Australian*, 19 June 2007, viewed 29 July 2008, http://www.theaustralian.news.com.au/story/0,20867,21929254-2702,00.html .

[116] Ibid.

thieving parasite dog" who would end up working at Hungry Jack's'.[117] Coarse language may be a characteristic of the industry but in this context, the language of these officials was merely abusive and intimidating.

Other instances of inappropriate and unlawful behaviour that have continued despite the existence of the ABCC or its predecessor, and which have been the subject of either prosecution by the ABCC or orders of the Commission include, but are not limited to, the following:

- On 4 August 2008 the Federal Magistrates' Court found that, in 2006, a CFMEU shop steward coerced and made false and misleading statements by advising a contractor he could not work if he was not a member of a union and that he had to be a member of the union to work on site. Penalties have not yet been decided. In his decision, Burchardt FM commented that '[i]t is difficult to think of anything more readily fitting the idea of coercion than being told you cannot work if you are not a member of a union. It is plainly conduct intended to negate choice.'[118] Burchardt FM further stated that '[t]he case was run on the very clear basis that [the shop steward] denied the conduct attributed to him. I, however, have found that he did say the things that he denied…'.[119]

- The Federal Court held that in 2005, a CFMEU delegate made false and misleading statements by advising a building contractor at the Roche Mining (JR) Pty Ltd Mineral Sands Separation Plant that he must be a member of the CFMEU and have a certified agreement with the CFMEU to work at the site. [120] Marshall J found '[the delegate] contravened s 170NC by telling [the contractor] that he had to have an enterprise agreement to be able to work on the construction side of the site. The exertion of such pressure involved unconscionable conduct which gave a party to the bargaining process no say in that process."Penalties have not yet been decided.

- Another Federal Court matter found that in 2003, a CFMEU official, among other unlawful actions, induced a breach of contract between a subcontractor and the head contractor because the subcontractor did not have a union agreement. Gyles J said '[i]t follows from the findings already made that [the official] made a number of explicit threats to disrupt the progress of work on the site if an EBA were not entered into. The threats

[117] Ibid.
[118] *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union & Anor* (No.2) [2008] FMCA 1015 para 105.
[119] *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union & Anor* (No.2) [2008] FMCA 1015 para 109.
[120] *Cruse v Construction, Forestry, Mining and Energy Union* [2008] FCA 1267.

were general and particular. In other words, disruption would occur by whatever means were available.[121] The CFMEU was ordered to pay $23,000 in damages to the subcontractor and $5,500 in penalties. CFMEU official was ordered to pay an $1800 penalty.[122]

- A Federal Court matter in Western Australia found on the basis of an agreed statement of facts that in 2005, CFMEU WA branch assistant secretary Joe McDonald and organiser Michael Powell were involved in unlawful industrial action and contravened section 170MN of the *Workplace Relations Act 1996* and section 38 of the BCII Act. The action involved a meeting that resulted in 400 employees leaving nickel mine construction site Ravensthorpe for two days of unlawful industrial action and a second strike involving 20 employees for 24 hours. This attracted $35,000 in penalties against the CFMEU, Joe McDonald and Michael Powell.[123]

- In 2006, the Federal Court held that 91 employees had engaged in unlawful industrial action on the Perth to Mandurah Railway Project, in order to pressure the Leighton Kumagai Joint Venture (LKVJ) to reinstate a dismissed CFMEU shop steward.[124] This was done in contravention of section 38 of the BCII Act and in breach of a section 127 order. In proceedings before the Federal Court brought by the ABCC, the affidavit of the project director identified actual and contingent losses of more than $1.6 million.[125] The affidavit listed the following costs:

  - Leighton Contractors, one of the LKJV joint venturers, is exposed to the potential claim under a Deed entered into with the Public Transport Authority, for liquidated damages at the rate of $52,000 per day for each day that the project goes beyond the date for practical completion of the Project;
  - daily recurring overhead costs of approximately $5,000 per day;
  - other preliminary costs of approximately $48,000 per day; and
  - other irrecoverable out-of-pocket expenses of approximately $45,000-$55,000 per day.[126]

- The Federal Magistrates Court found that on 28 March 2006, 192 employees engaged in unprotected industrial action on the Roche Mining Murray Basin Development Project after a mass meeting convened by the AWU in respect to payment of a camp allowance. Burchardt FM held 'the strike was plainly industrial action within the meaning of the BCII Act and

[121] *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2007] FCA 1047, para 68.
[122] *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2007] FCA 1047
[123] *Temple v Powell* [2008] FCA 714.
[124] *Hadgkiss v Aldin* [2007] FCA 2068.
[125] *Ibid*.
[126] *Ibid.*

was not lawful because of the terms of that legislation. Likewise the dispute resolution clauses of the RMJR agreement were clearly not adhered to.[127] The AWU, an AWU organiser and three AWU delegates admitted contraventions of section 38 of the BCII Act. The AWU was penalised $40,000 for failing to ensure that work continued normally while the dispute was dealt with under an agreed dispute resolution procedure.[128] The organiser and delegates were also penalised.[129]

- In another case involving the project, the Federal Magistrates Court found that the CFMEU and organiser Colin Stewart were involved in unlawful industrial action between 23 and 28 September 2005 taken by 288 workers at the Roche Minerals Sands Separation Plant in Victoria. The court declared '[t]hat the [CFMEU and Colin Stewart have] contravened section 38 of the BCII Act [and] [t]hat the [CFMEU] has contravened clauses 14 and 27 of the Roche Mining/CFMEU Murray Basin Development Project Construction Sites Agreement…'.[130] The CFMEU was penalised $35,000 and CFMEU organiser was penalised $7000. [131]

- In May 2008, the Commission issued an order that industrial action not occur, against employees of Kaefer Integrated Services Pty Ltd, contractor to Woodside Energy for its North West Shelf LNG Phase V Expansion Project. The Commission considered that industrial action was probable due to earlier periods of unprotected industrial action being taken by the employees between August 2007 and April 2008, despite the existence of dispute resolution procedures under its union collective agreement.[132]

- In July 2008, Commissioner Blair issued an interim order to stop unprotected industrial action being taken by employees of Skilled Group Ltd and members of the AMWU and AWU 2008 at the Viridian Glass Plant during its performance of shutdown and modification work. The Commissioner found that industrial action was been taken in the form of bans, which commenced after a meeting with union officials.[133]

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[127] *Furlong v Australian Workers Union and Ors* [2007] FMCA 443 para 9.
[128] Ibid.
[129] Ibid.
[130] *Cruse v Construction, Forestry, Mining and Energy Union & Anor* [2007] FMCA 1873 per Burchardt FM.
[131] Ibid.
[132] *Kaefer Integrated Services v AMWU and Construction, Forestry, Mining and Energy Union* [2008] AIRC 412 per DP McCarthy.
[133] Office of the Australian Building and Construction Commissioner, '*Skilled Group Ltd v Australian Manufacturing Workers Union and Australian Workers Union',* Case number C2008/2605, AIRC, 3 & 17 July 2008, *Interventions*, Australian Government, viewed 2 September 2008, http://www.abcc.gov.au/abcc/Interventions/SkilledGroupLtdvAMWUandAWU.htm

- Abigroup Contractors Pty Ltd made an application to the Commission seeking an order to stop or prevent industrial action being taken by its employees working on the Geelong Bypass Project, Southern Link Upgrade Project and the Monash Freeway Upgrade Project in Melbourne following a meeting with the CFMEU. It was alleged that this meeting was convened after Abigroup advised its employees it would need to address redundancy issues and procedures for employees to apply for other employment opportunities with the company as a result of the 'effective completion' of its contractual obligations. An interim order was granted by Commissioner Blair on the basis that future industrial action was probable.[134]

It would appear that the work of the ABCC is not yet completed. There remains a continuing disregard for the rule of law, and lessening the level of enforcement in the industry will send the wrong message that this sort of behaviour is acceptable. It may also open the door to retributive action, as occurred in Western Australia.

A Building Industry Taskforce operated in Western Australia for seven years until it was abolished on the election of a new government. When this occurred, unions declared that it was time to get even.[135] In his statement to the Royal Commission, Chief Executive of the Master Builders Association of Western Australia stated that,

> [t]he CFMEU's response to the abolition of the Task Force was almost immediate. Within 10 days car loads of CFMEU officials stormed several building sites and erected 'no ticket no start' signs on building sites (e.g. GRD Kirfield's, St George's Terrace project and Baulderstone Hornibrook's Woodside Offices Development and Consolidated Constructions David Jones Store project, all in the Perth CBD). Since the abolition of the Task Force the CFMEU has become much more militant and aggressive in pursuing:
>
> (a) union membership;
> (b) pattern EBAs;
> (c) rights of entry to building sites; and
> (d) other claims including under the guise of safety.
>
> Whereas in the Task Force days, builders and subcontractors were more inclined to resist inappropriate union tactics and claims, there is a noticeable trend nowadays for commercial decisions to be made in response to union demand. By this I mean that

[134] *Abigroup Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union*, case number C2008/2484, AIRC, 16, 19 & 28 May 2008, viewed 30 July 2008, http://www.abcc.gov.au/abcc/Interventions/AbigroupContractorsPtyLtdvCFMEU.htm

[135] Master Builders Association of Western Australia, 'Risk of Rudd denials from union boss can't rewrite history', *Media Release*, 16 May 2007, viewed 17 July 2008, http://www.mbawa.com/getfile.aspx?Type=document&ID=5646&ObjectType=3&ObjectID=1142.

> because the CFMEU can now exercise far more power and control and this causes commercial harm to the builder and subcontractors, more and more builders and subcontractors are agreeing to the CFMEU's demands because they fear that if they do not the economic consequences will be far worse.[136]

The Master Builders Association of Western Australia claimed that the industry experienced increased disputation, 'union thuggery and intimidation' and that its replacement Building Industry Special Projects Inspectorate was a 'toothless tiger'.[137]

The Royal Commission reached the same conclusion, stating that since the Task Force was abolished in Western Australia and replaced with a different body in early 2001,

> [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.[138]

There are lessons to be learned from the New South Wales and Western Australian experiences of disturbing cultural change processes before they are complete.

It is important that considerations for the transition of the ABCC to the specialist division of Fair Work Australia focus on transferring **all** of the existing ABCC functions and powers into the new specialist division with a strategy for review after a five year operating period. It is at that time that serious consideration could be given to the need or otherwise for a specialist division – if the evidence reflects that continued respect for the rule of law has become part of the culture of the building and construction industry.

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[136] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 21, 125-126.
[137] Master Builders Association of Western Australia, 'Risk of Rudd denials from union boss can't rewrite history', *Media Release*, 16 May 2007, viewed 17 July 2008, http://www.mbawa.com/getfile.aspx?Type=document&ID=5646&ObjectType=3&ObjectID=1142.
[138] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 39.

A STRONG AND EFFECTIVE COMPLIANCE REGIME – ACHIEVING GREATER INDUSTRIAL PEACE

As previously discussed the *Workplace Relations Act 1996* provides the necessary grounding in the building and construction industry for agreement making, union right of entry, pattern bargaining, freedom of association, secret ballots and prohibited content. This next section will discuss the historical events that lead to the creation of a strong and effective compliance regime under the *Workplace Relations Act 1996* and the impact of the government's Forward with Fairness policy.

The Australian workplace relations system has undergone an enormous amount of change since its inception in 1904. The *Conciliation and Arbitration Act 1904,* enacted in the wake of the great industrial disputes of the 1890s, set the tone for workplace relations in Australia and the continued attempt to reach a balance between the employees' right to strike, the right for employee organisations to enter the workplace and an employer's right to continuous and uninterrupted labour.

Industrial Action

The *Conciliation and Arbitration Act 1904* was the first federal Act to regulate industrial action by outlawing strikes and lockouts on the assumption that compulsory arbitration by an independent arbiter would adequately resolve disputes.[139] Significantly, there was no concept of 'protected industrial action' – all industrial action was unlawful and civil penalties and statutory sanctions applied when it was taken.[140] Yet Australia continued to be marked by industrial conflict despite the restrictions,[141] supporting Creighton and Stewart's argument that the logic behind a complete proscription on industrial action was 'unrealistic' and not 'seriously' enforced.[142]

Although the unlawful industrial action provisions in the *Conciliation and Arbitration Act 1904* were repealed in the 1930s,[143] industrial action continued to be prohibited under 'bans' clauses contained in awards and it remained unlawful under common law.[144] But while penalties applied for industrial action taken in breach of bans clauses and

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[139] Shae McCrystal, 'Shifting the Balance of Power in Collective Bargaining: Australian Law, Industrial Action and WorkChoices' (2006) *The Economics and Labour Relations Review* 16 (2), 183. http://www.austlii.edu.au/journals/ELRRev/2006/9.html site accessed 28 May 2007.
[140] Ibid.
[141] Breen Creighton and Andrew Stewart (2005) *Labour Law* (4th ed) The Federation Press, Sydney, 538.
[142] Ibid.
[143] CCH, *Australian Labour Law Reporter*, Industrial Action [¶45-552].
[144] Dr Shae McCrystal, 'Striking Distance', *ANU Reporter*, Winter 2006 http://info.anu.edu.au/mac/Newsletters_and_Journals/ANU_Reporter/097PP_2006/_03PP_Winter/_strikes.asp site accessed 8 May 2007.

employers could seek injunctions or damages under common law, these were often flouted by unions.[145]

The impact of industrial action on Australia's reputation was damaging. Up until the 1980s, Australia was considered to be a strike prone country that caused interruption to airlines, postal services, pubs, telecommunications and schools.[146] Industrial action in the resources sector was particularly damaging. Hamersley Iron experienced various 'strikes, stop work meetings and inter-union disputes' during the 1960s and 1970s to the extent that a million man hours were lost and Japanese investment was redirected to the Brazilian iron ore industry.[147] In 1985 alone, industrial action in coal and other mining resulted in 340,000 working days being lost. [148]

With the introduction of formalised enterprise bargaining in the late 1980s and early 1990s, unions and their members were given the freedom to strike in respect to agreement negotiations under the *Industrial Relations Reform Act 1993*. This right was introduced by the then Labor Government's Honourable L.J Brereton and was significant in that it was recognised that the right to strike needed to be limited.[149] In his second reading speech, Brereton stated that

> [T]he development of a more coherent framework for bargaining emphasises the need for a fairer and more effective regime to regulate industrial action and sanctions. A right to take action in the negotiation of agreements, and a distinction between the negotiation phase and the period when the agreement is in force is the norm in most OECD countries.[150]

While this put limitations on the right to strike, section 166A of the *Industrial Relations Act 1988* made it difficult for employers to get immediate redress against a union under the common law with the imposition of a 72 hour waiting period. Employers also faced difficulty in gaining immediate redress for secondary boycott action as a result of

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[145] Breen Creighton and Andrew Stewart (2005) *Labour Law* (4th ed) The Federation Press, Sydney, 538.
[146] Dr Shae McCrystal, 'Striking Distance', *ANU Reporter*, Winter 2006 http://info.anu.edu.au/mac/Newsletters_and_Journals/ANU_Reporter/097PP_2006/_03PP_Winter/_strikes.asp site accessed 8 May 2007.
[147] Matthew Stevens, 'Retiring Rio Boss Slams Rudd IR', *The Australian*, 2 May 2007, viewed 4 September 2008, http://www.theaustralian.news.com.au/story/0,20867,21657041-5001641,00.html.
[148] Australian Bureau of Statistics, *Industrial Disputation*, 'Table 2a Industrial disputes which occurred during the period, Working days lost 'Industry', time series spreadsheet, Cat no. 6321.0.55.001, viewed 5 June 2008, http://www.ausstats.abs.gov.au/ausstats/abs@archive.nsf/0/4D68A52A91B7B720CA25745E0011F0B4/$File/6321055001table2b.xls#A2159546L
[149] The Hon. L.J Brereton MP, *Second Reading Speech*, House of Assembly, Industrial Relations Reform Bill 1993 (Cth), 28 October 1993 http://parlinfoweb.aph.gov.au/piweb//view_document.aspx?TABLE=HANSARDR&ID=490786 (site accessed 6 June 2008).
[150] Ibid.

its regulation shifting from the *Trade Practices Act 1974* to the *Industrial Relations Act 1988* and the consequent requirement to participate in 'pre-litigation conciliation' first.[151]

The lax compliance measures for employers were remedied somewhat with the Howard Government's *Workplace Relations and Other Legislation Amendment Act 1996,* giving the Australian Industrial Relations Commission (the Commission) the discretion under section 127 to order that unprotected industrial action cease or not occur.[152] Provisions in respect to secondary boycott action were also returned to the *Trade Practices Act 1974*. The return of secondary boycott provisions to the *Trade Practices Act 1974* recognised the need for innocent businesses caught up in damaging disputes to seek immediate redress, and the significant cost to the national economy if this were not available.[153]

While secondary boycott provisions are not widely used, their existence has proved significant in ensuring the Australian economy does not suffer widespread economic damage. This was the case during the waterfront dispute between Patricks and the MUA, where secondary boycott action affecting innocent third parties would have occurred if not for the existence of substantial monetary penalties applying under the *Trade Practices Act 1974*.[154]

In the resources sector, the Australian Competition and Consumer Commission initiated proceedings against the AMWU, AWU and CEPU for breach of the secondary boycott provisions under the *Trade Practices Act 1974*. The Federal Court imposed $300,000 in penalties against the unions for unlawfully hindering the construction of the Patricia Baleen gas plant by maintaining a picket that prevented construction workers and vehicles from entering the site.[155]

Yet section 127 of the *Workplace Relations Act 1996* was not so successful. The discretion afforded to the Commission in determining whether to issue an order, regardless of whether the action being taken was found to be unprotected, meant that employers were not always successful in securing an order.[156] Where orders were

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[151] Ibid.
[152] *Workplace Relations Act 1996* s 127.
[153] AMMA, *Constructing lawful workplaces, the need to maintain Australia's economic success by retaining a strong industrial action compliance regime,(2007)* AMMA, viewed 1 August 2008, http://www.amma.org.au/home/publications/constructinglawfulworkplaces.pdf
[154] Peter Anderson, ACCI, Trade Practices vs Industrial Relations: Changing times – does the balance need revisiting? *Address to the Institute of Public Affairs Work Reform Unit Seminar*, 28 July 2004, site accessed 8 August 2008, http://www.acci.asn.au/text_files/speeches_transcripts/2004/(2004-07-28)%20Trade%20Practices.pdf
[155] Australian Competition and Consumer Commission, 'ACCC institute proceedings alleging breach breach of secondary boycott provisions', 16 May 2003, *Media Centre*, Australian Government, viewed 8 August 2008, http://www.accc.gov.au/content/index.phtml/itemId/347312/fromItemId/378016
[156] Ibid.

successfully obtained, this sometimes was at the end of a significant delay and continued damage to employers.[157] Section 127 therefore failed to achieve its intended objective to offer effective remedies to employers affected by unprotected industrial action and this was taken advantage of by many unions.[158]

It was not until the WorkChoices reforms commenced in 2006 that an effective remedy has become available to employers. This has been achieved by removing the Commission's discretion to issue an order, thus making orders mandatory if the Commission finds that industrial action is 'happening, threatened, impending, probable or is being organised.'[159] Any delay in receiving such an order is minimised with a requirement for the Commission to hear the application within 48 hours and if this is not practicable, an interim order can be made.

Alongside the rules in respect to taking industrial action are the restrictions on the type of matters that can be included in an agreement. The restrictions on agreement content serve two purposes: 1) they ensure that employers are only subject to claims that relate to the direct employment relationship and 2) they determine what matters can be pursued through protected industrial action.

Under the *Industrial Relations Act 1988* and the subsequent *Workplace Relations Act 1996*, an agreement must be about 'matters pertaining to the relationship' between an employer and an employee.[160] As a result of the High Court's 2004 decision in *Electrolux Home Products Pty Ltd v Australian Workers Union and Others*[161] an agreement could only be validly certified under the *Workplace Relations Act 1996* if all the matters pertained to the employment relationship. This also meant that protected industrial action could only be taken in support of matters that pertained to the employment relationship.[162]

The High Court's decision was endorsed by the then federal government in its prohibited content provisions under the *Workplace Relations Act 1996*, as amended by the *Workplace Relations Amendment (WorkChoices) Act 2005* (WorkChoices). Under the *Workplace Relations Act 1996* an employer must not lodge an agreement containing prohibited content.[163] A term is considered to be prohibited content if it

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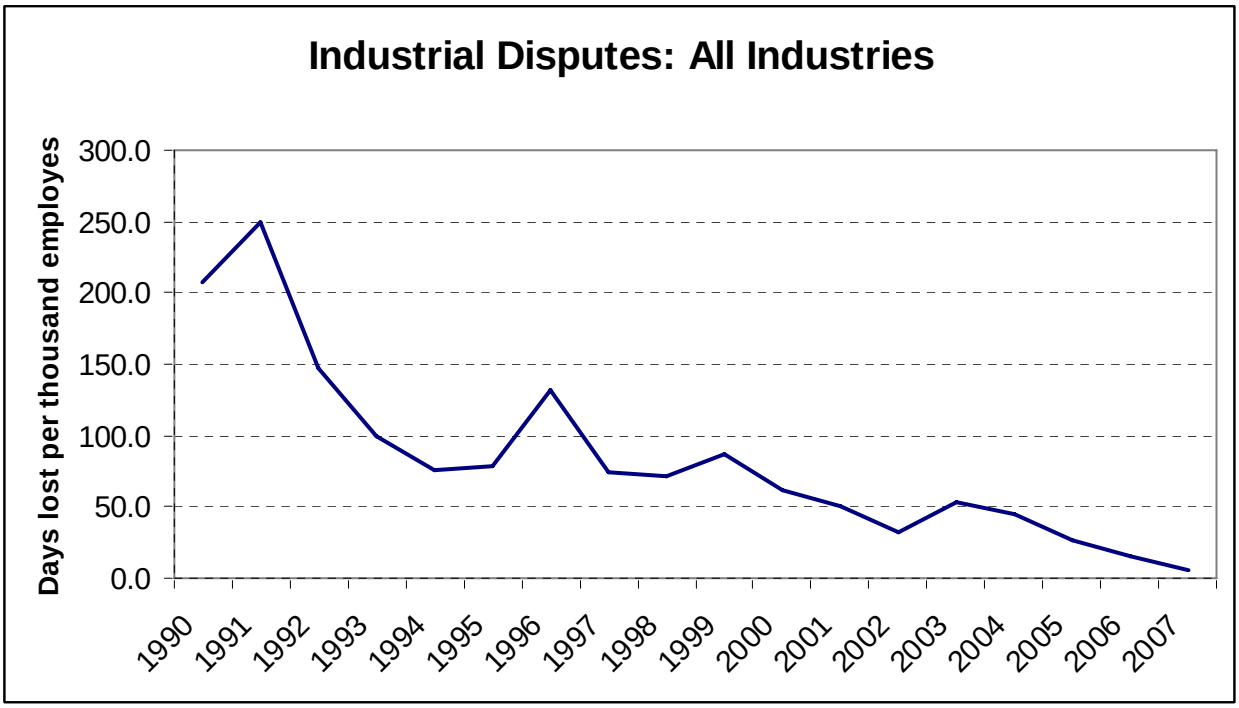
[157] Ibid, 12.
[158] Ibid, 14.
[159] *Workplace Relations Act 1996* s 496.
[160] For example *Workplace Relations Act 1996* section 170LI. The *Conciliation and Arbitration Act 1904* s 4(1) referred to 'industrial disputes as meaning a dispute as to an 'industrial matter' which in turn was defined to mean "all matters pertaining to the relations of employers and employees'. For a discussion on this see Breen Creighton and Andrew Stewart (2005) *Labour Law* (4th ed) The Federation Press, Sydney, 98.
[161] [2004] HCA 40.
[162] *Electrolux Home Products Pty Ltd v Australian Workers Union and Others* [2004] HCA 40.
[163] *Workplace Relations Act 1996* s 357.

deals with, among other things, a matter that does not pertain to the relationship between the employer and its employees.[164]

These limitations on agreement content and the operation of an effective industrial action compliance regime have contributed to a decline in industrial disputation. The level of industrial disputation since 1990 is illustrated in the graph below, which shows a steady decline that corresponds with the introduction of enterprise agreements and subsequent tightening of rules in respect to agreement content and unprotected industrial action.



AMMA has publicly acknowledged and supported the government's decision to prohibit industrial action during the term of an agreement and to retain secondary boycott provisions in the *Trade Practices Act 1972*. These provisions send a strong signal to the international community that Australia is no longer a strike prone country and is open for business. These were issues on which AMMA lobbied the government when in Opposition and we believe the government's decision is in the national interest.

However, unions are now calling for the restrictions on agreement content to be lifted[165] and in commenting on the Government's *Forward with Fairness Policy Implementation Plan*[166] the ACTU has stated that:

[164] *Workplace Relations Regulations 2006* r 8.7
[165] Jeff Lawrence, ACTU Secretary, 'Building a stable and efficient IR system', *Address to the National AIR Group (Ai Group) Conference*, 6 May 2008.
[166] ALP, *Forward with Fairness April 2007,* ALP, 14.

> Unions hope that this policy will allow employers and employees to agree on adopting climate change initiatives in the workplace. Or to agree that there will be clear and agreed understandings regarding the use of casuals and contractors in collective agreements.[167]

AMMA has responded that such an approach is not in the national interest and indicated that any push for 'open slather' bargaining will be 'resisted'.[168]

There is every risk that if agreements are not required, at the very least, to be about matters that pertain to the employment relationships demands may be made for a number of wide ranging matters that have no relevance to the relationship between the employer and employee and which yield no productivity return. There is some likelihood that unions could decide to take industrial action in support of these matters and cause an increase in the number of industrial disputes.

In the building and construction industry in particular, prior to the ABCC, BCII Act and the Building Industry Code, unions dictated who the company employed and discouraged by way of threats or industrial action, non-union members, contractors, casual workers and workers engaged through labour hire companies unless approved by the union.[169] These limitations imposed by unions, which are major productivity impediments, could again be the subject of negotiation and agreement across all industries in the future.

Union Right of Entry

A limited right of entry was first granted to unions in the 1973 amendments to the *Conciliation and Arbitration Act 1904*, up until which time union right of entry was conferred solely by industrial awards containing an appropriate right of entry provision.[170] The legislative rights were carried through to the *Industrial Relations Act 1988*, which enabled union officials (with the authority of the organisation's secretary or branch) to enter the workplace to ensure the observance of an award or order of the Commission it was bound to and that bound the employer or covered the work being carried out on the premises.[171] No restrictions were placed on unions aside from

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[167] Jeff Lawrence, ACTU Secretary, 'Building a stable and efficient IR system', *Address to the National AIR Group (Ai Group) Conference*, 6 May 2008, 9.
[168] Thomson, 'Employers will resist open slather bargaining: AMMA', *Workforce*, 7 May 2008, Thomson Legal & Regulatory Limited.
[169] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 218.
[170] W J Ford, 'Being there: changing union rights of entry under federal industrial law' (2000) 13 *Australian Journal of Labour Law* 1, 2-3, visited 30 August 2007, http://www.lexisnexis.com/au/legal/search/homesubmitForm.do
[171] *Industrial Relations Act 1988* s 286.

requiring entry to be made during working hours.[172] In particular, right of entry was available to unions regardless whether they had members at the workplace or not, although it must be remembered that union membership was as high as 46 percent in 1986.[173] In 2008, overall union membership levels are just 19 percent.[174] In the private sector less than 1 in 6 persons has joined a union.[175]

The right of entry provisions were amended by the *Workplace Relations and Other Legislation Amendment Act 1996* to make right of entry provisions within federal awards unenforceable[176] and create two specific instances where entry could occur. The first is to investigate a suspected breach of the *Workplace Relations Act 1996*, or award, order or certified agreement the union was bound to. The second is to hold discussions with members or eligible members during meal breaks. Greater restrictions on the legislated right considered necessary in order to balance the right with the business needs of employers were also imposed.[177] While the union official could enter the workplace to investigate a suspected breach or hold discussions, a union official had to hold a permit, provide 24 hours notice, enter during working hours and have members at the workplace they intend to enter (or eligible members if it was for discussion purposes).[178]

Yet despite the limitations placed on unions under the *Workplace Relations Act 1996* (as amended by the *Workplace Relations and Other Legislation Amendment Act 1996*) disruption in the workplace continued. In its submission on the Workplace Relations Amendment (Right of Entry) 2004 Bill, AMMA stated that employers experienced[179]

- union officials with no legal right to represent the employees at a workplace seeking right of entry;

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[172] *Industrial Relations Act 1988* s 286.
[173] Australian Bureau of Statistics, 'Trade Union Members', Australia, 1996, *Media Release*, 'Union Membership Down' 3 February 1997, viewed 18 June 2008, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/6325.0Media%20Release1August%201996?opendocument&tabname=Summary&prodno=6325.0&issue=August%201996&num=&view=
[174] Australian Bureau of Statistics (2008) 'Trade Union Membership' *Australian Social Trends* , Cat No, 4102.0, ABS, Canberra.
[175] Ibid.
[176] *Workplace Relations Act 1996* s 127AA
[177] W J Ford, 'Being there: changing union rights of entry under federal industrial law' (2000) 13 *Australian Journal of Labour Law* 1, 3-4 <http://www.lexisnexis.com/au/legal/search/homesubmitForm.do> at 30 August 2007.
[178] *Workplace Relations Act 1996* Part IX Division 11A.
[179] AMMA, 'The Workplace Relations Amendment (Right of Entry) Bill 2004,' *Submission by the Australian Mines and Metals Association to the Senate Employment, Workplace Relations and Education Committee*, February 2005, viewed 6 June 2008, <http://www.amma.org.au/publications/Submission_RightofEntryBill2004.pdf>

- unions officials seeking uninvited right of entry to workplaces covered by AWAs and employee agreements that they are not party to;

- union officials, when granted right of entry, failing to observe restrictions placed on them while in the workplace when many such restrictions are for security or safety reasons; and

- disruptive behaviour while in the workplace.

In its submission on the same Bill, Rio Tinto described two instances where unions had used their right of entry inappropriately.[180] In the first instance, the AMWU entered the site to investigate an alleged breach of the *Workplace Relations Act 1996* and was provided with a room to conduct interviews, given a site tour and introduced to employees who were invited to meet with the official. No employee met with the official (who did not inform the company what the alleged breaches were) and the union official left after two hours. After the union official left the site, the company found a number of pamphlets urging the employees to vote no to an agreement that was soon to be voted on.[181] This conduct pointed towards the union official entering the site not to investigate a suspected breach of the *Workplace Relations Act 1996* but to influence the employees' vote on an agreement.

In the second instance at another mine site, union officials entering the site refused to undertake a site induction (which is particularly important for occupational health and safety reasons) and proceeded to arrange an 'unauthorised mass meeting which resulted in an unlawful 48 hour strike by employees'.[182]

Clearly there is a genuine need for balance in respect to union right of entry laws as past experience shows that some unions have abused their right of access to pursue their own agendas, such as recruiting more members, engaging in demarcation disputes and engaging in self promotion for union elections.[183] It is only fair and reasonable that any right to enter an employer's premises are accompanied by reasonable conditions and parameters.

Right of entry is now granted entirely by the *Workplace Relations Act 1996* (as amended by the *Workplace Relations Amendment (WorkChoices) Act 2005*), with the

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[180] Rio Tinto, *The Workplace Relations Amendment (Right of Entry) Bill 2004, Submissions by Rio Tinto Limited to the Senate Employment, Workplace Relations and Education Committee*, February 2005, viewed 19 June 2008, http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2004-07/wr_rightentry/submissions/sub029.pdf

[181] Ibid.

[182] Ibid.

[183] See AMMA, *Constructing lawful workplaces, the need to maintain Australia's economic success by retaining a strong industrial action compliance regime, (2007)* AMMA viewed 1 August 2008, http://www.amma.org.au/home/publications/constructinglawfulworkplaces.pdf.

exception of entry for occupational health and safety purposes. Part 15 of the *Workplace Relations Act 1996*:

- (almost) creates a national union right of entry system;
- requires a permit holder to be a 'fit and proper person' in order to obtain and retain their permit;
- denies entry rights for discussion purposes to workplaces covered entirely by Australian Workplace Agreements (or the new Individual Transitional Employment Arrangements (ITEAs));
- allows entry to investigate a breach of an Australian Workplace Agreement (or ITEA) only where the employee requests the union in writing to do so;
- requires the permit holder to give an entry notice[184] at least 24 hours and not more than 14 days before entry and to enter on the day specified in the notice;
- requires the entry notice to specify the particulars of the suspected breach they are investigating;
- requires the union official to comply with occupational health and safety requirements; and
- requires the union official to adhere to any reasonable request by the employer to take a particular route and to conduct meetings in a particular room.[185]

The tightened restrictions on union right of entry are entirely appropriate and justified, proof of which can be seen in the examples described by Rio Tinto above. Any scaling back of the right of entry provisions could be taken advantage of by some union officials, (particularly due to pressures of falling membership levels) who hark back to the days the unions 'ran the country'.[186] For example, in a television interview, Joe McDonald, Assistant State Secretary of the CFMEU, stated that he believed 'bad laws should be broken'.[187] Prime Minister Rudd, during his time as Leader of the Opposition, has described Joe McDonald's behaviour as thuggery.[188] It is reported

[184] An entry notice is not required where the organisation has been given an exemption certificate: *Workplace Relations Act 1996* s 750
[185] The Parliament of the Commonwealth of Australia 2004-2005, *Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005*, House of Representatives, Commonwealth of Australia, 28-29.
[186] Greg Combet, Secretary ACTU, Union Address in Adelaide, 26/6/06
[187] Liam Bartlett, The Enforcer, *Sixty Minutes*, viewed 6 June 2008, http://sixtyminutes.ninemsn.com.au/article.aspx?id=564039
[188] Ibid.

that McDonald lost both his federal and state right of entry permits several years ago,[189] but continues to enter workplaces.[190] Joe McDonald remains in a position of authority as Assistant State Secretary of the CFMEU, subject to the outcome of a current contested leadership ballot.

Unfortunately, by retaining state and territory right of entry regimes under occupational health and safety legislation, WorkChoices did not create a truly national right of entry system.[191] It has given the states and territories the opportunity to circumvent the WorkChoices reforms that provide appropriate limitations on unions' right of entry, by amending their occupational health and safety laws to provide or expand entry rights for unions. For example, Queensland amended its occupational health and safety legislation to give union officials a right of entry for workplace health and safety purposes.[192] The New South Wales' draft *Occupational Health and Safety Amendment Bill 2006* sought to extend existing right of entry provisions so that union officials can enter the workplace to discuss occupational health and safety issues, in addition to their investigative rights.[193] Similar considerations have occurred in South Australia (which currently has no rights under its occupational health and safety laws), Tasmania and Western Australia.[194] The risk here is that appropriate safeguards will not be put in place to prevent misuse of entry for occupational health and safety by unions seeking to pursue industrial agendas.

[189] Kim MacDonald, 'Bid to keep McDonald off sites for three years', *The West*(Western Australia) 15 March 2008, viewed 6 June 2008, <http://www.thewest.com.au/default.aspx?MenuID=77&ContentID=63009>
[190] Kim MacDonald, 'Bid to keep McDonald off sites for three years', *The West* (Western Australia) 15 March 2008, viewed 6 June 2008, http://www.thewest.com.au/default.aspx?MenuID=77&ContentID=63009Liam Bartlett, The Enforcer, *Sixty Minutes*, viewed 6 June 2008, http://sixtyminutes.ninemsn.com.au/article.aspx?id=564039
[191] *Workplace Relations Act 1996* s 756.
[192] Neil Napper and Sarah Houghton, How does Work Choices affect union right of entry? (2006) 7 *Australian Industrial Law News*, CCH, 31 July 2006.
[193] WorkCover Authority of NSW, *Inquiry into New South Wales occupational health and safety legislation* New South Wales Government http://www.workcover.nsw.gov.au/OHS/OHSAct2000Review/default.htm at 30 August 2007.
[194] Neil Napper and Sarah Houghton, 'How does Work Choices affect union right of entry?' (2006) 7 *Australian Industrial Law News*, CCH, 31 July 2006.

FORWARD WITH FAIRNESS

The election of a Labor Government in November 2007 was followed closely by the implementation of the first stage of its *Forward with Fairness*[195] industrial relations policy.[196] Australian Workplace Agreements have been abolished, interim ITEAs have been created and operate where Australian Workplace Agreements used to be, the no disadvantage test has been reintroduced and award modernisation has begun.

More wide sweeping changes are to come in the government's substantive workplace relations reform Bill to be introduced into Parliament 'later this year'.[197] The government's *Forward with Fairness: Policy Implementation Plan*[198] (*Policy Implementation Plan*) gives a preview of what business should expect.

Union Right of Entry

The government has acknowledged in its *Policy Implementation Plan* that '[r]ight of entry laws balance the right of employees to be represented by their union with the right of employers to get on with running their business.'[199] Julia Gillard, Deputy Prime Minister and Minister for Employment, Education and Workplace Relations, has stated that

> the current rules in relation to right of entry will remain. With the right to enter another's workplace comes the responsibility to ensure that it is done only in accordance with the law.[200]

The government has effectively endorsed the current right of entry provisions contained in the *Workplace Relations Act 1996* but care needs to be taken that this is not just smoke and mirrors. The current right of entry system works well partly because it restricts a union from entering the workplace for discussion purposes

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[195] Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, *Forward with Fairness Labor's plan for fairer and more productive Australian workplaces*, April 2007, Australian Labor Party.
[196] The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* commenced on 28 March 2008.
[197] Thomson, 'Final National Employment Standards Released', *Workforce Daily*, 16 June 2008, Thomson Legal and Regulatory Limited.
[198] Kevin Rudd MP, Labor Leader and Julia Gillard MP Shadow Minister for Employment and Industrial Relations, *Forward with Fairness: Policy Implementation Plan*, August 2007, Australian Labor Party.
[199] Kevin Rudd MP and Julia Gillard MP, *Forward with Fairness: Policy Implementation Plan*, August 2007, Australian Labor Party.
[200] The Hon. Julia Gillard, Deputy Prime Minister and Minister for Education, Employment and Workplace Relations, *Fair Work Australia Summit Speech*, Sydney, 28 April 2008 viewed 19 June 2008, http://mediacentre.dewr.gov.au/mediacentre/Gillard/Releases/FairWorkAustraliaSummit.htm

where the workplace operates under Australian Workplace Agreements or ITEAs.[201] Many workplaces in the resources sector that have Australian Workplace Agreements in place have established direct relationships with their employees free from union involvement for many years.

A balanced right of entry regime reflects the choice of many employees to not join a union. Recent figures show union membership levels at just 14 percent of the private sector and in both the mining and construction industry, the percentage of employees in those industries is falling.[202] However, because Australian Workplace Agreements have been abolished and ITEAs will not be available after 31 December 2009, awards and collective agreements will again have a role and the right to enter to hold discussions and to investigate suspected breaches will open at these workplaces despite the fact that the majority of employees have chosen not to join a union.[203] Any entry by unions at these workplaces will merely be a membership recruitment drive. The union right of entry regime should not become a means by which workplaces can be used by unions for the purposes of recruiting members.

Kevin Reynolds, secretary of the Construction and General Division of the CFMEU, has criticised the government's policy to retain the existing right of entry provisions and does not see any merit to the requirement that a union official be restricted to a crib room to conduct meetings.[204] But what some union officials are failing to understand is that many of the restrictions are placed on union officials for reasons of security and safety, as well as to minimise any disruption to the workplace. The restrictions are well justified. In *Woodside v McDonald*[205] Carr J described the conduct of CFMEU officials attempting to gain access to the North-West Shelf Stage IV Project near Karratha on the Burrup Peninsula in North West Western Australia. Carr J described how the project was subject to attempts by CFMEU officials over several months trying to gain access. Despite refusals by the operators of the site to grant the union access and their warnings about likely breaches of strict security and safety procedures an official gained unauthorised entry by running through a gate opened to allow access to a bus, got in the bus and staged a 'sit in'. On another occasion, the official called on employees to shut down the site, which resulted in employees not attending work and engaging in unlawful industrial action that disrupted the project for six days. [206] Carr J considered the conduct to be 'inexcusable',[207] and subsequently

[201] *Workplace Relations Act 1996* s 760.
[202] Australian Bureau of Statistic, *Employee Earnings, Benefits and Trade Union Membership*, 6310.0 August 2007. Union membership in the construction industry has fallen from 21.9% in 2006 to 18.9% in 2007. Union membership in mining has fallen from 22.5% in 2006 to 21.5% in 2007.
[203] Union membership in the metal ore sector is just 11.8 percent. Australian Bureau of Statistics, *Employee earnings, Benefits and Trade Union Membership,* 2008, Cat. No. 6310.0, ABS, Canberra.
[204] Thomson, 'Reynolds condemns Labor refusal to reinstate full right of entry', *Workforce Daily*, 30 August 2007, issue 1601, Thomson.
[205] [2003] FCA 69.
[206] Ibid.
[207] *Woodside v McDonald* [2003] FCA 69, para 171 per Carr J.

refused to grant an interlocutory injunction that would have given the CFMEU representatives the right to access the site.[208]

Industrial Action

The government intends to be 'tough on industrial action in breach of its laws.'[209] The government's intention to retain secret ballots to approve industrial action, limit protected action to that taken during the negotiation of an agreement, prohibit industrial action in support of pattern bargaining, retain secondary boycott provisions in the *Trade Practices Act 1974* and retain all the measures currently available to stop or prevent unprotected action and gain redress[210] is proof that the current compliance system is the right one.

However, caution needs to be exercised to ensure that the current compliance regime is not undermined by broadening the scope of protected industrial action to include matters that do not pertain to the relationship between an employer and its employees. While the government has indicated that parties will be 'free to reach agreement on whatever matter suits them',[211] this does not necessarily mean that all matters should be open to industrial action. The *Policy Implementation Plan* states that:

> industrial action will not be protected by the law *except in limited circumstances* during bargaining for a collective enterprise agreement.[212] [emphasis added].

That industrial action can only be taken 'in limited circumstances' suggests that the government may not create a system whereby industrial action can be taken on any matter, despite opening up the allowable content for agreement making. Indeed, this is the position taken in the United States, which has three categories of bargaining, one of which allows for agreement on 'permissive subjects' but does not allow industrial action in support.[213] This sort of system will raise obvious difficulties about whether or not the action is in support of matters that are protected and therefore, restricting matters to the *Electrolux* principle would be more appropriate. But proper analysis of the impact of the government's policy on industrial action clearly cannot occur until the release of the substantive Bill.

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[208] Ibid, para 178.
[209] Kevin Rudd MP, Labor Leader and Julia Gillard MP, Shadow Minister for Employment and Industrial Relations, *Forward with Fairness: Policy Implementation Plan*, August 2007, Australian Labor Party, 21.
[210] Ibid
[211] Ibid, 14.
[212] Ibid, 21.
[213] Brian Bemmels, E.G. Fisher et Barbara Nyland, 'Canadian-American Jurisprudence on "good faith" bargaining, (1986) *Relations Industrielles*, Vol 14, No3, 596-621, 600.

CONCLUSION

In light of the current debate on the abolition of the ABCC it is important to remind ourselves of the industrial relations climate which was prevalent in the 1990s.

Despite the findings made by the independent Royal Commissioner in 2003, there are members of parliament who publicly claim that 'the Cole royal commission failed to detect any entrenched corruption, violence or intimidation on the part of trade unions of their members'.[214] Such claims are without foundation and are at odds with both fact and the Royal Commission's findings.

There can be no doubt that Australia's working environment has improved in leaps and bounds since being plagued by widespread and damaging industrial disputes at the workplace.

The building and construction industry has been a significant benefactor from reduced level of industrial disputation and reductions in lawless behaviour as evidences by the ABS statistics and the two Econtech Reports.

During the lead up to the 2007 election there were many calls from key figures in the union movement to walk away from the existing compliance regime and abolish the ABCC. Fortunately the ALP in determining its policy did not pander to the union hysteria which labels mechanisms to ensure compliance with the law as undemocratic and in some way breaching international conventions.

A review of almost all international labour conventions will reveal that their operation is subject to international law and practice; the ILO has never condoned coercion and intimidation or sanctioned unlawful behaviour.

As AMMA described in 1999[215], a change in Government traditionally carries with it the risk of an IR 'pendulum swing'. If the pendulum were to swing markedly in the building and construction industry it would destroy years of significant and positive industrial relations reform. This would be a detriment to the Australian economy, which is prospering from record export earnings and investment levels.

Large numbers of mining projects are being committed to in response to continued demand for Australia's resources, highlighting the importance of having an industrial relations system in place that ensures projects are not met with delays caused by

[214] Maiden Speech of Senator Cameron, *Senate Hansard*, 1 September 2008, 49.
[215] AMMA, Beyond enterprise bargaining: the case for ongoing reform of workplace relations in Australia (1999) AMMA, viewed 4 September 2008, http://www.amma.org.au/publications/beb_report.pdf

unlawful industrial stoppages or disruption from unions abusing their rights of entry. Where businesses are faced with this sort of conduct, strong and effective remedies are required to minimise its impact.

The existing system is working – it comes as no surprise that the government has recognised this and committed to retaining the current secondary boycott provisions, to continue to allow employers affected by unprotected industrial action to seek court orders immediately, to make orders preventing or stopping unprotected industrial action a mandatory requirement for the Commission and to retain the current right of entry system. The precise impact of this policy will not be known until we see the substantive legislation and how the current right of entry provisions will operate under the government's workplace relations system. Nor will we know exactly how effective our current measures and remedies are for addressing industrial action in a system without restriction on agreement content and continued uncertainty about what action will or won't be protected.

The resources sector holds particular concerns in respect to the transition of the ABCC to a specialist division of Fair Work Australia. The building and construction industry is the cornerstone of the Australian economy and has been plagued with unlawful and inappropriate conduct which to date has only been addressed and curtailed to some extent by an independent regulator with special powers.

The building and construction industry regulator not only relies on the strong compliance regime under the *Workplace Relations Act 1996* but has full effectiveness due to the operation of the BCII Act and the regulator's extensive compliance and enforcement powers. These powers have proved instrumental in pursuing prosecutions and indeed, in decisions to not take matters further.

This has benefited not only the building and construction industry directly, but has had significant flow on benefits to mining and other industries, which have experienced increased efficiency as a result of decreased costs and improved productivity in building and construction. The savings - $343.8 million on mining construction projects alone – are significant. It is extremely important, therefore, that the building and construction industry does not again become subject to union threats and bullying and poor productivity levels at a time when additional infrastructure development is required to meet future resource demands.

Rather then reviewing the continued powers of the regulator, the Government should consider expanding breadth of coverage of the regulator to cover other industries, for example the maritime industry.

To abolish the ABCC without providing the same powers to its successor would be akin to taking speeding, drug and alcohol testing powers away from police. Such powers to check the speed of vehicles and conduct alcohol and drug testing of drivers were put in place to combat increased numbers of vehicle accidents and fatalities; black spots are given special attention by the law enforcement agency. There is little doubt that these laws and police powers will remain in place until the risks to the public are eliminated and the culture has changed. There is no reason why the same approach shouldn't be taken to the rule of law in the building and construction industry.

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. The pantomime of left wing unions and academics aside, the facts dictate that a tough cop in the building and construction industry remains necessary. AMMA calls on the government to recognise these facts; avoid the toothless tiger approach and let the investment community know that effective measures are in place to address lawlessness and intimidation in the building and construction industry. A tough cop on the beat is in Australia's national interest.

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