Submission to DEEWR on the Wilcox Report Recommendations

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Recommendation 1: The proposed Specialist Division be located within the Office of the Fair Work Ombudsman but have: (i) operational autonomy under a Director, appointed by the Minister, who would implement policies, programs and priorities determined by an advisory board comprising the Fair Work Ombudsman, the Director and a number of part-time members appointed by the Minister; and (ii) funds allocated each year against an Outcome related only to the Specialist Division.	• The Specialist Division should be independent. • A Specialist Division operating at the direction of the FWO and an Advisory Board would put at risk stakeholder confidence in the Division's independence. • The Advisory Board, if established, should operate as a purely consultative body, with no decision making powers. • Existing resources and funding of the ABCC should transfer to the Specialist Division.
Recommendation 2: The provisions of the Fair Work Bill governing: (i) the conduct of employers, employees and industrial associations; and (ii) penalties for contraventions of the Fair Work Bill; apply, unchanged, to participants in the building and construction industry.	• AMMA does not agree with the views of the Hon. Murray Wilcox that the differences between the *Fair Work Act* and BCII Act are of no substantive consequence. • AMMA supports the continuation of the existing compliance regime in the BCII Act, including section 38 (which has a broader definition of industrial action encompassing action taken solely by unions); section 39 (which enables injunctions to be granted more generally, in respect to threatened, impending or probable unlawful industrial action); and section 44 (which provides greater protection against coercion or undue pressure in respect to making, varying etc an agreement). • The current penalties applying to the building and construction industry reflect the considerable financial consequences of unlawful and other inappropriate behaviour. These financial consequences are magnified by the fact that building and construction industry projects invariably involve multi-million or billion dollar investment.
Recommendation 3: The Director of the Building and Construction Division be invested with a power, similar to that	• AMMA supports the retention of the coercive powers in section 52 of the BCII Act in an equivalent, as opposed to similar, form.

contained in section 52 of the *Building and Construction Industry Improvement Act 2005*, to cause people compulsorily to attend for interrogation, but subject to the safeguards contained in Recommendation 4; and (i) the grant of this power be reviewed after five years; (ii) in order to ensure review, the provisions in the new legislation providing for compulsory interrogation be made subject to a five-year sunset clause.	• AMMA does not support a sunset clause to abolish the coercive powers before the outcome of the five year review has been considered.
Recommendation 4: The use of compulsory interrogation be subject to the following safeguards: (i) a notice to a person compulsorily to attend for interrogation be issued only by a presidential member of the Administrative Appeals Tribunal who is satisfied by written material, which may include evidence on the basis of "information and belief", that: (a) the Building and Construction Division has commenced an investigation into a particular suspected contravention, by one or more building industry participants, of the Fair Work Act, an "industrial law", as defined by that Act, or an industrial instrument made under that Act; (b) there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation, or is capable of giving evidence that is relevant to that investigation; (c) it is likely to be important to the progress of the investigation that this information or evidence, or those documents, be obtained; and (d) having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact upon the person of being required to do so, insofar as this is known, it is reasonable to require that person to attend before the Director or a Deputy Director and	• AMMA does not support the imposition of additional safeguards. The Hon. Murray Wilcox has not sufficiently demonstrated that the process recommended will not result in delay and less utilisation of the power, which will lead to the enforcement body becoming a 'toothless tiger'. • If an external body is give responsibility for issuing a notice to attend a compulsory interview, a review mechanism must be provided to allow the Director to appeal an unfavourable decision. • To ensure the continued effectiveness of the coercive power, current penalties for non-compliance with a notice must continue.

answer questions and/or produce documents relevant to the investigation; (ii) the Director or a Deputy Director of the Building and Construction Division preside at all compulsory interrogations; (iii) the Commonwealth Ombudsman monitor proceedings at all compulsory interrogations and for that purpose the Director: (a) promptly notify the Commonwealth Ombudsman of the issue of all notices to attend for interrogation; and (b) promptly after the interrogation, supply to the Commonwealth Ombudsman a report, a video recording of the interrogation and a copy of any written transcript; and (iv) the Commonwealth Ombudsman report to Parliament annually, and otherwise as required, concerning the exercise of the power of compulsory interrogation.	
Recommendation 5: The legislation authorising compulsory interrogation provide for: (i) payment to persons summoned for interrogation of their reasonable expenses (travelling, accommodation and legal, as may be) and any loss of wages or other income; and (ii) recognition and availability of client legal privilege and public interest immunity.	• Availability of public interest immunity must not be subject to misuse. 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 has been claimed. • AMMA does not oppose the payment of reasonable expenses to persons summoned for interrogation.
Recommendation 6: (i) A new Division 4 be added to Part 5-2 of the Fair Work Bill relating to the "building and construction industry", as therein defined. (ii) The definition of "building and construction industry" follow the definition of "building work" in the *Building and Construction Industry Improvement Act 2005*, but excluding off-site work.	• AMMA opposes the exclusion of 'off-site' work from the definition of 'building and construction industry' that would exclude temporary prefabrication yards established specifically to provide prefabrication work to a particular project.
Recommendation 7: The Director of the Building and Construction Division have all the functions, powers and responsibilities, in relation to the "building and	• No objection.

construction industry", as defined in the new legislation, that the Fair Work Ombudsman has in respect of other industries; including, in particular, investigation of suspected unlawful behaviour by any building industry participant (whether employer, employee or industrial association) and the prosecution of penalty and other legal proceedings.	
Recommendation 8: Except perhaps in rural and remote areas, the Building and Construction Division have its own dedicated operational staff, including inspectors.	• No objection.
Code and Guidelines	**Comments**
It seems desirable to retain the Code and Guidelines as an adjunct to the statutory provisions governing conduct in the industry. (paragraph 7.32(a))	• AMMA supports the retention of the Code and Guidelines, which in conjunction with the BCII Act, have assisted in improving the culture of the industry. • AMMA supports the recommendation that the Guidelines become a disallowable instrument, if done so in their current form. AMMA does not support any weakening of the Guidelines, nor the inclusion of 'desirable' positives. • The Guidelines should continue to cover temporary off-site prefabrication yards established specifically to provide prefabrication work to a particular project (also see comment in respect to recommendation 6 above).
I think it would be preferable to limit the application of the Guidelines to on-site work. (paragraph 7.32(c))	
I make the suggestion that the Government review the content of the Guidelines, in consultation with industry participants, including the unions and the States and Territories, both to remove existing ambiguities and to include desirable positives. It would be good to have the revised Guidelines take effect when the new regime commences on 1 February 2010. (paragraph 7.32(d))	
If the Guidelines are to be retained, either in their present or an amended form, they ought to be made a disallowable instrument, using either the present section 27 or a similar provision in the new Act. (paragraph 7.32(e))	
To demonstrate code-compliance, the entity would need to show that its industrial instruments comply with the Guidelines and, I suggest, that neither it nor any related entity has been found to have contravened the legislation, or an industrial instrument, within (say) the previous two years. (paragraph 7.32(f))	
If the [Building and Construction Division] is to have an investigative role in relation to contraventions, it makes sense for it to be responsible for determining	

whether an entity is code-compliant. (paragraph 7.32(h))	
Whether the Guidelines are to be retained in their present form or amended, it is my opinion that decisions taken under them should be made judicially reviewable under the ADJR Act and administratively reviewable by the AAT. (paragraph 7.32(i))	

2. Australian Mines and Metals Association (AMMA) Profile

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

3. Introduction

3.1. This submission is made in response to the 'Wilcox Report': *Transition to Fair Work Australia for the Building and Construction Industry* released on 3 April 2009.

3.2. AMMA assisted the inquiry of the Hon. Murray Wilcox by written submission lodged on 5 December 2009, which addressed issues raised in the Wilcox Discussion Paper and supplements further comments made herein. A copy of this submission can be found at http://www.amma.org.au/home/publications/AMMA_Submission_WilcoxABCC_Inquiry_5December2008.pdf

3.3. The Hon. Murray Wilcox makes eight recommendations in the Wilcox Report covering broad areas such as the location, structure and role of the Specialist Division, the rules which apply to building employees and compulsory interrogation. He also provides comment in respect to the Code and Guidelines.

3.4. The Wilcox report follows the Government's election commitment for the continuation of a 'tough cop on the beat' in the Australian building and construction industry, in order to address continuing 'persistent and unlawful behaviour'. This new 'tough cop on the beat' is to replace the current Australian Building and Construction Commission (ABCC) from 1 February 2010.

3.5. Discussions with AMMA members reveal that there is a great deal of concern regarding the forthcoming changes to the industrial relations regulation of the building and construction industry. AMMA has been informed that actual experiences and observations of AMMA member companies prior to and post the commencement of the *Building and Construction Industry Improvement Act 2005* (BCII Act) and the ABCC has led to company Boards and management holding the view that a weakening of the current regulatory arrangements will see a return to the disharmonious environment that previously ravaged the industry.

3.6. These experiences and observations, which include less disputation, reduced labour costs, and improved relationships with employees and unions, inform key business decisions made by company Boards and management about the viability of future mining construction and expansion projects. AMMA has been advised that the possibility of an increase in industrial action on a project will be factored into projected costs for future projects and may result in a scaling back of investment and commitment to these projects, which is already been impacted by the current global financial crisis. Company Boards and management are nervous about the proposed changes and their expectations about the industrial relations environment will play a significant part in their decisions about major projects arising over the next 18 months.

3.7. Investor confidence in the ability of Australia to deliver mega projects (such as the proposed multi-billion dollar Olympic Dam expansion project in South Australia) must not be undermined by a weakening of the current building and construction industry compliance regime. In this period of economic turmoil, regulatory reform must encourage investment in future projects and Australian jobs.

3.8. Combined with the changes under the *Fair Work Act*, which expands union involvement in the workplace, upsetting the regulatory arrangements in the building and construction industry will impact business certainty and confidence to the detriment of the Australian economy.

4. Structure of the Specialist Division

Wilcox Recommendation 1:	*A semi-autonomous Building and Construction Division of Fair Work Australia* *Funds allocated each year against an Outcome related only to the Specialist Division*

4.1. The Hon. Murray Wilcox has recommended that a semi-autonomous Building and Construction Division (the Specialist Division) be established within the Office of the Fair Work Ombudsman (FWO) and be subject to the direction of the FWO and an Advisory Board (paragraph 3.9).

4.2. His reasoning for the structure of the Specialist Division appears to be grounded largely in administrative savings and loses sight of the necessity to have a body that is not only 'tough' but seen to be 'tough'. Operating under the direction of the FWO and Advisory Board, combined with additional weakening of the enforcement body and compliance regime discussed in the points below, the Specialist Division may not be taken seriously by industry participants and may in fact become a 'toothless tiger'.

4.3. AMMA contends that the creation of an Advisory Board with responsibility for determining the policies, programs and priorities of the Specialist Division, will undermine the Specialist Division's independence and ability to respond quickly and effectively to issues in the industry, which is necessary to achieve the required cultural change.

4.4. The establishment of an Advisory Board in the manner recommended by the Hon. Murray Wilcox also raises concerns about its composition and the potential for matters to be 'hijacked' by members of the Board as a means of pursuing their own personal agendas.

4.5. If such a body is to be established, AMMA contends that it should operate in a purely advisory capacity as a ‘reference board’ and be comprised of key industry stakeholders. Views and concerns expressed by these stakeholders can assist the Director in his or her setting of the Specialist Division’s programs, policies and priorities.

4.6. **AMMA contends that the Specialist Division be headed by a Director with complete autonomy and independence.**

4.7. **AMMA opposes the establishment of an Advisory Board with decision making authority, but does support a consultative body comprised of key industry stakeholders.**

4.8. Adequate funding to the Specialist Division without the potential for dispute over its allocation is necessary to ensure the new ‘tough cop’ retains its current operational capacity and ability to address persistent and pervasive unlawful behaviour.

4.9. **AMMA supports the allocation of funds to the Specialist Division and contends that existing resources of the ABCC should be maintained.**

5. Rules and Penalties

Recommendation 2:	*Apply the same rules under the Fair Work Act to building industry employees* *Reduce penalties for contraventions and apply those penalties set under the Fair Work Act*

5.1. The Hon. Murray Wilcox recommends that the compliance rules contained within the BCII Act no longer apply to building industry employees in favour of those compliance rules set out in the *Fair Work Act*.

5.2. The recommendation will impact on the continuation of the following sections of the BCII Act:

- Section 38: prohibition against taking unlawful industrial action (defined in sections 36 and 37);
- Section 39: the power to grant an injunction in respect to threatened, impending or probable unlawful industrial action; and
- Section 44: protection against coercion or undue pressure in respect to making, varying or terminating a collective agreement, etc.

5.3. Section 38 of the BCII Act prohibits unlawful industrial action, referred to as 'building industrial action' in section 37, which in turn is defined in section 36. Section 36 currently defines 'industrial action' more broadly than the existing *Workplace Relations Act* and the *Fair Work Act*.

5.4. The Hon. Murray Wilcox' recommendation to not continue section 38 of the BCII Act is based partly on the assumption that under the new agreement making regime of the *Fair Work Act* almost all workplaces will have an agreement in operation, with the

result that any industrial action will be unlawful (paragraph 4.26). He therefore considered it unnecessary and of no practical difference, to retain the broad definition of industrial action contained in section 38 of the BCII Act.

5.5. It is AMMA's view that the assumption of the Hon. Murray Wilcox that almost all workplaces will have an operating agreement under the *Fair Work Act* (meaning that any industrial action will be 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 been reduced to four years under the *Fair Work Act*. Furthermore, building industry unions continue to seek agreements with a three year nominal term.

- It does not give consideration to the award modernisation process and the role of Modern Awards. If the relevant Modern Award is sufficiently flexible, employers could rely on the award and individual flexibility agreements to regulate the employment relationship without having to enter into formal statutory agreements.

- It does not give consideration to the continuation of enterprise awards as Modern Enterprise Awards.

5.6. It is therefore entirely possible for workplaces in the building and construction industry under the Government's *Fair Work Act*, to operate without an agreement or with an expired agreement.

5.7. The Hon. Murray Wilcox also does not believe that employers will be any worse off under the *Fair Work Act* on the basis that definition of 'industrial action' in section 19 is almost identical to the wording 'building industrial action' in section 36 of the BCII Act, after making the necessary adjustments for the definition to fit all industries (paragraph 4.15).

5.8. AMMA does not agree with this view, as unlike the BCII Act section 19(1)(a)-(c) of the *Fair Work Act* is concerned with the conduct of employees only. For example, industrial action is defined in section 19(1)(b) as 'a ban, limitation or restriction on the performance of work *by an employee*' [emphasis added]. It appears therefore, that unions are not capable of engaging in or organising industrial action by their own conduct only – 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 covered in the *Fair Work Act*.

5.9. 'Building industrial action' was considered by Kenny J in *Cahill v CFMEU* (No2) [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' argument was that there was no "building industrial action" as defined in s 36(1) and, therefore, no unlawful industrial action for the purposes of ss 37 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 s 36(1), because there was no ban, limitation or restriction imposed by employees.
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> 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 s 38). It is to be borne in mind, however, that when the definition of “industrial action” in the WR 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 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.

5.10. It is clear therefore, that the broad definition of industrial action in the BCII Act is quite necessary and of practical significance to efforts to address persistent and pervasive unlawful behaviour in the industry.

5.11. Likewise section 39 is also important to ensuring unlawful action is appropriately dealt with. Section 39 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*, 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 court 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.

5.12. Section 44 of the BCII Act also provides additional protection from coercion or undue pressure in respect to making, terminating, varying or extending etcetera, agreements under the *Workplace Relations Act*. The Hon. Murray Wilcox argues that sections 343 and 340 of the *Fair Work Act* cover the same ground as section 44, yet he acknowledges that section 44 is in fact different as it covers both an intention to ‘coerce’ and an intention to ‘apply undue pressure’ (paragraph 4.77). He reasons 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' (paragraph 4.78).

5.13. It is AMMA's view that the assertions of the Hon. Murray Wilcox that sections 340 and 343 of the *Fair Work Act* cover the same ground as section 44 are incorrect. Firstly, section 340 of the *Fair Work Act* is limited to 'adverse action' and the type of conduct which is considered to be 'adverse action', defined in section 342, is quite restrictive. Item seven of section 342 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, section 343 will not adequately deal with that behaviour. Section 44 of the BCII Act on the other hand, does not restrict the type of action and refers only to 'any action'.

5.14. Secondly, the absence of 'undue pressure' from section 343 is, despite Wilcox' view, 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].

5.15. Therefore, section 343 of the *Fair Work Act* imposes a higher threshold 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* may mean that some behaviour in the industry will 'fall under the radar' so to speak. Furthermore, while section 344 of the *Fair Work Act* does specifically cover undue influence or pressure, it is restricted to the conduct of employers as against employees.

5.16. **AMMA contends that the *Fair Work Act* is unable to adequately deal with all types of unlawful and inappropriate conduct in the building and construction industry, and therefore the current compliance regime in sections 38, 39 and 44 of the BCII Act must continue.**

5.17. **AMMA further contends that this compliance regime is more appropriately provided in a separate Act covering the building and construction industry to ensure certainty and clarity about its operation and application to the industry.**

5.18. In respect to the level of penalties for contraventions, the industry's current behaviour and conduct, evidenced by the recent Victorian disputes, shows that the industry continues to be dogged by a culture of disregard for the rule of law. The Cole Royal Commission characterised this industry as unique and its findings particular to the building and construction industry. While other industries of national significance identified by Wilcox (see paragraph 4.52) may also suffer great loss due to industrial action, these industries do not exhibit the same type and extent of behaviour and history of lawlessness as the building and construction industry.

5.19. The Hon. Murray Wilcox himself has conceded that the Cole Royal Commission was correct in pointing to a culture of lawlessness in his Discussion Paper, and following his consultations, holds the view that problems remain in the industry (paragraph 3.23).

5.20. It is therefore irresponsible to disregard that history and current experiences within the industry and recommend a reduction in the penalty applying for a contravention of the law. AMMA's submission to the Wilcox Inquiry highlighted recent decisions of the Commission and Courts where the following observations and comments were made in respect to the contraventions being heard:

> '*Blatant and significant contraventions*'
>
> '*Calculated indifference to the provisions of the Act*'

'Any return to the bad old days be appropriately penalised'

'Deliberate, contumacious and serious flouting of the relevant legal requirements'

'The contraventions were deliberate in nature and in defiance of the law'

'A preparedness to engage in industrial action in contravention of the AIRC order'

5.21. While the *Workplace Relations Act* and *Fair Work Act* offer a stronger compliance regime than that in place during the Cole Royal Commission inquiry, the regime is not adequate due to the ongoing lawlessness in the industry:

- Building industry participants show a propensity for breaching orders of the Australian Industrial Relations Commission. Reducing the penalties for breach of an order under section 496 (replicated in the *Fair Work Act*) will 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* to the building industry will have a non-deterrent effect if the penalties imposed are not significant.

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

5.22. It is possible for Parliament to abrogate or curtail a fundamental human right, which currently exists in respect to the coercive powers of the ABCC, and which the Hon. Murray Wilcox has recommended to continue despite the apparent inequality that exists. It is also not unusual for repeated unlawful conduct, as exhibited by building industry participants, to be dealt with more harshly under the law. If unions and

employees continue to behave differently than those in other industries, significant penalties should apply until they can demonstrate that they are ready to act in accordance with the rule of law and be treated like those in all other industries.

5.23. **AMMA contends that the existing penalties applying to building industry employees must continue to apply in order to effectively deter unlawful and inappropriate behaviour.**

6. Compulsory Interrogation

Recommendation 3:	*That the Specialist Division have coercive interrogation powers, subject to additional safeguards and a five year sunset clause.*

6.1. AMMA supports the retention of the coercive powers contained in section 52 of the BCII Act but notes that the Hon. Murray Wilcox recommends that the Specialist Division be invested with a power 'similar' to that contained in section 52. AMMA contends that on the basis that the Hon. Murray Wilcox recognises the necessity for the continuation of compulsory interrogation powers, the Specialist Division should be vested, so far as possible, with powers equivalent to those contained in section 52.

6.2. AMMA has previously commented that it would not be adverse to a review of the powers of the ABCC in five years time. However, AMMA does not support the inclusion of a sunset provision that will repeal that coercive power at a set date for the purpose of ensuring a review of the grant of the coercive power.

6.3. The difficulty with the imposition of a sunset clause is that the coercive power may be left to lapse at a specified date, even where the conditions of the industry have not changed to justify its cessation. A review may not be instigated or may be subject to delay such that the coercive power will be automatically lost and difficult to reinstate. AMMA contends that any recommendation to remove the coercive power arising from the five year review must require further action by Parliament to repeal the relevant provision.

6.4. **AMMA contends that the grant of a coercive power should be removed only by positive action of Parliament and not be subject to a sunset clause.**

6.5. **AMMA further contends that the Specialist Division should be vested with coercive powers equivalent to that contained in section 52 of the BCII Act.**

Recommendation 4:	*Impose additional safeguards on the use of the compulsory interrogation power.*
Recommendation 5:	*(ii) recognition and availability of client legal privilege and public interest immunity.*

6.6. The Hon. Murray Wilcox accepts that the work of the ABCC has been aided by the use of compulsory interrogation and that is not unwise, given that the conduct of the industry has not yet entirely improved, to continue to grant this power (paragraph 5.98). He does however believe that a number of additional safeguards should be imposed on the use of the power.

6.7. While AMMA has no difficulty with the imposition of additional safeguards, it should not result in the enforcement body becoming a toothless tiger. AMMA therefore supports the availability of client legal privilege and public interest immunity in respect to the use of the coercive power; however an efficient process must be made available for an appropriate body to determine whether a document or information is subject to public interest immunity. Public interest immunity should not allow unions to delay investigations by claiming that its service to its members is provided under an assurance of confidentiality and that it is injurious to the public interest to disclose information on the basis that it would discourage employees from using that service.

6.8. AMMA does not support the convoluted, high threshold test recommended at paragraph 6.42 of the Wilcox Report. The imposition of a number of steps and requirement for the Director to satisfy a Presidential Member of the Administrative Appeals Tribunal (AAT) of the necessity of the use of the power, including a requirement to provide written material may, despite Wilcox' assurances, lead to delay or the power being less utilised.

6.9. Should the recommendation requiring applications to be made to a Presidential Member of the AAT be implemented, it is necessary to include an appeal mechanism for the Director should the application be refused.

6.10. In addition, current significant penalties for a refusal to comply with a notice to attend a compulsory interview must continue. Without the threat of significant penalty it is unlikely that such notices will be complied with.

6.11. **AMMA contends that additional safeguards should not result in a weakening of the 'tough cop'.**

6.12. **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 has been claimed.**

6.13. **AMMA further contends that a mechanism must be available to appeal a decision of the Presidential Member of the AAT to refuse an application.**

6.14. **AMMA further contends that current penalties for non-compliance with a notice to attend compulsory interview must continue.**

7. Definition of “building and construction industry”

Recommendation 6:	*Exclude ‘off-site’ work from the definition of ‘building and construction industry’*

7.1. The Hon. Murray Wilcox’ recommendation to exclude ‘off-site’ work from the definition of ‘building and construction industry’ makes reference to section 5(1)(d)(iv) of the BCII Act, which relates to prefabrication of made-to-order components, whether carried out on-site or off-site.

7.2. On some resources sector projects, pre-fabrication of components may be set up in a temporary yard by a contractor to prefabricate parts of a structure or works purely for that particular project. These arrangements in temporary yards should remain covered.

7.3. **AMMA contends that off-site pre-fabrication work in temporary yards established specifically for a particular project should remain covered and within the definition of “building and construction industry”.**

8. The Code and Guidelines

8.1. AMMA strongly supports the continuation of the Code and Guidelines. The Code sets out principles by which a business in the building and construction industry is to operate if it is to successfully tender and work on government projects. This government purchasing policy is an essential component of ensuring that everyone is interested in being compliant with the Code.

8.2. The Guidelines assist in the interpretation and implementation of the Code in the building and construction industry. It is essential that the Guidelines continue, regardless whether some matters are reflected in the *Fair Work Act*. The Code and Guidelines represent the desirable industrial relations environment that breaks through the culture of lawlessness in the building and construction industry by forcing business to consider long term commercial gain rather than acquiescing to union demands for short term commercial gain. Where once business may have been willing to absorb penalties for contraventions of industrial legislation and engage in pattern bargaining or accept union-nominated labour or shop stewards, that type of conduct has been tightened as it will result in the business being 'frozen out' of government funded projects.

8.3. The importance of the Code and Guidelines to affecting cultural change in the building and construction industry has been acknowledged and accepted by the Hon. Murray Wilcox (paragraph 7.32).

8.4. **AMMA supports the continuation of the Code and Guidelines.**

8.5. However, the Hon. Murray Wilcox has recommended limiting the application of the Guidelines to on-site work. As discussed at paragraph seven of this submission, temporary yards are often established off-site to provide prefabrication work specifically for a particular project. Such projects should not be put at risk of different standards of behaviour at these temporary yards.

8.6. **AMMA contends that the Guidelines should continue to apply to off-site prefabrication yards specifically established to provide pre-fabrication work to a particular project.**

8.7. Any review of the content that will result in a watering down of the effectiveness of the Guidelines, which identify specific non-compliant behaviour such as providing names of new staff or contractors to unions and 'no-ticket-not start' signs, is not supported by AMMA. The Code and Guidelines address inappropriate and lawless behaviour identified by the Cole Royal Commission and their positive contribution to improving the culture of the industry should not be undermined.

8.8. Likewise it is not appropriate to include 'desirable positives' in the guidelines, such as employment of more apprentices and women etc that are more aptly dealt with in broader government social policy initiatives and which are not issues unique to the industry. The Guidelines are directed at implementation of the Code, which 'establishes a set of principles and standards of behaviour that is expected to apply in dealings between clients, their representatives and members of the construction industry'. The Code already makes reference to continuous improvement and best practice which includes equal employment opportunity.

8.9. **AMMA does not support the inclusion of 'desirable positives' in the Guidelines, nor any review that will result in a watering down of its effectiveness.**

8.10. **AMMA supports making the Guidelines a disallowable instrument, if done so *in their current form*.**