SUBMISSION

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009

CONTENTS

1. INTRODUCTION 3

2. OVERVIEW OF THE ACTU SUBMISSION 4

3. OBJECTS, DEFINITIONS AND SCOPE OF THE ACT 5

3.1 Objects of the Act 5
3.2 Definition of 'building work" 5
3.3 Definition of 'office' 6

4. THE OFFICE OF THE FAIR WORK BUILDING INSPECTORATE 6

4.1 Power of intervention 8

5. THE FAIR WORK BUILDING INSPECTORATE ADVISORY BOARD 8

5.1 Composition and quorum 9
5.2 Requirement that Director have regard to the recommendations of the Board 9

6. REPEAL OF INDUSTRIAL ACTION LAWS AND PENALTIES 10

7. COERCIVE POWERS 11

7.1 Preliminary remarks 11
7.2 The process for issuing examination notices 13
7.3 The criteria used to determine whether to issue a coercive notice 14
7.4 The role of the Director 15
7.5 The form and content of examination notices 16

8. THE INDEPENDENT ASSESSOR AND THE SWITCHING ON AND OFF ... OF THE COERCIVE INVESTIGATION POWERS 16

8.1 The commencement of the provision 16
8.2 Applications in respect to multiple projects 17
8.3 Standing to bring an application: interested persons 17
8.4 The criteria and process used by the Independent Assessor 18

9. CONCLUSION 20

1. INTRODUCTION

This submission is made by the ACTU on behalf of its affiliated unions including the State and Territory labour councils, and complements the joint submission of the four unions with significant membership in the construction industry.

At the outset the ACTU re-states our absolute opposition to the use of coercive information gathering powers in the enforcement of workplace laws.

These powers impinge upon the rights of individuals, including the right of protection of property and privacy, the right to silence, and statutory rights to the protection of personal information.

When exercised against trade unions these powers also impinge on freedom of association and compromise unions' rights to run their internal affairs without interference from public authorities – as provided for by article 3 of the ILO's *Convention concerning Freedom of Association and Protection of the Right to Organise*.

There is no public interest that justifies the inclusion of coercive interrogations in industrial law, irrespective of the safeguards that surround their use.

Having said that, the ACTU does support the introduction of safeguards surrounding the use of coercive information gathering powers, and the abolition of differential penalties for industrial action in the construction sector.

We welcome the opportunity to make submissions to this inquiry, particularly technical suggestions to improve the operation of the Bill. However these submissions should not be read in any way to diminish our deeply felt opposition to retention of coercive information gathering powers.

2. OVERVIEW OF THE ACTU SUBMISSION

In respect to the policy underpinning the Bill, the ACTU relies on the submission we made to Mr Wilcox, which is attached as Appendix 1. Our comments in this submission are largely restricted to technical comments regarding the operation of the Bill.

In summary the ACTU endorses:

- the abolition of the ABCC from 1 February 2010. However we oppose the establishment of the replacement inspectorate - the Fair Work Building Industry Inspectorate, separate from the Fair Work Ombudsman.

- the establishment of a Board with employer and employee representation to provide advice to the Inspectorate, but recommends that the composition and quorum requirements be amended;

- the intention to narrow the definition of the building and construction industry by excluding off site manufacturing of building products, but suggests some amendments to ensure the legislative intention is given effect; and

- provisions of the Bill that repeal the definitions of building construction industry industrial action, which have the effect of making the industry subject to the general industrial action provisions, and penalties, of the Fair Work Act.

The ACTU opposes absolutely the retention of the coercive information gathering powers. If the coercive powers are retained then the person seeking to use coercive information gathering powers should be required to demonstrate the overwhelming public interest that justifies their use.

- The Bill should be redrafted so that the coercive powers are not available unless the Independent Assessor has made a decision to "switch on" the powers;

- We believe the Bill should provide greater guidance to the Independent Assessor regarding the procedures and criteria under which his or functions are performed; and

- The Presidential Member of the AAT should hear from the person against whom an examination notice is sought.

3. OBJECTS, DEFINITIONS AND SCOPE OF THE ACT

3.1 Objects of the Act

The ACTU welcomes the revised Objects of the Act. We propose some minor amendments to the Objects that are consistent with the legislative intent of the Bill. The proposed amendments are:

- to insert the words 'promoting and' at the beginning of subparagraph (a)before the words 'ensuring compliance..'; and
- to insert the words 'appropriate and' at subparagraph (c) before the word 'effective' where it appears in the first line.

3.2 Definition of 'building work"

The ACTU remains concerned that the scope of the Principal Act is difficult to pinpoint with any certainty. This concern was shared by the Committee[1] and a number of employers in 2005 when the Principal Act was enacted, and it has proven in practice to be difficult to know where the boundaries of the current Act are set. At a practical level there will be ongoing confusion about the respective

[1] Employment, Workplace Relations and Education References Committee
Beyond Cole The future of the construction industry: confrontation or co-operation? pp 53-55.

responsibilities of the OFWO and the FWBI. More fundamentally, people should know which laws apply to them.

The exclusion of off-site pre-fabrication from the definition of building works will go a long way to improving this situation, and will bring greater certainty to the investigation of suspected breaches of the laws. To avoid any doubt the amendment proposed at Item 48 should be strengthened by including a new section 5(1)(h) which reads "the offsite site pre-fabrication of made to order components to form part of any building, structure or works."

3.3 Definition of 'office'

The definition of "office" in relation to unions in section 6 of the Principal Act appears to be identical to the definition of "office" in section 12 of the FW Act. It would therefore be sensible to repeal section 6 of the Principal Act.

4. THE OFFICE OF THE FAIR WORK BUILDING INSPECTORATE

The ACTU welcomes unreservedly the abolition of the Australian Building and Construction Commission. The ABCC, and its predecessor failed in the primary obligation of a regulator to impartially enforce the law.

However we do not support the creation of a new, statutorily separate inspectorate, with separate funding, staff and leadership. There is a real risk that this is simply reconstituting the ABCC under a new name.

The approach taken in the Bill is inconsistent with the government's election commitment to abolish the ABCC and to create specialist divisions within the workplace inspectorate that '*can focus on persistent or pervasive unlawful behaviour in particular industries or sectors. The first divisions established will be for the building industry and hospitality industry*.'[2] The ACTU is unable to find

[2] Forward with Fairness: Labor's plan for fairer and more productive workplaces, p 17.

any reference in either Forward with Fairness or the Policy Implementation Plan that suggests that the specialist divisions would be constituted by statute.

The ACTU does not deny that there is a role for some industry specialisation within the Office of the Fair Work Ombudsman. However it is preferable that this be done administratively rather than by statute, to ensure that resources can be deployed to areas of greatest need across the entire economy, and in response to emerging needs. This is because:

- As we noted above, creating a separate inspectorate invites and entrenches arguments about the reach of its jurisdiction which are not triggered if the unit is established administratively.

- The operational autonomy of Fair Work Ombudsman and the Fair Work Building Industry Inspectorate could lead to divergence of the policies, programs and practices with no way to resolve inconsistencies. For example, the Fair Work Building Industry Inspectorate may continue the ABCC's 'prosecution-first' enforcement policy, while the Office of the Fair Work Ombudsman is likely to adopt a 'prosecution-last' approach. We are not confident that the proposed Advisory Board would be able to achieve a synchronisation of activities and approaches.

- The culture that develops within any law enforcement agency is critical to its success. We strongly believe that an inspectorate that is an administrative unit within the Fair Work Ombudsman is more likely to develop a successful culture. Rotation of staff within the Office of the Fair Work Ombudsman would expose inspectors and other staff to new perspectives. In contrast, we fear a separate inspectorate will struggle to develop an impartial enforcement culture, and that the deep distrust of the ABCC felt by many workers is likely to carry over to the new Fair Work Building Industry Inspectorate.

Under our model regular workplace inspectors would be able to enforce the law using their ordinary powers. The Ombudsman could assign staff and resources to the unit. If the Ombudsman were not minded to create such a unit, the Minister could direct the Ombudsman to do so, under her power to issue general directions. This model retains the benefit of maximum flexibility for the Government (and the Office of the Fair Work Ombudsman) and could also be used to implement the promised specialist division for the hospitality industry.

4.1 Power of intervention

The ACTU notes that, contrary to Mr Wilcox's recommendation,[3] it is proposed that the new Inspectorate will retain the right to intervene in any proceedings under the FW Act or the Independent Contractors Act. Mr Wilcox opposed this because of the risk that a case could be hijacked, and preferred that right to intervene be granted by FWA or the Court. In our view, if a right to intervene is to be retained it should be identical to that conferred on the Fair work Ombudsman under section 539 of the FW Act.

It would be highly inappropriate for an inspectorate, which is established to *enforce* the law, to be involved in proceedings relating to private *interest-based disputes* about enterprise bargaining, including applications for secret ballots, bargaining orders and suspension of industrial action.

5. THE FAIR WORK BUILDING INSPECTORATE ADVISORY BOARD

The ACTU support the establishment of an advisory board to provide guidance regarding the programs and priorities of industrial inspectorates, and believes this model could be applied more broadly to the Office of the Fair Work Ombudsman.

[3] Recommendation 9.15. p99

5.1 Composition and quorum

The ACTU believes that the decisions of the Advisory Board should be supported representatives of industry. This could be achieved by amending the composition of the Board to increase industry representation (for example increasing the employer and employee "representatives" and reducing the other members appointed under proposed subparagraph 22(e)) and amending the quorum requirements to include a two third majority vote.

Regardless of the composition of the Board, proposed section 26G(2) should be amended. It is inappropriate to specify that a decision of the Board cannot be taken unless each of the Chair, the Director and the Fair Work Ombudsman is present. This would mean that any one of these people has a veto over decisions.

5.2 Requirement that Director have regard to the recommendations of the Board

Regardless of the location and composition of the specialist inspectorate, the Bill does not provide sufficient nexus between the work of the Advisory Board and the work of the Director and the Inspectorate.

In her second Reading Speech the Deputy Prime Minister said *"the director will consider their recommendations when determining the policies and priorities of the building inspectorate"*

However the Bill does not give effect to this statement. The Director should be required to have regard to the recommendations of the Advisory Board and to report to the Board on how the recommendations have been implemented or to give reasons why they have not been implemented. This could be achieved by:

(a) amending section 10 to read "The Director has the following functions: having regard to the advice of the Advisory Board, to promote:…"; and

(b) inserting into proposed clause 14 Annual Report a new clause (d) as follows: details of measures taken by the Director in response to recommendations of the Advisory Board.

6. REPEAL OF INDUSTRIAL ACTION LAWS AND PENALTIES

The ACTU strongly supports the repeal of Chapters 5 and 6 of the Principal Act. The government was elected with a mandate that one set of industrial laws should apply to all workers, including those in the building and construction industry. The Fair Work Act narrowly confines employees' ability to take protected industrial action, and provides a myriad of opportunities for employers to obtain relief against action taken outside these narrow confines.

The repeal of Chapters 5 and 6 will give effect to the fundamental legal principle of the equality of all persons before the law. It will ensure that conduct that is not unlawful when engaged in by every other worker (such as taking unprotected industrial action outside the life of a workplace agreement) is similarly not unlawful in the construction industry.

The repeal also introduces a more proportionate penalty regime. In our submissions to Mr Wilcox the ACTU noted that the level of the penalty in the BCII Act is out of all proportion to the public harm (if any) occasioned by the taking of unprotected industrial action. We noted that the maximum fine ($22,000 for a natural person, and $110,000 for a body corporate) is roughly on par with the fines for the following criminal offences under the Victorian Crimes Act 1914:

- sex offenders loitering near schools (section 60B(2A)(b));
- attempting to destroy evidence to be used in legal proceedings (section 254, 321P); and
- attempting to make a bomb hoax (section 317A, 321P).

We also noted they were equivalent to fines, under Commonwealth legislation, for such morally reprehensible conduct as:

- giving false evidence to a Royal Commission, or the Australian Crime Commission;
- recruiting people to serve in foreign armies;
- trafficking in pornography in certain Aboriginal communities; and
- deliberately misleading people in relation to a company's affairs, financial products, or when providing financial advice.

7. COERCIVE POWERS

7.1 Preliminary remarks

The ACTU opposes coercive interviews in the industrial jurisdiction. We do not think that the "safeguards" proposed by Mr Wilcox, or contained in the Bill remedy the injustice of having to submit to a forced interview. As we noted in our submission to this Committee last year many current members of the government once shared this view.

At the time the Bill was introduced into the House of Representatives the press commentary revealed a level of ignorance about the scope and use of the coercive powers. It is important to recall that:

- these powers have no connection with breaches of the criminal law. Allegations of violence or criminal damage will be investigated by police. These powers will be used to investigate breaches of some civil penalty offences under the Fair Work Act for example underpayments of wages, the organising of industrial action during the life of an agreement, or sham contracting.

- these powers are not aimed at suspected wrongdoers. In fact, because the evidence given by a person cannot be used to incriminate them, the powers are aimed at the associates of alleged wrongdoers, be they a colleague and co-worker, spouse or other family member or professional advisors. The powers can be also be used to obtain information from bystanders who have no connection to any building industry participant.

- the ordinary protections of private and confidential information are overridden. This means that confidential information relating to a person's health, financial affairs, membership of a trade union or information provided to an advisor (such as an accountant, a or trade union industrial officer) may be compulsorily obtained from someone who has been provided the information in a privately and confidentially .

Having said that, the safeguards proposed in the Bill represent a considerable improvement upon the existing provisions. The ACTU assumes that all Senators will support:

- the requirement that a presidential member of the AAT must authorise the issuing of examination notices, after being satisfied that the information is relevant, other methods to obtain the information have been unsuccessful, and that the circumstances warrant the use of coercive powers;

- the rights of any person subjected to a coercive interview to legal representation by a lawyer of their choice, the right to refuse to provide information that is subject to lawyer-client privilege or public interest immunity, and the reimbursement of expenses including legal expenses by the Commonwealth; and

- supervision of the coercive examination by the Commonwealth Ombudsman.

We therefore limit our submissions to the implementation of these safeguards.

7.2 The process for issuing examination notices

Proposed Subsection 47(1)(f) would require the AAT member to be satisfied, having regard to all of the circumstances, that it is appropriate to issue a notice. However there is no mechanism that ensures that the AAT member is cognisant of all the circumstances.

In particular there is no mechanism to ensure that the AAT member is made aware that the subject of the notice is claiming a public interest immunity or that the information is subject to legal professional privilege.

We recognise that Mr Wilcox recommended that applications be heard *ex parte*. However, we urge that the Bill be amended to confer a right to be heard upon the person who is the subject of the application for an examination notice.

As currently drafted the Director is not under any obligation to advise the AAT member that the subject of the notice is, for example, the spouse of a person suspected of breaching a law or is a minor. Nor is the Director required to disclose to the AAT member the reasons that a person may have for refusing to participate in an interview under the general powers of investigation. For example a person might claim the information is protected by privilege or was otherwise provided in confidence. In such cases the AAT member would be able to weigh the competing public interests.

It is in fact likely that such circumstances will frequently arise. Because the information gleaned under the coercive powers cannot be used against the person who is the subject of the examination, the coercive powers have been frequently used against people who are not suspected of any wrongdoing. This includes people who are in positions of trust, and have both statutory and professional obligations to protect confidential or personal information. Certain

communications between union officials including union members or between employers and their accountants and other professionals constitute confidential or personal information. The AAT member needs information about the competing public interests in determining whether to issue the notice.

While the Director could be required to disclose all relevant circumstances, a simpler and more reliable way to ensure that the AAT member is appraised of all of the circumstances of the matter is to hear from the person who is the subject of the application.

7.3 The criteria used to determine whether to issue a coercive notice

The AAT member must not issue a notice unless he or she is satisfied of the factors listed in proposed section 47. An investigation or investigations must be on foot where the powers have not been "switched off". There must be reasonable grounds to believe the person the subject of the notice has relevant information, and that other methods of obtaining the information have been unsuccessfully attempted or would be inappropriate. The information sought must be likely to be of assistance in the investigation and it must be appropriate having regard to all the circumstances to issue a notice.

The Bill weakens the tests proposed by Mr Wilcox:

- Proposed Subsection 47(1)(e) requires that the information is "likely to be of assistance," whereas Mr Wilcox recommended that a notice only be issues where the information "is likely to be important to the progress of the investigation." The subsection should be amended to reflect the higher threshold.

- Proposed Subsection 47(1)(g) allows for the government to regulate additional criteria. The government has indicated it will include two additional matters that were recommended by Mr Wilcox: the nature and likely

seriousness of the suspected contravention; and the likely impact, insofar as it is known, on the person who is the subject of the examination notice. This would impose a requirement upon the Director to disclose information about the subject of the notice such as whether the subject is a minor. The ACTU supports the inclusion of each of these in the threshold. We believe this should be done through amendment to the Bill rather than by regulation.

Both the Explanatory Memorandum and the Second Reading Speech indicate that that coercive powers would not be used except where the AAT member is satisfied that "all other methods of obtaining the material or evidence have been tried or were not appropriate" [emphasis added]. However this is not guaranteed in the Bill. Proposed section 45(5)(e) requires the Director to set out in the application details of methods that have been tried, but it does not require the Director to exhaust the investigation methods available under the Fair Work Act. Proposed section 47(1)(d) requires the AAT member to be satisfied that "any other methods" have been unsuccessful or are not appropriate. The Bill should be amended to require the Director to have exhausted the ordinary powers prior to making and application.

7.4 The role of the Director

The Director must not make an application unless he or she believes on reasonable grounds that a person has relevant information and that the person is capable of giving the information. While presumably a competent Director would, as a matter or practice, refrain from making an application until he or she was satisfied that the statutory threshold was met, there is no obligation that he or she do so. The Bill should be amended so that the Director must not make an application unless the objective statutory thresholds have been met. This is consistent with the expectation, at paragraph 122, that it is expected that the Director take these matters into account. The proposed amendment would ensure that applications are made as a last resort.

7.5 The form and content of examination notices

The examination notices should describe how and where documents are to be produced but there is no requirement that they specify the type of documents to be produced. The Bill should be amended to require the AAT member to specify the nature of the documents that are the subject of the examination notice.

8. THE INDEPENDENT ASSESSOR AND THE SWITCHING ON AND OFF OF THE COERCIVE INVESTIGATION POWERS

The Bill provides that an "approved person" (to be defined in regulations) can apply to a new authority to "switch off" the application of the coercive powers in respect to particular projects. In our view, if the coercive powers are to remain, then they should only be available where there is a compelling public interest justification. This could be achieved by redrafting the Bill so that projects commence without coercive powers being available, and allow interested persons to make application to the Independent Assessor to "switch on" the powers.

This would be consistent with the approach of the Deputy Prime Minister in her second reading speech, where she says that "the legislation is aimed at driving cultural change in the industry and focusing compliance activities where those activities are most needed."

8.1 The commencement of the provision

Proposed section 38 of the Bill provides that applications to switch off the coercive investigation powers will be available for projects if the building work that the projects consists of or includes commences the commencement of the provision – proposed to be 1 February 2010.

We understand the government intends that applications to switch off the coercive powers will not be available for pre-existing projects where building work, including preparatory work as described in Section 5 of the Principal Act

have commenced on any part of a project. This would exclude an estimated $42bn of non residential construction (excluding mining) forecast to commence in the second half of 2009, which may not reach completion for several years. It may also prove difficult, in years hence, for the Independent assessor to pinpoint accurately whether the building work commenced before or after 1 February 2010.

It would be preferable, and simpler, if the new regime governing information gathering powers, including the ability to switch them off, apply uniformly to all building projects from 1 February 2010 regardless of the stage of the project, and we propose that the Bill be amended so that the provision apply in relation to building projects whether or not the project begins on or after the commencement of the provision.

8.2 Applications in respect to multiple projects

Proposed section 40(3) makes clear that an application can be made in respect to more than one project. To ensure consistency, the heading of proposed section 39 should refer to projects and section 39(2) and (3) should be amended to refer to 'project or projects'.

8.3 Standing to bring an application: interested persons

We understand the government intends to make regulations conferring standing upon persons who are building industry participants in relation to a project or projects. The ACTU understands that this would extend to an association that was able to represent employers or employees in respect to the project concerned, regardless of whether they are covered by particular workplace instruments.

This approach seems sensible. It replicates the approach taken in the *Fair Work Act* where a union's eligibility rules are the primary means to determine whether it has representational rights at a workplace. As we understand it this would mean

that a union that was able to exercise right of entry, or be covered by an enterprise agreement or make a greenfields agreement in respect of the building project(s) in question would be an interested person.

The ACTU suggests that both peak councils and State Ministers should also have standing to make applications. Peak councils could make a single application supported by a number of unions or employer associations, and may be in a better position to obtain information about who the participants are for a particular project.

State Ministers have an interest in the workplace relations regime that applies in their State, particularly as it affects the health of the State economy, and the liberty of their citizens. These interests exist regardless of whether the State has a commercial interest in the project.

Finally we oppose employer suggestions that a person could be disqualified from making an application based on their record of compliance. We do not oppose a simple means to dispose of patently unmeritorious applications, but believe this is better dealt with as a matter of substance, not standing.

8.4 The criteria and process used by the Independent Assessor

Process

The Bill does not give sufficient guidance to Independent Assessor about the procedures to be applied in determining an application by an interested person. In our view, the following natural justice obligations should be provided for in the legislation. This need not require detailed regulation, but the following features should be enacted:

- An obligation on the Independent Assessor to be satisfied that evidence put to him or her about the prior conduct of a building industry participant is reliable;

- A requirement that the Independent Assessor publish reasons for decision; and
- Where an application (under proposed section 43) to reconsider a decision of the Independent Assessor is made, the applicant must be advised and be given an opportunity to be heard.

Proposed section 39(3)(a) provides that the Independent Assessor must have regard to the Objects of the Act, the public interest, and any matter prescribed in regulations.

The ACTU understands that the government intends to regulate that the Assessor be required to have considered the views of other participants in the project. While we recognise the intention of this, the regulation will need to be drafted to reflect the fact that building projects will include many participants, not all of whom will be known at a particular time, and many of whom have only peripheral involvement with a project.

The question also arises as to how the Independent Assessor is obtain the view of the participants. One option is to invite submissions. However, we believe that the applicant and the Director should be capable of providing the Independent Assessor with the information required. Alternatively, the Independent Assessor could be empowered to solicit the views of an interested person if, in his or view, they could provide additional information that has not been obtained from the applicant or the Director.

The ACTU understands that the government intends to prescribe that the Independent Assessor must be satisfied that the building industry participants have a record of compliance with workplace laws.

While this is generally consistent with the Objects, the regulation will need to be drafted to accommodate the problem of participants having only peripheral

involvement in a project. The regulation should focus upon the conduct of participants who will have significant involvement in the project. The regulation should also be drafted to ensure that the history of compliance relates to the conduct of participants who will be involved in the project, and not related persons over whose conduct the participants have no means of control.

9. CONCLUSION

The ACTU reluctantly urges the Committee to recommend the Bill be passed, with the amendments we have recommended. We do despite our deep disappointment that the government has chosen to retain coercive information gathering powers, which have no role in our workplace laws, and we urge the Committee to support the additional safeguards we have recommended to ensure that these powers are used only as a last resort.

APPENDIX 1

Submission to the Wilcox Consultations on the Proposed Building and Construction Division of Fair Work Australia

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Dear Secretariat

Submission to the Wilcox Consultations on the Proposed Building and Construction Division of Fair Work Australia

Please find enclosed the joint submission of the ACTU and the various State and Territory Trades and Labour Councils to the Wilcox Consultations on the Proposed Building and Construction Division of Fair Work Australia.

If you have any queries please do not hesitate to contact me.

Yours sincerely

Jeff Lawrence
Secretary

SUBMISSION TO THE WILCOX CONSULTATIONS ON BEHALF OF THE ACTU AND STATE AND TERRITORY LABOR COUNCILS

1 THE FAIR WORK BILL 2

2 THE 'SPECIAL' NATURE OF THE BUILDING AND CONSTRUCTION INDUSTRY? 5

3 AUSTRALIA'S INTERNATIONAL OBLIGATIONS 12

4 THE NEED FOR A SPECIALIST DIVISION 13

5 SPECIFIC RESPONSES 14

5.1 SPECIAL LAWS 14
5.2 ADDITIONAL PENALTIES FOR TAKING INDUSTRIAL ACTION 15
5.3 COERCIVE INTERROGATION 17
5.4 STRUCTURE OF THE INSPECTORATE 25
5.5 ACTIVITIES 27
5.6 USE OF INFORMATION 32
5.7 TRANSITION TO FWA 34

CONCLUSION 35

GLOSSARY 36

This submission is put in response to the Discussion Paper on behalf of the ACTU and the State and Territory Trades and Labour Councils.

Our submission will specifically address the questions asked in the 'checklist' appended to the Discussion Paper. However, before doing so, we would like to make some introductory remarks.

1 THE FAIR WORK BILL

The government has now introduced its Fair Work Bill into the Parliament. Assuming that no major amendments are made by the Senate, this Bill contains the future framework for regulating industrial relations in the building and construction industry. Its contents necessarily affect the discussion in the Discussion Paper, and go directly to some of the questions you have asked. As such, it is necessary to note some of the Bill's important features.

First of all, the laws are of general application. There is *no* provision for special oppressive laws to apply to any particular industry or group of workers. The same penalties apply in respect of breaches of the law across every industry sector.

Secondly, the law strongly protects employees' right to act collectively, and to strike. This is to be expected from a law which is expressly based on 'fairness and representation at work … [including] the right to freedom of association and the right to be represented'.[1] In particular, the laws are designed to 'take into account Australia's international labour obligations'.[2]

Industrial action (outside the nominal life of agreements) is lawful, whether or not it may be 'protected'.[3] If protected or unprotected action is occurring (whether unlawful or not), only an affected party (or, in some cases, the Minister) can apply to have the action

[1] FW Bill cl 3(e).
[2] FW Bill cl 3(a)
[3] FW Bill cl 417. Cf BCII Act s 38.

stopped; the inspectorate has no such power.[4] It is both lawful and protected to take industrial action in support of agreement even if unprotected third parties are also taking action.[5] It is also lawful for workers, and unions, to bargain for workplace agreements that deal with matters that pertain to the employer-union relationship,[6] including better union rights of entry (save for entry for discussion or compliance purposes).[7]

Thirdly, unions maintain their traditional role in compliance. Unions may enter an employer's premises to investigate suspected breaches of the law affecting a member, and may prosecute those employers who are in breach of the law.[8] This is an important, and longstanding, compliance function, which the construction unions routinely perform in this sector.

Fourthly, although the Terms of Reference proposed a 'Fair Work Inspectorate' as part of Fair Work Australia, it appears that the government has instead decided to establish the industrial inspectorate as the Office of the Workplace Ombudsman. This will be an independent statutory office that is separate from Fair Work Australia.

The functions of the head of the office, the Ombudsman, are:

- firstly, to promote compliance with the law 'by providing education, assistance and advice';
- secondly, to 'monitor' compliance with the law, and to 'investigate' suspected breaches; and
- thirdly, to 'commence proceedings' against those in breach of the law.[9]

It is obvious that this 'enforcement pyramid' has a focus on prevention of breaches through education, with prosecution as a last resort.

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[4] See FW Bill cll 417(2), 418(2), 419(2), 423(7), 424(2), 425(2), 426(6). Cf BCII s 39(1).
[5] Cf BCII Act s 40.
[6] FW Bill cl 172(1)(b). Cf WRA s 356(1)(f); Workplace Relations Regulations 2006 (Cth) rr 2.8.5, 2.8.7.
[7] FW Bill cl 194(f).
[8] FW Bill cll 481, 539.
[9] FW Bill cl 682.

The Ombudsman is independent of both the Minister and the President of Fair Work Australia (although the Minister may issue him or her with general directions, which are disallowable by the Senate).[10] The Ombudsman may appoint Fair Work Inspectors, and may issue them with general directions (which are disallowable) or specific instructions about the exercise of their statutory powers (provided the direction is not inconsistent with those powers).[11] In accordance with current practice, it is understood inspectors with special skills in dealing with particular issues or industries may be assigned, within the inspectorate, to work in those fields.

As under the current legislation, the inspectors have the power to enter premises,[12] interview persons (with their consent),[13] inspect documents (even without their custodian's consent)[14] and, ultimately, bring proceedings against those in breach of the law[15] or else refer the matter to another agency for enforcement.[16] They will also have a new power to issue 'compliance notices', requiring persons to remedy a breach of the law in a specified way.[17] The activities of the inspectorate are transparent in that the Ombudsman makes regular reports to the Minister[18] and to Parliament.[19] Furthermore, stakeholders will have the capacity to provide feedback, to the Ombudsman and to government, on the activities of the Office under the proposed new laws.[20]

We provide this summary of the Bill because, as we argue below, we consider that it provides an adequate and appropriate framework for compliance in industrial relations, whether in the building and construction activity or otherwise. The important features of the general compliance regime (which we will stress repeatedly in this submission) are:

[10] FW Bill cl 684.
[11] FW Bill cll 704-5.
[12] FW Bill cl 708.
[13] FW Bill cl 709(b).
[14] FW Bill cl 712.
[15] FW Bill cl 539.
[16] FW Bill cl 718.
[17] FW Bill cl 716.
[18] FW Bill cl 685.
[19] FW Bill cl 686.
[20] FW Bill Explanatory Memorandum, lxxvii.

- No 'singling out' of particular industries, although inspectors with special skills or expertise may be assigned to deal with particular industries;
- An enforcement pyramid that has its focus on education, not prosecution;
- An even-handed approach to ensuring that *all* parties comply with industrial law;
- No coercive questioning powers; and
- A truly independent and respected compliance unit.

We now turn to examine in more detail the question of whether any features of the building and construction industry warrant a departure from the standard model of industrial regulation that is proposed in the Fair Work Bill.

2 THE 'SPECIAL' NATURE OF THE BUILDING AND CONSTRUCTION INDUSTRY?

The Discussion Paper notes Royal Commission Cole's opinion that the building and construction industry is special or 'singular' in nature.[21] This singularity is said to stem from an alleged inequality of bargaining power between supposedly powerful unions with 'long-term aspirations' to improve working conditions for their members, and supposedly vulnerable head-contractors who are sensitive to short-term delays and additional project costs. These contractors are said to be unwilling or unable to oppose allegedly unlawful industrial conduct because of the weakness of legal compliance mechanisms, and because they desire the long-term co-operation of unions in the industry.[22]

We are pleased that the Discussion Paper notes that these views are 'controversial',[23] and does not adopt them.[24] However, because the Terms of Reference essentially assume that there *is* something 'singular' about the building and construction industry that, at the very least, warrants a 'special' (or rather 'Specialist') division of Fair Work Australia (or the

[21] Discussion Paper [4].
[22] Discussion Paper [4], [6].
[23] Discussion Paper [8].
[24] Discussion Paper [9], [11].

Office of the Fair Work Ombudsman), we think it is necessary, once again, to rebut some of the myths about the building and construction industry.

Myth 1: Vulnerable Employers

The building and construction industry was characterised in the Cole Royal Commission as being dominated by powerful unions, who are able to impose their wishes upon 'vulnerable' employers.

However, the evidence shows that the true picture of the building and construction industry is one of an industry dominated by large, sophisticated employers, and four unions that have been progressively weakened during 12 years of a Coalition government. We do not think that the evidence bears out Royal Commissioner Cole's supposition that there is an imbalance of power in the industry, in favour of unions.

The power of the large employers is borne out in the statistics. In 2006/07, the largest 100 companies (all having revenues above $50 million per year) won a 68% share of the $55.3 billion in contracting work awarded. The top 10 companies accounted for 55% of this take.[25] The largest entity, the Leighton group of companies, won $11 billion in work. Its revenue in 2007/08 was $14.5 billion, and its profit after tax was $608 million.[26]

According to the most recent ABS data, in 2002–03 construction businesses with an annual turnover of more than $10 million accounted for 51% of income earned in the sector.[27] They directly employed 24% of all employees in the industry (some 105,000 people) but, most importantly, provided $13.9 billion in contracting work. This is equivalent to work for 292,000 full-time sub-contractors.[28] In other words, large

[25] Housing Industry Association, *Construction 100* (2006-2007) 2.
[26] Leighton Holdings Ltd, *Concise Annual Report 2008* (2008) 10.
[27] ABS cat 8772.0, Table 2.
[28] Assuming average weekly cash earnings of $915 for contractors (working proprietors of incorporated businesses): ABS cat 6306.0, Table 15.

businesses employed, or controlled the work of, over 397,000 people.[29] That represents 55% of the workforce of the entire sector.

Myth 2: Uncommitted Employees

A second myth is that the industry is characterised by high job turnover, which causes low employee commitment to the employer (and to stable industrial arrangements), and a greater preparedness on the part of employees to 'hold the employer to ransom' for higher wages in the short-term, without consideration of the long-term impact on the viability of the business.[30]

However, the evidence does not bear this claim out. Seventy eight percent of employees in the sector have been with their employer for more than 12 months, 66% for over 2 years, and 24% have worked for the same employer for more than 10 years.[31] These percentage figures are exactly consistent with the all-industries averages. In other words, the construction industry is *not* a high-turnover industry.

The real reason for any lack of commitment on the part of some employees to their employers is that many employees are exploited by their employer. The hard facts about working in this industry, as an employee, are as follows:

- Wages are subdued: in 2006, full-time non-managerial male employees earned an average of $27.20 per hour, which was below the all-industries average of $27.50. Comparable women earned $21.70 per hour, which was is 11% below the female all-industries average of $24.40 per hour. Only women working in the hospitality and retail sectors received a lower hourly wage.[32]
- Many workers are denied standard leave entitlements: 24% of employees are casual and so do not receive paid sick leave or paid annual leave. However, 4.5% of permanent employees (292,700 people) are also denied these entitlements

[29] ABS cat 8772.0, Table 2.
[30] See, eg, Cole Report, 5.
[31] ABS cat 6209.0, Table 4.
[32] ABS cat 6306.0, Table 7.

(probably unlawfully). Furthermore, only 27% of employees receive paid parental leave (compared to the all-industries average of 40%), and only 66% receive long service leave.[33]

- Apprentices are particularly vulnerable: in Victoria, a newly apprenticed bricklayer earns $4.60 per hour.[34] Apprentices are particularly vulnerable to bullying and exploitation because of their youth and inexperience. Women and indigenous apprentices appear to be particularly at risk.[35]

- Foreign workers are also vulnerable: there are 7,220 foreign construction workers legally working in Australia under subclass 457 Business (Long Stay) visas ('section 457 visas').[36] The anecdotal evidence of severe exploitation of these workers has recently motivated the government to seek to pass laws for their protection.[37]

- Underpayment and non-payment of entitlements is rife: between 1996 and 2002, the CFMEU recovered over $18 million from employers in unpaid wages and entitlements (including superannuation and redundancy entitlements), in New South Wales alone.[38]

- Employers are often able to escape their obligations to employees: for example, by engaging workers who are, at law, employees as 'independent contractors', or by 'phoenixing' the business to escape debts owed to workers.[39]

- Most workers have no protection from unfair dismissal: of the 944,000 workers in the sector, about 40% are contractors and so have no unfair dismissal rights.[40] Of the remaining 560,000 people working as employees, 82% worked in small businesses employing fewer than 20 people, and so are not covered by federal

[33] ABS cat 6306.0, Table 17; ABS cat 6359.0, Table 10.
[34] *National Building and Construction Industry Award* [AW790741CRV] cl 20.6.3(c).
[35] Supplementary submission of the CFMEU NSW Branch (Construction and General Division) to the Building Industry Inquiry, 6.
[36] Department of Immigration and Citizenship, *State/Territory Summary Report: Subclass 457 Business (Long Stay) (2007-08)* 10.
[37] Migration Legislation Amendment (Worker Protection) Bill 2008.
[38] Submission of the CFMEU NSW Branch (Construction and General Division) to the Building Industry Inquiry, Attachment A, 2-3.
[39] Ibid 2.
[40] ABS cat 6359.0, Table 3; ABS cat 8772.0, Table 2.

unfair dismissal laws.[41] In addition, perhaps 13% of employees had been with their employer for less than 6 months, and so would be excluded from federal (and most State) unfair dismissal laws in any event.[42]

- Workers are vulnerable to employer disregard for their safety: in 2005-06, there were 14,360 injuries in the sector requiring one or more weeks off work, and 33 fatalities at work. This is the third highest incident rate of any industry in Australia.[43] Many workers are so concerned for their employment prospects that raising safety concerns is often not an option for them. The ABCC has consistently failed to address these occupational health and safety concerns.

This high degree of vulnerability by employees, on the one hand, and the strong position of employers, on the other, is the very reason why unions do, indeed, have legitimate 'long-term aspirations' to improve working conditions for their members, as the Royal Commissioner pointed out.

Myth 3: The lack of international competition causes problems

A third myth is that the absence of international competition in the domestic industry means that the industry is protected from the competitive forces that would otherwise limit, or prevent, industrial disruption. The argument is that, in the absence of these market forces, state regulation is needed to ensure that workers' wage claims are kept in check, and that industrial disruption is minimised.

However, the evidence shows that there is no link between the degree of international competition in an industry, and either wage outcomes or levels of industrial disputation. For example, the hospitality industry also faces a very low level of international competition, but has perhaps the *lowest* rate of industrial disputation, and pays the some of *lowest* wages in the economy. At the other end of the spectrum, mining (non-coal) is

[41] ABS cat 1321.0, Table 3.3.
[42] ABS cat 6209.0, Table 4.
[43] Australian Safety and Compensation Council, *Construction* (2008) Information Sheet, 1.

one of the *most* trade exposed industries, but has an extremely low level of industrial disputation, and pays the highest wages in Australia.[44]

In the words of a famous American TV show: 'This myth is busted'.

Myth 4: Unions undermine growth and productivity

A fourth myth, adopted by the Cole Royal Commission, is that union activity in the industry undermines economic growth and productivity. A related myth, propagated by the authors of the Econotech report (commissioned by the ABCC) is that that the introduction of the BCII Act regime has boosted growth and productivity.

The Econotech report suggested that unions had traditionally inflated costs for commercial builders, by up to 17%, but that the differential suddenly fell to less than 2 per cent in 2007, allegedly due to the introduction of the BCII Act. We are pleased that the Discussion Paper queries the 'provenance' of these figures, and disputes the conclusions that Econotech seeks to draw from them. Instead, the Discussion Paper correctly calls for 'hard evidence' of the economic circumstances of the industry.

The available evidence is as follows. The construction industry has grown reasonably steadily at an average rate of 3.9% over the last 20 years (in terms of value added, in volume terms).[45] There was a drop of 14% in value added output following the introduction of the GST in 2001, but there has been a strong recovery since then, with a construction boom (some would say' bubble') fuelled by a low inflation rate and high levels of investment in the mining sector. Over the long term, however, construction is classified as a 'low growth' sector, compared to a sector like telecommunications, which has grown at 8% per year for the last 20 years.[46]

[44] Industrial disputes data from ABS cat 6321.0.55.001, Table 2b; earnings data from ABS 6306.0, Table 7.
[45] ABS cat 5260.0.55.001, 49.
[46] Ibid 17.

The evidence shows that most of the growth in the sector has come from an increase in the quantity of labour inputs – that is, additional employment and/or additional hours worked by existing workers. This accounts for 2.3 percentage points of the 3.9% average annual increase, or 60% of the total. A further percentage point (25%) of the growth rate can be explained by an increase in capital investment in the industry each year. Only 0.7 percentage points (18%) can be explained by an increase in 'multifactor productivity', that is, increases in the quality or efficiency of capital and labour inputs (ie more skilled and efficient workers, working with faster and more effective machines and technology).[47]

It is not possible to establish what part of the 0.7% annual increase in multifactor productivity is due to better quality capital, rather than better quality labour, inputs. However, given that the last 20 years has been one in which the application of new information, communication and design technologies have resulted in significant (capital) productivity increases in many industries, it is reasonable to assume that the introduction of computers and computerised equipment in the sector represent a large part of the 0.7 percentage points. This interpretation is given weight by the figures showing that investment in equipment in the sector has skyrocketed since the late 1990s, especially investment in 'electrical and electronic equipment', which doubled between 2000 and 2006.[48] Greater levels of capital investment have been accompanied by greater returns to capital: in 1985/86, capital owners took 16 per cent of the income generated in the construction sector. By 2005/06, that share had doubled, to 32 per cent.[49]

In summary, then, we think that the true economic picture for the building and construction industry can only be understood if one considers all of the evidence over a sufficiently long period of time, and by considering the underlying causes of long-term productivity improvements. These causes are usually diffuse, and slow to show results. They include technological changes, improvements to workers' education and training,

[47] Ibid.
[48] Ibid 51–2.
[49] Ibid 18 (Table 2.29).

the development of more sophisticated and efficient management and industrial relations practices, and so forth.

To simply focus on an arbitrary measure (whether 'labour productivity' or 'commercial cost differentials') in a particular year is misleading. It is even more misleading to attribute short-term fluctuations to factors, such as short-term legislative changes, which are unlikely to affect the quality of capital or labour inputs. Does anybody really think that the BCII Act has induced a single employee to work smarter, harder, and more efficiently? Does anybody seriously contend that the passage of the Act has motivated a single employer to introduce a piece of new equipment that, without the passage of the law, they would not have introduced?

And so we would submit that the true picture of the building and construction industry is of an industry that is enjoying the productivity benefits of new technology, and a range of other factors, and is likely to continue growing at, or near, its long-term average of 3.9% per annum (ignoring the effects of any short-term slowdown which might occur in the next couple of years because of the present economic difficulties).

3 AUSTRALIA'S INTERNATIONAL OBLIGATIONS

The final introductory remark that we wish to make, in response to the background material included in the discussion paper, is in relation to Australia's international obligations. The Discussion Paper notes that fact that the ILO considers that the BCII Act breaches our international obligations, by restricting workers' rights to freedom of association, and by allowing the ABCC to interfere in union affairs. It acknowledges that the views of the ILO '*may* warrant attention in the design of the Specialist Division' (emphasis added).

With respect, we consider that it is *imperative* that the government, and this consultation process, pay serious attention to the fact that the existing laws are in breach of our international obligations, and take all necessary steps to remedy this situation. The fact of

our breach of key ILO Conventions – which have been declared as establishing 'fundamental' rights – is an extremely serious matter.[50] We are now on the ILO watch-list of countries in continued breach of these fundamental rights, in the company of countries such as Myanmar, Columbia and Gabon.[51]

Given that the Terms of Reference are premised upon the importance of ensuring compliance with the 'rule of law' in the domestic building and construction industry, it would be unfortunate if the consultations ignored the importance of compliance with, and the rule of, international law, in respect of all matters touching upon the establishment and operation of the Specialist Division of FWA.

We therefore contend that the views of the ILO not only 'may' warrant attention in these consultations, but that it is absolutely necessary that the outcome of these consultations is consistent with Australia's international obligations, and the rule of international law.

4 THE NEED FOR A SPECIALIST DIVISION

The unions, and many others, have consistently maintained the position that building and construction workers, and their representative organisations, should not be discriminated against by special laws that single the industry out for 'special' treatment, particularly when such treatment involves restrictions on workers' fundamental rights, and the imposition of an aggressive, coercive and biased inspectorate for the industry.

We continue to maintain the position that industrial law should be enforced in the building and construction industry as it is in every other industry – by the general industrial inspectorate, wielding the traditional robust powers of entry and inspection, and with an even-handed focus on encouraging compliance with industrial law by *all* parties.

[50] ILO, *Declaration on Fundamental Principles and Rights at Work* (1998).
[51] ILO, *350th Report of the Committee on Freedom of Association* (June 2008) 52.

Accordingly, we maintain our position that there is simply no need for a Specialist Division of FWA (or the Office of the Fair Work Ombudsman) for the building and construction industry. We have already pointed out that there is capacity, within the general inspectorate, to assign inspectors with specialised skills and experience in the construction industry to work on compliance issues within that industry. We consider that this is a more than satisfactory approach.

We acknowledge that the Terms of Reference inform you that the government has committed to establish a Specialist Division, of some sort, and ask you to report on 'matters related to the creation of the Specialist Division'. We do think that it is within the scope of this reference to recommend that the creation of the Specialist Division not be proceeded with. The Discussion Paper suggests that you 'must assume there will be a Specialist Division'.[52] With respect, we do not think this is the case, and think that it is open to you to simply recommend that the idea be abandoned by the government.

We now turn to address the specific questions raised in the discussion paper.

5 SPECIFIC RESPONSES

5.1 Special laws

The ACTU and Trade and Labor Councils have participated in these consultations on the basis that the general industrial law (as now proposed under the Fair Work Bill) will apply to all workers, including those in the building and construction industry. We understood that the only question before you, under the Terms of Reference, was whether there was a need for any specialist enforcement agency for the industry, under the aegis of Fair Work Australia.

We do not consider that it is within your remit to consider whether special laws are appropriate for the industry. We maintain our opposition to special oppressive laws for

[52] Discussion Paper 3.

any industry or group of workers. In particular, the special laws in question – namely, the additional penalties for taking protected or unprotected industrial action (BCII Act ch 5); the power of coercive interrogation (section 52); and the oppressive rules contained in the Code – are particularly objectionable. We set out our concerns about these provisions below.

5.2 Additional penalties for taking industrial action

Question 1(a) – Special laws

The BCII Act:

- imposes a penalty on conduct that is *not* unlawful when engaged in by other workers (such as taking unprotected industrial action outside the life of a workplace agreement); and
- more than triples the penalties for action that *is* unlawful, if engaged in by other workers (namely, taking unprotected industrial action during the life of an agreement).

These new, or increased, penalties violate the fundamental legal principle of the equality of all persons before the law.

Moreover, the level of the penalty is out of all proportion to the public harm (if any) occasioned by the taking of unprotected industrial action. For example, the maximum fine ($22,000 for a natural person, and $110,000 for a body corporate) is roughly on par with the fines for the following criminal offences under the Victorian *Crimes Act 1914*:

- sex offenders loitering near schools (section 60B(2A)(b));
- attempting to destroy evidence to be used in legal proceedings (section 254, 321P);
- attempting to make a bomb hoax (section 317A, 321P).

They are also equivalent to fines, under Commonwealth legislation, for:

- giving false evidence to a Royal Commission,[53] or the Australian Crime Commission,[54] or concealing evidence in an ASIC investigation;[55]
- endangering life at sea;56
- recruiting people to serve in foreign armies;57
- damaging the Great Barrier Reef,58 polluting the sea59 or an airport,60 or destroying a lighthouse;61
- trespassing onto Aboriginal sacred sites,62 or trafficking in pornography in certain Aboriginal communities;63
- engaging in market misconduct (such as market manipulation, market rigging and false trading)[64] or failing to disclose market sensitive information;[65]
- deliberately misleading people in relation to a company's affairs,[66] financial products,[67] or when providing financial advice.[68]

These Victorian and Commonwealth penalties are directed to morally reprehensible conduct that occasion serious harm to the community. The taking of unprotected industrial action is simply not in the same league.

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[53] *Royal Commissions Act 1902* (Cth) s 6H.
[54] *Australian Crime Commission Act* 2002 (Cth) s 33.
[55] *Australian Securities and Investments Commission Act* 2001 (Cth) s 67.
[56] *Navigation Act 1912* (Cth) ss 212, 268, 269A. Also operating an unsafe workplace on a ship, oil rig or offshore mine: *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) ss 15-16, 19, 22-5; *Offshore Petroleum Act 2006* (Cth) sch 3; *Offshore Minerals Act 1994* (Cth) ss 123, 183, 259, 308.
[57] *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 9.
[58] *Great Barrier Reef Marine Park Act* 1975 (Cth) ss 38A-K.
[59] *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth) s 26FEI.
[60] *Airports Act 1996* (Cth) s 131C.
[61] *Lighthouses Act 1911* (Cth) s 19.
[62] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 69.
[63] *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 103.
[64] *Corporations Act 2001 (Cth)* s 1041A-G.
[65] Ibid s 674.
[66] Ibid ss 1308-9.
[67] Ibid ss 1021D-K.
[68] Ibid ss 952D-G.

5.3 Coercive interrogation

Question 1(b) – Special laws

The BCII Act allows the ABCC to compulsorily interrogate any person who may have information or documents that are of interest to the ABCC. A person must submit to the interview, on pain of six months' imprisonment. They may have a lawyer present, but not necessarily a lawyer of their own choosing.

These are extreme laws that violate people's fundamental legal right to silence, as well as the right to legal representation. They overturn the presumption that it is the State which must prove a person's breach of the law, and that citizens are not compelled to assist the State to develop a case against themselves or against another person, unless they are ordered to by a court.

The Discussion Paper suggests that the obligation to submit to a coercive interview is no different to the obligation to respond to a subpoena, and that neither 'raise a human rights issue'.[69] However, there are significant important differences between the coercive interview process and a subpoena process.

The most important difference is that the latter process is controlled in an open fashion by an independent court, which acts to balance the interest of the applicant for the subpoena in obtaining relevant information, and the interest of the addressee in not being subjected to harassment, oppression or abuse. In contrast, the coercive interview process occurs in a closed interrogation room, and is controlled by Commissioners who are not obliged to consider the interests of the witness.

For example, as part of its control of proceedings, a court has discretion to set aside, or refuse to issue, a subpoena where:

[69] Discussion Paper [113].

- the applicant is seeking irrelevant information, or information that the addressee does not possess;
- the applicant is seeking relevant information, but it is not sufficiently particularised (ie the applicant is on a 'fishing expedition');
- answering the subpoena would be oppressive to the addressee; or
- the information held by the addressee is privileged (for example, under legal professional privilege).

On the other hand, there is little to stop ABCC Commissioners (apart from the protests of the interviewee's lawyer, if present), in their zeal to obtain information, from calling persons in for 'fishing expedition' interviews; from harassing witnesses (through, for example, holding long interrogations, or badgering the interviewee with oppressive questions); from asking interviewees to reveal privileged information (which the witness might not know they have the right to withhold), and so forth.

Secondly, a court has the discretion to decide the form in which the subpoena will be answered: whether the examination is held in public or in private, who may conduct the examination, to whom the information evidence may be disclosed, etc. If (as is the usual case for oral information) the subpoena is answered in open court, the witness has the protection of:

- the fact that the prosecutor is restrained in their questioning by ethical duties owed to the court;
- the defence of a legal representative of their choosing (who is able to insist on the witness being given a chance to respond to allegations made against them); and
- the presence of an independent judge who monitors and controls the proceedings, and who can stop the examination if it becomes oppressive.

On the other hand, the ABCC interviewers do not have formal ethical duties to the interviewee or the community at large (besides their statutory employment duties to

conduct themselves properly); they are not subject to the immediate oversight of a judge; and interviewees do not necessarily have the right to have their say (unless permitted by the interviewers).

The third difference is that a person who is subpoenaed is entitled to conduct money and, in addition, may be entitled to be reimbursed for their expenses in complying with the subpoena. In contrast, persons interviewed by the ABCC may be put to considerable expense in attending an interview (for example, in lost wages), but are not entitled to compensation.

In summary, we consider that the subpoena process is the appropriate mechanism for workplace inspectors to use if they wish to obtain relevant information from persons about possible breaches of workplace law.

We do not think that any analogies can be drawn to other areas of law, where coercive interviews are permitted in place of the subpoena process. As the Discussion Paper notes, this is only permitted where there is a public interest in the strictest enforcement of the

law. This occurs in those areas where non-compliance with the law would jeopardise:

- national security;
- public revenue and the capacity of government to function;
- effective and democratic governance by those in public office (including the police);
- the functioning of the economic system (as in cases of corporate fraud or anti-consumer conduct); or
- the safety of people at work.

The enforcement of industrial law (whether in the building and construction industries, or generally) simply does not go to these issues of vital public importance. It does not raise

questions of public safety, national security, the functioning of government, or the smooth operation of the economic system. Industrial law is merely concerned with the relationship between employers, employees and unions, just as rental tenancy law is concerned with the relationship between landlords and tenants. Inasmuch as it would be outrageous for an 'Australian Residential Tenancies Commissioner' to have powers to coercively interrogate people (including innocent bystanders) to investigate breaches of leases, it is wholly inappropriate for the ABCC to have coercive powers to enforce industrial law.

The Discussion Paper seems to be attracted to the Victorian OPI as a possible model for the proposed Specialist Division. We strongly oppose applying an anti-corruption model to the regulation of industrial law. First of all, the OPI's mandate is to investigate cases of 'police corruption and serious misconduct'. This mandate is inherently inapplicable to the industrial jurisdiction. Firstly, 'corruption' generally refers to an abuse of office, or perversion of the course of justice, by a person who holds a public office.[70] On this definition, 'corruption' cannot arise in an industrial setting, since the parties do not have public duties. Secondly, the 'serious misconduct' that the OPI investigates is relevantly limited to conduct which 'constitutes an offence punishable by imprisonment'.[71] In contrast, the industrial jurisdiction is a non-criminal jurisdiction; there is no relevant prohibition under the WRA or the BCII Act the breach of which results in imprisonment.[72]

In summary, it is clear that the role of the OPI is to investigate serious, criminal, misfeasance by persons who hold important public offices. Police officers' decisions directly impact upon the liberty (and, because of their possession of firearms, the life) of individuals in the community. Their strict adherence to the law is vital to the proper administration of the system of justice, and the safety of the community. This high public purpose is the reason why it has been given extensive coercive powers of investigation.

[70] See, eg, *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 6.
[71] *Police Integrity Act 2008* (2008) s 3.
[72] Apart from misconduct in relation to AIRC proceedings (such as giving false evidence, or contravening orders): WRA s 814(3).

These compelling public interest justifications are not present in the industrial jurisdiction. For this reason, we submit that it would be wrong to apply an OPI model to industrial relations.

In conclusion, we oppose coercive interview powers for inspectors in the Specialist Division (if one is created). We think that the capacity for inspectors to subpoena evidence from persons is an appropriate way for them to obtain evidence, and provides much greater protections for the legitimate rights and interests of persons from whom information is sought.

Questions 11, 12 – Safeguards

We have already put our view that there should be no power of compulsory interrogation. If workplace inspectors wish to obtain evidence from a person, in our opinion it suffices for them to use their (existing) power to commence legal proceedings and apply for interrogatories (directed to the defendant),[73] or subpoenas (directed to a third party witness).[74]

The criteria for taking this course of action are:

- Firstly, there are sufficient grounds for commencing proceedings – namely, there is sufficient evidence to commence prosecuting the case, and that it is in the public interest to do so;[75] and
- Secondly, that the court grants leave for the subpoena or notice to answer interrogatories to be issued – which it will only do if the person is likely to have relevant evidence to give.[76]

[73] *Federal Court Rules 1999* (Cth) O 16.
[74] Ibid O 27.
[75] WO Litigation Policy, above n 86, [9.4].
[76] See discussion page 17 above.

We believe that court control of the evidence-gathering process is vital to guard against abuse. It is simply not enough to have internal monitoring of the inspectors, whether by a supervisory board within any Specialist Division, or otherwise.

Question 13 – Expenses

We believe that a person who is compelled by a workplace inspector to provide evidence (for example, under a subpoena) should be compensated for any losses or expenses they occur in participating in the investigation or proceedings.

The rules of most courts already provide that a person who takes out a subpoena against a witness must give that witness conduct money (ie reimburse their travel expenses) and may also be ordered by the court to compensate them for their losses and expenses in complying with the subpoena.[77] We think that this is an appropriate provision.

5.4 The Code

The unions accept that the government has the right to set internal guidelines for government procurement. Indeed, we see merit in the government using those guidelines to promote good industrial practices, by preferring suppliers who pay decent wages and conditions, and who respect their workers' rights. Many State and foreign governments have taken this approach in relation to their own procurement codes.

However, the present Code and guidelines do not achieve these progressive objectives; on the contrary, they appear to reward employers who have engaged in poor industrial practices, such as strategies to defeat collective bargaining (for example, by refusing to negotiate collective agreements, and insisting on the use of individual agreements). They seek to use the Commonwealth's purchasing power to control industry outcomes, in areas that are far beyond the reach of the Commonwealth's constitutional power, and in ways which the government could never convince the Parliament to endorse.

[77] *Federal Court Rules 1999* (Cth) O 27 rr 6(1), 11(1).

Moreover, by burdening employers with an additional layer of prohibitions and regulations of their dealings with unions and employees, beyond that provided for in the WRA, the Code has discouraged many clients, employers and unions from entering into otherwise lawful arrangements that would have led to harmonious workplace relations.

These include:

- facilitating the wishes of employees who are, or want to be, union members (by allowing payroll deduction of union dues, or providing leave to attend union meetings or training);[78]
- facilitating employees communicating with unions (by allowing expanded union rights of entry to the workplace, beyond those set out in the WRA);[79]
- facilitating a role for employees to have unions protect their collective interests (such as by giving unions an automatic role in rostering, or dispute resolution);[80]
- supporting employee job security (for example, by agreeing not to engage casuals or contractors);[81]
- facilitating equality of treatment for employees on project sites (by agreeing to project agreements);[82]
- respecting employees' wishes to collectively bargain, by agreeing not to use statutory individual contracts.[83]

The result of these restrictions has been that many progressive industrial relations developments have been forestalled. For example, recently the ACTU and the Telstra unions attempted to negotiate a 'memorandum of understanding' ('MOU') with the

[78] The 'prohibited conduct' rules are extended to side-deals: Guidelines [8.1.2].
[79] Guidelines [8.6].
[80] Guidelines [8.7.4].
[81] Guidelines [8.5.3].
[82] Guidelines [8.4].
[83] Code 7; Guidelines [8.2.3].

company,[84] under which Telstra would recognise the important role that unions play in its business, and would acknowledge 'collective bargaining as the preferred model of employee relations and agree to negotiate collective agreements in good faith'. Telstra refused to enter into the MOU, claiming that it breached the Code. It appears that Telstra is bound by the Code, even though it is not principally in the building and construction industry, because it engages in a small amount of construction work as an incident of its main telecommunications business. This highlights another problem with the current Code, namely its reach far beyond the building and construction industry.

In summary, the unions are not opposed to the government having a procurement code, but submit that the code should:

- be consistent with the government's industrial relations legislation and policies;
- be consistent with our international obligations (including the obligation to promote collective bargaining); and
- facilitate positive, progressive, modern industrial relations practices.

In particular, we think that the following reforms need to be made:

- The **scope** of the Code should be clarified so that it only covers the 'construction industry' (ie excludes off-site construction, mining, etc).
- The **application** of the Code should be narrowed so that it only applies:
  - to tenderers for government work, and not their related entities;
  - to work that is *substantially* funded by the Commonwealth;
  - from the time that the construction contract is entered into, not from the time the tender is submitted.
- The **requirements** of the Code should be amended, so that:

[84] Available from <www.rightsatwork.com.au/mou>.

- successful tenderers need only comply with general industrial law (ie as set out in the Fair Work Bill) and need not comply with any additional industrial rules;
- preference is given to tenders that promote important social objectives such as occupational health and safety, training and skill development, use of Australian labour and materials, respect for the environment, participation of women and Indigenous people in the workforce, and security of employee entitlements;
- engaging in participating collusive tendering practices disqualify the tenderer.

- The task of **monitoring** of the Code should be given to the Department, and not to the ABCC or any other compliance agency; and
- The **enforcement** of the Code should be improved, by allowing both merits review and judicial review of decisions taken under the Code. We express no opinion on the question of whether the Code should be subject to disallowance by the Senate.

5.4 Structure of the inspectorate

Question 6 – Role of Specialist Division

Our position is that there should not be a Specialist Division, for the reasons outlined above. Instead, the Ombudsman should assign Fair Work Inspectors who have special skills or experience in the building and construction activity to focus on compliance issues in that industry.

Under our proposal, it would be up to the Ombudsman to decide what resources (human or financial) to allocate to compliance functions in the construction industry. If the

Minister felt strongly that compliance activities in the sector were under-resourced, she could direct the Ombudsman to allocate more resources to it.[85]

Questions 3, 5, 7 – Independence

Under our proposal, the inspectors would be independent, and would be seen to be independent by the public. They would exercise their functions in accordance with the enforcement pyramid set out in the Fair Work Bill, as reinforced by litigation guidelines issued by the Ombudsman.[86] The inspectors might work full-time on construction industry issues or, if there is insufficient work, they may be assigned to other duties, on a permanent or temporary basis, in the discretion of the Ombudsman.

Of course, given that under the ABCC regime, public confidence in the independence of workplace inspectors has been significantly eroded, it may be necessary to make some changes (mostly in relation to hiring practices) to ensure that FWA inspectors:

- either have experience in the industry or else are drawn from a *civil* law enforcement background (rather than an anti-corruption or criminal law enforcement background);
- are non-partisan and are drawn from both sides of industry;
- work across all industries so they become familiar with 'education-first' compliance strategies;
- are free from direct or indirect control or influence by the government or by political appointments to statutory offices;
- do not have their salary or career prospects affected by the degree to which they have pleased the head of the inspectorate, or the government.

[85] FW Bill cl 684.
[86] See, eg, the WO's Litigation Policy: <www.wo.gov.au/data/portal/00007407/content/94111001196051899657.pdf> [4.2]-[4.4].

5.5 Activities

Question 8, 10 – Compliance functions

We consider that the traditional system of enforcing industrial law has worked relatively well. That system has distinguished, in practice, between:

- Violations of employee entitlements and industrial rights; and
- Breaches of procedural rules under industrial law.

First of all, in relation to employee entitlements and industrial rights (such as freedom of association rights), unions have historically been responsible for enforcing these provisions in those workplaces where they have members (or in workplaces without members where the union has decided to act). In recent years, the general inspectorate has been increasingly active in enforcing these rights and entitlements for the remainder of the workforce.

In enforcing employee rights and entitlements, the unions (and the inspectors) have tended to take a tough approach to enforcement, with a focus on ensuring that employees are compensated for any losses, and that there is general and specific deterrence against further breaches of the law.

We think that the primary role of unions in enforcing employee entitlements and industrial rights, with assistance from the general inspectorate, should continue.

Secondly, in relation to enforcing the general (mostly procedural) rules under industrial legislation (such as those relating to bargaining or the taking of industrial action), the traditional approach has been that these rules are primarily enforced by the parties, rather than the inspectorate. For example, if one party fails to fulfil the requirements for taking protected industrial action, it is generally up to another affected party (if they so wish) to apply to the independent umpire for relief (namely, an order stopping the action).

Inspectors generally do not have power to enforce these procedural provisions. Even where they do have such power, the inspectorate has generally declined to intervene in cases where the affected parties have themselves declined to take a remedy which is available to them.

Moreover, when the inspectorate *does* decide to enforce the 'general' industrial law, we have noted above that the inspectorate adopts an approach (mandated by the legislation) which has an emphasis on education rather than prosecution. This approach is in stark contrast to the enforcement policy of the ABCC, as set out in section 10 of the BCII Act. Section 10 turns the enforcement pyramid on its head. Investigation and prosecution are listed as the ABCC's primary compliance activities, with the function of advising building industry participants of their rights and obligations, and public dissemination of information about workplace laws, relegated to the end of the list.

In our view, the traditional enforcement approach is overwhelmingly preferable to the approach under the BCII Act. The emphasis on encouraging compliance with procedural rules through education, with prosecution as a last resort, is particularly appropriate in the building and construction industry, given the very high proportion of small employers in the sector.

Finally, we believe that the inspectorate should investigate and prosecute breaches by any person, not only employees or unions. This has been the historical practice. Your question 10 seems to suggest that the Specialist Division (if there is one) might focus on employee and union breaches of the law, with another division of the general inspectorate to prosecute employer breaches. We strongly believe that there should be one inspectorate for employers, unions and employees, with the same powers in relation to each of the regulated parties. To do otherwise would undermine public confidence in the impartiality of the inspectorate, and would breach the fundamental rule-of-law principle that the law should be enforced equally against all, without fear or favour towards particular groups or individuals.

Questions 15, 16 – Litigation practices

Power to prosecute

Under the current law, and the Fair Work Bill, workplace inspectors may bring legal actions in their own names to enforce workplace laws.[87] We see no reason why this rule should change.

We note that, since taking unprotected industrial action is *not* prohibited under the WRA, workplace inspectors do not have the power to seek injunctions to stop industrial action (although they do have power to enforce any stop orders issued by the AIRC).[88] The position is different under the BCII Act, where it is *unlawful* for workers to take unprotected industrial action, and where 'any person' (including an inspector) can seek injunctions to stop such action.[89]

We are strongly of the view that there is no legitimate role for workplace inspectors to be able to bring independent proceedings to stop industrial action (whether unprotected or not). Such a power is repugnant in that it involves the state directly intervening in workplace relations to deny workers their fundamental human right to strike. The taking of industrial action is a private matter between employers, workers and unions; there is no basis for the state to intervene, unless the industrial action is endangering the life, personal safety or health of the population.[90]

Power to intervene in proceedings

Under the WRA, workplace inspectors may only intervene in other parties' litigation with the leave of the court concerned.[91] The exception occurs in relation to breaches of the law

[87] WRA s 718(1); FW Bill cl 539.
[88] WRA s 496(4), 718(1) item 5. See above n 4.
[89] BCII Act s 39(1).
[90] ILO, *Freedom of Association and Collective Bargaining* (1994) General Survey [159]. Cf WRA ss 430-4, 496-8.
[91] WRA s 855.

relating to bargaining, where inspectors can compulsorily 'take over' proceedings initiated by another party.[92] Under the Fair Work Bill, there is no statutory right for workplace inspectors to intervene in other parties' litigation (although a court may grant an inspector leave to do so, under the rules of the relevant court).

We do not think that workplace inspectors require a statutory right to intervene. If there are strong public interest reasons to intervene, a court will grant leave do so. The matter should be left to the discretion of the court.

5.6 Oversight

Questions 4, 14 – Monitoring

We have already set out our view that there should not be a Specialist Division or, if there is to be one, that it be staffed by regular inspectors exercising general compliance powers under the Fair Work Bill. That would include the provisions dealing with internal and external monitoring of the inspectors, be by way of:

- General and specific directions from the Ombudsman;[93]
- Indirect direction from the Minister via the Ombudsman;[94]
- Regular reports to the Minister;[95] and
- Annual reports to Parliament;[96]
- Monitoring by the Commonwealth Ombudsman;[97]
- Informal monitoring by stakeholders (through feedback to the Ombudsman);
- Oversight by the High Court (through constitutional writs);[98]

[92] WRA s 404.
[93] FW Bill cl 704-5
[94] FW Bill cl 684.
[95] FW Bill cl 685.
[96] FW Bill cl 686.
[97] *Ombudsman Act 1976* (Cth) s 5(1)(a).

- Oversight by other courts (who may scrutinise the inspectors' litigation practices).[99]

If our views about the existence and role of the Specialist Division are accepted, then no additional monitoring is required.

In any event, we do not favour using the OPI as a model for overseeing the functions of workplace inspectors. First, as we explained above, we object as a matter of principle to extending an anti-corruption model to the industrial jurisdiction. The OPI model was developed to deal with the very serious issue of criminal activity (involving crimes punishable by imprisonment) on the part of public officials. 'Tough' interrogation of suspected corrupt police is, arguably, warranted, because of the strong public interest in rooting out corruption in the police force. However, we think that extreme caution should be exercised in trying to extend any aspect of this model to the industrial sphere, where the industrial actors are not public officials (and indeed are often vulnerable workers), where the prohibited conduct involved is not criminal in nature, and where breaches of the law generally only affect private interests, rather than the public at large.

Secondly, and more specifically, the OPI model of oversight is inadequate to prevent abuse of interrogation powers in that the Special Investigations Monitor:

- only investigates misconduct after the fact (and so cannot act before or during an *ultra vires* interview);
- does not have to give his or her consent to the holding of a coercive interview; and
- is not able to issue binding recommendations to the OPI.

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[98] See *Constitution* s 75(v). Note that the Federal Court has jurisdiction to oversee the role of ABCC inspectors, but not general workplace inspectors: *Judiciary Act 1904* (Cth) s 39B(1), (2).
[99] See, eg, *Washington v Hadgkiss* (2008) FCA 28.

These deficiencies led the minority (non-government) report of the Parliamentary Inquiry into the Police Integrity Bill 2008 (Vic) to conclude:

> *On the key issue of accountability, The Police Association of Victoria and Liberty Victoria agreed that the lack of a stringent reporting and accountability framework for an office dealing with police corruption is a most serious concern, also shared by the authors of this minority report which we refer to Parliament for its earnest consideration.*
>
> …
>
> *The overriding view amongst key stakeholders is that the Police Integrity Bill 2008 does not provide for sufficient powers of oversight from the Parliament or from the Special Investigations Monitor to enable this new regime to operate effectively and with some level of public confidence.*[100]

In summary, even the OPI model, which the Discussion Paper appears to be attracted to, is highly controversial. We think that extending this model to the *civil* law that applies in the workplace is absolutely inappropriate, and would set an extremely dangerous precedent.

5.6 Use of information

Questions 9, 17 – Use of Information

The traditional position under the WRA, which is preserved in the Fair Work Bill, is that:

- evidence obtained under entry and inspection powers may be used by the inspectors as evidence in proceedings against the person under industrial law or else referred to another law enforcement agency for use in other law enforcement proceedings.[101]
- a person may refuse to divulge information to inspectors on the grounds of legal professional privilege,[102] or public interest immunity;[103]

[100] Available at <www.parliament.vic.gov.au/sarc/Police_Integrity_Bill_08/Report/minority.htm>.
[101] WRA 169(9); FW Bill cl 718(1).
[102] *Rilstone v BP Australia Pty Ltd* [2007] FCA 1557 (Besanko J).

- in practice, the inspectors do not disclose the information to anybody else (such as a person affected by the alleged breach), even though they formally have the power to do so where the inspector reasonably believes that it is 'necessary or appropriate to do so' in the course of exercising their powers.[104]

In contrast, in relation to the ABCC:

- a person cannot refuse to divulge information on the grounds that doing so would be against the public interest (so ousting public interest immunity)[105] or would contravene any other law;[106]
- information can be divulged to a third party (whether a law enforcement agency or another person) '*in the course of*' the inspector's duties – without any test of necessity or appropriateness.[107] There is evidence that, in practice, the ABCC does not treat evidence gathered as confidential and is, for example, willing to pass it to third parties (such as persons affected by the alleged breach).

We consider that the WRA contains the better balance between the rights of private citizens and the public interest in effective law enforcement. In particular, we think that it is desirable to:

- preserve a person's right to refuse to produce information on public interest immunity grounds;
- restrict the freedom of inspectors to pass material on to third parties who are not law enforcement agencies (such as another party at the workplace); and
- ensure that inspectors may only refer matters to other agencies where it is 'necessary or appropriate' to do so.

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[103] *Commonwealth v CFMEU* [2000] FCA 453 (Full Court).
[104] WRA s 166U(1); FW Bill cl 718(2).
[105] BCII Act s 53(1)(c).
[106] BCII Act s 52(7).
[107] BCII Act s 65(3)(b).

5.7 Transition to FWA

Question 18(c) – Abolition of the ABCC

We strongly believe that the BCII Act should be repealed and the ABCC disbanded immediately. The Office of the Fair Work Ombudsman is scheduled to commence operations on 1 July 2008; inspectors from the Workplace Ombudsman could perform compliance functions in the building and construction industry until that date.

Question 18(a) – Resources

In 2007-08, the ABCC had a budget of $33 million (and 155 staff),[108] whereas the general inspectorate had a budget of $61 million (and staff of 293, including 220 inspectors).[109] This means that the WO has a budget of about $9-12 for every employee within its jurisdiction, while the ABCC had a budget of about $74-105 for every building worker within its jurisdiction.[110] In other words, the ABCC is eight or nine times better resourced than the WO.

While we would welcome the government adding the budgets of the WO and the ABCC together, so that the FWA inspectorate would have a total annual budget of about $100 million, we think it is preferable if this budget is available for enforcement activities across all industry sectors.

In particular, we do not think it would be appropriate to quarantine a third of the budget and direct it towards enforcement activities in the construction sector. We would trust the head of the FWA inspectorate to use his or her discretion as to how to allocate total funds across all industries. This flexibility is important considering that compliance with

[108] ABCC, *Annual Report 2006-07* (2007) 35.
[109] WO, *Annual Report 2006-07* (2007) 16, 108.
[110] These figures are based on the estimate that the WRA covers 60-85% of the 8.3 million employees in Australia (excluding owner-managers of incorporated enterprises), and the same proportion of the 520,000 construction employees: ABS cat 6310.0, Table 6. The 60-85% estimate is from George Williams, *Inquiry into Options for a New National Industrial Relations System: Issues Paper* (2007) 4, 8.

workplace law is particularly poor in other sectors of the economy. For example, in 2006-07, the WO commenced 'targeted compliance campaigns' in the retail, hospitality, clothing, fast food, patient transport and horse training industries. It recovered $1.85 million in unpaid employee entitlements from 3,119 businesses audited.[111] Clearly, if the WO had the funds to double the number of businesses audited in these campaigns, it might have doubled the number of employees whose entitlements were enforced. This would have been an excellent use of Commonwealth resources, we submit, compared to using the funds to prosecute workers who take short periods of industrial action.

CONCLUSION

In our view, the BCII Act and the ABCC have been an ugly blot on the landscape of industrial relations in Australia. The special regime established for building and construction industry employees has been unfair, oppressive, in breach of workers' fundamental rights, and in breach of our international legal obligations to protect those rights. The sooner that the BCII Act is repealed, and the ABCC abolished, the better. We look forward to the day when building and construction employees have their rights protected under the *Fair Work Act*, with unions and the Fair Work Ombudsman enforcing those rights – just like every other employee in the federal industrial relations system.

[111] WO, *Annual Report 2006-07* (2007) 18.

GLOSSARY

Abbreviation	Title
ABS	Australian Bureau of Statistics
• cat 1321.0	*Small Business in Australia, 2001*
• cat 5260.0.55.001	*Information Paper: Experimental Estimates of Industry Multifactor Productivity, 2007*
• cat 6209.0	*Labour Mobility, Australia, Feb 2008*
• cat 6306.0	*Employee Earnings and Hours, Australia, May 2006*
• cat 6310.0	*Employee Earnings, Benefits and Trade Union Membership, Australia, Aug 2007*
• cat 6321.0.55.001	*Industrial Disputes, Australia, Sep 2008*
• cat 6359.0	*Forms of Employment, Australia, Nov 2007*
• cat 8165.0	*Counts of Australian Businesses, Including Entries and Exits, Jun 2003 to Jun 2007*
• cat 8772.0	*Private Sector Construction Industry, Australia, 2002-03*
ABCC	Australian Building and Construction Commissioner
ACTU	Australian Council of Trade Unions
AIRC	Australian Industrial Relations Commission
BCII Act	*Building and Construction Industry Improvement Act 2005* (Cth)
Building Industry Inquiry	Senate Education, Employment and Workplace References Committee, Building and Construction Industry Inquiry (2004)
CFMEU	Construction, Forestry, Mining and Energy Union
Code	Australian Procurement and Construction Council, *National Code of Practice for the Construction Industry* (1997)

Cole Report	The Hon Terence Cole QC, *Reform: Achieving Cultural Change* (2003) Final Report of the Royal Commission into the Building and Construction Industry, vol 11
Discussion Paper	The Hon Murray Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia: Discussion Paper* (2008)
FWA	Fair Work Australia
FW Bill	Fair Work Bill 2008 (Cth)
Guidelines	Department of Employment and Workplace Relations, *Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry* (June 2006).
ILO	International Labour Organisation
OPI	Office of Police Integrity, Victoria
WO	Workplace Ombudsdman
WRA	*Workplace Relations Act 1996* (Cth)

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Dear Mr Dwyer

ACTU submission: erratum

We draw to your attention a typographical error in our submission. At the bottom of page 7 we state that approximately 292,700 permanent employees in the construction industry appear to have been wrongfully denied their paid annual leave and sick leave entitlements. We advise that the comma is in the wrong position; the correct figure is 29,270.

Yours sincerely

Joel Fetter
Legal & Industrial Officer