Submission to the Wilcox Review of the transition of the Australian Building and Construction Commission to Specialist Division of Fair Work Australia

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1. Executive Summary

> "*We will not tolerate old school, thuggish behaviour. We will not allow people to step a millimetre over the line….**I understand there is persistent and pervasive unlawful behaviour in the construction industry**. Under a Rudd Labor Government, there will not be a single moment where our construction industry is without a strong cop on the beat*." Julia Gillard, Deputy Labor Leader, address to the National Press Club, 30 May 2007 [emphasis added].
>
> "*The practices of the past are not part of Labor's future for industrial relations*" Forward with Fairness – Policy Implementation Plan

The Australian building and construction industry has a long standing reputation of being a law unto itself. This reputation was confirmed by the Cole Royal Commission in its Final Report released in 2003. The Howard Government sought to address the culture of lawlessness by putting in place legislative reforms in the Building and Construction Industry Improvement Act (BCII) and creating a specialist regulator – the Australian Building Construction Commission (ABCC).

The Rudd Government has also recognised that the building and construction industry continues to suffer persistent and pervasive unlawful behaviour that requires the continuation of a tough cop on the beat.

The ABCC is still in its infancy and this no doubt explains why the Courts continue to deal with cases alleging coercion, unlawful industrial action, misleading and deceptive conduct by industry participants, breaches of freedom of association and abuse of right of entry.

Fortunately this type of conduct is not as widespread as it was prior to the creation of the ABCC. Whilst it is possible (although it has not been substantiated) this may be partly attributable to social and community factors, it is more likely due to the regulation of inappropriate behaviours and conduct by the BCII Act and its enforcement body, the ABCC,

together with the requirements of the National Code of Practice for the Construction Industry.

The ABCC's ability to enforce the rule of law has been assisted by the coercive information gathering powers under the BCII Act. These powers meet the principles for fair, efficient and effective use of the coercive information gathering powers proposed by the Administrative Review Council.

In this industry, the tough cop must be able to require the provision of information, production of documents and attendance to answer questions, in order to overcome the 'code of silence' in the industry which until recently frustrated investigations into unlawful behaviour.

The coercive powers are adequately balanced by the protections afforded to persons under the BCII Act, including very broad protections against the admissibility of evidence obtained in this manner. If only one lesson is to be learned from past practices, it is that construction industry participants, with the knowledge that a regulatory body is unable to effectively enforce the law, will continue to break the law.

Building and construction industry participants have observed benefits such as improved and direct communication with employees, which in turn has improved relationships in the industry. Industry tells us that '*[t]his is a buoyant time for the industry. It has changed greatly and it has changed for the better'*.[1]

In an industry that the Cole Royal Commission revealed as having widespread disregard for the rule of law and a culture of lawlessness, and which has one of the highest number of working days lost in the 20 years to 2007, common sense tells you that it is highly probable that the BCII Act and ABCC have contributed to a decline in disputes and an increase in productivity.

[1] Interviewee comment cited in Jackson Wells Morris Pty Ltd, *Four years on: a report on changes following reforms flowing from the building and construction industry royal commission as observed by managers, superintendents and subcontractors*, Australian Constructors Association, August 2007, 9.

In light of the demonstrable benefits that the BCII and ABCC have delivered to the Australian building and construction industry (and thus the Australian community as a whole) AMMA makes the following recommendations:

Recommendation 1 - That the confidential volume 23 of the Cole Royal Commission's Final Report be publicly released to further validate the recommendations contained within that report and that the Wilcox inquiry accept that the findings and recommendations of the Cole Royal Commission remain relevant considerations in the determination of the required powers of the Building and Construction Division of Fair Work Australia.

Recommendation 2 - The Wilcox inquiry should collect further direct evidence from industry employers and employees on an 'in camera' basis to enable the collection of evidence free from fear of coercion or intimidation.

Recommendation 3 - The continued prohibition on the taking of unlawful industrial action contained in Section 38 of the BCII Act remain so as to sufficiently deter and punish unlawful industrial action in the building and construction industry.

Recommendation 4 - That the coercive powers of the ABCC are a necessary tool to overcome a culture of silence and intimidation and should be transferred to the Specialist Division of Fair Work Australia.

Recommendation 5 - Compensation should be paid to a person summonsed under the compulsory powers in respect of reasonable expenses necessarily incurred.

Recommendation 6 - AMMA supports the principles proposed by the Administrative Review Council, for fair, effective and efficient use of coercive information-gathering powers.

Recommendation 7 - There is no need for additional external monitoring of the ABCC or its replacement Specialist Division of Fair Work Australia.

Recommendation 8 - The Specialist Division of Fair Work Australia continue the role played by the ABCC in preventing the abuse of OHS issues to pursue industrial agendas.

Recommendation 9 - AMMA submits that the Specialist Division must be given adequate resources and powers to continue ongoing investigations and proceedings commenced by the ABCC.

Recommendation 10 - The short time in which the BCII Act and ABCC has been in place has limited the opportunity to change the lawless culture in the building and construction industry, and now is not the time to water down the BCII Act requirements or the powers and resources of the ABCC's replacement, the Building and Construction Division of Fair Work Australia.

When an industry has a deeply embedded culture that the law does not apply, compliance with the law is considered optional. It is important that the compliance powers be supported by serious penalty provisions to adequately deter unlawful and inappropriate behaviour from occurring or recurring – merely sanctioning unions for engaging in unlawful industrial action by removing their rights of entry is a poor substitute when union officials have a history of flouting right of entry laws.

The tough cop - the ABCC - has not yet been on the beat for long enough to change the lawless culture of the industry. Recent Court proceedings and public statements by union officials reveal a continuing propensity to engage in unlawful and inappropriate conduct.

Now is not the time to replace the tough cop on the beat with a toothless tiger.

2. Introduction

2.1. This submission is made in response to the *Proposed Building and Construction Division of Fair Work Australia Discussion Paper* (Wilcox Discussion Paper) as part of the Wilcox Inquiry into the transition of the Australian Building and Construction Commission (ABCC) to a Specialist Division of Fair Work Australia.

2.2. AMMA has previously considered the operation of the ABCC in the building and construction industry and is particularly concerned with respect to modification of the regulatory environment in this industry and its impact on mining construction projects. These considerations and concerns, which are relevant to the current discussion, have been raised in the following AMMA papers and submissions:

- *Building industry regulator: a tough cop or return to toothless tiger*, released 9 September 2008; and

- *Submission to the Senate Employment, Education and Workplace Relations Committee Inquiry into the Building Industry (Restoring Workplace Rights) Bill 2008*, submitted 10 October 2008.

2.3. A copy of each of these documents is provided with this submission.

3. Australian Mines and Metals Association (AMMA) Profile

3.1. 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.

3.2. AMMA member companies operate in the following industry categories:

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

4. Resources Sector Profile and Construction Activity

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

4.2. Over the past 20 years the resources sector has contributed over $500 billion to Australia's wealth.[2] Currently, the resources sector:

- Accounts for 8 percent of Australia's gross domestic product.[3]

- Directly employees 172,000 employees – an approximate 22.5 percent rise in the past 12 months;[4] and

- Is forecast to contribute $180 billion in minerals and energy exports in 2008-09, a 52 percent rise from the previous year.[5]

4.3. The continued growth of minerals and energy exports is supported by large capital expenditure programs in the resources sector, both on the expansion of existing projects and development of new projects. Construction in the resources sector provides strong employment growth in local communities, either directly or 'indirectly

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

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

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

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

through local service industries such as catering, cleaning and maintenance';[6] and it 'can result in improved local infrastructure including roads, schools, community leisure and health facilities.'[7] Infrastructure development since 1967 includes the construction of 26 towns, 12 ports and additional port bulk handling infrastructure at many existing ports, 25 airfields and over 2,000 km of railway line.[8]

4.4. Actual capital expenditure of $27.35 billion in the mining industry was the driving growth of all new capital expenditure in 2007-08.[9] This is estimated to increase to approximately $42.2 billion in actual capital expenditure in 2008-09.[10] This correlates with the record listing of 347 major minerals and energy development projects identified by the Australian Bureau of Agricultural and Resource Economics (ABARE).[11] Significantly, 262 of these minerals and energy projects, with an estimated total capital expenditure of $220.8 billion, are undergoing feasibility studies.[12] These are projects with no definite decision on development and therefore are vulnerable to changing conditions that will impact on when and if they proceed.[13] Likewise projects that have reached the committed stage 'may be deferred, modified or even cancelled if economic or competitive circumstances change significantly.'[14]

4.5. According to ABARE, '[a] further 85 projects are at an advanced stage with projected capital expenditure of $67.3 billion.'[15] The map overleaf illustrates the number and location of advanced minerals and energy projects in Australia.

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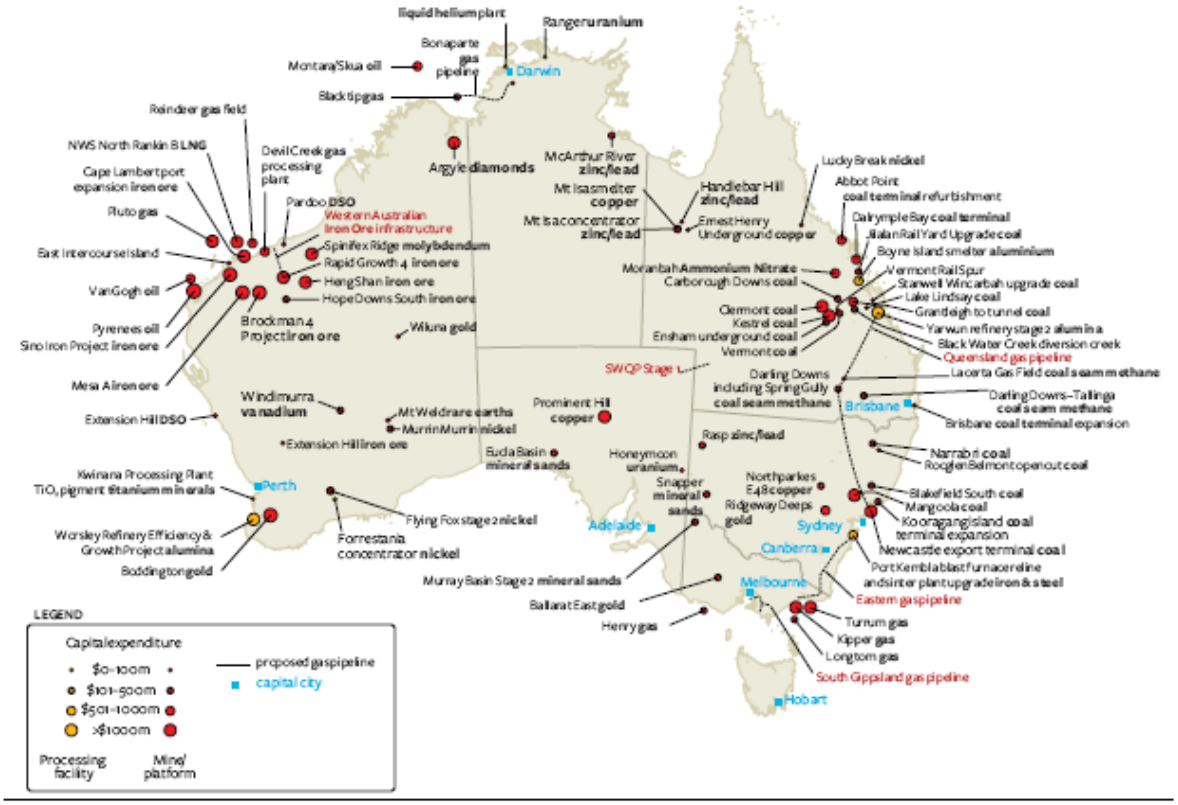
[6] Australian Bureau of Statistics, 'A century of mining in Australia 1988-1999', *Australian Mining Industry*, Cat No. 8414.0, ABS.
[7] Australian Bureau of Statistics, 'A century of mining in Australia 1988-1999', *Australian Mining Industry*, Cat No. 8414.0, ABS.
[8] Minerals Council of Australia, *2004 Annual report: creating value through commitment and performance*, 2004, MCA, 5.
[9] Australian Bureau of Statistics, Private n*ew capital expenditure*, Cat No. 5625.0, ABS, September Quarter 2008.
[10] Australian Bureau of Agricultural and Resource Economics, Major *Development Projects – October 2008 listing,* Australian Bureau of Agricultural and Resource Economics, Resources and Energy Branch, ABARE, 4, viewed 5 December 2008, http://www.abare.gov.au/publications_html/energy/energy_08/ME08_April.pdf
[11] Ibid, 15.
[12] Ibid, 17, 15. Abare advises that potential capital expenditure for these projects should be used as a guide only. Data for early projects is either not available or is likely to change significantly if it proceeds to development. Most will often proceed to development in the medium term.
[13] Ibid, 15.
[14] Ibid.
[15] Ibid, 1.

1 Advanced minerals and energy projects October 2008



Source: ABARE

4.6. The following table extracted from ABARE's major minerals and energy projects listing,[16] identifies selected key projects and their status, expected date for commencement of operations following completion of the construction stage, estimated capital expenditure and employment figures, where available.[17] This table and the earlier discussion of the contribution of the resources sector to the Australia economy highlights the enormous significance of the resources sector, both in terms of export revenue and domestic capital investment. Consequently, the resources sector has a strong interest in workplace relations legislative reform in the Australian building and construction industry.

[16] This table is sourced from the April listing.
[17] Abare advises that most information come from publicly available sources and is sometimes supplemented from information direct from the company.

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

5. Background: The Cole Royal Commission into the Australian Building and Construction Industry

5.1. The findings and recommendations of the Cole Royal Commission into the Building and Construction Industry (the Cole Royal Commission), contained within its 23 volume report tabled in Parliament in 2003, are important to understanding the current arrangements in place in the building and construction industry.

5.2. The Cole Royal Commission was comprehensive and conducted over 12 months (there were 171 public sitting days, 16,000 pages of transcript, 765 witnesses, 1900 exhibits, and 29 general submissions).[18]

5.3. The Cole Royal Commission's final report revealed widespread disregard for the rule of law and documented over 100 types of unlawful and inappropriate conduct occurring in the building and construction industry,[19] revealing

a. widespread disregard of, or breach of, the enterprise bargaining provisions of the *Workplace Relations Act 1996*;
b. widespread disregard of, or breach of, the freedom of association provisions of the *Workplace Relations Act 1996*;
c. widespread departure from proper standards of occupational health and safety;
d. widespread requirement by head contractors for sub-contractors to have union endorsed enterprise bargaining agreements before being permitted to commence work on major projects in state capital central business districts;
e. widespread requirement for employees of sub-contractors to become members of unions in association with their employer obtaining a union endorsed enterprise bargaining agreement;
f. widespread requirement to employ union-nominated persons in critical positions on building projects;

[18] Tony Abbott MHR, Ministerial Statements: Royal Commission into the Building and Construction Industry, 26 March 2003, viewed 2 October 2008, http://www.tonyabbott.com.au/Pages/Article.aspx?ID=87
[19] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 4-5.

g. widespread disregard of the terms of enterprise bargaining agreements once entered into;
h. widespread application of, and surrender to, inappropriate industrial pressure;
i. widespread use of occupational health and safety as an industrial tool;
j. widespread making of, and receipt of, inappropriate payments;
k. unlawful strikes, and threats of unlawful strikes;
l. threatening and intimidatory conduct;
m. underpayment of employees' entitlements;
n. disregard of contractual obligations;
o. disregard of National and State codes of practice in the building and construction industry;
p. disregard of, or breach of, the strike pay provisions of the Workplace Relations Act 1996;
q. disregard of, or breach of, the right of entry provisions of the Workplace Relations act 1996;
r. disregard of Australian Industrial Relations Commission and court orders;
s. disregard by senior union officials of unlawful or inappropriate acts by inferior union officials;
t. reluctance of employers to use legal remedies available to them;
u. absence of adequate security of payment for subcontractors;
v. avoidance and evasion of taxation obligations;
w. inflexibility in workplace arrangements;
x. endeavours by unions, particularly the Construction, Forestry, Mining and Energy Union (CFMEU), to regulate the industry; and
y. disregard of the rule of law.[20]

5.4. The particular types of conduct that characterised this behaviour, and which were documented in the Cole Royal Commission's Final Report include:[21]

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

[20] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) Vol 3, 4-5.
[21] Ibid, 8-10.

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

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

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

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

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

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

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

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

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

- a union circulating 'approved subcontractor lists';

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

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

- union officials using abusive language and intimidatory behaviour;

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

- disregard of the provisions of agreements entered into.

5.5. Particular statements made by some union officials in evidence to the Cole Royal Commission, or presented in statutory declarations by witnesses are also noteworthy:

> *"[t]here was a need for militant action and militant action took place…it was my intention to try and close that site down if everyone wasn't a financial member of the union"*[22] Joe McDonald, Assistant State Secretary CFMEU
>
> *"You guys just don't understand. We rule the site and we will do what we want to do,"*[23] union organiser.
>
> *"[w]ithdraw the section 127 and we will leave you alone*"[24] union organiser.

5.6. Further evidence of unlawful and inappropriate conduct is contained within a confidential volume (Volume 23) of the Cole Royal Commission's Final Report.[25]

5.7. The findings of the Royal Commission into the Australian building and construction industry also reflected the same findings of earlier state Royal Commissions into state jurisdictions. The Royal Commission into Efficiency and Productivity in the Building

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[22] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 23-24.
[23] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 21, 255-256.
[24] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 3, 27.
[25] See http://www.royalcombci.gov.au/hearings/reports.asp

Industry in New South Wales delivered a report in 1992 which made findings of illegal practices, conduct, intimidation and violence.[26]

5.8. The Wilcox Discussion Paper acknowledges the findings contained within the Cole Royal Commission's Final Report, stating that:

> [T]here 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 employers, during the years immediately preceding his report. The evidence summarised in the report is too powerful to permit any other view.[27]

5.9. The findings of the Interim Building Industry Taskforce (the Taskforce), established in 2002 to introduce the rule of law in the Australian building and construction industry, also supported those made by the Cole Royal Commission. The most common complaints made to the Taskforce during its 17 months of operation were:

- Coercion, intimidation, violence and threatening behaviour;
- Employers' and union official's disregard for the freedom of association laws: eg the closed shop syndrome of 'no ticket no start';
- Loss of work resulting from the prevention of people going to work on building sites;
- Inappropriate payments; and
- Unlawful strikes.[28]

5.10. Continued disregard by building industry participants for the rule of law and those empowered to enforce the law was also reported by the Taskforce. For example, the

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

[27] The Hon. Murray Wilcox, *Proposed building and construction division of Fair Work Australia Discussion Paper*, Australian Government, 7.

[28] Ibid, 3.

report revealed that Taskforce inspectors were subject to personal derogatory attacks contained in publications posted on construction sites.[29]

Recommendation - That the confidential volume 23 of the Cole Royal Commission's Final Report be publicly released to further validate the recommendations contained within that report and that the Wilcox Review accept that the findings and recommendations of the Cole Royal Commission remain relevant considerations in the determination of the required powers of the Building and Construction Division of Fair Work Australia.

[29] Nigel Hadgkiss, Director, *Upholding the law - one year on: findings of the interim building industry taskforce*, 25 March 2004, Australian Government.

6. Improvements in the Building and Construction Industry

6.1. A number of reports have been released attesting to the improvements in the building and construction industry since the commencement of the Interim Building Industry Taskforce and the ABCC and BCII Act in particular. The Econtech reports released in 2007 and 2008 and which are the subject of contention in the Wilcox Discussion Paper, is also supported by the Allen Consulting Group's 2007 report *Economic Importance of the Construction Industry of Australia.*[30] This report also found an increase in productivity in the building and construction industry. The report stated that:

> The recent growth in productivity has been associated with a very large fall in the industrial disputes… This more harmonious industrial relations environment has been conducive to greater productivity of both labour and capital (i.e. equipment used in the industry) and hence multi-factor productivity has grown quickly.

6.2. This report also considered the impact that a 10 percent drop in productivity would have on the industry and found that:

> [T]the shock to productivity in the non-residential construction industry has significant implications for the national economy. National economic output, and indeed state-based economic output in all jurisdictions, is reduced in each and every year of the forecast period from 2008 to 2020. Investment is stifled as general cost increases bought about by relatively low rates of productivity increase the cost of capital and consumption is hampered by lower levels of economic output and a decrease in the purchasing power of real wages.[31]

6.3. The Allen Consulting Group's report was accompanied by a report of the Australian Constructors Association, which reported on observed changes in the building and construction environment from the perspective of managers, superintendents,

[30] The Allen Consulting Group, *The economic importance of the construction industry in Australia,* Report to the Australian Constructors Association, 21 August 2007
[31] The Allen Consulting Group, *The economic importance of the construction industry in Australia,* Report to the Australian Constructors Association, 21 August 2007, 8.

subcontractors and other senior personnel.[32] The research was conducted in 2007 and reached the following conclusions:

- Management is spending less time managing industrial relations problems due to the decline in industrial disputes and more time engaging with their employees. This increases efficiency and allows for 'more effective planning';[33]

- Project costs are decreasing and tenders for projects are reflecting actual costs rather than inflated risk management prices due to industrial disputation.[34] At the height of lawlessness in the industry, businesses in Victoria would allow 20 or 30 percent lost time when bidding for jobs;[35]

- There is less control by unions over the type of agreement that must be entered into, greater flexibility in agreements and the choice of subcontractor is not dictated by the union;[36]

- Relationships are less adversarial and businesses can engage their employees directly;[37] and

- Employees are happier to be at work and earning money rather than 'sitting in the shed and not getting paid for two weeks.'[38]

6.4. The Australian Constructors Association also noted the particular comments made during the interviews, which formed the bulk of the report. The questions sought information about industry efficiency, relationships, workplace arrangements,

[32] The Allen Consulting Group, *The economic importance of the construction industry in Australia,* Report to the Australian Constructors Association, 21 August 2007.
[33] Jackson Wells Morris Pty Ltd, *Four Years On: A report on changes following reforms flowing from the Building and Construction Industry Royal Commission as observed by managers, superintendents and subcontractors*, Australian Constructors Association, August 2007, 9.
[34] Ibid.
[35] Ibid.
[36] Ibid, 11.
[37] Ibid, 18.
[38] Ibid, 29.

employee satisfaction, role of unions, safety standards and the ABCC.[39] The majority of responses highlighted improvements that are being experienced. A number of comments are reproduced below:

"We don't have to stop work all the time because the union simply demands workers to lay down their tools and come to an offsite meeting."

"It allows us to plan the jobs a lot better when we don't have to worry that unions are going to call a sudden strike."

"We are now in more control of our own destiny and have the ability to deliver our plans."

"We're getting more efficiency out of our guys. We are able to be a bit sharper with our price because we know we don't have as big a risk that there's going to be stoppages. Those stoppages previously would have been because a whole job would shut down and people would go home. We're more profitable."

"We have a lot less down time. Safety is run as a fair-dinkum thing. It's not used as an IR tool. The calibre of sub contractors and employees has changed for the better. Restricted work hours that the union held us to have gone. In the past if a sub-contractor did not have an EBA the union wanted, we could not use him. Now we can go out into the market place and get a more realistic price for him".

"IR changes have led to significant productivity improvement in Victoria– less lost time, safety issues more under control, no longer having to foot the bill for nonworking shop stewards".

"We negotiate separate agreements that suit the needs of each site. In Victoria we have negotiated to be able to work on shut down long weekends that better suit railway projects because there are fewer trains."

"There is a lot better alignment on achieving safety objectives across the board and between managers and employees."

[39] Ibid.

"The union could walk on site and call a meeting of guys to complain about the weather etc. If there's a legitimate safety concern now we deal with it and work does not stop. There were times when there were second agenda items and international issues and we would get caught up in it."

"This is a buoyant time for the industry. It has changed greatly and it has changed for the better."

"We communicate with employees more than ever. In the past we would have to go through the unions if we wanted to communicate with employees."

"Most of them used to hate going on strike: a lot are country boys and they just want to work. If we have issues now, we sort them out straight away and that suits everyone better."

"They know that they are working every day and not losing time because of someone else's issues. Money means a lot to people these days. In the past they could be sitting in the shed and not getting paid for two weeks. Those days are long gone".

"The union presence is more controlled: they are on a leash. I support the role of trade unions but wish they would modernise their behaviour. They operate on the basis that "all bosses are bastards". They can't be seen to work cooperatively with employers; they create conflict situations but would do better in most cases by working with employers. Unions still have strong support from employees."

"My site is as good if not better than when the union was around. Protective eyewear was blocked by the unions. They said we should make sites safer so people didn't need eyewear. That is no longer a problem. OH&S has grown as an issue because it's the only way they can get on the site. But OH&S has improved."

"The injury rate has reduced. Previously, our desire for workplaces to be safe was not able to be achieved because there were other people like unions involved."

6.5. Some of the interviewees commented on continued negative union behaviour, despite the presence of the ABCC and operation of the BCII Act, stating that:

"It's very patchy. It's hard to make a generalisation on the whole industry. We need to take each job. There are still a lot of groups using their muscle to get what they want."

"Unions are still causing mischief and trying to create havoc at work sites".

"It's not so good with unions because unions are still acting in a militant, non cooperative way"

6.6. The report also contained a comparative table provided by an interviewee that illustrates the impact of the ABCC on its business. This table is extracted below:

Productivity for comparable construction projects

Parameter	Before changes	After changes
Size of building (stories)	40	44
Productivity (sq m/man hour)	0.7	0.9
Contract duration (months)	18	21
Actual project duration (months)	28	19
Days lost to strikes	36	1
Hours lost to strikes	5,500	80

6.7. Comment is made at page 17 of the Wilcox Discussion Paper that the decline in disputation is common across all industries. AMMA recognises that there has been a continued decline in days lost to industrial action in all industries, including the construction industry. However, given that the Royal Commission revealed widespread lawless behaviour, including industry wide stoppages in disregard for the rule of law, the existence of a tough cop on the beat should not be so readily discounted. Absent the ABCC and BCII Act, the decline in disputes in the construction industry may have occurred at a much slower rate, if at all.

6.8. Particular consideration must also be given to the views expressed by those that actually operate in the industry when expressing disfavour with the economic data, which occurs at pages 16 and 17 of the Discussion Paper. As discussed above at

paragraph 6.5, managers, superintendents and other senior personnel within the industry have observed a change in the industry including a drop in wildcat and unprotected strike action, better job planning and delivery, greater efficiency and removal of paid and unproductive shop stewards and less use of safety as an industrial agenda. These attest to the veracity of the economic data released in respect to the building and construction industry.

6.9. Other less quantifiable improvements in the building and construction industry are apparent from the findings of the Australian Constructors Association. This includes improved and more direct communication between employees and employers and improved relationships in the industry. These improvements may not show an immediate impact on productivity data, but should not be undervalued.

6.10. The ABCC and BCII Act have been operating for three years. As will be seen in the discussion in the next section, there has been a resistance to these regulatory changes and continued unlawful and inappropriate behaviour. As such, there remains significant scope and opportunity to effect change in the industry.

Recommendation - **The Wilcox inquiry should collect further direct evidence from industry employers and employees on an 'in camera' basis to enable the collection of evidence free from fear of coercion or intimidation.**

7. Continued unlawful/inappropriate conduct in the building and construction industry

Joe McDonald, Assistant State Secretary CFMEU, reported to have made the following statements:

"*You wait till Kevin Rudd's elected. I'll be back*"[40]

"*I think bad laws should be broken*"[41]

"*I have this philosophy - "If they don't fear ya they don't hear ya.*"[42]

"I'm not going to give up. I'm not going to change my way, I'm not going to take a backward step to them. I mean why should I? I'm not."[43]

Deputy Prime Minister Julia Gillard:

"*We will not tolerate old school, thuggish behaviour. We will not allow people to step a millimetre over the line….**I understand there is persistent and pervasive unlawful behaviour in the construction industry**. Under a Rudd Labor Government, there will not be a single moment where our construction industry is without a strong cop on the beat*." Julia Gillard, Deputy Labor Leader, address to the National Press Club, 30 May 2007 [emphasis added].

"*The practices of the past are not part of Labor's future for industrial relations*" Forward with Fairness – Policy Implementation Plan

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[40] Glenn Milne, 'Rudd facing more union strife', *Perth Now*, 2 June 2007, at 1 December 2008, http://www.news.com.au/perthnow/story/o,21598,21837729-948,00.html. Joe McDonald, while not denying he did not make this statement, has said that he does not remember making it.
[41] Liam Bartlett, The Enforcer, *Sixty Minutes*, viewed 6 June 2008, http://sixtyminutes.ninemsn.com.au/article.aspx?id=564039
[42] Ibid.
[43] Ibid.

7.1. Despite evidence of improvement in the building and construction industry, highlighted in the previous section, unlawful and inappropriate behaviour continues to dog the industry. This indicates that while there has been some modification of behaviour in the industry (which AMMA asserts is largely attributable to the BCII Act and presence of the ABCC), there continues to exist an underlying culture of lawlessness and attitude that the law is there to be broken.

7.2. In the paper *Building Industry Regulator*, AMMA identified a number of recent decisions that highlighted the type of conduct that continues in the building and construction industry. This conduct includes misleading statements regarding union membership obligations, misleading statements about a requirement to have a union certified agreement to work on site, threats to disrupt the site if a union agreement was not entered into and industrial action engaged in during the nominal term of an agreement and in breach of its dispute resolution procedure. The Australian Industrial Relations Commission had also issued a number of orders to prevent or stop unprotected industrial action that was threatened, occurring or probable.

7.3. A more substantial although not exhaustive list of court and tribunal decisions of unlawful and other inappropriate conduct in the building and construction industry since the Royal Commission has been compiled by AMMA and is provided at **Appendix A**. This document further substantiates AMMA's contention that there remains a continued disregard for the rule of law in the building and construction industry. It also includes comments by the relevant judge or magistrate about the behaviour, such as:

> '**[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* (No3) [2008] FMCA 1435 (27 October 2008) under appeal

‘[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)

‘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 Limited v Construction, Forestry, Mining and Energy Union* [2008] FCA 466 (11 April 2008)

‘[the] representation…was…deliberate, contumacious and serious and involved a…flouting…of the relevant legal requirement directed at ensuring freedom of association’. Graham J, *Hadgkiss v Construction, Forestry, Mining and Energy Union (No. 5)* [2008] FCA 1040 (14 July 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 Construction, Forestry, Mining and Energy Union* [2008] FCA 495 (11 April 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 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)

‘[T]he loss of two and a half day's 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 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)

7.4. In the Cole Royal Commission's Final Report, following a discussion of the types of unlawful and inappropriate conduct that was discovered, the Royal Commissioner stated that:

> These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. They indicate an urgent need for structural and cultural reform.[44]

7.5. The industry has not yet departed from the type of behaviour and conduct that caused it to be characterised by the Cole Royal Commission as being 'singular', although due to the presence of the ABCC and operation of the BCII Act, such behaviour is not as widespread as it once was. Drawing on the list of behaviour in the Cole Royal Commission's Final Report and replicated at paragraph 5.3, the Court and Australian Industrial Relations Commission decisions discussed above show continuing lawlessness including,

- disregard of enterprise bargaining provisions;
- disregard of freedom of association provisions
- requirement of contractors to have union endorsed agreements;
- requirement on subcontractors to become members of the union;
- disregard of the terms of enterprise agreements
- use of OHS as an industrial tool;

[44] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) Vol 1, 6.

- unlawful strikes and threats of strikes;
- breach of strike pay provisions; and
- breach of right of entry provisions.

7.6. AMMA has previously argued and maintains its position that:

> [I]t does not appear that the required cultural and attitudinal change has become embedded to the point that there can be confidence that improvement in the construction and building industry's industrial environment will continue without specific industry laws and a regulatory body with the powers of the ABCC.[45]

7.7. The Cole Royal Commission noted that since the Western Australian Taskforce was abolished in Western Australia and replaced with a different body in early 2001,

> [p]ractices which had not been prominent have re-emerged. They include 'no ticket no start' practices, 'no pattern EBA no start' practices, threats of industrial action, entering premises irrespective of right, re-emergence of intimidatory, coercive and threatening behaviour in pursuit of industrial demands, and effective compulsory unionism on CBD sites.[46]

This consequence must be avoided in the transition of the ABCC to the Specialist Division of Fair Work Australia.

Recommendation - The short time in which the BCII Act and ABCC has been in place has limited the opportunity to change the lawless culture in the building and construction industry, and that now is not the time to water down the BCII Act requirements or the powers and resources of the ABCC's replacement, the Building and Construction Division of Fair Work Australia.

[45] AMMA, *Building industry regulator: a tough cop or return to toothless tiger*, AMMA, 2008, 27.
[46] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) Vol 3, 39.

8. Content of the law enforced by the Specialist Division

Penalty for unprotected industrial action

8.1. The BCII Act imposes tough penalties on corporations and individuals that take industrial action that is considered unprotected or unlawful. These significant penalties are required in order to act as a deterrent to unlawful industrial action that subjects companies to enormous costs. Penalties for individuals are necessary to ensure that action taken by employees against the advice of their union is not left unpunished and to ensure that unions do not use their members as 'human shields' to avoid the attribution of responsibility on the basis that their members will not be subject to penalties for contravening the law.[47]

8.2. The Wilcox Discussion Paper at pages 22-23 raises the proposition that special provisions for the building industry will not need to be retained in respect of unprotected action because it already attracts automatic penalty of loss of wages. It is also proposed that the general industrial action provisions of the new legislation be borne in mind when considering retaining specific provisions in the BCII Act. The recommendation of the Cole Royal Commission that unprotected action attract penalty under the BCII Act recognised the shortcomings of section 127 of the *Workplace Relations Act*, which effectively allowed unprotected action to continue unabated to the detriment of the affected business.[48] Section 127 was replaced with section 496 in March 2006, and offered employers greater remedial measures against unprotected industrial action. But section 496 is a largely a reactive measure against threatened or actual industrial action and the *Workplace Relations Act 1996* offers little by way of effective deterrent. In an industry with one of the highest numbers of working days lost between 1987 and 2007[49] there must be an effective deterrent to prevent such action from occurring or recurring.

[47] AMMA, *Building industry regulator: a tough cop or return to toothless tiger*, AMMA, 2008.
[48] See discussion in AMMA, *Building industry regulator: a tough cop or return to toothless tiger*, AMMA, 2008.
[49] ABS, Year Book 2008, ABS. (16% of days lost attributed to construction industry).

8.3. In 2006, 91 employees breached an order of the Australian Industrial Relations Commission and engaged in unprotected industrial action on the Perth to Mandurah Railway Project. This action was taken for the purpose of pressuring the employer to reinstate a CFMEU shop steward. The affidavit of the project director attested to losses of $1.6 million. Also in 2006, 192 employees on the Roche Mining Murray Darling Basin Project engaged in unprotected industrial action rather than following an agreed dispute resolution process. The employer suffered significant financial loss.[50] In both of these cases, the loss of a minimum four hours wages for taking unprotected industrial action would have been an inadequate penalty, and would not operate as a general or specific deterrent against future action.

8.4. Also raised in the Wilcox Discussion Paper at page 21 is the prospect of penalising a union which is involved in unlawful industrial action by withdrawing that union's right of entry to the site for a period of time. AMMA submits that this would not be sufficient enough to discourage unlawful industrial action as some union officials have no qualms with entering sites despite the absence of a permit or in another unauthorised manner. The Australian Industrial Relations Commission has just recently ordered the CFMEU to give Joe McDonald written directions that he must not rely on any right of entry under the *Workplace Relations Act 1996* in order to enter a construction site, when he does not in fact hold a right of entry permit.[51] Similarly the CFMEU had earlier given an undertaking that it would direct Joe McDonald not to enter a Multiplex site unless he holds a right of entry permit,[52] in response to numerous unauthorised entries to site.

Recommendation - The continued prohibition on the taking of unlawful industrial action contained in Section 38 of the BCII Act remain so as to sufficiently deter and punish unlawful industrial action in the building and construction industry.

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[50] *Furlong v Australian Workers Union and Ors* [2007] FMCA 443
[51] Buchan, Heath, Molina & CFMEU, Consent Order, Senior Deputy President Lacy,18 November 2008 http://www.abcc.gov.au/NR/rdonlyres/B17DFAC6-1EDB-41F8-BB2E-85C52D50E574/0/CDRadisichvCFMEUBuchanHeathMolinaPR984581.pdf
[52] Brookfield Multiplex Constructions P/L [2008] AIRC 323 (10 April 2008)

Power of coercive interrogation

8.5. The Cole Royal Commission uncovered a strong culture of silence and intimidation in the building and construction industry that supported the lawless behaviour and encouraged its continuation.[53] The Cole Royal Commission considered that this culture made it impossible to effectively investigate unlawful and inappropriate behaviour in the building and construction industry, where the regulatory body in place had insufficient power to overcome this conduct. The Cole Royal Commission noted that

> The efforts, inadequate and ineffective though they were, by the Office of the Employment Advocate, to enforce the *Workplace Relations Act 1996 (C'wth)* on building and construction sites, were defeated by the unions by a consistent policy of obstruction and threat of industrial action if contractors co-operated with the Office of the Employment Advocate. The CFMEU in New South Wales issued pamphlets advising workers that if representatives of the Office of Employment Advocate entered a site, they should say nothing and immediately contact the union. The men were directed to sit in the sheds whenever an inspector was on site. The threat of future union action if there was co-operation by contractors with the OEA inspectors was effective in ensuring there was no such co-operation.[54]

8.6. The Taskforce had similar experiences to the Office of the Employment Advocate. The Taskforce was charged with providing 'advisory, compliance and education services to the industry', and significantly did not have the coercive powers of its replacement body, the ABCC. The Taskforce's report on its activities is particularly illustrative of the difficulties facing an enforcement body with limited powers in an industry with a culture of silence and intimidation. In his report, the Director of the Taskforce, Nigel Hadgkiss, remarked that:

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[53] Buchan, Heath, Molina & CFMEU, Consent Order, Senior Deputy President Lacy,18 November 2008 http://www.abcc.gov.au/NR/rdonlyres/B17DFAC6-1EDB-41F8-BB2E-85C52D50E574/0/CDRadisichvCFMEUBuchanHeathMolinaPR984581.pdf

[54] Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) Vol 3, 12.

> [T]he Taskforce has investigated over 380 matters in its 17 months of operation. Of this number, **the Taskforce has had to finalise approximately 50% of these investigations due to the lack of powers to gather information**. These investigations have had to be finalised because witnesses would not make a statement or victims have simply given up.
>
> The investigation of complaints by the Taskforce is greatly impeded by the limited powers provided by the [Workplace Relations] Act. On 132 occasions between 1 October 2002 and 31 December 2003, the Taskforce required and requested further assistance from complainants but it was not forthcoming.
>
> **In the absence of greater powers to gather evidence, the Taskforce has been unable to proceed with investigations**. ...**This almost wholly limits the ability of the Taskforce to introduce the rule of law to the industry**.[55]

8.7. On the other hand, the ABCC has reported that its compliance powers contained within section 52 of the BCII Act have been critical to its court proceedings.[56] Section 52 of the BCII Act empowers the ABCC to compel a person to attend to answer questions at an examination, provide information and produce documentation as part of its investigations. AMMA supports the continuation of section 52 of the BCII Act. The following statement was made in AMMA's paper *Building Industry Regulator*:

> Without these strong and effective compliance measures, it is unlikely that some industry participants would take the investigations of the ABCC seriously, reluctant witnesses may not cooperate if they cannot rely on the fact that they have been compelled to in the face of serious consequences, and intimidating and bullying behaviour aimed at thwarting investigations could continue unabated.[57]

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[55] Nigel Hadgkiss, Director Interim Building Industry Taskforce, *Upholding the law – one year on: findings of the interim building taskforce*, 25 March 2004, 18-19.
[56] Australian Building and Construction Commissioner, *Report on the exercise of compliance powers by the ABCC for the period 1 October 2005 to 31 March 2008*, ABCC, Australian Government viewed 2 September 2008, http://www.abcc.gov.au/NR/rdonlyres/4CB84879-678F-4E2C-94CD-F46DEE7E6B48/0/CPowersReportMar08.pdf
[57] AMMA, *Building industry regulator: a tough cop or return to toothless tiger*, AMMA, 2008, 24.

8.8. However, there are significant qualifications to these powers contained in sections 52 and 53 of the BCII Act, which offer adequate protection to persons subject to the compliance powers:

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

Particular comment is warranted in respect to the qualifications of reasonable belief and inadmissibility of evidence.

Reasonable belief

8.9. The exercise of the coercive powers under the BCII Act is predicated by the existence of 'reasonable grounds' to believe a person has information or documents or is capable of giving evidence. Significantly, it is the ABC Commissioner that must hold this state of mind and is responsible for the exercise of the power,[58] as opposed to an ABCC inspector. This is not a power that the ABCC avails itself for general monitoring purposes, but is limited specifically to information, document or evidence that is relevant to an investigation into a contravention of a designated building law. Section 59 of the BCII Act (which deals with the power of inspectors to enter premises) already provides this general monitoring function.

[58] BCII Act s 52(1).

9. In its report *The coercive information-gathering powers of government agencies*, the Administrative Review Council considered comments of the High Court in *Rocket*.[59] In *Rocket*, the High Court stated that 'reasonable grounds' for a particular state of mind, including suspicion or belief…requires the existence of facts which are sufficient to induce that state of mind in a reasonable person'.[60] It was also considered that facts required to ground a suspicion may not be enough to ground a belief, indicating that 'belief' is a higher test. The High Court stated that a ''belief' needs to 'point more clearly to the subject matter'.[61] This will require 'supporting facts or circumstances.'[62] While this involves discretion on part of the decision maker, such discretion is also examinable by the courts.[63]

9.1. The 'reasonable grounds' requirement under the BCII Act accords with principle 1 of the 20 best practice principles put forward by the Administrative Review Council designed to ensure 'fair, efficient and effective use of coercive information-gathering powers.'[64]

9.2. The practice of the ABCC, as determined by its published policy guidelines[65] on the use of section 52 powers, also show that it accords with the Administrative Review Council's second principle.[66] In that respect, the ABCC states that it will first consider alternative ways of obtaining the information, such as through the exercise of its rights on entry to the workplace under the BCII Act and through information that has been provided to the ABCC voluntarily.[67]

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[59] Administrative Review Council, 'The coercive information-gathering powers of government agencies', Report No. 48, May 2008, 10-11.
[60] Cited in Administrative Review Council, 'The coercive information-gathering powers of government agencies', Report No. 48, May 2008, 11.
[61] Ibid, 10.
[62] Ibid, 11.
[63] Ibid.
[64] Ibid, xi.
[65] ABCC, Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry October 2005, ABCC, at 3 December 2008, 4, http://www.abcc.gov.au/NR/rdonlyres/04D15260-3A85-4026-9CD8-03C5FA1CDEF0/0/BCIIActCompliancePowersGuidelines.pdf
[66] Ibid, 13.
[67] ABCC, Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry October 2005, ABCC, at 3 December 2008, 4, http://www.abcc.gov.au/NR/rdonlyres/04D15260-3A85-4026-9CD8-03C5FA1CDEF0/0/BCIIActCompliancePowersGuidelines.pdf

Inadmissibility of evidence

9.3. The Australian Law Reform Commission, in a general discussion on privilege from self incrimination, has said that the 'right to privilege from self exposure balances against the public interest in securing effective compliance and prosecutions.'[68] This recognises that in return for imposing such coercive powers on persons, it is appropriate to provide them with immunity from prosecution.

9.4. In recommending privilege to persons that are subject to compulsory powers, the Royal Commission made the following remarks:

> Were there to be a use immunity limited to criminal proceedings, the incentive for persons to provide information, truthfully to answer questions or to produce documents, would be less likely to occur than if the provisions in the *Royal Commissions Act 1902 (C'wth)*, which are of course more generous to such persons, applied. This will mean that, except in relation to offences against the Building and Construction Industry Improvement Act (for example, perjury), a statement or disclosure made by a person in the course of giving evidence to the ABCC, or production of information, documents or a thing in answer to a requirement made or imposed under that Act, is not admissible in evidence against a natural person in any civil or criminal proceedings in any Court of the Commonwealth, of a State, or of a Territory.[69]

The resulting privilege afforded under section 53(2) and section 54 is broad, protecting persons from self incrimination in both civil and criminal proceedings and covers documents, information and questions. The Australian Law Reform Commission has said that '[a]n information privilege is broader in scope than a documentary privilege or questioning privilege, since it extends, for example, to compulsory disclosure of certain facts.'[70]

[68] ALRC, Principled regulation: civil and administrative penalties in Australia, Report No. 75, ALRC, Sydney.
[69] Royal Commission, vol 11, 38.
[70] ALRC, Principled regulation: civil and administrative penalties in Australia, Report No. 75, ALRC, Sydney.

9.5. The powers under section 52 of the BCII Act are not unique to the ABCC. Occupational health and safety inspectorates in each state and territory also have extensive powers to provide information, produce documents and appear before an inspector to give evidence.[71] Other Commonwealth agencies also have similar compulsory powers to the ABCC, including the Australian Consumer and Competition Commission.

9.6. While serious penalties accompany any act of non-compliance with a direction of the ABCC, these are required to ensure that investigations are taken seriously (i.e. to overcome the difficulties faced by the OEA, discussed above) and that there are no barriers to addressing unlawful and inappropriate conduct.

Recommendation - That the coercive powers of the ABCC are a necessary tool to overcome a culture of silence and intimidation should be transferred to the Specialist Division of Fair Work Australia.

Recommendation - Compensation should be paid to a person summonsed under the compulsory powers in respect of reasonable expenses necessarily incurred.

Recommendation - AMMA supports the principles proposed by the Administrative Review Council, for fair, effective and efficient use of coercive information-gathering powers.

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

10. External Monitoring

10.1. At page 33, the Discussion Paper expresses an opinion in respect to the operation of a Specialist Division that is granted coercive powers, stating that 'it seems essential to subject it to external monitoring.' The Discussion Paper also acknowledges that the 20 principles within *The Coercive Information-Gathering Powers of Government Agencies* 'contained no reference to external review, possibly because, no Commonwealth agency that exercises coercive information-gathering powers is currently subject to any more effective external scrutiny than the ABCC.'

10.2. The ABCC has an internal complaints process in place and dissatisfied complainants can seek external review by the Commonwealth Ombudsman, Privacy Commissioner, Administrative Review Council or Human Rights and Equal Opportunity Commission.[72] The ABCC is also subject to judicial scrutiny and scrutiny before the Senate Estimates Committee. The ABCC also publishes reports on the use of its compliance powers.[73] It is also open to the Minister under section 11 of the BCII Act to issue a direction to the ABC Commissioner on how to exercise or perform his powers or functions and under section 12 may require the ABC Commissioner to provide a written report relating to his functions. The latter requirement would be in addition to the required annual report on the operations of the ABC Commissioner under section 14 of the BCII Act.

10.3. The Administrative Review Council in *The Coercive Information-Gathering Powers of Government Agencies* has stated:

[72] ABCC, *ABCC Service Charter*, Australian Government, viewed 4 December 2008, 4, http://www.abcc.gov.au/NR/rdonlyres/5A12A5C6-A29C-4A0E-BD2A-FCF668E0357F/0/ServiceCharter.pdf
[73] See for example,

> If internal monitoring of the delegation and use of coercive information-gathering powers is done regularly, the Council sees no need for external monitoring additional to what already occurs.[74]

This is reflected in principle 10 of the Administrative Review Council's report.[75] Four reports on the exercise of its compliance powers have been released by the ABCC since it began operating in October 2005.[76] The ABCC also has an audit committee that 'reviews, monitors and recommends improvements to processes that involve internal control, financial reporting, internal and external auditing, monitoring compliance with legislation, regulations and government policy and fraud control.'

Recommendation - There is no need for additional external monitoring of the ABCC or its replacement Specialist Division of Fair Work Australia.

[74] ALRC, Principled regulation: civil and administrative penalties in Australia, Report No. 75, ALRC, Sydney, 27.
[75] Ibid, 27.
[76] The most recent report was released in March 2008 and can be found here: http://www.abcc.gov.au/NR/rdonlyres/4CB84879-678F-4E2C-94CD-F46DEE7E6B48/0/CPowersReportMar08.pdf

11. Occupational Health and Safety

11.1. At page 19 of the Discussion Paper reference is made to union claims that restrictions on union right of entry has negatively interfered with union ability to detect occupational health and safety risks.

11.2. Evidence has been presented in this submission of the abuse by unions of safety issues for the purposes of advancing industrial agendas. Widespread use of safety for industrial purposes was reported by the Royal Commission and noted in recent decisions of the courts, extracts of which were provided at paragraph 7.3 of this submission. Relevant sections of the extracted decisions are again provided below for ease of reference:

> "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 Construction, Forestry, Mining and Energy Union* [2008] FCA 495 (11 April 2008)
>
> 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)

11.3. Matters relating to industrial relations and matters relating to occupational health and safety should remain separate. It is appropriate for the ABCC and the replacement Specialist Division to be empowered and free to enforce the right of entry restrictions in place under industrial legislation to ensure OHS is not used as an industrial tool. Restrictions on entry for occupational health and safety purposes also remain in place under the Fair Work Bill, but it is essential to recognise that unions are provided with a right both under the *Workplace Relations Act 1996* and also in the Fair Work Bill to enter to investigate suspected breaches of occupational health and safety. Such a

right has not been removed. Appropriately resourced agencies with trained inspectors also exist in all jurisdictions to monitor and improve OHS outcomes.

Recommendation - The Specialist Division of Fair Work Australia continue the role played by the ABBC in preventing the abuse of OHS issues to pursue industrial agendas.

12. Resources, Personnel and Transmission

12.1. The ABCC will continue to operate until it is replaced by a Specialist Division of Fair Work Australia on 1 February 2010. During this time, the full powers and resources of the ABCC will remain. The ABCC is continuing to investigate and initiate proceedings against persons for conduct in breach of the BCII Act and the *Workplace Relations Act 1996*. A number of matters are currently before the courts,[77] and will continue to be brought before the courts as required. These investigations and court proceedings must not be undermined by any transmission to the Specialist Division.

Recommendation - AMMA submits that the Specialist Division must be given adequate resources and powers to continue ongoing investigations and proceedings commenced by the ABCC.

[77] Particular matters currently before the courts are detailed on the ABCC website at http://www.abcc.gov.au/abcc/Prosecutions/CurrentCourtCases/

13. Conclusion

The Rudd Government has determined to retain a 'tough cop on the beat' in order to address what it has described as 'persistent and pervasive unlawful behaviour in the building and construction industry'. Such practices of the past are not part of Labor's future for industrial relations.

In determining the powers and resources required to arm the tough cop, AMMA contends that it is important to identify and understand the past practices in the building and construction industry.

The history of unlawful behaviour has been extensively documented in the Cole Royal Commission report. The public volumes of this report reveal a multitude of unlawful and inappropriate practices, including widespread disregard for the rule of law, restrictive work practices and breaches of freedom of association, that were underpinned by an embedded culture of lawlessness, intimidation and silence. AMMA suspects that the unpublished volume will provide additional evidence.

The Wilcox discussion paper recognises that the Cole Royal Commission findings are too powerful to ignore. These findings formed the basis on which the Cole Royal Commission recommended to separately regulate the industry under the BCII Act and ABCC.

It is AMMA's view that the BCII Act and activities of the ABCC have contributed to the improvements in the industrial relations environment in the industry. These improvements are reflected in the declining industrial disputation levels.

Additional evidence of improvement is also documented in the Econtech and Allen Consulting Group reports. Whilst Econtech reports released in 2007 and 2008 were brought into question in the Wilcox Discussion Paper, AMMA argues that the Econtech findings are corroborated by the Allen Consulting Group Report and also by the 2007 report of the Australian Constructors Association.

The latter report goes beyond the economic data and highlights the improvements in employee engagement observed by managers, superintendents and subcontractors interviewed for the report. These interviews reveal an industry less affected by wildcat strikes and misuse of occupational health and safety for industrial purposes, improved and direct communication with employees, happy employees, less restrictive workplaces, less control by unions of the workplace and more realistic prices when tendering for work due to reduced industrial relations risk.

In addition, proper consideration should be given to the observations of those employers and employees operating with the industry. For this reason AMMA has requested that consultations be conducted with employers and employees in camera to illicit further evidence.

AMMA submits that despite evidence of improvements, there is a clear evidence of a continuing disregard for the rule of law that is demonstrative of a lawless culture that remains in the industry. This has been demonstrated by the recent cases heard by courts and tribunals and findings of the following types of conduct:

- unprotected and unlawful industrial action;
- coercion to join a union;
- coercion to enter into a union endorsed agreement;
- claims for strike pay and taking unprotected industrial action to coerce payment of strike pay;
- secondary boycott action affecting innocent third parties and inducing breach of contract;
- false or misleading representations about union membership;
- inappropriate use of right of entry, hindering, obstructing and intimidating employers and employees;
- failing to follow agreed dispute resolution procedures; and
- misusing occupational health and safety for industrial purposes.

This is the very type of behaviour revealed by the Cole Royal Commission. What makes regulation of this industry more difficult is that it has a very strong culture of silence that undermines any effort to introduce the rule of law, unless the regulator has strong powers to gather evidence.

It is also important that the BCII Act provisions operate to deter any unlawful behaviour and where it does occur, at serious consequence to business, provide appropriate penalties to deter unlawful behaviour.

The ABCC has been operating for approximately three years. AMMA contends that this is insufficient time for the required cultural and attitudinal change to become embedded to the point that there can be confidence that improvement in the construction and building industry's industrial environment will continue without specific industry laws and a regulatory body with the powers of the ABCC.

The transition to a Specialist Division of Fair Work Australia must not put at risk the improvements achieved in the building and construction industry's industrial environment.

Now is not the time to water down the BCII Act requirements or the powers and resources of the ABCC's replacement.

AMMA contends that the Building and Construction Division of Fair Work Australia retain all of the powers and resources accessed by the ABCC and that the provisions of the BCII Act remain unchanged.

APPENDIX A: Instances of unlawful and inappropriate behaviour

INSTANCES OF UNLAWFUL AND INAPPROPRIATE BEHAVIOUR – IN ORDER OF DATE OF BREACH OCCURRING			
Case name	**Offending conduct**	**Date of offending conduct**	**Court's comments**
Cahill v CFMEU & Mates [2006] FCA 196 (10 March 2006)	• Unlawful industrial action; coercion in relation to the engagement of workers • Prevented crane from entering site	Period of events leading up to climax on 21 February 2006	Kenny J: On the evidence before me, the union's alleged conduct is causing losses to TJV of around $50,000 per day, with a risk that the project might not proceed at all, occasioning further significant damage of up to $3 million. Further, if the project were not to proceed, then the employment prospects of 24 of Hardcorp's employees, 10 sub-contractors and 7 of TJV's staff would be jeopardised. According to Mr Goss, retrenchments at the site have already commenced and will continue without this grant of relief. The conduct in question does not apparently involve any possibility of protected action.
Carr v AMWU, Mulipola, Eiffe, Thomas and Mansour [2005] FCA 1802 (4 November 2005)	• Coercion at two building sites to enter a certified agreement	June 2003	Finkelstein J: In the circumstances, prima facie at least, a harsh penalty was justified.
There were 18 separate proceedings against multiple respondents arising out of events on 5 August and 6 August 2003 across building sites in Melbourne based on application of industry wide policy following fatality on one site. Cases include: Cruse v Multiplex Limited [2008] FCAFC 179 (5 November 2008) Ponzio v B & P Caelli Construction [2007] FCAFC 65	• Claim for strike pay • Taking industrial action to coerce payment of strike pay	5 and 6 August 2003	Goldberg and Jessup JJ In Cruse v Multiplex: the stoppage of work was for the express purpose of claiming payment for time not worked, rather than to facilitate the conduct of the safety audit itself Lander J in Ponzio: There can be no doubt that the Union and the third and fourth respondents were aware that what they were doing was a contravention of s 187AB(1)(a) and s 187AB(1)(b). They were aware that if Caelli paid its employees in response to that pressure

(14 May 2007) Furlong v Maxim Electrical Services (Aust) Pty Ltd [2006] FCA 1705 (26 November 2006) Ponzio v Maxim Electrical Services (Vic) Pty Ltd [2006[FCA 579 (17 May 2006)			Caelli would also be caused to contravene the Act. The Union should have been aware that, by causing Caelli to make the payments in contravention of s 187AA, any of their member employees who accepted the payment would also be contravening the Act. In my opinion, the 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. Marshall J in Ponzio v Maxim: The Union has agreed that it breached s 187AB(1)(b) of the Act by organising or engaging in industrial action against an employer with intent to coerce it to make a payment to employees in relation to a period during which those employees engaged in industrial action and did not work.
A & L Silvestri Pty Ltd Pty Ltd & Hadgkiss v Construction, Forestry, Mining and Energy Union [2007] FCA 1047 (13 July 2007) A & L Silvestri Pty Limited v Construction, Forestry, Mining and Energy Union [2008] FCA 466 (11 April 2008) – penalty hearing	• Threatening to take action to coerce the employer to enter into a union certified agreement • Engaging in secondary boycott by hindering or preventing the supply or acquisition of services (TPA s 45D) • Inducing a breach of contract	20 and 21 October 2003	Gyles J: It can safely be concluded that Lane's intent in making the threats was to coerce the officers of LGB into agreeing to an EBA. The threat of disruption to work on the project by any available means was pressure that was illegitimate and unconscionable. LGB had completion of a project of some $16 million at stake. Any disruption to progress would have significant adverse financial consequences. It was clear enough that the threats also envisaged unlawful action. Threats of picketing were made. There would appear to be no lawful basis for picketing in relation to this site. Gyles J (penalty hearing): 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.
Hadgkiss v Construction, Forestry, Mining and Energy Union (No. 4) [2007] FCA 425 (26 March 2007) Hadgkiss v CFMEU [2008] FCAFC 22 (5 March 2008) Hadgkiss v Construction, Forestry, Mining and Energy Union (No. 5) [2008] FCA 1040 (14 July 2008)	• Making a false or misleading representation that union membership was required to work on site	• 19 January 2004 • 18 February 2004	Graham J ([2008] FCA 1040): [the] representation…was…deliberate, contumacious and serious and involved a…flouting…of the relevant legal requirement directed at ensuring freedom of association
Standen v Feehan [2008] FCA 1009 (3 July 2008)	• Union official intentionally hindered and obstructed the employer and employees	• 5 May 2004	Lander J: I am satisfied that the respondent did what he did with the purpose of intentionally obstructing Mr Potter carrying out his duties and the Boral employee from entering the site in his truck. The fact that the respondent parked his vehicle there demonstrates, in my opinion, that the respondent had in mind to make the pour which was to take place on this day as difficult as possible. The delay was such that he and his employees were required to work quite late and under lights in an attempt to finish the concrete pour.
Standen v Feehan (No 2) [2008[FCA 1574 (23 October 2008)	• Hinder/Obstruct/Intimidate	5 May 2004	Lander J: the conduct was premeditated and was designed to hinder the contractor and the subcontractor in the carrying out

			of their work…(and) continued over a relatively long period.
Cahill v Construction, Forestry, Mining and Energy Union [2008] FCA 495 (11 April 2008)	• Making a claim for strike pay • Organising and engaging in industrial action to coerce payment of strike pay • Threatening to organise industrial action to coerce payment of strike pay • Imposing bans to coerce payment of strike pay	• 13 May 2004 to 18 May 2004 • 11 May 2004 to 18 May 2004 • 14 May 2004 • 14 May 2004	Marshall J: 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. So much is consistent with the safety disputes resolution procedure which is commonly applied on building sites. That procedure involves the immediate problem being isolated and work being performed elsewhere when it is safe to do so.
Martino v CFMEU and Maher (T02692326 Melbourne Mag. Court) (10 May 2006)	• Conduct intending to coerce subcontractor to enter into an agreement with the union with intent to prevent subcontractor from performing work unless agreement was made	26 October 2004 and 28 October 2004	Magistrate Hawkins: By engaging in conduct in breach…the…defendant caused Civiltest to lose the benefit of its contract.
Hadgkiss v Sunland Construction (Qld) Pty Ltd [2006] FCA 1566 (25 October 2006)	• Making a false and misleading representation that the employee was obliged to be a member of the union • Dismissing an employee due to non-membership of the union	4 November 2004	Dowsett J: Concerns have arisen that workers not be compelled or persuaded, using inappropriate methods, to join trade unions. It is in those circumstances that the present legislation has emerged. It is a serious matter that an employer should seek to pressure an employee into joining or remaining in a union, just as it has traditionally been treated as a serious matter that an employer should seek to dissuade an employee from joining a union using inappropriate methods of persuasion. It is, of course, also important that employers who, by their position, are more likely to be aware of the law than are their employees, not mislead them as to

			their legal obligations.
Martino v CEPU & Mooney (Industrial Magistrate 7 May 2007)	• Engaging in conduct intending to coerce employer to make an agreement with the union	8 November 2004	Magistrate Hawkins: The contraventions by the Union organiser, Mr Mooney were deliberate.
Alfred v Lanscar & CFMEU [2007] FCA 1001 (4 July 2007)	• Inciting company to refuse to engage non-union members, thereby breaching freedom of association provisions	9 February 2005	Buchannan J: The conduct admitted by Mr Lanscar and by the CFMEU is serious. It must be regarded as a deliberate breach of a clear legislative prohibition.
Leighton Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union [No 4] [2006] WASC 317 (3 November 2006)	• Unlawful industrial action by way of unauthorised meetings, and strikes and work bans	Various dates between 9 March 2005 and February 2006	Le Miere J: The first and second defendants have each admitted, and the evidence establishes that they committed 18 and five contraventions of s 38 of the Act respectively during the period from 9 March 2005 to February 2006. The agreed facts establish that the third defendant committed 16 contraventions of s 38 of the Act. The contraventions have involved: 1. meetings of project employees during working hours which have not been sanctioned by the plaintiffs; 2. the imposition of bans by project employees on overtime work; and strikes.
Temple v Powell [2008] FCA 714 (23 May 2008)	• Taking Industrial action during the term of an agreement and in breach of the agreement dispute resolution procedure	17 March 2005 and 25 August 2005	Dowsett J: 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 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.
Cruse v Construction, Forestry,	• Making a false and misleading	May 2005	Marshall J: Intention to coerce requires

Mining & Energy Union [2008] FCA 1267 (22 August 2008)	representation about the employee's obligation to join the union • Telling a person they cannot work at a particular location without being party to an agreement in order to coerce that person to enter into a union certified agreement (s 170NC WRA)		intent to exert pressure that would in a practical sense negate choice…The exertion of such pressure involved unconscionable conduct which gave a party to the bargaining process no say in that process.
Cruse v CFMEU & Anor [2007] FMCA 1873 (14 November 2007)	• 300 employees taking industrial action during the term of a certified agreement, and in breach of the dispute resolution procedure for safety concerns	23 September 2005, 27 September and 28 September 2005	Burchardt FM: the strike occurred in direct breach of the applicable certified agreement and in circumstances where Mr Stewart and the employees and the union all knew that this was the case. The provisions of the certified agreement which were breached were dispute resolution procedures expressly designed to avoid this sort of strike… on any view, the strike cost RMJR money and disruption. There is no formal proof that it cost $300,000.00 or any other figure, but the loss of two and a half day's 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.
Stuart-Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426 (19 September 2008)	• Engaging in industrial action by imposing an overtime ban during the term of an agreement. • Organising unlawful industrial	6 October 2005 to 12 October 2005	Tracey J: the conduct was serious and was designed to coerce Hooker Cockram (or, through it, one of its sub-contractors) to meet the Employment Requirement. The ban was imposed in preference to alternative, lawful, actions such as

	action by imposing an overtime ban in order to coerce the employer to engage an apprentice.		negotiations or resort to dispute resolution procedures which were available to the CFMEU and its members… there is no evidence of any contrition on the part of the respondents
Alfred v Wakelin (No. 1) [2008] FCA 1455 (25 September 2008)	• Engaging in industrial action during the term of an agreement	10 November 2005 to 11 November 2005	Jagot J: Mr Wakelin and the employees: - (i) failed or refused to attend for building work, (ii) engaged in action that was industrially-motivated and constitutionally-connected within the meaning of s 36 of the BCII Act, and (iii) engaged in action that was not protected action for the purposes of the Workplace Relations Act and was unlawful industrial action in contravention of s 38 of the BCII Act.
Carr v CEPU and Anor [2007] FMCA 1526 (4 September 2007)	• Engaging in unlawful industrial action during the term of an agreement.	14 December 2005	Lucev FM: The unlawful industrial action was serious. It involved withdrawal of labour by 81 employees for a full day of work on 14 December 2005… The contraventions were deliberate.
Hadgkiss v Aldin and Ors [2007] FCA 2069 (20 December 2007)	• Unlawful industrial action by approximately 100 employees	24, 25, 27 and 28 February and 1, 2, 3 March 2006	Gilmour J: "The conduct demonstrated a complete disregard for the terms of the Certified Agreement and struck at the very heart of the main object of the legislation. Such is the case also in relation to those respondents who have admitted contravention of the WR Act. This conduct was even more serious, as it deliberately flouted the very clear terms of an order of the AIRC. Furthermore they were warned on several occasions during the Period at workforce meetings by representatives of the CMFEU that they should not take unlawful industrial action as they would be exposing themselves to very serious penalties if they did so… The consequences of the respondents' action were serious. It has involved very

			considerable costs to the LKJV, the delay of a very major infrastructure project in this State, involving public inconvenience; it had the potential to have caused substantial safety issues with associated damage to machinery and property.
Furlong v Australian Workers Union and Ors [2007] FMCA 443	• Engaging in industrial action during the term of an agreement	24 and 25 March 2006	Burchardt FM: there was a two day strike at a particularly sensitive time, in terms of the project in which RMJR was engaged, as I would readily infer both the union and the officers and members were well aware. It was designed to bring pressure to bear and to cause difficulty. It did so. Very substantial financial loss on any view was occasioned to RMJR.
Martino v McLaughlin [2007] AIRC 717 (29 August 2007)	• Union official failed to produce right of entry permit (at four different building sites between June and December 2006) • Union official failed to sign the visitor book and undertake a site induction on exercising a right of entry • Union official conducted an unauthorised meeting, interrupting work for 26 minutes.	• 21 June 2006, 6 July 2006, 11 July 2006, 26 July 2006, 10 August 2006 • 3 August 2006 and 15 August 2006 • 1 June 2006	SDP Watson: In my view, the legislative objective of avoidance of disruptive entry into workplaces and abuse of right of entry laws is best achieved, in the circumstances of the present matter, by a suspension of Mr McLoughlin's permit for a limited period of time, together with the imposition of conditions on the permit, directed to avoiding any future abuse of Part 15 rights by Mr McLoughlin, in reliance upon his permit.

Stuart-Mahoney v CFMEU & Anor (No.2) [2008] FMCA 1015 (4 August 2008) Stuart-Mahoney v CFMEU & Anor (No.3) [2008] FMCA 1435 (27 October 2008) (under appeal)	• Coercing an employee to be a member of the union • Making a false and misleading statement that the employee must be a member of a union to work on the site • Requiring an employee to settle their outstanding union membership fees before commencing employment, which prejudiced the employee	12 September 2006 (in respect to two separate employees)	Burchardt FM: It is difficult to think of anything more readily fitting the idea of coercion than being told you cannot work if you are not a member of a union. It is plainly conduct intended to negate choice. Similarly, the assertion that Mr Gauci could not start work if he was not a union member was plainly false and misleading. It is entirely unreasonable to suppose he wanted to do anything other than to start work. The fact is he was prevented from doing so because of the actions of Mr Deans, and in the circumstances this conduct, in my view, plainly contravenes s.797 of the Act. He was made to go and sort his financial status out before he was allowed to start work. Penalty hearing: is difficult in some ways 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.
Alfred v Primmer & Ors (No.2) [2008] FMCA 1476 (3 November 2008)	• Advising and encouraging a company to stop an independent contractor it has engaged from performing work which would cause the company to contravene the Workplace Relations Act	12 October 2006	Cameron FM: it is clear that Mr Primmer was saying that C&C should dissociate itself from Fine Line, by preventing that company from working on the Project, and the root cause of this was the NSWIRC proceedings". "If C&C had acted on this advice and encouragement of Mr Primmer it would have, at least, altered the position of Fine Line to Fine Line's prejudice. Depending on the precise action which C&C took, it might also have terminated Fine Line's contract or injured Fine Line in relation to the terms and conditions of its

			contract with C&C…and thus from enjoying the fruits of its contract…
Jeff Radisich v Michael Buchan, Doug Heath, Walter Molina and Construction, Forestry, Mining and Energy Union [2008] AIRC 896 (20 November 2008)	• Abuse of right of entry by three union officials, including entry without the required permit.	14 February 2007, 24 and 27 April 2007	Lacy SDP: failed to exercise the purported rights with due diligence, reasonable civility and avoidance of unnecessary obstruction by repeatedly making offensive statements to site personalities; refused repeated directions to leave the site when he had no lawful basis to remain on site; deliberately sought to mislead the occupier of the site as to the basis of his right to enter… acted in an improper manner by refusing to comply with reasonable directions regarding site safety; remained on site contrary to reasonable requests and directions to leave; embarked on a general safety inspection despite reasonable requests to comply with OHS requirements applicable to the areas inspected and generally…threaten to disrupt the site; used the OHS right for a collateral purpose, namely to promote the CFMEU by distributing union paraphernalia to workers
Paper Australia Pty Ltd v CEPU [2007] AIRC 505 (20 June 2007) Paper Australia Pty Ltd & Bilfinger Berger Services (Australia) Pty Ltd v AWU	• Organisation of unlawful industrial action	19 June 2007	SDP Watson: I am satisfied that it appears that industrial action, within the meaning of s.420 of the Act, by an employee or employees of contractors to PAPL at its Maryvale site is happening and that further industrial action is probable. The jurisdictional prerequisites for the making of an order pursuant to s.496 have been established
Kaefer Integrated Services Pty Ltd v AMWU & CFMEU [2008] AIRC 412	• Unlawful Industrial action	27 August 2007, 27 September 2007, 19 January 2008, 14 and 15 February 2008, 26, 27 and	DP McCarthy: I…have formed the view that there is a probability that there will be further and future failures to follow the issue resolution procedures

		28 April 2008	
Mayfield Engineering Pty Ltd v AMWU [2007] AIRC 490 (18 June 2007)	• Unlawful challenge to termination of Agreements	5 April 2007	SDP Cartwright: During January 2007, Blair C conciliated over one and a half to two days to assist the negotiation process. Protected industrial action occurred between 8 February and 5 March 2007, followed by further meeting and negotiation.
Radisch v Buchanan, Heath, Molina & FCMEU [2008] AIRC 2185 (17 November 2008)	• Abuse of right of entry permit system	24, 27 April 2007 and 14, 22 February 2008	SDP Lacy: A duly authorised officer of the CFMEU give written direction to Mr McDonald that Mr McDonald must not purport to rely on any right of entry under the Workplace Relations Act 1996 in order to facilitate access to construction sites when he in fact holds no right of entry permit under the Act.
Brookfield Multiplex Pty Ltd v CFMEU & Others [2008] AIRC 323 (10 April 2008)	• Abuse of right of entry provisions	Dates unavailable	SDP Watson: The Construction, Forestry, Mining and Energy Union, by Kevin Reynolds, the State Secretary of the Construction, Forestry, Mining and Energy Union hereby undertake that it will direct Joe McDonald not to enter any construction site owned, occupied or controlled by Brookfield Multiplex Constructions Pty Ltd or any related body corporate of Brookfield Multiplex Constructions Pty Ltd until such time as Joe McDonald holds a valid right of entry permit under the Workplace Relations Act 1996.
CBI Construction Pty Ltd v Abbott [2008] FCA 1629 (28 October 2008)	• Industrial demands and threat to take unlawful industrial action if demands not met • Unlawful industrial action taken by around 150 employees (number varied each day)	1 October 2008 and 13 October 2008 14 October, 17- 24 October 2008	Gilmour J: This also is not a case of idle threats. The respondents have made good their threat to engage in a week of industrial action and … threatened further industrial action if the Demand is not met. Further, the respondents have shown a preparedness to engage in industrial action in contravention of the AIRC

			Order… 12,720 hours have been lost. The effect on the applicant if there is further industrial action will be significant. The estimated wasted costs alone exceed $600,000 a week. There are further potential consequences of industrial action such as damage to the applicant's reputation and loss of production.
Bovis Lend Lease v CFMEU & CEPU [2008] AIRC 693 (3 September 2008)	• Failing to follow lawful direction of employer • Unlawful industrial action	23 May; 11 July; 5 August; 14 August 2008	SDP Watson: There is sufficient direct evidence to support findings that the employees of subcontractors on the Projects have refused to obtain and use the BG swipe card and that each of the unions have organised such refusal.