Senate Inquiry into the Provisions of the Building and Construction Industrial Improvement Amendment (Transition to Fair Work) Bill 2009

July 2009

Submission prepared by the Chamber of Commerce and Industry of Western Australia

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About CCI

The Chamber of Commerce and Industry of Western Australia (CCI) is the leading business association in Western Australia (WA).

It is the second largest organisation of its kind in Australia, with a membership of over 5,300 organisations in all sectors including: manufacturing; resources; agriculture; transport; communications; retailing; hospitality; building and construction; community services; and finance.

CCI members are located in all geographical regions of WA.

CCI has extensive involvement on behalf of members in a diversity of workplace relations matters across all these industries.

Most members are private businesses, but CCI also has representation in the not-for-profit sector and the government sector.

CCI members employ a significant number of employees – nearly 73% of members employ up to 9 employees; 21.3% between 20 and 99 employees and 5.89% over 100 employees.

CCI is the direct employer of over 900 apprentices across WA as part of a Group Training Scheme operated by Apprenticeships Australia Pty Ltd, a wholly owned subsidiary of CCI. The apprentices are in traditional trades in the resources sector, building and construction, metal and engineering fabrication, ranging through to trainees operating in the aged care sector.

CCI's workplace relations policy promotes flexibility to achieve workplace productivity that will sustain high levels of economic growth.

Executive Summary

Without strong compliance powers and penalties that act as a deterrent to unlawful conduct WA's reputation as a stable and reliable supplier of raw materials is compromised and WA projects still in the planning phase worth $100b are potentially threatened.

At a time when business confidence is falling as a result of the GFC, the WA business community cannot afford such compromise.

Economic Overview

The high level of activity in global mineral and energy markets has meant that the mining and resources sectors have been the key drivers of WA's strong economic growth. The benefits of the state's once in a lifetime economic boom have spilled over into all sectors of the economy, with the construction sector being a primary beneficiary of this increased level of activity.

In the words of Justice Wilcox:

> "*The building and construction industry is not only economically important. The industry underpins our standard of living and lifestyle, which rely heavily upon the use, and therefore maintenance and supplementation, of physical infrastructure. It is essential to maintain, and further improve, the productivity of the industry"*

WA is also making an increasing contribution to the national economy and it plays a critical role in increasing the productive capacity of other sectors such as mining, manufacturing and service related industries.

CCI Economics also finds that despite the local impacts of the global recession continuing to be felt across the economy, Western Australia remains one of the world's few economies that grew in 2008-09. Growth is for the financial year just ended is expected to reach 3 per cent, driven by strong economic activity in the first six months of the year.

Industrial Disputation

The low levels of industrial disputation over the last 3 years have led to a period of unprecedented industrial peace that has had a significant impact on Australia's reputation for stability and reliability as a supplier of raw materials.

This industrial peace has been largely due to the compliance powers available under the *Building and Construction Industry Improvement Act 2005* ("the BCII Act"), the *National Code of Practice for the Construction Industry* 1997 ("the Code"), the *Implementation Guidelines for the National Code of Practice for the Construction Industry* ("the Guidelines") and the *Workplace Relations Act 1996* ("the WR Act") and the enforcement role of the Office of the Australian Building and Construction Commissioner ("the ABCC").

These laws allow the ABCC to promptly deal with unlawful actions by requiring:

- individuals to produce information;
- individuals to attend a hearing;
- evidence to be provided on oath; and
- substantial fines can be levelled against offences.

The availability of these above powers and their judicious use has brought construction industry disputation levels to a position consistent with other industries.

Put another way, the legislation was introduced to address serious problems of bad behaviour manifest in the industry over a very long period of time. Removal or weakening of such power is expected to encourage union lawlessness.

Construction Industry History

In the construction industry, unions have proven from their lawless and inappropriate behaviour that has been documented over a long period by two Royal Commissions and a Productivity Commission report, that they have abrogated personal rights. In doing so, they have set themselves apart from other industries in terms of the how they should be treated. If workers and union officials in other industries conducted themselves in the lawless manner that has become the trademark of the construction industry, then similar level compliance powers would be warranted in those industries. The facts do not support the taking of such action.

Role and Powers of the ABCC

CCI acknowledges and accepts Government's policy regarding creation of a Specialist Division.

At the same time, there is no evidence of abuse by the ABCC of the BCII Act powers. As a result, CCI submits there is no basis to remove key powers that underpinned improvements in behaviour but where further improvement remains necessary particularly in view of the comments made by Justice Wilcox in reviewing the coercive powers that while conduct in the industry has improved in recent years, "the job is not yet done".

The WA Government has also indicated a willingness to reinstate a predecessor of the ABCC, the Building Industry Taskforce, in the face of a reduction in coercive and penalty powers under the proposed legislation.

Government's proposed amendments

Proposed amendments to the BCII Act will repeal a majority of provisions contained within the BCII Act and rename it the "Fair Work (Building Industry) Act 2009" ("the FWBI Act"). Key amendments will:

- Dilute penalties for engagement in unlawful industrial action. The availability of the power to impose significant penalties has acted as a deterrent and brought down construction industry disputation to a level consistent with other industries. It is for this reason that current penalties should be maintained.

- Increase requirements to access coercive powers including added processes of third party approval for examinations and the ability for an "interested party" to apply to "turn off" the coercive powers will make their use cumbersome and ineffective and negatively impact investigations into unlawful conduct.

- Sunset coercive powers after 5 years assumes there will no longer be a need for the powers at that time in spite of the weight of evidence of 2 Royal Commissions that found once a watch dogs powers disappear lawless behaviour re-emerges immediately.

Recommendations

1. The current penalties, set out in the BCII Act be included in the proposed the FWBI Act. This means penalties of $110,000, for a corporation, or $22,000, for an individual, to replace $33,000 and $6,600 respectively.

2. The Fair Work Building industry Inspectorate should continue to exercise the coercive investigatory powers currently available under the BCII Act.

3. The ability to "switch off" the coercive powers should only be considered during the review foreshadowed to take place in five years time and not before. The ability to apply to "switch off" the coercive powers from 1 February 2010 does not allow sufficient time for the necessary cultural change in the industry to occur which would remove the lawless behaviour.

4. However, if such a power is included criteria for the switching off must be included in the Act rather than the regulations. The criteria should include:

> "coercive powers can be switched off only in the case that on a particular building site there has been no unlawful industrial action that is occurring, threatened, impending or probable AND no employee or union official has engaged in threatening, intimidatory unlawful behaviour for a period of at least 2 years."

In addition, the following conditions must accompany a switching off of powers:

> "Where coercive powers are switched off any allegations about unlawful conduct will trigger the suspension of a determination by the Independent Assessor."

5. Replace proposed section 46 with the following:

"After the end of 5 years after the day on which the *Fair Work (Building Industry) Act 2009* commences, an independent review is undertaken to consider whether the objects of the Act have been met.

In reviewing the Act the review must take into consideration the economic and social costs of the removal of the coercive powers contained in section 52."

WA economic overview

The high level of activity in global mineral and energy markets has meant that the mining and resources sectors have been the key drivers of WA's outstanding economic growth. However, the state's economic success has not been limited to the resources sector. The benefits of the state's once in a lifetime economic boom have spilled over into all sectors of the economy, with the construction sector being a primary beneficiary of this increased level of activity.

As a result, WA's economy is now almost twice the size it was at the start of the decade. Almost 200,000 jobs have been created, and record numbers of people are coming to the state to share in the benefits of such positive economic conditions.

This period of exceptional growth has mean that WA is also making an increasing contribution to the national economy. WA is now the powerhouse of the nation, accounting for up to one fifth of growth in the domestic economy, one quarter of total business investment, and one third of Australia's exports.

At the same time, growth is expected to slow in the near term as the GFC and associated weakening international conditions impact locally. As a consequence, the near term prospects for the WA and national economies have weakened.

In terms of business confidence, however, all major surveys of business have highlighted a rapid deterioration in business confidence as the impacts of the GFC are increasingly felt. This is particularly true for business and industry in WA, where the *Commonwealth Bank-CCI Survey of Business Expectations* showed that confidence has fallen from record highs in June 2006 (where over 87 per cent of businesses expected the WA economy to remain strong or strengthen in the 12 months ahead) to successive lows in December 2008 and March 2009. Around three quarters of businesses now expect the WA economy to weaken in the next 12 months.

CCI predicts WA's economy will grow by 4½ % in 2010/2011 and by 5½ per cent in 2011-12, bolstered by stronger conditions overseas and renewed demand for WA exports.

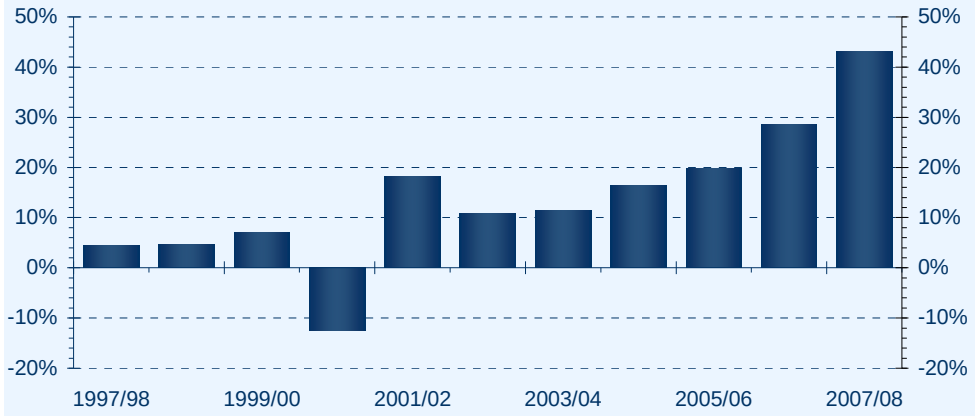
Construction sector overview

The construction sector is a key driver of the WA economy. Not only does the sector make a valuable contribution to the state in terms of output and employment, but it also plays a critical role in increasing the productive capacity of other sectors such as mining, manufacturing and service related industries.

In recent years, the construction sector in WA has recorded an exceptional performance, in part due to the favourable investment environment and strong levels of resource sector investment and housing activity in the state.

Since the beginning of the decade, output from the construction sector has grown on average by nearly 17 per cent per annum. Output from the construction sector has recorded particularly strong growth in the past year, rising by 43.2 per cent (Chart 1). As a result, construction is now the third largest industry sector in WA, with output totalling almost $14.6 billion in 2007-08, and accounting for 10.1 per cent of the state's economy. WA's construction sector also makes a valuable contribution at the national level, representing 18 per cent of construction output across Australia.

Chart 1
Total Factor Income, Construction Sector, WA
Yearly % Change



Source: ABS Cat.5220.37

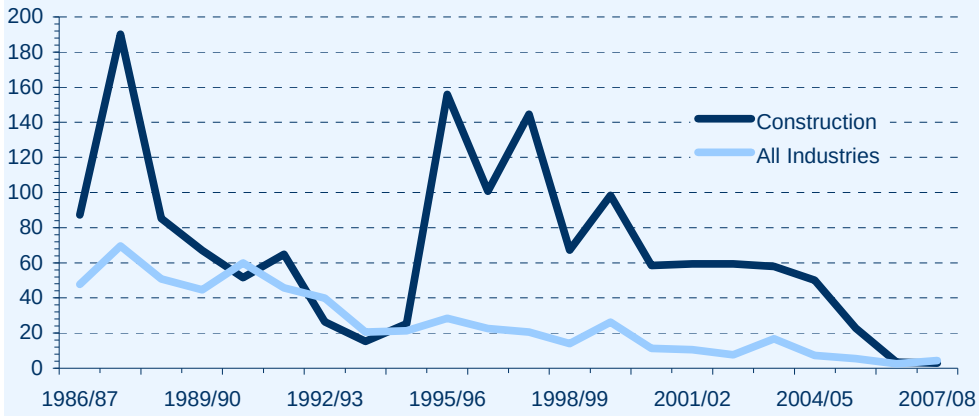
At the same time, employment in the state's construction sector has also grown strongly. Since the beginning of the decade, the construction sector's workforce has increased on average by 5.8 per cent per annum, with a net 41,000 jobs created over this period. This has seen construction's share of the state workforce rise from 8.5 per cent at the beginning of the decade, to 10.6 per cent by 2007-08. Around 120,000 Western Australians were employed in the construction sector during 2007-08.

It is argued that the improved productivity in the construction sector has been underpinned by a fall in the number of industrial disputes in recent times. Industrial disputes in the construction sector have been trending downwards since the beginning of the decade, and are currently at a historically low level.

In 2007-08, the average number of work days lost per thousand workers in the construction sector dropped to its lowest level on record, at just 3,000 days lost per thousand workers (Chart 2). This compares to the beginning of the decade, where the average number of work days lost per thousand workers in the construction sector as a result of industrial disputes stood at 58,500.

Industrial disputes in the construction sector have also fallen at a greater rate than most other industries. On average, the number of days lost per thousand workers in the construction sector has fallen by 26.2 per cent per annum since the beginning of the decade, compared to a 3.6 per cent fall across the economy more generally.

Chart 2
Industrial Disputes Per Thousand Workers, Australia
Construction vs All Industries, In '000s



Source: Productivity Commission

The number of work days lost per thousand workers in the construction sector due to industrial disputes is now well below a number of other industries including coal mining (17,200 days), education (16,600 days) and metal product and machinery manufacturing (8,900 days). The number of days lost per thousand employees due to industrial disputes in the construction sector is also below the all industries average of 4,400 days.

There are a range of factors which are likely to have contributed to this fall in industrial disputes, including the strong economic environment which has generated strong wages growth in the construction sector. However, it is believed that changes to the policy environment have been pivotal to this result. Since the beginning of the decade, a range of changes to the industrial environment have been implemented, which are likely to have reduced the number of industrial disputes.

A key change to the policy environment for the construction sector specifically was the introduction of the BCII Act, which established the ABCC. Another key change to the broader policy environment in recent times has been the introduction of labour market reforms. Reforms introduced since 1993 were estimated by Econtech to have increased labour market productivity at an annual compound rate of 1.7 per cent from the 1992-93 to 2005-06 period of reform.

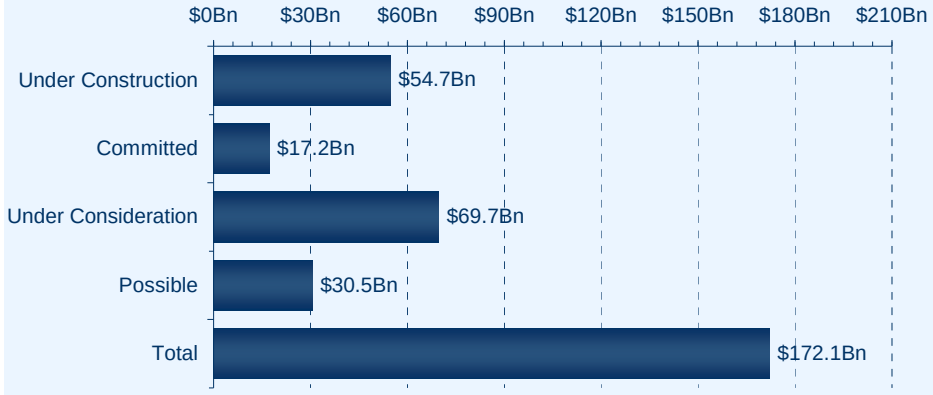
Implications of an Increase in Industrial Disputes in the Construction Sector

Given that the construction sector plays a major role in increasing the future productive capacity of other sectors, any downturn in activity in the sector would have significant economic consequences across all industries and the WA economy more generally.

An increase in industrial disputes in the construction sector may threaten the viability of some of the key investment projects for WA. In March 2009, around $172 billion worth of projects were under construction or in the pipeline for WA. These projects are expected to ensure that business investment, and the broader WA economy, remain strong for some time to come.

An increase in industrial disputes in the construction sector is of particular concern for the $100 billion worth of major projects which are still in the planning phase (Chart 3). Rising industrial disputes reduce the productivity of the construction sector, and add significantly to the cost of construction, as well as extending the time taken for projects to be completed. These concerns would have to be considered by project proponents when assessing the commercial viability of a specific project.

Chart 3
Investment Projects by Status, WA
March 2009, in $Billions



Source: Access Investment Monitor

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With almost two thirds of the investment pipeline related to mining and metals projects, an increase in industrial disputes has the potential to dampen growth in the state's booming resources sector, which would have significant flow on effects for the WA economy more generally. Given that WA is leading the nation in terms of economic growth, this would also have significant implications for the national economy.

Industry culture

History of lawless behaviour

The lawless behaviour that has become a symbol of building and construction industry culture has been documented by two Royal Commissions and the Productivity Commission as well as by peak groups operating in the industry over a number of years.

The NSW Gyles Royal Commission in 1992, setting out the history of industrial relations in the building industry in New South Wales over the previous century, describes the militant behaviour of unions operating in the industry and their refusal to accept determinations of properly constituted authorities. The behaviour resulted in proceedings for deregistration of a number of state and federal bodies of the Builders Labourers Federation and its predecessor the Building Workers Industrial Union.

The Productivity Commission in 1999, noting there had been some improvement in a number of the highly inefficient work arrangements that existed on large capital city building sites in the late 1980s, also found that not all changes have been positive and progress has varied among cities, with work arrangements in Melbourne being generally less flexible than in Sydney or Brisbane. While building completion times had reportedly fallen, the rate of dispute related delays remained much higher than the economy-wide average.

The high cost of delays, combined with the complex contractual arrangements and blanket union coverage on large capital city building projects, were found by the Commission to make sites vulnerable to industrial action leading to unproductive work arrangements affecting progress in reform.

Subcontractors, who can employ up to 90 per cent of workers on a large building site, were found to have limited influence over work arrangements with their employees.

Workplace change through legislation to improve the timeliness of penalties against unprotected industrial action and to address de facto compulsory unionism was felt to be necessary to facilitate further change.

The Cole Royal Commission was the first national review of the conduct and practices in the industry in Australia. Its findings "*demonstrated an urgent need for structural and cultural reform*" noting that all past attempts to reform the conduct and culture of the industry had failed. [1]

It found that productivity growth in the building and construction industry was less than the average for the market sector over the previous five years concluding that had productivity growth matched that of the market sector, the accumulated gain in real gross domestic product between 2003 and 2010 would approximate $12 billion pointing out that benefits would be felt across industries.

Cole's finding that "*At the heart of the findings is lawlessness…. exhibited in many ways*" was a demonstration that behaviour in the construction industry had not changed following the Gyles Royal Commission or the Productivity Commission recommendations.[2]

The Cole Royal Commission recommendations led to the introduction of the BCII Act and establishment of the ABCC.

Current culture

The Australian Constructors Association ("the ACA"), in a summary of insights of project managers, superintendents, sub-contractors and equivalent personnel in the building and construction industry at the middle management or senior supervisor level, notes that while changes brought about through establishment of the ABCC and the National Code of Practice are at an early stage, they appear to have been highly successful in removing or constraining negative and aggressive behaviour on the part of union officials.

The ACA reports that respondents felt moving away from confrontation towards collaboration was the most notable characteristic of industry relationships commenting that "*everyone is getting on better now mainly because everyone realises that if they break the rules then they will be punished whereas years ago unions were breaking the rules a lot and not being punished for it*".[3]

[1] Australian Government, *Royal Commission into the Building and Construction Industry, Final Report*, 'Summary of Findings and Recommendations' (2003) vol 1, page 3, pn1
[2] Ibid, page 6, pn17.
[3] Australian Constructors Association, *Fours Years On, A report on changes following reforms flowing from the Building & Construction Industry Royal Commission as observed by managers, superintendents and sub-contractors,* August 2007, page 22.

The ACA commented that WA was considered by those interviewed to be "*the worst State by far*" in terms of relationships with union officials with Victoria being somewhat better.[4]

Reporting on concern expressed that the ABCC may not continue, the ACA report noted a familiar comment about the influence of the ABCC on industry:

> *"Its' cleaned up the industry…….. It would be good if the strength was still there because those people are still in the industry but they have been shackled at the moment. But you don't know for how long."*[5]

The Australian Mines and Metals Association (AMMA) also commented that it is the special powers conferred on the ABCC through the BCII Act that gives protection without fear of reprisals to speak out about unlawful and inappropriate behaviour:

> *"This is the only way to break the culture of intimidation and silence that has hold of the industry."*[6]

Mr Ken Phillips, Institute of Public Affairs, commented on the practice in the industry even today to budget for significant industrial disruptions during agreement renewals in Victoria. He cites "*at least 5 weeks of production disruption and productivity decreases*" as common practice in Victorian construction during negotiations quoting a loss to revenue of $9.2 million as well as unknown overheads.[7]

Mr Ian Masson, Woodside Energy Ltd, stated in an attachment to CCI's submission to the Wilcox Review his firm belief that a "*weakening of the current regulatory arrangements…..holds the potential for a return to a less stable industrial relations environment in which major projects are approved and executed."* Mr Masson describes his concern about competing overseas project investment opportunities noting that "*a return to pre-ABCC/BCIIA industrial*

[4] Ibid, page 5.
[5] Ibid, page 49.
[6] Australian Mines and Metals Association, *The building industry regulator – A tough cop or a transition to a toothless tiger,* page 4.
[7] Ken Phillips, *Industrial Relations and the struggle to build in Victoria*, Institute of Public Affairs Briefing Paper, November 2006.

relations outcomes would act as a potentially significant disincentive to major project investment within Australia." [8]

While the type of conduct found by the Cole Royal Commission to have been common as referred to above is significantly reduced because of the current powers it is clear from evidence provided that the culture in the industry has not changed. It is the existence of the current coercive powers that keep behaviour within reasonable limits.

WA CFMEU Secretary, Mr Kevin Reynolds, made it clear that his behaviour has not changed when he threatened a national strike through the media on 1 December 2008.

Mr Reynolds called on WA workers to join a national strike protesting against powers of the ABCC. The *West Australian* quoted Mr Reynolds saying:

> *"even if it (the ABCC) deemed the walk-off to be illegal, it would be unable to act against the tens of thousands of protesters he expected to take to the streets…"*[9]

Following the passing of the Government's proposed amendments to the BCII Act in the Lower House, WA's Assistant Secretary of the CFMEU, whose entry permit onto building sites has been cancelled for 2 years, publicly led an unlawful walkout on a Perth building site on 15 July 2009. [10]

This action demonstrates that the finding made by the Cole Royal Commission, that the union ignores orders with impunity, continues to be true and demonstrates the need for preserving strong powers.

In the face of the abolition of the ABCC, the WA Government has indicated it may reinstate the building industry taskforce in WA. Commerce Minister Buswell has said that "… our government will not stand by and allow unions to return to ruling the industry in this state,….. If we see any sign of the ABCC being turned into a tame-cat compliance unit within a Government department, then we will act to bring back a version of the BITF in WA" [11]

[8] CCI Submission to the Wilcox Review into the Proposed Building and Construction Division of Fair Work Australia, pages 14-17 and Affidavit of Ian Masson, December 2008.
[9] *The West Australian*, 'MUA to join rally against watchdog', 1 December 2008.
[10] *The West Australian*, 'City's biggest site hit by strike', 16 July 2009, page 13.
[11] *The West Australian*, 'WA Govt promises to reinstate building industry taskforce', 24 November 2008.

Distinction between construction and other sectors

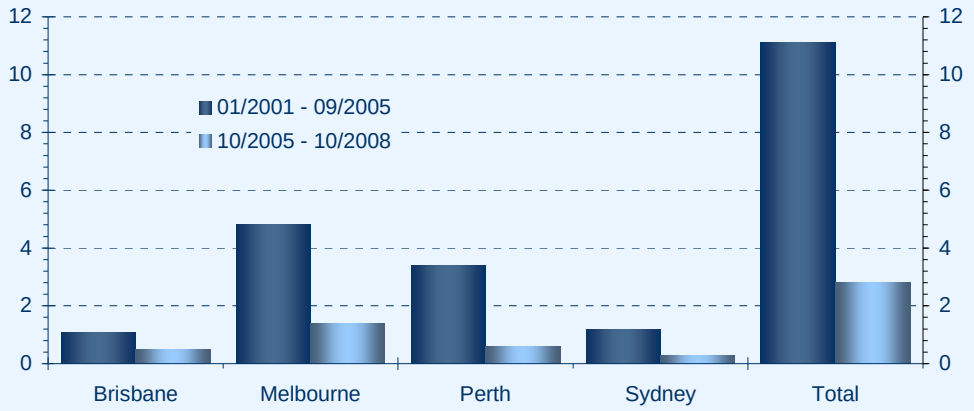
As is shown in Chart 2 earlier in this submission, other than a period in the 1990s, construction sector industrial disputation has been significantly higher than in other industries.

The steep decline in the level of disputation from late 2005 back to levels commensurate with other industries coincides with the commencement of the BCII Act powers in October 2005.

Section 127 and later 496 applications under the WR Act were the only remedy available to stop or prevent industrial action prior to the commencement of the BCII Act powers.

Chart 4 below shows a marked decrease in the use of such applications since the BCII Act powers were enacted.

Chart 4
Building & Construction s.127 & s.496 Applications to the AIRC
Monthly Average, by State



Source: ABCC

The cases referred to in this submission depict systematic inappropriate and unlawful conduct by unions operating in the building and construction industry.

The cases referred to by the Cole Royal Commission provided clear evidence of unlawful behaviour leading to the finding that "*At the heart of the findings is lawlessness*" resulting in the special compliance powers being built into the BCII Act administered by the ABCC.

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Proposed amendments to the BCII Act

CCI key concerns with the proposed legislation, contained in the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the Bill), are set out below:

1. Removal of section 38 penalties

The Bill removes section 38. The provision requires that a person must not engage in unlawful industrial action and a breach constitutes a Grade A civil penalty. The Bill also removes the actual penalties themselves by repealing section 49 (2)

A Grade A civil penalty is $110,000, for a corporation, or $22,000, for an individual, under the BCII Act, compared with $33,000/$6,600 under the *Fair Work Act 2009* (the FW Act). The result is that the reduced penalties under the FW Act set out above will now apply for breaches occurring in the construction industry as elsewhere. The express prohibition on the taking of unlawful industrial action that was coupled with the penalties has been removed and is not replaced in any form either in the FW Act or the Bill.

Importantly, the FW Act will apply to building industry participants and their conduct in the same way as it applies to other persons.

The availability of the power to impose significant penalties and its judicious use has acted as a significant deterrent bringing down construction industry disputation to a level consistent with other industries. It is for this reason that current penalties should be maintained.

Section 38 has operated effectively in conjunction with section 39 (also removed in the Bill) because it provided direct access to Court injunctions with significant pecuniary penalties. While direct redress is available under the FW Act, the lack of meaningful penalties will reduce its effectiveness.

The following examples using previous powers under section 127 of the WR Act illustrate that the bad behaviour did not cease until financial penalties were increased to such a level that they worked as a strong disincentive.

Previous powers under WR Act – Section 127

Section 127 powers available under the previous WR Act, while well intentioned, were inadequate as they often required follow up Court action for injunctions that created further delay to resumption of work. Orders were often issued too late to avoid costly disruption to business. Penalties were insufficient to act as a disincentive.

The WR Act just prior to the *Workplace Relations Amendment (Work Choices) Act 2005* in s.127(3) required that:

> *"The Commission must hear and determine an application for an Order under this Section as quickly as practicable".*

In practice, imposing a 48-hour obligation on the Australian Industrial Relations Commission ("the AIRC") to issue s.127 orders often meant employers were wrongly subjected to industrial action that continued for much longer than 48 hours.

Employers had often been experiencing industrial action for a period before applying for a s.127 order. In practice, it meant adding an extra 48 hours which was the fastest the AIRC could usually deal with a matter and issue orders. There was then delay before resumption of work, and in some instances, even following the issuance of a s.127 order, as orders were often ignored. However, it was more likely that no order would issue because union officials would typically create argument as to whether, for example, the industrial action was real or not. The union would not be ready with evidence to prove their case and this would add further delay resulting in adjournments for preparation of union evidence. Meanwhile the strike would continue and once proceedings resumed the workers would go back to work.

WR Act s. 178 breach applications provided an insufficient remedy as penalties were too low ($10,000 for a body corporate and $2,000 for an individual) to have deterrent value.

The Cole Royal Commission found that unions ignore orders of the AIRC, and the Federal Court, with impunity. Section 127 of the *Workplace Relations Act 1996* has proved to be ineffectual in preventing unlawful industrial action taking place in the building and construction industry.

Some examples illustrating the point are set out below.

Western Power dispute

In 1997, Western Australia experienced disruptions to the electricity supply in a series of events involving industrial action by employees of Western Power that underscored the level of disruption experienced.

The facts of the dispute are set out in the Reasons for Judgment of the Federal Court of Australia in Matter WAG 68 of 1997, Commissioner Laing of the AIRC, First Respondent and Electricity Corporation, Second Respondent dated 4 November 1998.

The industrial action causing the loss of power supply that impacted on all businesses throughout the Perth metropolitan area and South West grid regions began on Monday 28 April 1997, power was restricted as a consequence the next day and was not to resume properly until a full six days later during which the AIRC refused to issue an order stopping industrial action because employees continually returned to work when the matter was heard and recommenced unlawful action once the parties left the AIRC.

Leighton Kumagai Joint Venture (LKJV)

A more recent example of the inadequacy of s. 127 to deal with damaging industrial action concerns the Leighton rail dispute in which an application for a s.127 order to stop or prevent industrial action was made on 1 August 2005, just prior to the commencement of the ABCC.

The disputes which extended from late 2004 until 2007 forced the employer and later the ABCC to pursue a number of applications in a range of jurisdictions.

During 2004, a number of s. 127 orders to stop or prevent industrial action were granted by AIRC Deputy President McCarthy. In November 2004, due to the disregard for the AIRC orders and prior to the introduction of the BCII Act, LKJV made an application for an interlocutory injunction in the Supreme Court of Western Australia which was granted by Justice Roberts-Smith.

In granting the injunction Justice Roberts-Smith held that:

> *"The effect of the ban on night shift is to cause delay of one full working day. That ban is continuing and accordingly the delay is continuing. It is submitted to me, and appears to be the case from the contractual documents annexed to the affidavit, that in addition to liquidated damages incurred, a lost working day also incurs additional losses such as overhead, salary, costs and others which are substantial. The figure of $90,000 has been mentioned."*[12]

He went on to state that:

> *"There is significant detriment and disadvantage to the plaintiffs from the delay, and not only to them I may say, but also to the public interest (and that includes the subcontractors)."*

[12] [2004] WASC 250.

In late 2005, LKJV returned to the AIRC with a further application for a s. 127 order to stop or prevent industrial action. In this case LKJV sought a full hearing for an order to extend over the duration of the certified agreement then in existence. This application was sought due to a series of incidents in which approximately 400 employees had given notice that they would not be attending work because they were sick. This came as "*one more episode in a history of patterned behaviour…*". The company noted "*…the Leighton Kumagai Joint Venture has lost a total of 35 full days due to industrial action.*"[13]

During an AIRC hearing on 28 November 2005 the union made a number of attempts to delay the proceedings. Mr T Kucera for the union indicated that a witness for the CFMEU was not available as he was in Queensland and was not returning before the evening of 30 November.

At the adjourned hearing on 2 December 2005, Mr Hooker for the ABCC commented about the nature of the industry "*what is noteworthy…in this context is the very fact that building projects, of their nature, are of a finite period, unlike many other industries. So its open……for an order for the duration of the project to provide some sense of security, compliance with the statutory provisions….so that sensible, meaningful industrial relations can take place.*"

In issuing the order for the full period of the certified agreement, Senior Commissioner Gregor in his reasons for decision issued on 6 December 2005, found there had been continued and continuing industrial action on the project since 2004. The Commissioner noted that "*The s 127 Orders that Deputy President McCarthy issued did cause some changes to behaviour on the project for the life but the changes did not last.*"[14]

[13] Submission of Ms E Athanasiou, application C2005/1168, Leighton Kumagai Joint Venture and Construction, Forestry, Mining and Energy Union, Australian Industrial Relations Commission, Perth Transcript of proceedings, 2 August 2005. See also the affidavit of Mr Doug Bevan.
[14] PR 966077, page 43.

In granting the application Senior Commissioner Gregor stated:

> *"If this application is successful it will be the third s. 127 order issued on the project…….. The CFMEU has bought this application for restriction on their activities on themselves. The Order ought to cover employees as the CFMEU has a propensity to fail to accept its responsibilities. There is no foundation in any allegation of unfairness; it is proper that the form of the Order go to all industrial action except where there is an imminent threat of danger to health. The Order in its terms should reflect the existing pattern of behaviour. There is clear evidence that the action on 9th March 2005 is unlawful; all of it is illegitimate; the disputes procedure must be given an opportunity to operate."*

The CFMEU gave notice of an appeal against the order of Gregor SC. Following a hearing on 21 February 2006 the Full Bench refused leave to appeal.

After the CFMEU and its members showed a complete disregard for the section 127 orders made by the AIRC, LKJV applied on 24 February 2006 to the Supreme Court of WA for an urgent interlocutory injunction to prevent further industrial action. The ABCC, having just commenced operating, intervened in this proceeding under section 71 of the BCII Act in the public interest.

An interim injunction was granted on 24 February which restrained the CFMEU, the CFMEUW and Mr Joseph McDonald from participating as a principal in, or an accessory to, unlawful industrial action. An extension of the injunction was granted in July 2006.

Justice Le Miere found that there was a history of unlawful industrial action on the project and that such action had caused or exposed LKJV to the risk of, substantial financial loss and had interfered with, or had the potential to interfere with, the expeditious carrying out of an important public project.

In granting the injunction Justice Le Miere stated that:

> *"Under the Project Contract the first plaintiff is obliged to ensure that the project works are completed by the date specified for practical completion and its obligations are carried out with all due expedition. If the first plaintiff does not complete the works by the date specified for practical completion it must pay liquidated damages of $52,000.00 per day capped at $16,686,380.45. In addition to the liquidated damages to which the plaintiffs are exposed, there is evidence that a lost working day also incurs additional losses such as overhead salary costs and other overhead costs. There is evidence that the loss incurred by the first plaintiff, by reason of a lost working day, is approximately $175,000.00 - $185,000.00 per day. The*

evidence establishes that if the employees engage in unlawful industrial action the plaintiffs will be exposed to substantial financial loss."[15]

On 2 November 2006, Justice Le Miere accepted a proposed settlement between LKJV and the CFMEU. The terms of the settlement required the respondents to pay agreed penalties of $150,000 plus their legal costs and discontinue any further strike action on the Perth to Mandurah railway project.

Chronology of events –

Delivered (heard)	Jurisdiction	Outcome
12 November 2004	AIRC order (PR953218)	S127 order granted
15 November 2004	AIRC order - DP McCarthy	S166A notice of intention to bring an action in tort certificate
16 November 2004	WA Supreme Court [2004] WASC 250	Injunction granted
17 November 2004	Federal Court – Justice Lee	Order to enforce the 12/11/4 s127 order
22 November 2004	AIRC order (PR95487)	S127 order granted
1 December 2004	AIRC order (PR953864)	S127 order granted
3 November 2005	AIRC order (PR964638)	S127 order granted
December 2005	AIRC Decision Gregor – PR966077	S127 application – order granted
24 Feb 2006	WA Supreme Court [2006] WASC 39	Application for interlocutory injunction – order granted
3 March 2006	WA Supreme Court [2006] WASC 47	Application for further interlocutory orders – not granted

[15] Extract from [2006] WASC 144.

Delivered (heard)	Jurisdiction	Outcome
9 May 2006	AIRC Decision – FB (PR972196)	Appeal by CFMEU of s127 order (PR966077) – leave not granted – application dismissed
20 July 2006 (16/03)	WA Supreme Court [2006] WASC 144	Extending the interlocutory injunction
3 November 2006 (30/10, 2& 3/11)	WA Supreme Court - [2006] WASC 317	Penalties. CFMEU $90,000; CFMEU(WA) $30,000; Joseph McDonald $30,000
Hadkiss v Aldin and others	Federal Court of Australia	
24 October 2007	Directions hearing	Penalty hearing set down for 5 & 14 November 2007 for 87 respondents admitting breaches and 4 respondents with no appearance
5 November 2007	Penalty hearing	Federal court considered submissions on breaches
14 November 2007	Penalty hearing	Federal Court considered submissions on 4 who hadn't filed appearance.
20 December 2007	Decision on penalty	Federal Court ordered 91 workers to pay penalties of $10,000 each

McConnell Dowell Barclay Mowlem Joint Venture on the Dampier Port Upgrade Project

A further illustration of the inadequacy of section 496 and 127 powers to deal with unprotected action and the cavalier behaviour of construction industry unions ignoring orders is in the disputes at McConnell Dowell Barclay Mowlem Joint Venture on the Dampier Port Upgrade Project. The significant period of lost time caused by the disputes commencing in December 2004 is summarised by Mr

Michael Dodgson in the industrial events and lost time register attachment to his Affidavit to CCI's submission to the Wilcox Review.[16]

Application C2004/6501 for a s127 order was filed on 8 December 2004 to stop or prevent industrial action following four strikes by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union ("the AFMEPKIU") members covered by a certified agreement that had been registered a month previously. The company argued it should be able to expect that the agreement would be complied with and the dispute resolution process would be followed.

The company noted significant out-of-pocket expenses well over $1 million in direct costs of the dispute.

An interim order issued on 11 December 2004 ordering the AFMEPKIU to stop and not engage in any industrial action, not impose any ban and must not encourage or authorise any person to engage in any industrial action.[17]

The interim order was rescinded after assurances from the union that there would be no industrial action before 31 January 2005. However, the matter was relisted on 21 January 2005 following stop work meetings on 10 and 14 January, a 48 hour stoppage on 18 January and a total of nine episodes of industrial action and two threats of further action by AMWU officials. In each case there was a failure to follow the dispute resolution procedure and therefore a breach of agreement. An interim order was issued on 21 January 2005 for normal work to resume by 6pm.

On 2 February the matter was relisted for report back coinciding with further industrial action having commenced the previous day and concern that further action was pending. The AIRC used its discretion on that occasion not to issue an order because there was no action occurring at that time in spite of the finding that "*there is clearly a pattern developing…*" of industrial action warning that the AIRC would at short notice hear a further application for an interim order. [18]

On 18 February 2005 the matter was relisted following further unprotected industrial action on 16 February, 17 February and 18 February. As employees returned to work during the proceedings no order was issued.

[16] Above n 8, Statutory Declaration of Michael Dodgson and attachment.
[17] PR954200.
[18] Transcript of proceedings, 020205C20046501, 2 February 2005, PN148, McConnell Dowell Barclay Mowlem Joint Venture and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Industries Union Construction, Forestry Mining and Energy Union.

On 23 March 2005 orders were issued dismissing the s127 applications as no industrial action was happening.

On 12 July 2005 another s127 application was filed following further unprotected industrial action on 6 and 7 July 2005 and 11 July 2008.

At a hearing convened by the AIRC at short notice on 12 July the CFMEU, which had also joined the dispute by this time, and the AFMEPKIU claimed no instructions. Ms Scoble's comments are recorded: "*…I'm at a loss as to what the actual issues are as I just don't have those instructions.…*"[19]

No orders were issued when the unions undertook to use its " *….best endeavours to facilitate…*" return to work.[20]

A further s127 application, C2005/371, was filed on 31 August 2005 after unprotected industrial action commenced again from 31 August with no indication as to when workers would be returning to work allegedly over a safety issue that had occurred a fortnight previously with no attempt made by the unions or employees to raise it with the companies and deal with issues through the certified agreement's dispute resolution process. Mr Bull commented on transcript that "*….why the employees are on strike is again unclear to us…*"[21]

The period of industrial action was extended by the unions arguing that they were not sure it was a fact that industrial action was occurring and yet they were not able to bring evidence to prove their point. The frustration experienced by the companies is summarised in the submissions of Mr Bull for the companies:

> *"The fact is that the workforce, after a meeting with the union officials yesterday morning, took, we say, industrial action. Now, its now at least 36 hours since that's occurred and they now say, well, we can't demonstrate to this Commission that a return to work order shouldn't issue because there's an imminent concern for someone's health and safety, but we've got nobody, no employee out of 400 can get in the witness box and give any evidence and*

[19] 120705C2005243, transcript of proceedings, C2005/243 McConnell Dowell Barclay Mowlem Joint Venture and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Construction, Forestry Mining and Energy Union, 12 July 2005, PN16.
[20] Ibid, PN45.
[21] 010905C2005371, transcript of proceedings, C2005/371 McConnell Dowell Barclay Mowlem Joint Venture and Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Construction, Forestry Mining and Energy Union, 1 September 2005, PN25.

no site official, no union organiser is available to do so also. It's a rather remarkable submission."[22]

Without evidence, the matter could not proceed and was adjourned until the following day. During the adjournment the parties reached agreement and the industrial action finished. However, the project was finished shortly afterwards.

Mr Dodgson's statutory declaration notes the amount of time lost suffered by the contractors to the project during this series of disputes was approximately 60,000 employee hours.[23]

The level of frustration experienced by the project joint venture partners in trying to procure orders only to be frustrated by union officials pleading lack of evidence or some other reason not to proceed with a hearing, forcing delay, and agreeing to return to work was typical in the industry at the time.

The disputes and the significant amount of lost time occurred just prior to the commencement of the ABCC.

Separate proceedings were also commenced against the CFMEU at the same time following CFMEU and CEPU joining the dispute.

Bovis Lend Lease

A recent case further illustrates the finding by the Cole Royal Commission that some unions are contemptuous of Court orders and illustrate that lowering the existing penalty maxima to that under the FW Act would be a fundamental error.

In *Bovis Lend Lease P/L vs CFMEU (No 2)* [2009] FCA 650, the Federal Court ordered the CFMEU to pay a $75,000 penalty, plus costs, for wilfully disobeying a Court order which amounted to a contempt on the administration of justice.

The background of the case is necessary to outline as it indicates a number of factors relevant to this Senate inquiry.

On 19 and 23 of February 2009, officials and members of the CFMEU obstructed and interfered with the passage of vehicles wishing to lawfully enter the New Royal Children's Hospital Site, in breach of an order made on that same day by Justice Marshall (i.e. 19 February).

[22] Ibid, PN116.
[23] Above, n 8.

Justice Tracey stated (at para 13) that the submissions made by the CFMEU on the nature of the contempt, *"reflects the cavalier attitude taken by the CFMEU to the Order and the Court …"*.

And further:

> *"… The immediate purpose of the Order was to ensure that access to the Site by persons and vehicles should not be impeded. The Order was ignored. CFMEU officials and members were responsible on two occasions for obstructing the passage of vehicles which could otherwise have entered the Site. It was purely fortuitous (if it be the case) that the impugned conduct did not disrupt work on the Site."*

at para 15…

> *"The CFMEU was determined not to obey the Order and did not make a reasonable attempt to comply with the Order."*

at para 26…

> *"In Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd (2003) 196 ALR 350 Tamberlin and Goldberg JJ considered (at 358 [40]), that the fact that contempt had been committed by a large representative body was a relevant consideration in assessing an appropriate penalty:*
>
> > *"Generally, it can be said that the adverse impact on the important public interest in the effective administration of justice which results from defiance of a court order or from a failure by a powerful institution or body to comply in a timely manner with an order will generally be more significant than a failure to comply with an order made against a private individual litigant engaged in a personal dispute which does not impact on the community to the same extent. This is a relevant consideration in the present case where the contempt is committed by a large representative body."*
>
> *I respectfully agree. The CFMEU is a large organisation and it deployed considerable resources in order to maintain the obstruction to an important public hospital development."*

at para 27 when discussing the means of the CFMEU…

> *"The Applicant next referred to the substantial means of the CFMEU. It tendered evidence which showed that as at 31 December 2007, the CFMEU Construction and General Division – National Office had net assets of $8,239,524.00 and the Construction and General Division Victorian Divisional Branch recorded net assets of $39,795,785.00. This was not disputed by the*

CFMEU; nor did it seek to tender any evidence which demonstrated its current financial position."

At para 40…

The penalty must be imposed at a meaningful level so as to deter the CFMEU, and others who, save for the risk of a high penalty, may otherwise engage in contravening conduct …

The Court ultimately imposed a $75,000 penalty because of the "public defiance" as outlined in para 37:

"When presented with copies of the orders by representatives of the Applicant, a number of the CFMEU's officials either refused to accept them or allowed them to fall to the ground despite being advised of the nature of the documents. Statements were also made by some of the officials to the effect that they would act on advice from the union office rather than have regard to the terms of the orders which they were told required them to desist from obstructive action. This conduct occurred outside the Site gates and in the presence of employees of the Applicant. They constituted public acts of defiance even though they were not publicised to the wider community."

The case highlights the utter disregard for the rule of law, where the union in question publicly defies the Court Order the very day it is handed down. It is also clear that the construction union in question are well resourced and able to pay large pecuniary penalties. These factors must be borne in mind by the Committee when it considers the removal of the current penalty provisions in the BCII Act to those of the FW Act.

The FW Act has a maximum penalty of $33,000 for a body corporate and $6,600 for individuals, compared to $110,000 for a body corporate or $22,000 for an individual under the BCII Act. The fact that these are maximum penalty provisions cannot be understated. A Court will consider the range of a penalty and other factors before imposing it upon a transgressor.

2. Access to Coercive powers

The importance of the coercive powers contained in section 52 of the BCII Act is firmly established by the Wilcox Report and has been acknowledged by the Government with its commitment to continue the powers for at least the next 5 years.

However, increased requirements to access coercive powers including added processes of third party approval for examinations and the ability for an "interested party" to apply to "switch off" the coercive powers will make their use

cumbersome and ineffective and negatively impact investigations into unlawful conduct.

Impact of increased requirements to access coercive powers

While a number of aspects of the proposed FWBI Act are similar to the BCII Act, there are critical changes that will make use of the powers cumbersome and ineffective.

The BCII Act provides a straightforward process for bringing about an investigation of an alleged breach. The ABC Commissioner simply needs to give written notice to the person alleged to have committed a breach of the BCII Act, after having made an investigation into the alleged contravention.

By contrast, the FWBI Act under s.45 requires the Director to undertake a series of steps before the written notice can be provided to the person alleged to have committed a breach. To access the coercive powers the steps require the Director to apply to the Administrative Appeals Tribunal ("the AAT") for the issue of an examination notice.

The application must be accompanied by an affidavit that includes information on a range of issues including:

- The name of the person in relation to whom the application relates
- Details of the investigation (or investigations)
- A statement that the building site is not exempted (under "switching off" powers)
- Grounds on which the Director believes the person has information or documents or is capable of giving evidence
- Details of other methods used to attempt to obtain the information, documents or evidence
- The number of previous applications made in relation to the person in respect of the investigation (or investigations)
- Any other applications that have been or will be made in relation to the investigation.

The AAT may request more information from the Director and, once issued, the Director must also notify the Commonwealth Ombudsman of the issuing of the examination notice.

These requirements will make use of the coercive powers time consuming and unwieldy and the longer the time lag before prosecution the greater the likelihood of error from inaccurate evidence. Creating delays to the investigative process may weaken the ability for the Building Industry Inspectorate to gather enough information to prosecute. Current ABC Commissioner, John Lloyd, is quoted in the Wilcox Report as commenting: "*in six investigations, a proceeding would not have been commenced without the use of the examination power. In three*

investigations, the basis for commencing a proceeding became much firmer as a result of the use of examination power. In one investigation, the exercise of the power was of some benefit but was not critical in the decision to commence proceedings."[24] Investigations must be timely to ensure the collection of accurate evidence.

Further, CCI does not believe that additional safeguards have been proven to be necessary. There has not been any evidence of misuse or abuse by the Interim Building Taskforce or the ABCC. The ABCC has its own published policy on how it will exercise its powers. The ABCC uses the s.52 powers in compliance with the Administrative Review Council's principles contained in Report No.48 (May 2008)

The structure, content and formulation of section 52, was based upon section 155 of the *Trade Practices Act 1974* which was recommended by the Cole Royal Commission. All other agencies which have similar coercive gathering powers, such as the ATO, APRA, ASIC, ACCC, Centrelink and Medicare, are not subject to additional safeguards. According to the annual reports of ASIC and the ACCC, these agencies use the powers a greater number of times per annum than has been the case with the ABCC.

CCI has a further concern about a new power under section 52 for a person to refuse to give information, produce a document or answer questions if to do so would disclose information that would be protected by public interest immunity.

CCI is concerned that if public interest immunity should be available, there is a possibility that claimants may unnecessarily invoke this exception to avoid providing information and slow down investigations. If such a power is enacted it must be accompanied by a corresponding power for the Director to apply to either the AAT or Court to determine whether something should be subject to public interest immunity.

Switching off powers

The creation of the role of the Independent Assessor and the ability of the Independent Assessor to determine, under s45, that the coercive powers do not apply in relation to a particular building project was not part of the Wilcox Recommendations.

[24] Australian Government, *Transition to Fair Work Australia for the Building and Construction Industry*, 'Report by Murray Wilcox QC', March 2009, page 33.

By contrast, Justice Wilcox stated that he was "*satisfied there is still such a level of industrial unlawfulness in the building and construction industry, especially in Victoria and Western Australia, that it would be inadvisable not to empower the [Specialist Division] to undertake compulsory interrogation. The reality is that, without such a power, some types of contravention would be almost impossible to prove*". [25]

Justice Wilcox further comments that

> *"….I have reached the opinion that it would be unwise not to endow the [Specialist Division] (at least for now) with a coercive interrogation power. Although conduct in the industry has improved in recent years, I believe the job is not yet done."*[26]

Justice Wilcox's concerns are realised in the press article of 16 July 2009 referred to earlier in this submission which proves there has been no change in behaviour by the CFMEU.[27] Justice Wilcox's comments reflect again the earlier finding of the Cole Royal Commission that unions ignore orders with impunity. It is clear from such behaviour that the time is far from right to allow for "switching off" of powers.

Under the FWBI Act, an interested person (defined as the Minister or any other person as defined by the regulations) will be able to make an application to the Independent Assessor to have coercive powers switched off in relation to a specific project.

In determining whether to "switch off" the coercive powers, the Independent Assessor must be satisfied that it would be appropriate to make the determination, having regard to the object of this Act and any matters prescribed by the regulations. The Independent Assessor must also be satisfied that it would not be contrary to the public interest to make the determination.

While the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill Explanatory Memorandum ("BCIIA Bill Ex Mo") provides some guidance on which matters the Independent Assessor must have regard to when considering an application that might be defined in the regulations, the fact that such criteria is left to the regulations provides significant uncertainty. Given the affect that "switching" the powers off might have on the industry and a building project in particular, such matters including the criteria to be used to

[25] Ibid, page 3.
[26] Ibid, page 58.
[27] Above n 10.

determine when the powers will be used and in what circumstances should be defined in the Act. The BCIIA Bill Ex Mo states that "matters prescribed by the regulations might include, for example, a demonstrated record of compliance with workplace relations laws, including court or tribunal orders, in connection with the building project."[28]

To ensure that the powers are not abused the matters that the Independent Assessor must consider should be more significant that simply "a demonstrated record of compliance".

Further, the provisions which allow the Independent Assessor to rescind or revoke the original decision need to be strengthened. As it is currently proposed, a legislative note after section 39 states that "a determination can be varied or revoked on application by an interested person (see subsection 33(3) of the Acts Interpretation Act 1901) or on request by the Director (see section 43 of this Act).

The ability to "switch off" the coercive powers should only be considered during the review which is foreshadowed to take place in five years time. The ability to apply to "switch off" the coercive powers from 1 February 2010 does not allow sufficient time for the necessary cultural change in the industry to occur which would remove the lawless behaviour.

CCI proposes the following conditions/criteria for the switching off of powers:

> "coercive powers can be switched off only in the case that on a particular building site there has been no unlawful industrial action that is occurring, threatened, impending or probable AND no employee or union official has engaged in threatening, intimidatory unlawful behaviour for a period of at least 2 years."

In addition, the following conditions must accompany a switching off of powers:

> "Where coercive powers are switched off any allegations about unlawful conduct will trigger the suspension of a determination by the Independent Assessor."

[28] The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill Explanatory Memorandum, paragraph 92.

3. Sunset of coercive powers after 5 years

Sunset coercive powers after 5 years assumes there will no longer be a need for the powers at that time in spite of the weight of evidence of 2 Royal Commissions that found once a watch dogs powers disappear lawless behaviour re-emerges.

WA Building Industry Task Force

In WA the first attempt by government to deal with irresponsible behaviour in the construction industry was made by the Court Government in 1993 which set up the WA Task Force for the Building and Construction Industry (WA BITF). It operated from 1993 until February 2001. It operated with three full time staff appointed as industrial inspectors under and subject to the *Public Sector Management Act 1994 (WA*) and also the WR Act. It operated subject to a the *Code of Practice for the WA Building and Construction Industry* but had no statutory powers.

The WA BITF's objectives were to ensure compliance with the Code of Practice, and to ensure improved performance and efficiency in the building and construction industry.

The effectiveness and benefits of the WA BITF were described to the Cole Royal Commission by WA Police Assistant Commissioner John Standing:

> *"The Task Force would ratify intelligence, establish working relationships with police, communicate possible industrial action sites or areas of conflict, train management and staff on their rights, attend particular sites and advise police on appropriate action and rights of union members in relation to right of entry onto building sites, rights of refusal by construction management or companies, breaches of practices in relation to intimidation, threats and disruption to construction sites…..The Task Force members' major identified strengths were drawn from the fact that they were issued with Special Constable powers of arrest, investigation, collection of evidence, preparation of briefs and moving towards prosecution of offenders within the building and construction industry and/or unions of any representation."*[29]

The WA BITF was disbanded after a change of Government. The evidence of Mr Michael McLean, Executive Director of the Master Builders Association of WA (the MBA) to the Cole Royal Commission summed up the union response of the abolition of the WA BITF:

[29] Above n 1, volume 21, page 110-111.

"The CFMEU's response ….was almost immediate. Within 10 days car loads of CFMEU officials stormed several building sites and erected 'no ticket, no start' signs on building sites…the CFMEU has become much more militant and aggressive in pursuing (a) union membership; (b) pattern EBAs; (c) rights of entry to building sites; and (d) other claims including under the guise of safety."[30]

Mr Howard John, stated to the Royal Commission:

"….after the state election all hell broke loose. It was payback time because on that day Joe McDonald visited the convention centre site and …..said 'this is GST time. This is get square time. We have waited for this for years."[31]

Industry employers fear reprisals from "get square time" will negatively impact levels of productivity and efficiency even now in 2009.

Building Industry and Special Projects Inspectorate

The Building Industry and Special Projects Inspectorate (BISPI) was set up by the WA Labor Government following the change of government and the abolition of the WA BITF in February 2001.

Mr McLean of MBA described the difference between the WA BITF and BISPI, when, after 12 months of operation BISPI had received no complaints and therefore conducted no investigations or inspections:

"Whereas builders and specialist contractors contacted the Task Force for assistance or to investigate an allegation of inappropriate or unlawful conduct, they do not have the same confidence to do the same with BISPI….BISPI has been limited by its industrial inspectorate powers to investigate and to prosecute industrial relations matters only.. …..in contrast to the Task Force which was able to initiate prosecutions in relation to criminal and contractual matters"[32]

The conclusion drawn by the Cole Royal Commission, that the threat of a criminal prosecution carries far more deterrence than the threat of proceedings before the Industrial Relations Commission, is telling.

CCI submits in conclusion that it is too early to be allowing for sunsetting of coercive and penalty powers. The weight of evidence makes clear that, whenever

[30] Ibid, volume 21, page 125.
[31] Ibid, volume 21, page 126.
[32] Ibid, volume 21, page 135-136.

compliance powers have been removed in the past, the conduct which is typical of the industry returns. If the Government is determined to introduce sunset provisions, it should consider how and when it is achieved following a review after 5 years to determine the appropriateness.

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