Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into:

The Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011

By the Australian Mines & Metals Association (AMMA)

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Executive summary

This submission builds on AMMA's July 2009 submission to the *Senate Education, Employment and Workplace Relations Committee's* inquiry into the *Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009*. With a couple of differences, the earlier bill was almost identical to the newly-proposed *Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*, to which this current submission relates.

AMMA contends now, as it did in 2009, that the overall effect of the bill will be to water down the building industry inspectorate's capacity to ensure that building and construction industry participants conduct their activities in accordance with the law, which will have serious flow-on effects to the Australian economy.

There remain a culture of unlawfulness in the building and construction industry which requires the continuation of the Australian Building and Construction Commission (ABCC). While this culture has been curtailed by the ABCC it poses a future threat should the existing legislative scheme be dismantled and weakened and sends out the completely wrong message to all participants.

As Federal Court Justice Gyles said in 2008 "*it desirable that any return to the bad old days be appropriately penalised*.' *A&L Silvestri Pty Ltd v CFMEU* [2008] FCA 466 (11 April 2008).

Law abiding union officials, employers and workers cannot fear strong laws that protect against intimidation, coercion and thuggery on building and construction sites.

The Cole Royal Commission Report in 2003[1] and the Wilcox Report in 2009[2] gave the Federal Government ample basis upon which to transfer the entire powers of the existing Australian Building & Construction Commission (ABCC) to the proposed new Fair Work Building Industry Inspectorate if and when the new body is established under the proposed legislation.

The value of current and proposed resource construction projects totalling more than $600 billion, many of them awaiting a final investment decision, highlights the need to ensure that the building and construction industry conducts itself lawfully and efficiently in order to achieve the best value for investors and taxpayers.

Forcing the "tough cop" off the beat at this time is a bad economic move.

The proposed legislation, if passed, will neuter the building industry watchdog and reduce the capacity of its officers to act quickly, effectively and independently by:

- Abolishing the ABCC and replacing it with the Office of the Fair Work Building Industry Inspectorate;

- Reducing by around two-thirds the maximum penalties applicable for unlawful behaviour despite the persistence of such behaviour in the industry;

- Reducing the independence of the Building Industry Inspectorate by giving the Workplace Relations Minister of the day the capacity to issue directions about its policies, programs and priorities and the manner in which its powers and functions are exercised;

- Tying up the inspectorate in red tape by imposing additional onerous obligations on accessing its compulsory information gathering powers;

[1] The Hon Terrance Cole, Royal Commission into the Building and Construction Industry, Final Report,
[2] The Hon Murray Wilcox QC, Report, Transition to Fair Work Australia for the building and construction industry, March 2009, Australian Government.

- Weakening the inspectorate's current powers to investigate and compulsorily acquire information by giving an external assessor the capacity to remove those powers upon application from an interested person, including a trade union, based on questionable criteria;

- Abolishing the compulsory information gathering powers three years after the legislation is enacted, with no stipulation that the necessary cultural change is achieved in the industry beforehand;

- Narrowing the definition of industrial action taken by building industry participants, thereby reducing the policeman's reach and exempting industrial action taken solely by unions; and

- Removing the coercion and undue pressure provisions, which provide greater protection from coercive behaviour than do those under the *Fair Work Act 2009*.

If passed, the bill will also:

- Make significant changes to the *Building & Construction Industry Improvement Act 2005* and rename it the *Fair Work (Building Industry) Act*;

- Restrict the circumstances under which employers can obtain injunctions against unlawful industrial action;

- Only apply to onsite building work, not onsite and offsite work as does the current legislation;

- Mean the inspectorate will not be part of Fair Work Australia or the Fair Work Ombudsman's Office but an independent statutory authority answerable to the Workplace Relations Minister;

- Change the objects of the Act and how they are to be achieved;

- Exclude manufacturing from the definition of the building and construction industry, thereby narrowing the legislation's application;

- Change the key function of the director to one of 'assisting' building industry participants to understand their obligations;

- Make compulsory examination notices available in relation to investigations of safety net and entitlements breaches by employers;

- Allow the Minister to set the terms and conditions of the director's appointment as well as terminate that appointment;

- Repeal s. 28 so that there will be no civil penalties for failing to provide a report on compliance with the national code; and

- Repeal all existing civil remedy provisions of the BCII Act.

In AMMA's view, the overall effect of the bill will be to disarm the tough cop and tie up the building industry watchdog in red tape.

AMMA's key recommendations for changes to the bill are as follows.

Recommendations

1. That existing maximum penalties for unlawful behaviour by building industry participants be maintained.

2. That the compulsory information gathering powers that currently reside in s.52 of the BCII Act be retained in their entirety and not automatically be repealed three years after the proposed legislation takes effect.

3. That the provisions of the BCII Act that deal with industrial action by unions and coercion or undue pressure applied to building industry participants be retained given that the *Fair Work Act 2009* does not deal effectively with those issues.

4. That the proposed capacity be removed for the Workplace Relations Minister to undermine the independence of the inspectorate by issuing directions about policies, programs and priorities and the manner in which the powers and functions of the inspectorate are performed.

5. That the bill be amended to explicitly state that any recommendations made by the proposed advisory board be non-binding.

6. Advisory board members be required to prove they are of good character.

7. That a process be put in place for the director of the inspectorate to seek a determination as to whether public interest immunity should apply to a particular document or information if claimed by a building industry participant in response to the proposed use of the compulsory information gathering powers.

About the resource industry

The construction of new resource projects and the expansion of existing ones will be a key driver in ensuring the continuation of the resource industry's recent outstanding performance. The building and construction industry is a vital sector of the resource industry, for this reason, the operation of the laws and regulations applying in the building and construction industry is critical to the continued growth of the resource industry.

This is the basis upon which AMMA makes this submission to the *Senate Education, Employment and Workplace Relations Committee's* inquiry into proposed amendments to the *Building & Construction Industry Improvement Act 2005* (BCII Act) that are embodied in the *Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011*.

There are currently $316 billion worth of approved resource projects across Australia that are either committed or under construction, plus a further

$307.6 billion worth of projects awaiting approval[3]. These include mineral, energy and infrastructure projects in every state across the country. The value of committed capital expenditure associated with these projects is nearly 12 per cent of Australia's gross domestic product (GDP), while the resource industry as a whole currently accounts for nine per cent of Australia's GDP at a value of $102.6 billion[4].

AMMA members that have had input into this submission range from those employing 50 workers locally to 100,000 globally. The value of construction projects these member companies are engaged on own range from several million dollars to $43 billion.

Projects include:

- Liquefied natural gas (LNG);
- Coal;
- Mineral processing plant expansions;
- Offshore oil and gas construction projects
- Port rail expansions;
- Civil road and infrastructure projects for local, state and federal governments;
- Capital works; and
- Desalination plants.

The commencement in 2009 of construction on the Gorgon Project on Barrow Island in Western Australia involves an investment of $43 billion. This is the largest single resource project investment in Australia and will be an

[3] Pitcrew Consulting Management Services, *Major Project Labour Market in Australia*
[4] *Australian Commodities Statistical Tables*, Vol 18, No 1 March quarter 2011, ABARE

enormous boost for the Western Australian and Australian economies. More than $15 billion in contracts awarded for the project has already been committed to Australian goods and services.

During its life, the Gorgon project is expected to:

- Create 3,500 direct construction jobs on Barrow Island and 10,000 direct and indirect jobs during peak construction;
- Produce 15 million tonnes of LNG annually and provide 300 terajoules day of domestic gas to Western Australia;
- Increase Western Australia's state gross product by approximately four per cent;
- Boost Australia's gross domestic product by more than $64 billion; and
- See the purchase of $33 billion worth of Australian goods and services.

In addition to the Gorgon project, the following table from the Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES)[5][6].identifies selected key projects and their status, the expected date of commencement of operations following construction, the estimated capital expenditure and anticipated employment figures where available (employment figures are included for both the construction and operational phases where possible).

These are just a small proportion of proposed resource projects across Australia, representing only those with a capital expenditure of $1 billion or more which are either committed or already under construction.

Project	Company	Status	Expected start-up	Capital expenditure	Additional employment
Ravensworth North	Xstrata	Expansion, under	2012	$1.44b	550 (const)

[5] ABARES major minerals and energy projects listing for April 2011
[6] Some updating to the table has been done by AMMA

		construction			500 (op)
Ulan West	Xstrata	Expansion, under construction	2014	$1.34b	270 (const) 350 (op)
Daunia	BHP Billiton Mitsubishi Alliance (BMA)	New project, committed	2013	$1.65b	450 (const) 300 (op)
Kestrel	Rio Tinto	Expansion, under construction	2012-13	$1.13b	
Goonyella to Abbott Pt (rail) (X50)	QR National	Expansion, under construction	Early 2012	$1.1b	
Hay Point Coal Terminal Phase 3	BHP Billiton Mitsubishi Alliance (BMA)	Expansion, committed	2014	$2.6b	
Gladstone LNG project	Santos/Petronas/ Total/Kogas	New project, committed	2015	$16.5b	5000 (const) 1000 (op)
Gorgon LNG	Chevron/Shell/ ExxonMobil/ Osaka Gas/Tokyo Gas/Chubu Electric Power	New project, under construction	2014	$43b	3000 (const) 600 (op)
Wheatstone LNG	Chevron/Apache/ Kupec/Shell	New project	2016	$29b	1500
Kipper gas project (stage 1)	Esso/BHP Billiton/ Santos	New project, under construction	2012	$1.9b	
Macedon	BHP Billiton/ Apache Energy	New project, under construction	2013	$1.55b	300 (const)
NWS CWLH	Woodside Energy, BHP Billiton, BP, Chevron, Shell, Japan Australia LNG	Expansion, under construction	2011	$1.5b	
NWS North Rankin B	Woodside Energy, BHP Billiton, BP, Chevron, Shell, Japan Australia LNG	Expansion, under construction	2013	$5.3b	
Pluto (train 1)	Woodside Energy	New project, under construction	Late 2011	$14b	2000 (const) 150 (op)

Queensland Curtis LNG project	BG Group	New project, under construction	2014	$15.5b	5000 (const) 1000 (op)
Reindeer gas field/Devil Creek gas processing plant (phase 1)	Apache Energy/Santos	New project, under construction	Late 2011	$1.08b	
Turrum	ExxonMobil/BHP Billiton	New project, under construction	2013	$2.8b	
Cadia East	Newcrest	Expansion, under construction	2013	$1.9b	1300 (const) 800 (op)
Chichester Hub	Fortescue Metals Group	Expansion, committed	2013	$1.55b	
Hamersley Iron Brockman 4 project (Phase B)	Rio Tinto	Expansion, committed	2013	$1.13b	
Hope Downs 4	Rio Tinto, Hancock Prospecting	New project, under construction	2013	$1.65b	
Jimblebar mine and rail (WAIO)	BHP Billiton	New project, committed	2014	$3.5b	
Karara Project	Gindalbie Metals/Ansteel	New project, under construction	2011	$2.6b	500 (const) 130 (op)
Sino Iron Project	CITIC Pacific Mining	New project, under construction	2011	$5.4b	4500 (const) 800 (op)
Western Australian Iron Ore Rapid Growth Project 5	BHP Billiton	Expansion, under construction	2011	$5.8b	
Cape Lambert port and rail expansion	Rio Tinto/Robe River	Expansion, under construction	2013	$3.2b	
Port 55	Fortescue Metals	Expansion,	2013	$2.5b	

	Group	under construction			
WAIO optimisation (port blending and rail yards)	BHP Billiton	Expansion, committed	2014	$1.7b	
Argyle underground development (diamonds)	Rio Tinto	Expansion, under construction	2013	$1.65b	250 (const) 500 (op)
Worsley refinery efficiency and growth project	BHP Billiton, Japan Alumina, Sojitz Alumina	Expansion, under construction	2011	$2.3b	4000 (const) 100 (op)
Yarwun alumina refinery expansion	Rio Tinto Alcan	Expansion, under construction	2012	$1.96b	1200 (const) 300 (op)

This table shows the enormous significance of the resource industry both in terms of export revenue and domestic capital investment. Hence, the industry has a strong interest in workplace relations legislative reform in the building and construction industry given its potential to impact on the viability of these and other resource industry projects.

About AMMA

AMMA is the only national employer group representing the workplace relations interests of the resource industry, having been serving the industry for over 90 years.

AMMA members employ a significant proportion of the 226,000 direct employees in the mining industry as a whole[7], with the industry estimated to be responsible for three to four times as many indirect as direct jobs.

AMMA member companies are engaged in a variety of activities in sectors including:

- Mining;
- Hydrocarbons;

[7] *Labour Force, Australia, Detailed, Quarterly, August 2011*, ABS, Catalogue no: 6291.0.55.003

- Maritime;
- Exploration;
- Energy;
- Construction;
- Transport;
- Smelting;
- Refining; and
- Suppliers to those industries.

AMMA's Board is comprised of business leaders from:

- Alcoa of Australia Ltd;
- Esso Australia Pty Ltd and Mobil Oil Australia Pty Ltd;
- Minara Resources Ltd;
- Newcrest Mining Ltd;
- Oz Minerals Ltd;
- P&O Maritime Services Pty Ltd;
- Sodexo Australia and New Zealand; and
- Woodside Energy Ltd.

The Cole Royal Commission and the Wilcox Inquiry

1.1 On August 29, 2001, the Howard Government appointed the Honourable Terrance Cole QC to conduct a Royal Commission into the Australian building and construction industry.

1.2 In October 2002, the Building Industry Taskforce was established as an interim body to help ensure lawfulness in the industry.

1.3 In his February 24, 2003 report, Cole concluded that a culture of lawlessness was rife.

1.4 He recommended the establishment of a permanent special regulatory authority, the Australian Building & Construction Commission (ABCC), which the *Building & Construction Industry Improvement Act* created on 1 October 2005.

1.5 In 2008, the Rudd/Gillard Government asked the Hon Murray Wilcox QC to conduct an inquiry to assist the government to fulfil its pre-election commitment to business of retaining a 'tough cop' on the beat in the building and construction industry. This was despite the government's plans to abolish the existing ABCC due to a pre-election commitment to trade unions that it would do so.

1.6 The Federal Government commissioned Wilcox to consult and report on how a new inspectorate could be created which would have responsibility for the building and construction industry.

1.7 In its submission to, and consultation with, the Wilcox inquiry, AMMA advocated the following:

- Continued legislative prohibitions on unlawful industrial action as currently defined in the building industry-specific legislation along with continued significant penalties for breaches;

- The transfer of the ABCC's existing coercive powers to the new inspectorate in order to overcome the culture of silence and intimidation in the industry;

- The payment of compensation to persons summonsed under the compulsory interrogation powers in respect of reasonable expenses necessarily incurred in respect of hearings (this recommendation has been adopted in the bill); and

- The retention of the existing BCII Act requirements, powers and resources in the interests of achieving long-term, sustained cultural change in the building and construction industry.

1.8 On April 3, 2009, then-Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, released the final Wilcox report, *Transition to Fair Work Australia for the Building and Construction Industry*[8].

1.9 In that report, Wilcox concluded:

> *... there can be no doubt that the Royal Commissioner was correct in pointing to a culture of lawlessness by some union officers and employees, and supineness by some employers, during the years immediately preceding his report ...*

1.10 Specifically, Wilcox found:

- The ABCC had made a significant contribution to improved conduct and harmony in the building and construction industry;

[8] The Hon Murray Wilcox QC, Report, Transition to Fair Work Australia for the building and construction industry, March 2009, Australian Government.

- There remained a high level of industrial lawlessness in the industry, particularly in Victoria and Western Australia, which meant it was inadvisable to remove the power of the building industry inspectorate to undertake compulsory interrogations;

- Any tough new industry regulator would need the power of coercive interrogation in light of persisting industry conditions; and

- Repeated breaches of the law, even if only of industrial law as distinct from criminal law, could cause considerable disruption to building projects. If projects were sufficiently large or urgent, or the conduct replicated extensively, breaches could take on national economic significance.

1.11 Despite these findings, the Wilcox recommendations have led to a proposed building industry inspectorate that will be undermined by bureaucratic administrative processes and weak laws. Recommendations of concern in the Wilcox report that made their way into the proposed bill include:

- The creation of an advisory group with responsibility for influencing the policies, programs and priorities of the inspectorate;

- The requirement that access to the compulsory information gathering powers be approved by a presidential member of the Administrative Appeals Tribunal who would be responsible for approving the use of such powers;

- A sunset provision that would automatically repeal the compulsory information gathering powers at a future point in time (this has been reduced to a three-year sunset provision in the current bill from five years in the previous bill); and

- Access to public interest immunity for persons served a notice to compulsorily provide information to the inspectorate.

1.12 AMMA responded to the Wilcox recommendations in a submission to the Department of Education, Employment & Workplace Relations in May 2009[9], arguing that:

- The proposed building industry inspectorate should be independent from government in order to maintain stakeholder confidence and avoid conflicts of interest;

- The existing provisions dealing with unlawful industrial action and coercion were necessary to address ongoing damaging conduct in the industry that would not be adequately dealt with by the *Fair Work Act 2009*;

- The current penalty regime reflected the considerable financial consequences caused by unlawful and inappropriate behaviour and was a necessary general and individual deterrent;

- The existing compulsory information gathering powers were an efficient and effective tool to assist investigations and should not be weakened or waylaid by procedural processes;

- The ability to claim public interest immunity when compulsorily required to provide information, without processes in place to test the validity of such claims, would be open to misuse;

- Existing penalties for failing to comply with a notice to compulsorily provide information should continue in order to ensure compliance; and

[9] AMMA submission to DEEWR on the Wilcox Report Recommendations, 15 May 2009

- The exclusion of 'off-site' work from the definition of 'building and construction industry' should not exclude temporary pre-fabrication yards established specifically to provide pre-fabrication work to particular construction projects.

1.13 The Federal Government's current bill largely reflects the Wilcox recommendations, with some modifications including the proposed establishment of a new independent assessor with an ability make determinations to 'switch off' the compulsory information gathering powers on specific building projects.

1.14 The Cole Royal Commission and the Wilcox inquiry found evidence of an industry culture characterised by a widespread disregard for the rule of law, particularly in respect of Victoria and Western Australia[10]. Instances of inappropriate behaviour cited in both reports included industrial action against employers with non-union agreements, work stoppages due to refusals to enter into union agreements, union failures to consult with and give regard to the views of employees, union circulation of 'approved contractor lists' and disregard for the provisions of agreements[11].

1.15 They also found a history of disregard for industrial tribunal and court orders combined with a 'culture of silence' that had undermined attempts to effectively carry out investigations and enforce the law[12], thus encouraging industrial anarchy in the building and construction industry.

1.16 The ABCC (supported by the BCII Act) was created to address this lawless behaviour and enforce the rule of law as a means of achieving long-term, sustainable cultural change in the building and construction

[10] AMMA, Building industry regulator: a tough cop or a transition to a toothless tiger? 2008
[11] The Hon Murray Wilcox QC, Report, Transition to Fair Work Australia for the building and construction industry, March 2009, Australian Government
[12] AMMA, Building industry regulator: a tough cop or a transition to a toothless tiger? 2008

industry. Wilcox acknowledged this in the discussion paper preceding his inquiry[13].

1.17 While onsite behaviour has improved since the commencement of the BCII Act, the industry has by no means undergone a cultural change, and recent disputes on key projects outlined throughout this submission reflect this.

1.18 The ABCC currently has 33 legal proceedings on foot, including:

- 16 involving allegations of unlawful industrial action;
- Nine involving allegations of coercion;
- Eight involving allegations of unlawful right of entry;
- Four involving alleged breaches of orders/agreements;
- Three involving alleged freedom of association breaches;
- Two involving allegations of sham contracting;
- Two involving alleged claims for strike pay; and
- Two involving allegations of discrimination.

1.19 Of the 105 court cases initiated by the ABCC that were finalised between 1 October 2005 and 30 November 2011, 85 were successful, 12 were discontinued and eight were unsuccessful.

1.20 AMMA submits that respect for the rule of law remains lacking in the building and construction industry today, and the rights of building industry participants continue to be disregarded. ABCC-initiated court cases, which have to date resulted in $4.7m in penalties being

[13] The Hon Murray Wilcox, Proposed building and construction division of Fair Work Australia discussion paper, Australian Government

awarded, are a key factor in reining in that unlawful behaviour and punishing the wrongdoers. The building industry inspectorate, whatever its name should be able to continue to prosecute the same breadth of conduct as it currently does, and should not be hobbled by the proposals contained in this bill.

2. The BCII Act versus the Fair Work Act

2.1 Since 2005, the BCII Act has operated in conjunction with the federal workplace relations legislation to apply an extra layer of regulation to building industry participants in acknowledgement of the unique circumstances of the industry and its history as an industrial hotspot.

2.2 The bulk of the provisions of the *Fair Work Act 2009* commenced on 1 July 2009. Like the *Workplace Relations Act 1996*, the *Fair Work Act 2009* regulates terms and conditions of employment, union right of entry, industrial action, agreement making and freedom of association for all industries. It provides remedies in response to unprotected industrial action, penalises breaches and protects workplace rights.

2.3 However, on its own the *Fair Work Act 2009* does not provide adequate protection against unlawful and inappropriate conduct by participants in the building and construction industry which in our view continues to demand special attention.

2.4 Unfortunately, the current Federal Government accepted the Wilcox recommendation that the same rules that apply under the *Fair Work Act 2009* should apply to building industry employees in relation to industrial action and coercive conduct.

2.5 As a consequence, the proposed bill seeks to repeal the broad definition of unlawful industrial action contained in Chapter 5 of the

BCII Act as well as Chapter 6 which relates to discrimination, coercion and unfair contracts.

2.6 AMMA members have had positive experiences with these provisions under the BCII Act. They have had a demonstrably calming effect on unions and have had the effect of holding all parties more accountable and responsible for their actions.

2.7 The provisions, which do not exist under other workplace laws, have changed the industry and brought honesty back into industrial representation. Given the fact that the construction industry already has the highest level of industrial action of all industries, even with the more rigorous provisions on industrial action and coercion in place, removing them can only lead to more unlawful behaviour and economic vandalism.

2.8 Unions and individuals will perceive they are less accountable for unlawful action than they currently are if the building-industry specific provisions are removed.

2.9 Unions will seek to interfere more in the industrial arrangements of contractors and sub-contractors and will more frequently attempt to coerce them into making union collective agreements. Militant unions will attempt to exploit the gaps in the industrial relations legislation for their own ends, which include the aim of having everyone in the industry signed up to an EBA with their particular union. Numerous cases of this type of coercive behaviour are evidenced in this submission.

2.10 If the bill in its current form becomes law and the strict prohibitions against unlawful industrial action, coercion and undue pressure are removed, AMMA members fear a return to widespread coercion bullying and harassment at the hands of unions.

2.11 One AMMA member described the removal of such provisions would be to *unleash the union movement to make an unprecedented attack on the construction industry and destroy foreign investment possibilities for the future*.

2.12 Research published by independent brokerage and investment group CLSA[14] in January 2011 was already warning investors in Australia's resource industry to expect higher capital expenditure, completion delays and lower project returns due to Australia's changed legislative environment. That changed environment included the Fair Work Act being introduced in 2009 as well as changes to Australia's skilled migration program in 2010.

2.13 The CLSA report predicted unions would be 'reinvigorated' by the Fair Work Act's removal of Australian Workplace Agreements (AWAs) and its increased tolerance for the strategic use of protected industrial action:

> *Seasonally high wage agreement expiration and record numbers of protected action ballot orders set the scene for a possible fiery industrial relations environment in 2011.*

2.14 Those predictions have proved true across all industries, with the number of working days lost to industrial disputes growing in 2011. In the 12 months to September 2010, the number of working days lost to industrial disputes per thousand employees in all industries was 144.1, but grew to 214.4 in the 12 months to September 2011[15]. If building industry participants are subject to the same rules for protected industrial action as under the *Fair Work Act 2009* rather than the tighter rules under the BCII Act, industrial action in the building industry will undoubtedly rise.

[14] Australia Market Strategy, CLSA Asia-Pacific, 31 January 2011
[15] ABS, *Industrial Disputes, Australia, September 2011*. Cat no: 6321.0.55.001

2.15 The CLSA report confirmed that in the 12 months to 2011, labour costs in Australia's resource industry had accelerated. Casual daily rates for offshore and onshore resource construction workers had risen by 37 per cent since July 2009 following the introduction of the *Fair Work Act 2009*, with onshore construction rates expected to head in the same direction in future.

2.16 In its submission to DEEWR in 2009, AMMA responded to the Wilcox recommendations and opposed the narrowing of the definition of unlawful industrial action as well as the loss of protection from coercion or undue pressure[16]. AMMA raised particular concerns with the reasoning adopted by Wilcox in arriving at his recommendations on the rules that should apply in the building and construction industry.

2.17 The proposed bill will impact on the following sections of the BCII Act, among others:

- Section 38 – which prohibits taking unlawful industrial action (defined in ss.36 and 37);
- Section 39 – which bestows the power to grant an injunction against threatened, impending or probable unlawful industrial action; and
- Section 44 – which offers protection against coercion or undue pressure in respect to making, varying or terminating a collective agreement?

2.18 Section 38 of the BCII Act prohibits unlawful industrial action, referred to as 'building industrial action' in s.37, which in turn is defined in s.36. Section 36 defines 'industrial action' more broadly than the *Fair Work Act 2009*.

[16] AMMA submission to DEEWR on the Wilcox Report recommendations, 15 May 2009

2.19 The Wilcox recommendation not to retain s.38 of the BCII Act is based partly on the assumption that under the agreement making rules of the *Fair Work Act 2009*, almost all workplaces will have an operating agreement in place, with the result that any industrial action will be unlawful. He considered it unnecessary and of no practical significance to retain the broader definition of industrial action contained in s.38 of the BCII Act.

2.20 AMMA contends that Wilcox's assumption that almost all workplaces will have an operating agreement under the *Fair Work Act 2009* (thereby rendering any industrial action unlawful), is incorrect for the following reasons:

- Large mining expansion and construction projects will extend beyond the nominal operating life of an agreement, which has in any case been reduced to a maximum of four years under the *Fair Work Act 2009*. Furthermore, building industry unions continue to seek agreements with a three-year nominal term and;

- Wilcox's assumption does not take into account the award modernisation process and the role of modern awards. If the relevant modern award is sufficiently flexible, as is the *Mining Industry Award 2010* and the *Hydrocarbons Industry (Upstream) Award 2010*, employers can rely on the award and/or individual flexibility arrangements and/or common law contracts to regulate the employment relationship without having to enter into formal collective statutory agreements.

2.21 An April 2011 survey[17] of 74 AMMA member companies, which included construction the following types of industrial agreements were still in place at companies:

- Fair Work Act single enterprise non-greenfield agreements;

[17] *AMMA Workplace Relations Research Project Report 3*, April 2011, RMIT University, Dr Steven Kates

- Fair Work Act single enterprise greenfield agreements;
- Workplace Relations Act employee collective agreements;
- Workplace Relations Act employer greenfield agreements;
- Workplace Relations Act union greenfield agreements;
- Australian Workplace Agreements (AWAs);
- Common law contracts;
- Modern award-based terms and conditions; and
- Enterprise award-based terms and conditions.

2.22 It is therefore entirely possible for workplaces in the building and construction industry under the *Fair Work Act 2009* to operate without an agreement or with an expired agreement in place.

2.23 Wilcox also did not accept that building and construction industry employers would be any worse off under the *Fair Work Act 2009* on the basis that the Fair Work Act's definition of 'industrial action' under s.19 was almost identical to the wording under 'building industrial action' in s.36 of the BCII Act, after making the necessary adjustments for the definition to fit all industries.

2.24 AMMA does not agree with this view. Unlike the BCII Act, s.19(1)(a)-(c) of the *Fair Work Act 2009* is concerned with the conduct of employees only.

2.25 Industrial action is defined in s.19(1)(b) as a 'ban, limitation or restriction on the performance of work by an employee'. It appears, therefore, that unions are not capable of engaging in or organising industrial action by their own conduct alone under the *Fair Work Act 2009*. The 'industrial action' as defined must be imposed by an employee. For this reason, the continuation of the unlawful industrial action provisions of the BCII Act is necessary to cover union conduct that is not adequately dealt with by the *Fair Work Act 2009*.

2.26 'Building industrial action' was considered by Kenny J in *Cahill v CFMEU (No 2)* [2008] FCA 1292, who accepted that if any ban, limitation or

restriction on the performance of work had been imposed by a union, then the definition of 'building industrial action' might be satisfied:

> *The respondents' [the CFMEU's] argument was that there was no 'building industrial action' as defined in s36(1) and, therefore, no unlawful industrial action for the purposes of ss37 and 38 of the BCII Act. This was because there was no 'ban, limitation or restriction on the performance of building work' within the meaning of paras (b) and (c) of the definition of 'building industrial action' in s36(1), because there was no ban, limitation or restriction imposed by employees.*
>
> *The respondents submitted, and it was not in dispute, that the applicant led no evidence that any of Hardcorp's employees had imposed a ban, limitation or restriction on the performance of work. The question is, however, whether or not the words 'a ban, limitation or restriction on the performance of building work' in paras (b) and (c) of the definition of 'building industrial action' refer to a ban, limitation or restriction imposed only by employees, or can extend to union action.*
>
> *Paragraphs (b) and (c) of the definition of 'building industrial action' in terms contain no limitation of the kind for which the respondents contend. The expression 'a ban, limitation or restriction on the performance of building work' in paras (b) and (c) may as naturally comprehend that which is imposed by a union as by employees. If the expression 'a ban, limitation or restriction on the performance of building work' in paras (b) and (c) of the definition of 'building industrial action' refer only to that which is imposed by employees in respect of their work, and cannot refer to a prohibition or restriction on the performance of work imposed by a union, then it is unlikely that union action could ever amount to 'building industrial action' (for which the union could be held responsible under s38). It is to be borne in mind, however, that when the definition of*

> *'industrial action' in the Workplace Relations Act was amended by the introduction of s.420, with the effect that it became clear in terms that a relevant 'ban, limitation or restriction on the performance of work' must be imposed 'by an employee', the Parliament did not adopt the same course with respect to the definition of 'building industrial action' in the BCII Act.*

2.27 It is clear, therefore, that the broad definition of industrial action in the BCII Act is necessary and of practical significance to efforts to address persistent and pervasive unlawful behaviour in the industry, in particular to deal with unions' incitement of industrial action by employees.

2.28 Section 39 of the BCII Act is also important to ensuring unlawful action is appropriately dealt with. That section allows an appropriate court to grant an injunction where it is satisfied that unlawful industrial action (as broadly defined) is threatened, impending or probable. This general power to grant an injunction is wider than the *Fair Work Act 2009*, which is limited only to instances where industrial action (as more narrowly defined) is being organised or engaged in, not that which is threatened, impending or probable. The courts can also grant an injunction under the BCII Act whether or not the person has previously engaged, intends to engage again or continues to engage in such conduct.

2.29 Section 44 of the BCII Act provides extra protection from coercion or undue pressure in respect of making, terminating, varying or extending etc industrial agreements. The Hon Murray Wilcox argued that ss.343 and 340 of the *Fair Work Act 2009* covered the same ground as section 44 of the BCII Act, yet he acknowledged that s.44 was in fact different as it covered both the intention to 'coerce' and an intention to 'apply undue pressure'. He reasoned that the '*application of undue pressure would be regarded as force, and therefore a form of coercion. If I am wrong, the difference hardly warrants a different rule for the building and construction industry.*'

2.30 It is AMMA's view that Wilcox's assertion is incorrect and that ss.340 and 343 of the *Fair Work Act 2009* do not cover the same ground as does s.44 of the BCII Act.

2.31 Firstly, s.340 of the *Fair Work Act 2009* is limited to 'adverse action'. The type of conduct considered to be 'adverse action', defined in s.342, is restricted.

2.32 Section 342(7) covers action taken by a union that includes the less broadly defined 'industrial action'; action that has the effect of prejudicing a person's employment or an independent contractor's contract for services, and action involving the imposition of a penalty on a member. If action is taken by a union that does not fall within this meaning of 'adverse action' but yet is taken with the intent to coerce another to make, vary etc an agreement, s.343 will not adequately deal with that behaviour. In contrast, s.44 of the BCII Act does not restrict the type of action that can be considered coercive and refers only to 'any action' that has that intent.

2.33 Secondly, the absence of 'undue pressure' from s.343 of the *Fair Work Act 2009* is significant. In *John Holland v AMWU* [2009] FCA 235 at paragraph 60, the following statement was made in respect to 'undue pressure':

> *[T]he expression 'undue pressure' has at least the potential to cover some forms of pressure which are somewhat more benign than those considered necessary to make good allegations of coercion in the statutory sense.*

2.34 Therefore, s.343 of the *Fair Work Act 2009* imposes a higher hurdle than the BCII Act and may not adequately deal with some of the inappropriate and unlawful conduct that continues to plague the industry. Reliance on the *Fair Work Act 2009* will mean that some behaviour in the industry 'falls under the radar'.. Further, while s.344 of the *Fair Work Act 2009* specifically covers undue influence or pressure

being applied, this is confined to the conduct of employers against employees.

2.35 In AMMA's view, the success of the ABCC's activities to date rests on the provisions of the BCII Act that provide for:

- A broader definition of unlawful industrial action with a wider net than the current industrial relations legislation;
- Greater scope for injunctions to be granted in response to unlawful industrial action;
- Strong anti-coercion provisions;
- Higher penalties for unlawful conduct by building industry participants than those under general industrial relations laws; and
- An independent regulatory body with effective compulsory interrogation powers.

2.36 The BCII Act is complemented by the Building Industry Code of Practice and Guidelines which are designed to lift standards in the industry. Together, they form a strong and effective regulatory framework that compels compliance with the rule of law.

2.37 AMMA contends that the *Fair Work Act 2009* is unable to adequately deal with all types of unlawful and inappropriate conduct in the building and construction industry, and AMMA opposes the repeal of ss.38, 39 and 44 of the BCII Act, along with other building industry-specific provisions.

3. Evidence of the success of the ABCC

3.1 In the period between the ABCC being established on 1 October 2005 and 30 November 2011, the ABCC launched 105 court proceedings and conducted 205 compulsory examinations. As discussed, most completed proceedings have been successful.

3.2 From the perspective of AMMA members in the construction of resource projects, the ABCC and the BCII Act have brought huge positive changes to the way unions and construction employees behave on these worksites.

3.3 AMMA members report that the ABCC has supported their efforts in the building and construction industry by:

- Enforcing the BCII Act and investigating any breaches to create a level playing field;
- Restoring law and order to construction sites;
- Employing officials with legal backgrounds who are responsive, who understand the issues and who are able to achieve good results thanks to the strength of the legislation backing them;
- Improving industrial relations practices on projects, including by reducing the incidence of unlawful industrial action;
- Providing a set of obligations with which all building industry participants must comply;
- Ensuring a more orderly and controlled industry and, equally importantly, restoring the perception to overseas investors of a reliable and lawfully operating workforce;

- Increasing the accountability of building industry participants for their actions, including by bringing increased media attention to transgressions;

- Helping to resolve entrenched industrial relations issues that were not being addressed or not able to be addressed by building industry participants themselves;

- Introducing a strong and powerful 'policeman' required to meet its statutory obligations without fear or favour; and

- Ensuring fairer outcomes to disputes.

3.4 In terms of hard evidence of its economic and other benefits to the industry, the Wilcox report[18] acknowledged as 'persuasive' the information provided locally in terms of productivity improvements on specific construction projects. Wilcox said evidence from two companies in particular helped to 'throw some light' on productivity improvements that had occurred at the project level since the introduction of the building industry reforms.

3.5 The first case study cited in the Wilcox report was from Grocon Pty Ltd, a Melbourne-based construction company. Grocon told the Wilcox inquiry it had witnessed increased productivity since the introduction of the Building Industry Taskforce in 2002 as a result of fewer industrial disputes.

3.6 Grocon gave evidence that on one building site where work was performed between 1999 and 2002, there were 206 working days lost from a total of 1,156 days for the life of the project. Of the 206 days lost, 120 were due to inclement weather but 86 were attributable to industrial disputes (this equated to 7% of total working days on the project being lost to industrial disputes).

[18] The Hon Murray Wilcox QC, Report, Transition to Fair Work Australia for the building and construction industry, March 2009, Australian Government

3.7 On a second construction project which ran from 2005 to 2007 (i.e. after the building industry reforms were introduced), there were 22 working days lost from a total of 565 working days on the project. However, just one of those days was lost due to industrial disputes (equating to 0.002% of total working days on the project).

3.8 Grocon told the inquiry:

> *Many inefficient practices existed before the establishment of the ABCC as we believe it has not only helped to eliminate those practices and improve productivity and efficiency, but also to an increase in benefits in terms of improved OHS standards ... We believe the ABCC has been instrumental in bringing about compliance to lawful conduct in the building and construction industry.*

3.9 The Wilcox report also cited evidence from Woodside Energy on the differences between two resource projects, one following the introduction of the BCII Act and one preceding its introduction. The two projects were compared for their industrial relations records. Both had a similar capital cost, a similar sized workforce during peak periods, and similar man hours worked.

3.10 On the 'LNG Train 4' project, construction of which began before the BCII Act and the ABCC were introduced:

- The number of man hours lost to industrial action was 254,000 (compared with 27,000 on the later 'LNG Train 5' project);
- The number of disputes resulting in industrial action was 26 (compared with nine on the later project);
- The number of stoppages of two days or more was 17 (compared with three on the later project); and

- The number of matters subject to federal industrial tribunal applications was 10 (compared with four on the later project).

3.11 Woodside told the Wilcox inquiry that while part of this improved industrial performance could be attributed to 'proactive management of workplace relations', the most significant contributor was the threat of the compliance powers under the BCII Act together with the activities of the ABCC.

3.12 A 2009 report by KPMG Econtech, *Economic analysis of building and construction industry productivity,* commissioned by Master Builders Australia concluded that not only the legislative reforms themselves, but the regulator's effective monitoring and enforcement of them, were important in driving productivity increases in the industry that would not otherwise have been achieved.

3.13 The KPMG Econtech report cited practical benefits for employers associated with the operation of the ABCC and BCII Act as including:

- Significantly reduced days lost to industrial action;
- Less misuse of OHS issues for industrial purposes;
- Proper management of inclement weather procedures;
- Improved rostering arrangements; and
- Cost savings stemming from the prohibition on pattern bargaining.

3.14 These achievements were said to be due to:

- The BCII Act which established various prohibitions;
- The ABCC's extensive powers of investigation and prosecution; and

- The National Code of Practice for the Construction Industry, which provided a powerful commercial incentive to comply with the principles of freedom of association.

3.15 Evidence from AMMA members is that the economic benefits the ABCC has achieved to date include:

- Curbing the unreasonable site activities of militant unions;
- Reducing the number of costly unlawful strikes;
- Bringing disputes to a speedier resolution thereby reducing the economic impact of stoppages;
- Ensuring an even playing field within the market in which construction and resource companies operate;
- Providing an inspectorate that gives companies more teeth when dealing with unreasonable and unproductive union demands; and
- Improving labour productivity.

3.16 Productivity improvements experienced in the construction industry have direct flow-on effects to the mining industry in terms of cost savings and reduced prices.

3.17 Consequently, if the powers of the building industry inspectorate are watered down in the ways proposed by this bill, AMMA members in both the resource and construction industries fear:

- Businesses and unions will take short cuts that will impact economically on the entire resource construction industry;

- Further erosion of managerial prerogative consistent with some of the decisions being handed down by Fair Work Australia under the *Fair Work Act 2009*;

- A return to the industry being held to ransom by unions and the lawlessness and instability that ensues;

- A reduced ability to manage the industry in a collaborative way;

- Increased industrial action, both protected and unprotected;

- Increased potential for unlawful activity of all types together with reduced prospects for prosecuting it; and

- Declining productivity and increased costs for construction activities across Australia.

3.18 In short, AMMA members view the approach recommended through the changes in this bill as a retrograde step. The building industry watchdog, regardless of its name, must have the power to do the job it was put there to do in the first place. This will not be the case under the proposed legislation, which will significantly hamper the effectiveness of the industry regulator.

4. Unlawful action in the building and construction industry

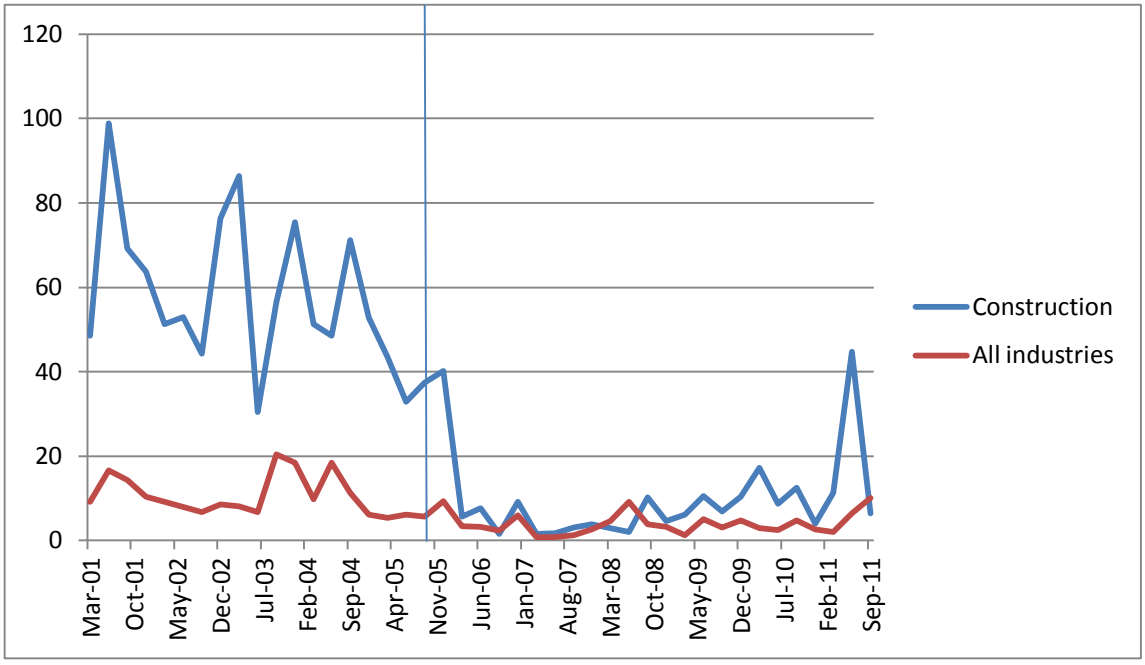
4.1 The problems that plagued the building and construction industry prior to the implementation of the Building Industry Taskforce in 2002 and the ABCC in 2005 still exist today but are tempered by the potency of the current regulatory environment.

4.2 Even so, the past two years has seen a return to the types of wildcat strikes that had not been a major factor in the industry for some years.

One can attribute this to the changed political environment and the expectation by unions that the regulator's current powers to punish their actions will soon disappear.

4.3 The graph below shows the incidence of working days lost to industrial disputes per thousand employees in the construction industry compared to all other industries between 2001 and 2011. The line on the vertical axis marks the implementation of the ABCC in October 2005. As can be seen, the effect of the new regulator on days lost to industrial disputes was immediate and dramatic. It brought the level of disputes down almost straight away to levels commensurate with all other industries, which had seen relatively stable levels of less than 20 days lost per thousand employees to industrial disputes for the entire 10-year period.

Days lost to industrial disputes per thousand employees



4.4 The spike in industrial activity seen in mid-2011 can be attributed to several large industrial disputes as well as the changed political environment. It also coincides with the reduced use of the ABCC's

compliance powers and the announcements of a change of direction by new ABC Commissioner Leigh Johns[19].

4.5 There are numerous examples in the past two years of industrial disputes in the building and construction industry that have involved unprotected strike action and the defying federal industrial tribunal orders. The continuing incidence of this type of behaviour shows there is still very much a need for a tough industry regulator.

4.6 One AMMA member cited losing 12 days to protected industrial action at a cost of $1 million per day.

4.7 Another AMMA member reported losing around 10 days to unprotected industrial action at a cost of between $40 million and $80 million in total.

4.8 Unprotected industrial action on the $24 billion Victorian Desalination plant at Wonthaggi contributed to a 12-month delay in production of the first water from the plant[20].

The Pluto project

4.9 In a case that attracted a lot of attention, Woodside Burrup Pty Ltd and the ABCC launched legal proceedings against the CFMEU WA branch and its official Joe McDonald over unprotected strike action by employees in December 2009 on the Pluto LNG processing plant near Karratha in the Pilbara.

4.10 Several project contractors also launched proceedings against more than 1,300 individual employees who were alleged to have taken part in a subsequent strike on the Pluto project in January 2010. Those

[19] *ABCC to adopt checks on coercive powers*, published by Workplace Express, 22 February 2011
[20] *Wages, water and Wonthaggi*, The Age, 13 December 2011

workers were in December 2011 ordered to pay fines of thousands of dollars each for the unlawful action[21].

4.11 The ABCC's statement of claim in the Federal Court alleged McDonald encouraged workers to go on strike unless Woodside reversed its plans to introduce 'motelling'. Motelling involves workers' accommodation being changed at the end of each roster rather than being allocated on a permanent basis for the duration of the project.

4.12 McDonald was in August 2011 found by the court[22] to have actively encouraged workers to go on strike over the issue, reportedly saying to them:

Nothing ever happens without a fight.

4.13 This remains the culture in some parts of the construction industry, particularly in WA and Victoria. Rather than resolving disputes through the proper channels, unions often choose to break the law and incite employees to take damaging and costly unprotected strike action.

4.14 In the Pluto case, it was nearly two years after the event that an outcome was seen that compensated the parties for the damages caused by the strikes.

4.15 In one Federal Court decision associated with the case, a contractor was quoted as estimating the costs of the strike to be $500,000 a day. For a 10-day strike, this would have cost the project around $5 million.

4.16 In cases such as this, documented losses due to illegal strike action include:

- Delays to the construction program affecting the ultimate completion date;

[21] *United Group Resources Pty Ltd v Calabro* (No 5) [2011] FCA 1408, 8 December 2012
[22] *Woodside Burrup Pty Ltd v CFMEU* [2011] FCA 949, 22 August 2011

- Costs associated with having machinery and equipment laying idle;

- Having to replace workers who resign as a result of strike action;

- Significant accommodation costs while no productive work is being performed of around $90 a night per employee (although an October 2011 court ruling[23] clarified that employees were not to be provided with accommodation during periods of industrial action as this would be deemed an unlawful payment for taking unprotected industrial action);

- Costs associated with providing extra security;

- Extension of time claims by contractors; and

- The inability of clients to meet contracts for future commodity sales due to delays in the project being up and running following the construction stage and

- Significant damage to employer reputation.

4.17 One employer on the Pluto project told the court that threats had even been made against employees who refused to take part in the strikes. This meant security onsite and around the accommodation village had to be increased. Workers who wanted to return to work after the initial strike were also allegedly threatened by those who chose to stay out. As the Federal Court heard, workers who refused to participate in the strikes were exposed to the risk of serious physical and psychological harm.

4.18 It is not just businesses and the economy that are threatened by this type of behaviour but also the workers themselves who are prevented from exercising their legitimate rights not to break the law.

[23] *CFMEU v Mammoet Australia Pty Ltd* [2011] FMCA 802, 20 October 2011

The City Square project

4.19 In a decision handed down in September 2011[24], the Federal Court imposed a $40,000 fine on the CFMEU and $8,000 on its official Joe McDonald for his involvement in unlawful strike action on the City Square Project construction site in Perth.

4.20 In 2009, McDonald called a meeting of workers on the site run by Brookfield Multiplex after one of the site's contractors refused to sign a document signifying its commitment to safety (all other contractors had signed).

4.21 The court found McDonald was involved in the unlawful strike, even going so far as to hold a second vote of workers when the first vote failed to endorse a stoppage.

4.22 The Federal Court noted that losses arising from the strike for one contractor could be in the realm of $45,000 a day in preliminary costs, $113,000 a day in interest charges as well as the possible loss of an early completion bonus.

4.23 According to the judge:

> *It is not possible simply to say that every project has built into it some wriggle room to ensure that a project will be finished on time according to the contract, even taking into account some industrial action.*

4.24 While in this case the unlawful strike indirectly involved safety it was not based on an imminent threat to health or safety which would have been the only thing to render it lawful, the judge said.

Diploma Constructions

[24] *ABCC v CFMEU (No 2)* [2010] FCA 977, 3 September 2010

4.25 In an interlocutory injunction handed down by the Federal Court in December 2009[25], Joe McDonald and fellow CFMEU organiser Michael Buchan were ordered not to go within 100 metres of any Diploma Constructions site in WA due to their involvement in strike action by the employees of nine contractors at Diploma's Hay Street, Perth site.

4.26 The union was alleged to have made threats against the company that further industrial action would ensue at all Diploma sites, not just where the dispute arose, if the union's demands were not met.

4.27 In an earlier decision in the matter[26], the Federal Court said the dispute, which the CFMEU alleged was over safety concerns, followed the company telling McDonald he would no longer be given right of entry because he did not hold a valid entry permit.

4.28 In order to tender for Federal Government construction work, the company was required to observe the letter of the law with regard to right of entry and told the union it would do so going forward.

4.29 The judge noted that from the time work began on the site in December 2008, no industrial action had been taken over health and safety issues, despite Buchan's frequent attendance onsite (Buchan was the CFMEU organiser responsible for safety). In his decision in the matter, the judge said:

> *It is trite that responsible union involvement in health and safety matters is in the interests of employees and in the public interest. However, it has been recognised that the building and construction industry has in the past been afflicted by this use of purported health and safety issues to advance other causes. This artifice seeks to portray unlawful conduct as lawful.*

[25] *ABCC v CFMEU (No 2)* [2009] FCA 1587, 23 December 2009
[26] *ABCC v CFMEU* [2009] FCA 1092, 29 September 2009

4.30 The judge said there had never been any suggestion from workers that safety issues were not dealt with quickly and effectively once they were raised.

The West Gate Bridge project

4.31 Unprotected industrial action was taken during 2009-10 on the West Gate Bridge strengthening project run by John Holland. Following a successful prosecution by the ABCC, the CFMEU and two of its officials were ordered to pay a record $1 million in penalties and the Australian Manufacturing Workers Union (AMWU) and one of its officials ordered to pay $325,000.

4.32 The trigger for the unprotected action was a demarcation dispute. It was alleged by the ABCC and later proven that the CFMEU and to a lesser extent the AMWU put pressure on site contractor Civil Pacific (Victoria) Pty Ltd to drop its enterprise agreement with the AWU and strike an agreement with the two other unions instead.

Other unlawful stoppages

4.33 On a project at the Melbourne RMIT University Campus in March 2010, the CFMEU and Electrical Trades Union (ETU) acknowledged they had introduced a policy that workers would 'shed up' every time ABCC inspectors came onto the site. Workers subsequently took politically motivated unprotected stoppages whenever that occurred.

4.34 In May 2010, a picket line and blockade was set up at the Melbourne Wholesale Fruit, Vegetable and Flower Market in Epping. Around 75 workers that were scheduled to work and 30 vehicles were prevented from entering the site, with CFMEU officials alleged to have blocked the entrance with their cars.

4.35 The ABCC alleged the unlawful industrial action was designed to force Fulton Hogan to enter into a union collective agreement with the

CFMEU instead of the greenfields deal it had struck with the AWU (i.e. a demarcation dispute). The Federal Court issued an injunction ordering the union to stop hindering access to the project, but the CFMEU did not comply. The ABCC alleged contempt against the CFMEU and the court fined the union a total of $560,000 in penalties, costs and compensation[27].

4.36 In another dispute, between April and June 2011, unions and workers engaged in unlawful industrial action and defied Fair Work Australia orders during stoppages at two Lend Lease construction sites; the Brisbane Law Courts project and the Gold Coast University Hospital project. Industrial action took place despite orders by the federal industrial tribunal that it not proceed. The ABCC has alleged the CFMEU, CEPU and seven officials breached the Fair Work Act and the BCII Act.

4.37 In another July 2007 Federal Court decision[28], Justice Roger Gyles commented on the behaviour of the CFMEU in relation to a particular project, saying:

> *The threat of disruption to work on the project by any available means was pressure that was illegitimate and unconscionable.*

4.38 In an unrelated September 2010 decision[29], Federal Court Justice Barker said:

> *The BCII Act is plainly designed to ensure that industrial disputation will be resolved by means other than unlawful industrial action.*

4.39 Another decision by a Full Bench of Fair Work Australia in August 2010 also warrants mention here. In *CFMEU v Woodside Burrup Pty Ltd and*

[27] *Alfred v CFMEU* [2011] FCA 556 and FCA 557, 2 June 2011
[28] *A & L Silvestri Pty Ltd v CFMEU* [2007] FCA 1047, 13 July 2007
[29] *ABCC v CFMEU (No 2)* [2010] FCA 977, 3 September 2010

Kentz E & C Pty Ltd[30], the Bench made a comment in response to Pluto project operator Woodside's application as a third party for sustaining economic damage as a result of industrial action taken by one of its sub-contractor's employees. Woodside said it cost $3.5 million a day to keep the Pluto project running. This, it said, was the potential economic loss from each day's industrial action taken by its sub-contractor's employees given the flow-on effects and delays caused to other work on the project.

4.40 The Full Bench disputed that $3.5 million was the daily loss that would be sustained by Woodside, but said even if that were true, the amount was '*a function of the enormous size of the project*':

> *In our view, those amounts are not significant in the relevant sense when considered in the context of the project as a whole unless the further delays on account of the protected industrial action become very protracted.*

4.41 While this case was heard under the *Fair Work Act 2009* and involved protected industrial action being taken, it shows the federal industrial tribunal views economic losses of $3.5 million a day as insignificant to the economy simply because they occur on large projects. This is particularly concerning given it is the Fair Work Act's rules that will cover building industry participants in key instances where they were previously covered by the BCII Act if the current bill goes through.

5. The justification for higher penalties

5.1 AMMA members are extremely concerned with the Bill's proposals to reduce the maximum fines available for breaches of the building industry legislation by around two-thirds; from $22,000 to $6,600 for

[30] *CFMEU v Woodside Burrup Pty Ltd and Kentz E & C Pty Ltd* [2010] FWAFB 6021, 6 August 2010

individuals and from $110,000 to $33,000 for corporations (including unions).

5.2 The ABCC has functioned extremely well with its existing powers of investigation and levels of penalties applicable for transgressions.

5.3 AMMA members believe that if the penalties for building industry participants are reduced, increased industrial action and unlawful behaviour will ensue.

5.4 AMMA members report that the higher penalties under the BCII Act compared with the *Fair Work Act 2009* have resulted in the best union behaviour on-site in recent history since the BCII Act was introduced.

5.5 There is a need to maintain a high level of punitive financial sanctions against workers and unions in order for there to be a significant cost to transgressors for breaching the law. Lower sanctions reduce the costs associated with any breach and encourage unlawful actions. It also needs to be remembered that unions, particularly construction unions, are not deterred by token or small fines.

5.6 Reduced maximum penalties will particularly impact on smaller suppliers that are more cost-sensitive and can be forced out of business due to a single course of conduct on a single price-sensitive project.

5.7 Building industry participants will assess their exposure to penalties and weigh up whether the benefit of the action they intend to take is outweighed by the punishment of the applicable fines and penalties. When fines are reduced, so are the incentives not to act illegally.

5.8 Reducing maximum penalties in the way proposed by the bill will lead to a weakening of industry standards and have a snowball effect on the regulator's ability to deal with unlawful behaviour. Reduced compliance with the law will result.

5.9 Many AMMA members report that militant and sometimes criminal behaviour has been curbed by the threat of significant penalties against not only the union but the individuals involved.

5.10 Unions no longer engage in or encourage the same level of unlawful behaviour and this can be attributed to the financial risks involved.

5.11 In 2009-10, in numerous instances on the Victorian Desalination Project, AMMA members reported that the existence of injunctions for transgressions under the current legislation had a marked impact on site behaviour, although unprotected industrial action did still occur delaying the completion of the project.

5.12 In 2006; 91 employees on the Perth to Mandurah Railway Project took unprotected industrial action that caused financial losses of around $1.6 million[31]. Individual workers were successfully prosecuted by the ABCC.

5.13 In 2006; 192 employees on the Roche Mining Murray Darling Basin Project engaged in unprotected industrial action instead of following agreed dispute resolution processes, which again caused significant financial losses to the project.

5.14 These examples show the significant damage that unlawful behaviour can have on construction projects, industry productivity and Australia's international reputation. They show disregard for the rule of law and build a strong case for higher industry-specific penalties given the increased damages employers are faced with compared with industrial action taken in other industries.

5.15 The current higher maximum penalties under the BCII Act reflect the considerable financial consequences of unlawful conduct engaged in by building industry participants. The potentially dire financial consequences for employers are magnified by the fact that projects

[31] *CFMEU settles legal battle*, Workplace Express, published 24 July 2009

invariably involve multi-million or billion dollar investments. A failure to meet contractual requirements can also incur significant liquidated damages.

5.16 Both the Federal Government and the Hon Murray Wilcox QC have accepted there remains a high level of lawlessness in the industry. In its submission to the Wilcox inquiry, AMMA drew attention to pertinent observations made in court proceedings:

- '[The] representation ... was... deliberate, contumacious and serious and involved a ... flouting ... of the relevant legal requirement directed at ensuring freedom of association.' Graham J, *Hadgkissbbbbb v CFMEU (No 5)* [2008] FCA 1040 (14 July 2009).

- '[T]he respondents have shown a preparedness to engage in industrial action in contravention of the AIRC order.' Gilmour J, *CBI Construction Pty Ltd v Abbott [2008]* FCA 1629 (28 October 2008).

- '[I]t is difficult ... to imagine a commission of contravention of the freedom of association provisions by an individual delegate that could be more blatant or significant than those that occurred here.' Burchardt FM, *Stuart-Mahoney v CFMEU and Deans (No 3)* [2008] FMCA 1435 (27 October 2008).

- 'There is nothing oppressive about requiring parties in an industrial relationship to adhere to the law. Where the parties have agreed upon dispute resolution procedures there is nothing oppressive about insisting upon their complying with the terms of such an agreement. The strike action was quite arbitrary. The absence of any prior negotiations concerning the claims suggests that they may not have been the real, or sole, reason for the strike.' Dowsett J, *Temple v Powell [2008*] FCA 714 (23 May 2008).

- 'There is a long and well-documented history of unlawful activity by union organisers and delegates in the building industry in Australia that counsel for the CFMEU acknowledged, but submitted that there has been a considerable change in culture over recent years. This makes it desirable that any return to the bad old days be appropriately penalised.' Gyles J, *A&L Silvestri Pty Ltd v CFMEU* [2008] FCA 466 (11 April 2008).

- 'The breaches, although in response to a safety issue, were deliberate. Resolution of the safety issue did not require the taking of industrial action. There was no reason why work could not continue on other parts of the site which were unaffected by the spill.' *Cahill v CFMEU* [2008] FCA 495 (11 April 2008).

- '[T]he loss of two and a half days' labour by three hundred employees must necessarily have involved a substantial financial impost ... the contraventions were deliberate in nature and in defiance of the law. There is no basis upon which the justification of the action on the basis of health and safety grounds can be maintained.' Burchardt FM, Cruse v CFMEU & Anor [2007] FMCA 1873 (14 November 2007).

- '[T]he conduct of the union and the third and fourth respondents indicated a calculated indifference to the provisions of the Act of the kind that Commissioner Cole spoke about in his report.' Lander J, *Ponzio v B&P Caelli Construction* [2007] FCAFC 65 (14 May 2007).

5.17 Imposing a penalty on a person for breaching the law serves to hold that person to account for their actions and aims to deter that person and others from engaging in similar action. This in time will lead to cultural change and respect for the rule of law.

5.18 Reducing the higher penalties now, while the culture of the building and construction industry still reflects contempt for the industrial

regulator, will undo the improvements that have been achieved since the commencement of the ABCC and the BCII Act. The lower penalties included in the *Fair Work Act 2009* are not adequate because:

- Building industry participants show a propensity for breaching orders of the federal industrial tribunal. Reducing penalties for breaches of those orders will certainly not deter that behaviour;

- It is rare for a court to order a maximum penalty. Applying the lower maximum penalty threshold in the *Fair Work Act 2009* to the building industry will reduce the deterrent effect unless the maximum penalties available are significant; and

- A significantly lower penalty for individuals under the *Fair Work Act 2009* may result in unions using employees as 'human shields' and encourage wildcat action.

5.19 It is not unusual for repeated unlawful conduct, as exhibited by construction industry participants, to be dealt with more harshly under the law. However, some have argued it is discriminatory to apply harsher penalties on the basis of the industry, including the Hon Murray Wilcox QC in his report[32]:

> *The history of the building and construction industry may provide a case for the retention of special investigative measures, to increase the chance of a contravener in that industry being brought to justice. However, I do not see how it can justify that a contravener then being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and happened to be brought to justice. To do that would be to depart from the principle, mentioned by the ACTU, of equality before the law …*

[32] The Hon Murray Wilcox QC, Report, *Transition to Fair Work Australia for the building and construction industry*, March 2009, Australian Government

it is inconsistent with the principle to use a yardstick that varies according to the identity of the contravener's industry.

5.20 The reality is that if construction unions and employees continue to show a greater disregard for the law and a propensity to engage in unlawful industrial action than employees in other industries, then significant penalties should apply until they demonstrate they are ready to be treated like participants in other industries.

5.21 AMMA maintains the existing higher penalties applying to building and construction industry participants must continue to apply in order to effectively deter unlawful and inappropriate behaviour by unions and workers.

6. The compulsory information gathering powers

6.1 Section 52 of the BCII Act empowers the ABC Commissioner to compulsorily require a person to provide information or documents, or attend interviews to answer questions to help with its investigations. Certain pre-requisites must be met including:

- The commissioner has reasonable grounds to believe the person has information or documents or is capable of giving evidence; and

- The information, documents or evidence are relevant to the investigation.

6.2 The proposed bill b make it more difficult for the director to exercise those powers in the short term, and to completely abolish them three years after the legislation takes effect.

6.3 The Cole Royal Commission in 2003[33] cited an embedded culture of silence in the building and construction industry in which workers were often advised by their representatives to refuse to speak with bodies carrying out investigations and instead contact their union or 'sit in their sheds' whenever an inspector came onsite.

6.4 The Cole Commission found intimidation was rife in the industry as a means of preventing individuals from assisting with investigations. As such, Cole recommended the introduction of the compulsory information gathering powers.

6.5 In 2008, the WA Government told the Wilcox inquiry the compulsory information gathering powers were still necessary:

> *... based on evidence of a prevailing climate of fear and intimidation in the industry, which serves as a barrier to its participants accessing appropriate legal remedies and formalising complaints of unlawful behaviour. Industry participants have genuine apprehension that accessing such legal remedies will result in significant repercussions for them either personally, professionally or both.*

6.6 Beyond the ability to compel a person to give information, produce documents or attend to answer questions is the protection such power gives individuals who are otherwise willing to assist the ABCC but do not want to be seen as doing so. This can include company representatives and workers.

6.7 While the proposed bill continues to enable the director of the building industry inspectorate to compulsorily acquire information, documents and evidence where there is a belief on reasonable grounds that a person has information relevant to an investigation, it imposes a number of new requirements:

[33] The Hon Terrance Cole, Royal Commission into the Building and Construction Industry, Final Report, February 2003

- The director must apply to a nominated Administrative Appeals Tribunal (AAT) presidential member for the issue of an examination notice requiring a person to give information, produce documents or attend to answer questions (proposed s.45);

- Only the director can make this application;

- The application must be in a form prescribed by the regulations (proposed s.45(3));

- The application must be accompanied by an affidavit from the director containing information including details of the investigation, the grounds for believing the person has relevant information, details of the other methods used to attempt to obtain information, and whether the director has made or expects to make any other applications for an examination notice in relation to that person (proposed s.45(5)(a)-(g));

- The director must provide further information in writing if requested by the AAT (s.45(6) and (7));

- The nominated AAT member must, before issuing an examination notice, be satisfied the director has commenced an investigation, that reasonable grounds exist, that other methods for obtaining information have been attempted but are not appropriate, that the information sought would be likely to assist and that it would be appropriate in the circumstances to issue the notice; and

- The director has to notify the Commonwealth Ombudsman about the issuing of all examination notices.

6.8 These additional 'safeguards' are based on the Wilcox recommendations.

6.9 AMMA members are concerned that the proposed new approval requirements will reduce the inspectorate's ability to obtain information and will delay investigations.

6.10 Such delays could lead to extended periods where unlawful industrial action is taking place which could have been stopped earlier had a compulsory notice been issued. The bill will also encourage the perception by unions and workers that they have more time before they need to curb their behaviour.

6.11 If the administrative process attached to examination notices becomes too onerous, which AMMA believes will happen, it will further slow the progress of matters from the investigatory to the prosecution stage. It can already take up to two years for some matters to go before the courts. If the current bill passes, further delays can be expected.

6.12 Because construction projects are time and cost sensitive, so must be the industrial relations system that supports them.

6.13 The building industry inspectorate should maintain its independence by retaining its own authority to exercise the investigative powers. The inspectorate should be able to act on the face of the evidence without delay or interference from third parties.

6.14 Between 1 October 2005 and 30 September 2011, the ABCC served 205 witnesses with a notice to attend to answer questions, and seven witnesses with a notice requiring production of documents.

6.15 According to the ABCC's 2010-11 Annual Report, there has been a deliberate and stark reduction in the ABCC's use of its compliance powers since new ABC Commissioner Leigh Johns came on board in October 2010.

6.16 In the 2010-11 year, the ABCC conducted just six compulsory examinations, down from 37 the previous year and 60 the year before. In the five years to 30 September 2010 (prior to Johns' appointment), the ABCC conducted 200 examinations or an average of 40 a year.

6.17 The dramatic decrease in the use of the powers, according to the Annual Report, is due to 'a number of factors involving a change of investigative technique, a shift in agency emphasis and consistent communication to industry by the ABCC and increased voluntary compliance by parties.'

6.18 The ABCC insists the reduction has not adversely affected its regulatory activity or the success of its investigations.

6.19 However, former ABC Commissioner John Lloyd has said the regulator's compliance powers were critical to the success of its court proceedings[34].

6.20 In the final Wilcox report, the information provided by then-ABC Commissioner John Lloyd (Johns' predecessor) was acknowledged:

> *[O]n his analysis, information obtained at section 52 interrogations has been important to the decision to prosecute nine of the 36 penalty proceedings commenced by the ABCC up to 3 February 2009. Even leaving aside the 27 ongoing investigations, one-quarter is not an insignificant proportion. Moreover, I have been told there were cases in which information obtained at an interrogation persuaded the ABCC that a penalty proceeding was unlikely to succeed; thereby obviating waste of the ABCC and court resources and infliction of an unnecessary burden on the prospective respondent.*

[34] ABCC, Report on the exercise of compliance powers by the ABCC for the period 1 October 2005 to 31 March 2008

6.21 It is also of concern that there appears to be no means for the director of the inspectorate to request a reconsideration of any decision of the nominated AAT presidential member to refuse to issue an examination notice, nor any other appeal processes.

6.22 If an external body is given responsibility for issuing examination notices, a review mechanism must be provided to allow the director to appeal decisions.

6.23 AMMA believes that imposing additional obligations on examination notices will lead to reduced access to the compulsory information gathering powers and thus undermine the effectiveness of investigations.

6.24 One AMMA member described the compulsory powers as '*the last bow in the quiver of the ABCC'*, meaning that because the ABCC has done its job so well for the past six years it has kept a lid on bad behaviour by exercising all of its current powers. This has enabled the compulsory interview powers to be used less. However, if you take away the regulator's suite of powers in the ways suggested by this bill, the information gathering powers take on increased significance.

6.25 Some have argued the new commissioner has taken a more conservative approach to the use of the powers as a means of self-preservation given staunch union opposition to the ABCC and its controversial powers of interrogation.

6.26 Former ABC Commissioner John Lloyd in April 2010 said[35] a significant part of the ABCC's constituency in the building industry remained 'hostile and vehemently opposes the ABCC's roles and powers. I refer to unions, the ACTU, some contractors and employees'.

6.27 According to Lloyd:

[35] *The experience of the ABCC*, ABC Commissioner John Lloyd, speech to HR Nicholls Society conference in Melbourne, 17 April 2010

The trade unions have not ventured even a modicum of support to the ABCC and appear to refuse to recognise that unlawful conduct such as coercion and intimidation is a serious issue in the industry.

6.28 It is perhaps therefore unsurprising that the new commissioner is seeking to appear more balanced. However, such political considerations should not overshadow the potential detriment to the industry.

Three-year sunset clause

6.29 Along with increased bureaucracy associated with applying to exercise the compulsory information gathering powers, the bill proposes to remove the powers completely three years down the track unless a review conducted at that time reveals the need for the powers to be kept. Importantly, the review will place a reverse onus of proof on the industry to show why the powers should be retained rather than on the government to show why they should be repealed.

6.30 AMMA members' experience has been that duly authorised officers of the ABCC have not abused the information gathering powers when undertaking investigations and the powers have been used responsibly.

6.31 Removing them after three years on the back of making them more difficult to exercise will only encourage non-cooperation with future investigations. Arguably, the promise of the removal of the powers has already had a negative impact as seen in the recent spike in industrial disputes in the industry over the past 12 months.

6.32 The removal of the powers would again allow unions to pressure building industry participants not to co-operate with official investigations.

6.33 Unless the ABCC or its replacement have appropriate powers to obtain information, information is unlikely to be provided. Anyone who would actively breach or condone a breach of the BCII Act would hardly contribute voluntarily to an investigation.

6.34 It has been the experience of AMMA members that their statements to union officials that any matter may be disclosed and discussed under a compelled interview has the effect of modifying unlawful behaviour. It has also had the effect of diverting criticism for providing information away from the building industry participants themselves and towards the ABCC.

6.35 AMMA maintains that the inclusion of a three-year sunset clause (proposed s.46), in addition to the proposed 'safeguards' on the use of the power, represents a further weakening of the existing compliance regime and will have a detrimental impact on the industry and the economy.

6.36 The sunset provision could result in the powers being left to lapse, even where the conditions of the industry have not yet changed enough to justify their cessation, if a review is not instigated or is delayed. Reinstatement of the power beyond the sunset day may therefore prove difficult even if a strong case is made.

6.37 AMMA contends that the grant of a compulsory information gathering power should not be removed and that the proposed s.46 be abandoned.

Public interest immunity

6.38 Proposed sub-s. 52(2)(b) of the bill would allow a person to refuse to give information, produce documents or answer questions if it would disclose information that would be protected by public interest immunity.

6.39 AMMA does not oppose the availability of public interest immunity in respect to the use of the compulsory information gathering powers; however, this provision must not be open to misuse.

6.40 Any person claiming public interest immunity should be required to provide a statement setting out the basis for their claim. An efficient process must then be made available to the director of the inspectorate to seek a determination from an appropriate body as to whether a document or information should be subject to public interest immunity. Public interest immunity should not allow unions to delay investigations by claiming, for example, that their services to members are provided under an assurance of confidentiality and it would be injurious to the public interest to disclose information that would discourage employees from using their services.

6.41 AMMA contends that a process must be put in place for the director to seek a determination as to whether public interest immunity applies to a particular document or information, if such immunity has been claimed.

7. The independent assessor

7.1 The Bill proposes to establish an Office of the Independent Assessor – Special Building Industry Powers. The bill would allow an 'interested person' to apply to the assessor for the compulsory information gathering powers to be 'switched off' on a particular project.

7.2 The Bill provides that following application by an interested person the assessor may make a written determination that s.45 (the compulsory information gathering powers) not apply to one or more building projects.

7.3 In 2009, the Rudd/Gillard Government advised that it was intended that the regulations would require the independent assessor to be satisfied that all of the relevant building industry participants had a

demonstrated record of compliance with workplace relations laws, including court or tribunal orders. In reaching this assessment, the independent assessor would consider the views of 'interested persons' which, in this case, would mean 'building industry participants' as defined in the existing BCII Act.

7.4 AMMA supports the requirement that all participants on the relevant project have a demonstrated record of compliance.

7.5 However, AMMA contends that the 'interested person' whom the independent assessor would be required to consider should be restricted to building industry participants who are (or will be) bound by the relevant industrial agreements in place on particular projects.

7.6 An appropriate consultation model can be found in s.289(1) of the *Fair Work Act 2009*. This model will ensure procedural fairness. Further, the term 'project' should be defined by the scope of the relevant commercial contract.

7.7 It is AMMA's view that the compulsory information gathering powers are a key element of the regulatory regime in the building and construction industry and are a necessary tool for identifying unlawful conduct and holding those responsible accountable. A legislative option to 'switch off' this power is therefore of significant interest to the resource industry.

7.8 AMMA maintains that the independent assessor should be required to have regard to the following matters before making a determination:

- The probability of improper behaviour occurring; and
- The outcomes of previous applications in respect of the project.

7.9 Proposed sub-s.40(3) allows for an application to relate to more than one building project. Circumstances are likely to arise where the

project involves different contractors, sub-contractors and unions. The project may also be in different states or territories.

7.10 AMMA does not oppose the ability to make an application that relates to more than one building project, but submits that each project should be considered separately on its individual merits when making a determination.

7.11 However, depending on how the independent assessor measures 'good behaviour', AMMA members have concerns around the operation of the 'switch off' provisions. There is the potential for corruption, factionalism and opening the door for unlawful union behaviour. Keeping that door firmly shut under the current regulatory regime has proven to be a sound strategic move in controlling 'out of control' participants.

7.12 Unfortunately, in the context of an independent assessor being appointed, the Federal Government has not demonstrated to date that purported independent appointments are truly independent. Employers have lost faith that anyone selected for the position of the independent assessor would be impartial in assessing the case for switching off the compulsory examination powers.

7.13 The existing ABC Commissioner was a member of the Labor Party when appointed to the position. Former ABC Commissioner John Lloyd recently criticised the impartiality of the current government's selection process for key positions. In a December 6, 2011 media statement[36], Lloyd criticised the selection process in place for choosing an appropriate successor for Fair Work Australia president Justice Geoffrey Giudice who has announced he will retire in February 2012:

> *The protocol of past years of maintaining a respectable balance between appointees with employer, union and*

[36] *The next president of Fair Work Australia – hard to get the right person*, media release, John Lloyd, Director of the Work Reform and Productivity Unit at the Institute of Public Affairs, December 6, 2011

> *government backgrounds has been trashed. Persons with union backgrounds dominate the 10 fresh appointments. The selection of another person with a union background as president would not augur well for the standing of the tribunal in future years.*

7.14 In AMMA's view, the same concerns apply to the election of an independent assessor with powers in relation to building industry projects, particularly given the former head of the building industry inspectorate has identified political bias in the government's agency appointments to date.

8. The advisory board

8.1 The bill proposes to establish an advisory board that will be responsible for making recommendations about the policies and priorities of the new building industry inspectorate.

8.2 The board will be comprised of: the director of the building industry inspectorate; the Fair Work Ombudsman; a representative of employees; a representative of employers; and not more than three others.

8.3 The board would make recommendations to the inspectorate about its activities. However, nowhere in the bill does it say that such recommendations will be non-binding. AMMA maintains this should be made explicit so as to remove any doubt.

8.4 There are also concerns around the ability to nominate members to the board and whether sufficient character checks will be performed.

8.5 With the Federal Government's current bias towards unions evidenced in its recent statutory appointments, AMMA members have concerns about the impartiality of the advisory board and the ability of the

inspectorate to make its own decisions contrary to the board's recommendations.

8.6 The ABCC is at present an independent statutory body responsible for investigating breaches of workplace laws, enforcing those laws and educating and providing advice to building industry participants on their rights and obligations under those laws.

8.7 Such an independent body was recommended by the Cole Royal Commission on the basis that the ABCC would have a greater chance of succeeding where there was '*confidence in its impartiality'*, it was seen to '*act even-handedly and independently'* and it was not subject to ministerial direction in its operations[37].

8.8 The independent status of the ABCC allows it to respond effectively and efficiently to matters that arise and which are identified in direct enquiries or site visits. This ensures public confidence.

8.9 AMMA members believe the proposed building industry inspectorate should not have to bend to the wishes of an advisory board appointed by the minister of the day.

9. The ministerial power to issue directions

9.1 AMMA members have serious concerns about the proposed ability for the Workplace Relations Minister of the day to issue directions to the building industry inspectorate about how it exercises its functions and powers.

9.2 To state the obvious, the minister of the day will be politically motivated. The proposed ability for the minister to issue binding

[37] The Hon Terrance Cole, Royal Commission into the Building and Construction Industry, Final Report, February 2003

directions to the inspectorate therefore makes the regulator vulnerable to political bias, instability and interference.

9.3 An example of how ministerial directions can be misused was the 17 June 2009 attempt by the then-Minister for Employment & Workplace Relations, Julia Gillard, to direct the ABCC on how it should use its compulsory information gathering powers[38]. This attempt was defeated in the Senate, but such interference has the potential to undermine the independence of the building industry inspectorate as well as public confidence in it.

9.4 The Federal Government should seek to maintain consistency of application of its laws and remove the opportunity for any party to have political influence over its statutory agencies. This approach should be enshrined in legislation so that it cannot be changed at will by the minister or government of the day.

9.5 The building industry inspectorate should be completely independent of government and should be perceived that way by all industry participants.

9.6 The proposed ministerial power to issue directions could lead to a loss of confidence in the ability of the inspectorate to act impartially and respond to issues across the industry as they arise, which is necessary to achieve and maintain the required cultural change.

9.7 AMMA does not support the capacity for the minister to issue directions to the director of the inspectorate.

[38] *Senate votes down Gillard's bid to safeguard ABCC's use of coercive powers*, 25 June 2009, published by Workplace Express

Conclusion

In AMMA's view, the proposed bill, will undermine the building industry inspectorate's capacity to ensure industry participants are acting in accordance with the law.

It has been recognised that there is a need for building-industry specific laws and yet at the same time the Federal Government has chosen to water down the inspectorate's powers to the point where they will become a toothless tiger.

In summary, the proposed bill's:

- imposition of an administrative, bureaucratic process on the compulsory information gathering powers,
- its proposal to sunset the powers after three years and
- its ability to claim public interest immunity in relation to specific information without a robust framework

represents a significant watering down of the inspectorate's investigatory strength and will erode the independence of the director.

If the bill in its current form becomes law and the strict prohibitions against unlawful industrial action, coercion and undue pressure are removed, AMMA members fear a return to bullying and harassment at the hands of unions following the removal of the existing provisions.

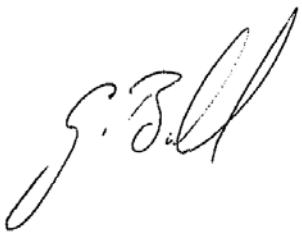
The bulk of the proposed changes embodied in the *Building & Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* are not in the resource construction industries interests.

Higher penalties for building industry participants are justified and should be retained; the compulsory powers are an essential tool to help ensure compliance and have reversed the culture of silence in the industry.

Stricter controls on industrial action and coercion are needed in the industry given that workers and unions are more militant and have shown an increased propensity towards getting their industrial agendas met by whatever means necessary.

AMMA does not support the bill in its current form.

AMMA would be pleased to elaborate on or clarify any of the submissions included above should the Inquiry deem it necessary.



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