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

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Contents

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

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Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The Bill amends the *Building and Construction Industry Improvement Act 2005* (BCII Act) to:

- create the Office of the Fair Work Building Industry Inspectorate to regulate the building and construction industry, replacing the Office of the Australian Building and Construction Commissioner

- introduce certain safeguards in relation to the use of the power to compulsorily obtain information or documents pertaining to its regulatory function

- create the Office of the Independent Assessor who may make a determination that the examination notice powers will not apply to a particular project.

Glossary

AAT	Administrative Appeals Tribunal
ABCC	Australian Building and Construction Commission
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AiG	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AMWU	Australian Manufacturing Workers Union
AWU	Australian Workers Union
BCII Act	*Building and Construction Industry Improvement Act 2005*
BIT	(Interim) Building Industry Taskforce
CEACR	Committee of Experts on the Application of Conventions and Recommendation
CEPU	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
CFMEU	Construction Forestry Mining and Energy Union
FW Act	*Fair Work Act 2009*
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
ILO	International Labour Organisation
NES	National Employment Standards
OFWBII	Office of the Fair Work Building Industry Inspectorate. Reports prior to this Bill often refer to a Building and Construction Division (BCD) of Fair Work Australia incorporating the Office of the Fair Work Ombudsman
OFWO	Office of the Fair Work Ombudsman
WR Act	*Workplace Relations Act 1996*

Chronology

The Wilcox Discussion Paper[1] contains a useful chronology to Commonwealth developments in regulating the building and construction industry. It is reproduced below as it sets out the key instruments and dates relating to building industry regulation. More recent developments have been added to this chronology by the Digest authors.

Commonwealth instruments and agencies regulating of the Building and Construction industry

31 December 1996	Commencement of workplace relations legislation—*Workplace Relations Act 1996* ("the WR Act").
22 September 1997	Commencement of Commonwealth-State-Territory *National Code of Practice for the Construction Industry* ("the Code").
February 1998	Commencement of the *Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry* ("the Guidelines"). Application limited to Commonwealth projects.
May 2001	Report to Government on the Building Industry by the Employment Advocate.
29 August 2001	Establishment of Cole Royal Commission.
1 October 2002	Establishment of Building Industry Taskforce ("BIT").
24 February 2003	Commissioner Cole delivers Royal Commission report.
6 November 2003	Building and Construction Industry Improvement Bill ("the 2003 Bill") introduced into the House of Representatives.
December 2003	The Guidelines are revised so as to transfer enforcement responsibility to BIT and extend their operation to projects funded (directly or indirectly) by the Commonwealth.
June 2004	Senate Employment, Workplace Relations and Education References Committee *Beyond Cole. The future of the construction industry: confrontation or co-operation?*
13 July 2004	Commencement of the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* which provided coercive information gathering powers to BIT.
9 October 2004	Federal election at which Coalition Government gains control of the Senate, as from 1 July 2005.

1. M Wilcox QC, *Proposed Building and Construction Division of Fair Work Australia: Discussion Paper*, Canberra, October 2008, viewed 6 August 2009, http://www.workplace.gov.au/NR/rdonlyres/421EEA04-4C43-44F3-93B4-673076222DF4/0/WilcoxDiscussionPaper.pdf

9 March 2005	Building and Construction Industry Improvement Bill ("the 2005 Bill") introduced into House of Representatives.
May 2005	Senate Employment, Workplace Relations and Education References Committee, *Provisions of the Building and Construction Industry Improvement Bill 2005 and the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005*.
12 September 2005	The 2005 Bill becomes law as the *Building and Construction Industry Improvement Act 2005* ("the BCII Act").
1 October 2005	The Office of the Australian Building and Construction Commissioner ("the ABCC") commences operation.
1 November 2005	Further amendment of the Guidelines (released September 2005) so as to extend their application to private projects of contractors interested in undertaking Australian Government work took effect.
27 March 2006	*Workplace Relations Amendment Act 2006 (Work Choices)* took effect.
1 June 2006	Amendment of Guidelines to adopt WorkChoices reforms.
30 April 2007	ALP workplace relations policy announced, including plan to establish Fair Work Australia ("FWA") with a specialist building and construction division.
24 November 2007	Australian Labor Government elected.
21 July 2008	Consultation Terms of Reference for Wilcox Inquiry finalised.
3 October 2008	Wilcox Discussion Paper released.
3 April 2009	Wilcox Report released.
17 June 2009	Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (this Bill) introduced to House of Representatives. Minister Gillard issues directions to ABC Commissioner Lloyd concerning the spread of ABCC resources and the conduct of coercion powers and compulsory interviews.[2]
25 June 2009	Senate disallows Minister Gillard's directions.
10 July 2009	New construction Code Guidelines to operate from 1 August 2009 issued by Minister Gillard.

2. J Gillard (Minister for Education, Employment and Workplace Relations, and Social Inclusion), 'Direction in relation to coercive powers' , Federal Register of Legislative Instruments F2009L02483, viewed 6 August 2009, http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/1680FA250270FD05CA2575DD002226F3/$file/CoercivePowersDirection.pdf

Recent background

On 28 November 2008, the Senate Standing Committee on Education, Employment and Workplace Relations (the Senate Committee) reported on its inquiry into a private member's bill entitled the Building and Construction Industry (Restoring Workplace Rights) Bill 2008 (the private member's bill).[3] That bill sought to repeal both the *Building and Construction Industry Improvement Act 2005* (BCII Act) and the *Building and Construction Industry Improvement (Consequential and Transitional) Act 2005*. In considering the terms of the private member's bill the Senate Committee also reviewed industrial issues pertaining to regulation of the Building and Construction industry.

The Rudd Government had earlier requested the Hon. Murray Wilcox QC to consult and report on matters related to the creation of a specialist division, called the Building and Construction Division (BCD) of the 'one-stop-industrial shop', Fair Work Australia (FWA).[4]

FWA had been outlined in Australian Labor Party (ALP) election policy (discussed below) as the agency to incorporate most of the industrial and workplace regulatory agencies established since 1997. FWA came into operation on 1 July 2009, following the enactment of the *Fair Work Act 2009*. Mr Wilcox presented his Discussion Paper in October 2008 and his report on the proposed BCD of FWA (the Wilcox Report) was released by Minister Gillard in March 2009. Its recommendations are central to the proposed operation of this Bill.[5]

The issues outlined below cover: the main findings of the Cole Royal Commission, a summary of the BCII Act, the ALP's election position on the ABCC, the recommendations in the Wilcox Report on the functions and powers for a proposed Building and Construction Division of FWA (replacing the ABCC) and views of key organisations on the BCII Act and its replacement under this Bill, including the view of the ABC Commissioner, Mr Lloyd on the Wilcox recommendations.

Cole Royal Commission: the rule of law and cultural change

The existing BCII Act was drafted in response to the report of a subsequent Royal Commission, the Royal Commission into the Building and Construction Industry ('Cole

3. Senate Standing Committee on Education, Employment and Workplace Relations, *Building and Construction Industry (Restoring Workplace Rights) Bill 2008*, Department of the Senate, Canberra, 28 November 2008, viewed 6 August 2009, http://www.aph.gov.au/Senate/committee/eet_ctte/building_and_construction/report/report.pdf
4. M Wilcox QC, Discussion Paper, p. 1.
5. M Wilcox QC, *Transition to Fair Work Australia for the building and construction industry: Report*, Canberra, March 2009, viewed 6 August 2009, http://www.workplace.gov.au/NR/rdonlyres/0B44B3D3-9ABD-4F4A-94FE-866F9ACDB2A6/0/WilcoxReport.pdf.

Royal Commission').[6] The Royal Commission report contained 212 recommendations, the majority of which proposed changes to federal workplace relations legislation governing the building and construction industry.[7]

Commissioner Cole specifically recommended:

- changes to ensure bargaining only at enterprise level, eliminating 'pattern bargaining'[8]
- mechanisms to 'ensure that any participant in the industry causing loss to other participants as a result of unlawful industrial action is held responsible for that loss'[9]
- mechanisms to ensure that disputes are settled in accordance with legislated or agreed dispute resolution procedures 'rather than by the application of industrial and commercial pressure',[10] and
- creation of an independent body that will ensure 'that participants comply with industrial, civil and criminal laws applicable to all Australians....as well as industry specific laws applicable to this industry only.'[11]

It might be noted that the Cole Royal Commission exhibited a different view on the freedom of association and the freedom not to associate than did the 1982 Winneke Royal Commission into the Builders' Labourers Federation which accepted the practice of 'no ticket no start' practices in the building industry:

> The building industry … magnifies problems which, traditionally, exist where unionists work alongside non-unionists, because all people share the benefits of working conditions which apply universally on the site. Improvements in these conditions – including site amenities and safety conditions – have been gained, to a significant extent, by labour organisations. Feelings of resentment against those who have not, and will not, contribute to the cost of maintaining those conditions, accordingly, runs high…
>
> Throughout the 1970s the industry – both employer and employee organisations alike – has sought, by empirical processes, to minimise the disharmony which has hitherto existed by establishing a 'closed shop' policy. In its operation, this policy has meant that persons working on major construction sites must belong to 'an appropriate union' … The policy has been enshrined, at least in the south-eastern states and the

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6. T R H Cole RFD QC, Final Report of the Royal Commission into the Building and Construction Industry, Commonwealth of Australia, Canberra, February 2003, viewed 6 August 2009, http://www.royalcombci.gov.au/hearings/reports.asp
7. For further information about the BCII see P Prince and J Varghese, 'Building and Construction Industry Improvement Bill 2003', *Bills digest nos. 129–130*, Parliamentary Library, Canberra, 7 May 2004, viewed 6 August 2009, http://www.aph.gov.au/library/pubs/bd/2003-04/04bd129.pdf
8. T R H Cole RFD QC, op. cit., p. 28.
9. T R H Cole RFD QC, op. cit., p. 4.
10. T R H Cole RFD QC, op. cit.
11. T R H Cole RFD QC, op. cit.

> A.C.T. in the 'no ticket no start' agreements … The policy is embraced by both employer and employee organisations alike.[12]

What had changed between the Winneke Royal Commission and the Cole Royal Commission were the legislative provisions of the *Workplace Relations Act 1996* (WR Act) curbing the closed shop and milder forms of union security agreements. In particular the freedom of association provisions which supported non association, prohibition on strike pay, prohibition on coercion to enter into enterprise bargaining and the prohibition on union bargaining fees (in lieu of union membership).

Nevertheless, the perception of the infringement of these provisions resulted in the Cole Royal Commission calling for 'cultural change' in the form of:

- recognition by all participants that 'the rule of law applies within the industry'[13]
- recognition, principally by the unions but also by the major contractors and subcontractors, that in Australia there exists freedom of choice to either join or not join an association of employees[14]
- an attitudinal change of participants regarding management of building and construction projects that is, control should be exercised by head contractors and major subcontractors, not by unions[15] and
- an attitudinal change to safety by all participants: governments, clients, contractors, subcontractors, unions and workers.[16]

The legislation which gave effect to the Cole Commission's desire for the implementation of the rule of law included the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (WRA (Codifying Contempt Offences) Act) and later the BCII Act.

Building and Construction Industry Improvement Act 2005—summary

The BCII Act incorporated provisions earlier set out in the WRA (Codifying Contempt Offences) Act in respect of the provision of evidence. It applies to certain parts (mainly 'high rise' buildings) of the building and construction industry and certain areas of off-site work. The BCII Act:

- allows the Minister to issue a Building Code, prescribing conduct and protocols on contractors bidding for Commonwealth (and associated) building work[17]

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12. J.S. Winneke, Report of the Commissioner appointed to inquire into activities of the Australian building construction employees and builders labourers federation, Australian Government Publishing Service (AGPS), Canberra, 1982, pp. 388-389.
13. T R H Cole RFD QC, op. cit., p. 79.
14. T R H Cole RFD QC, op. cit., p. 4.
15. T R H Cole RFD QC, op. cit.
16. T R H Cole RFD QC, op. cit., p. 5.
17. Section 27 Building and Construction Industry Improvement Act 2005

- makes broader forms of industrial action than are prescribed under the FW Act, unlawful[18]
- prohibits certain forms of coercive and discriminatory conduct[19]
- trebles the maximum penalties, stiffens the criteria for the application of a penalty and enhances access to uncapped damages for unlawful conduct (than are provided currently under the FW Act)[20]
- establishes the Australian Building and Construction Commissioner (ABC Commissioner) and establishes the Federal Safety Commissioner[21]
- provides the ABC Commissioner with wide-ranging powers to monitor, investigate and enforce workplace laws and building codes in the industry[22]
- provides the ABC Commissioner power to compel a person to produce information and documents, attend meetings and answer questions regarding building industry matters,[23] and
- provides that failure to cooperate with the Commissioner is punishable by up to six months' imprisonment.[24]

The BCII Act received assent on 12 September 2005 (as did the related consequential and transitional Act). Sections of the BCII Act relating to industrial action had a retrospective commencement date of 9 March 2005.

ALP election commitments on the ABCC

The ALP undertook to maintain a specialist inspectorate division within the proposed 'one-stop-shop', Fair Work Australia for certain industries stating that:

> Labor does not believe in separate industrial rules and regulations for different industries. Under Labor all employers, employees and unions across all industries will be required to comply with the rules and will face penalties if they do not do so. Fair Work Australia's inspectorate will have specialist divisions 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.[25]

18. Section 38 Building and Construction Industry Improvement Act 2005
19. Chapter 6 Building and Construction Industry Improvement Act 2005
20. Chapter 7 Building and Construction Industry Improvement Act 2005
21. Chapter 2 and Chapter 4 Building and Construction Industry Improvement Act 2005
22. Chapter 7 Building and Construction Industry Improvement Act 2005
23. Section 52 Building and Construction Industry Improvement Act 2005
24. Subsection 52(6) Building and Construction Industry Improvement Act 2005
25. K Rudd and J Gillard, *Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*, April 2007, p. 17, viewed 6 August 2009, http://www.alp.org.au/download/now/forwardwithfairness.pdf

Later, the ALP's workplace relations policy confirmed a move of resources and functions from the ABCC to a specialist division within the inspectorate of Fair Work Australia:

> The current Australian Building and Construction Commission arrangements will remain in place until the 31st of January 2010 […] At that time, those responsibilities will be transferred to a specialist division within the inspectorate of Fair Work Australia […] Labor's system will be simpler with the ABCC and then the specialist inspectorate within Fair Work Australia ensuring compliance with our tough rules on industrial action and strike pay. Labor will consult extensively with industry stakeholders to ensure the transition to new arrangements will be orderly, effective and robust. The principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue, as will a specialist inspectorate for the building and construction industry.[26]

Wilcox Report – Recommendations regarding the BCII Act

The Wilcox Report made eight key recommendations as follows:

- the proposed Specialist Division be located within the Office of the Fair Work Ombudsman but have:

  (i) operational autonomy under a Director, appointed by the Minister, who would implement policies, programs and priorities determined by an advisory board comprising the Fair Work Ombudsman, the Director and a number of part-time members appointed by the Minister; and

  (ii) funds allocated each year against an Outcome related only to the Specialist Division.[27]

- the provisions of the Fair Work Bill governing:

  (i) the conduct of employers, employees and industrial associations; and

  (ii) penalties for contraventions of the Fair Work Bill;

  apply, unchanged, to participants in the building and construction industry.[28]

- the Director of the Building and Construction Division be invested with a power, similar to that contained in section 52 of the *Building and Construction Industry Improvement Act 2005*, to cause people compulsorily to attend for interrogation, but subject to the safeguards contained in Recommendation 4; and

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26. K Rudd and J Gillard, *Forward with Fairness: Policy Implementation Plan*, August 2007, p. 24, viewed 6 August 2009, http://www.alp.org.au/download/now/070828_dp_forward_with_fairness___policy_implementation_plan.pdf
27. M Wilcox QC, Report, op. cit., recommendation 1, p. 6.
28. M Wilcox QC, Report, op. cit., recommendation 2.

(i) the grant of this power be reviewed after five years;

(ii) in order to ensure review, the provisions in the new legislation providing for compulsory interrogation be made subject to a five-year sunset clause.[29]

- the use of compulsory interrogation be subject to the following safeguards:

(i) a notice to a person compulsorily to attend for interrogation be issued only by a presidential member of the Administrative Appeals Tribunal who is satisfied by written material, which may include evidence on the basis of "information and belief", that:

(a) the Building and Construction Division has commenced an investigation into a particular suspected contravention, by one or more building industry participants, of the Fair Work Act, an "industrial law", as defined by that Act, or an industrial instrument made under that Act;

(b) there are reasonable grounds to believe that a particular person has information or documents relevant to that investigation, or is capable of giving evidence that is relevant to that investigation;

(c) it is likely to be important to the progress of the investigation that this information or evidence, or those documents, be obtained; and

(d) having regard to the nature and likely seriousness of the suspected contravention, any alternative method of obtaining the information, evidence or documents and the likely impact upon the person of being required to do so, insofar as this is known, it is reasonable to require that person to attend before the Director or a Deputy Director and answer questions and/or produce documents relevant to the investigation;

(ii) the Director or a Deputy Director of the Building and Construction Division preside at all compulsory interrogations;

(iii) the Commonwealth Ombudsman monitor proceedings at all compulsory interrogations and for that purpose the Director:

(a) promptly notify the Commonwealth Ombudsman of the issue of all notices to attend for interrogation; and

(b) promptly after the interrogation, supply to the Commonwealth Ombudsman a report, a video recording of the interrogation and a copy of any written transcript; and

29. M Wilcox QC, Report, op. cit., recommendation 3.

(iv) the Commonwealth Ombudsman report to Parliament annually, and otherwise as required, concerning the exercise of the power of compulsory interrogation.[30]

- the legislation authorising compulsory interrogation provide for:

  (i) payment to persons summoned for interrogation of their reasonable expenses (travelling, accommodation and legal, as may be) and any loss of wages or other income; and

  (ii) recognition and availability of client legal privilege and public interest immunity.[31]

- a new Division 4 be added to Part 5-2 of the Fair Work Bill relating to the "building and construction industry", as therein defined. The definition of "building and construction industry" follow the definition of "building work" in the *Building and Construction Industry Improvement Act 2005*, but excluding off-site work.[32]
- the Director of the Building and Construction Division have all the functions, powers and responsibilities, in relation to the "building and construction industry", as defined in the new legislation, that the Fair Work Ombudsman has in respect of other industries; including, in particular, investigation of suspected unlawful behaviour by any building industry participant (whether employer, employee or industrial association) and the prosecution of penalty and other legal proceedings.[33]
- Except perhaps in rural and remote areas, the Building and Construction Division have its own dedicated operational staff, including inspectors.[34]

Position of significant interest groups

Note: The Main provisions section of the Digest contains further comment from significant interest groups.

Australian Chamber of Commerce and Industry

ACCI lodged a formal submission to the Senate Education Employment and Workplace Relations Committee (the Senate EEWR Committee) urging that the Bill be blocked. ACCI does not support proposals that would, in its view:

- remove existing unlawful industrial action and penalty provisions
- remove the current ability for a successful party to recoup legal costs
- automatically repeal the coercive powers after five years, which appears to pre-empt an inquiry into the issue

30. M Wilcox QC, Report, op. cit., recommendation 4, p. 7.
31. M Wilcox QC, Report, op. cit., recommendation 5.
32. M Wilcox QC, Report, op. cit., recommendation 6.
33. M Wilcox QC, Report, op. cit., recommendation 7.
34. M Wilcox QC, Report, op. cit., recommendation 8.

- place strictures on exercising coercive powers where similar Commonwealth regulators do not have similar 'safeguards' or oversight mechanisms.

ACCI argues that the BCII Act was not part of 'WorkChoices'. It was the culmination of an extensive Royal Commission into the industry that looked at conduct by all participants, not just unions. The Royal Commission's 200 specific recommendations for legislative reform were designed to tackle the widespread unlawfulness and 'disregard of the rule of law'. It argues that the Bill has the potential to reverse the achievements that have so far been made, and threaten the important reform agenda of achieving, once and for all, lasting cultural change for the industry' and the legislation, if passed by Parliament, would essentially gut the most potent and effective provisions in the existing framework — provisions that deal effectively with unlawful wildcat strike action, coercion and duress. ACCI also raises legal questions about the ability for Parliament to delegate its powers to allow an 'assessor' to switch off vital coercive investigation powers for a building project.

The ACCI considers that, in light of the Government's expenditure on national infrastructure projects, proposed changes that add substantial costs and lead to potential industrial unrest will come at a high price for the community. There are still problems in the industry which require tough laws as illustrated by a recent Federal Court case, where it stated in its decision that the union's breach of an order the very same day it was issued, reflects the cavalier attitude taken by the CFMEU to the Order and the Court. Following a Royal Commission into the issue and countless examples of the ABCC's success to date, ACCI does not consider the case has been made to change the existing laws.[35]

International Labour Organisation

Most of the WR Act prohibitions cited earlier have been found to run squarely against relevant International Labour Organisation conventions.[36] Australia has been urged repeatedly by the ILO to bring its industrial laws into conformity with the ILO conventions which it has signed. At the 98th session of the ILO's International Labour Conference, the Committee of Experts on the Application of Conventions and Recommendation (CEACR) reiterated its concerns over Australian labour law and the BCII Act 2005 specifically. The CEACR noted, at that time, that the newly elected Rudd Government had informed the CEACR of its commitment to address issues it has raised with regard to the BCII Act.

> *Building industry.* In its previous comments, the Committee, taking note of the conclusions and recommendations of the Committee on Freedom of Association in Case No. 2326 (338th Report, paragraphs 409–457), had raised the need to rectify

35. 'ACCI calls on Senate to block ABCC changes', *Workplaceinfo.com.au*, 21 July 2009.
36. J. Romeyn, 'The International Labour Organisation's core labour standards and the *Workplace Relations Act 1996 Research Paper* no. 13, 2007–08, Parliamentary Library, Canberra, 2008, pp. 30-35, viewed 10 August 2009 http://www.aph.gov.au/library/pubs/RP/2007-08/08RP13.pdf.

> numerous discrepancies between the Building and Construction Industry Improvement (BCII) Act, 2005, and the Convention. The Committee had regretted, in particular, the declining rate of trade unionism in the industry which, in the Committee's view, might not be unrelated to impediments placed over collective bargaining in the BCII Act …
>
> The Committee, therefore, once again urges the Government to indicate in its next report any measures taken or contemplated with a view to: (i) amending sections 36, 37 and 38 of the BCII Act, 2005, which refer to "unlawful industrial action" (implying not simply liability in tort vis-à-vis the employer, but a wider responsibility towards third parties and an outright prohibition of industrial action); (ii) amending sections 39, 40 and 48–50 of the BCII Act so as to eliminate any excessive impediments, penalties and sanctions against industrial action in the building and construction industry; (iii) introducing sufficient safeguards into the BCII Act so as to ensure that the functioning of the Australian Building and Construction (ABC) Commissioner and inspectors does not lead to interference in the internal affairs of trade unions – especially provisions on the possibility of lodging an appeal before the courts against the ABC Commissioner's notices prior to the handing over of documents (sections 52, 53, 55, 56 and 59 of the BCII Act); and (iv) amending section 52(6) of the BCII Act which enables the ABC Commissioner to impose a penalty of six months' imprisonment for failure to comply with a notice to produce documents or give information so as to ensure that penalties are proportional to the gravity of any offence. The Committee also requests the Government to indicate any measures taken to instruct the ABCC to refrain from imposing penalties or commencing legal proceedings under the ABCC while the review is under way. [37]

Australian Building and Construction Commission

In a letter from the office of the Australian Building and Construction Commissioner to the Deputy Prime Minister which was tabled in the Parliament,[38] the ABC Commissioner made the following comments:

- The maximum penalty for industrial action set under the BCII Act of $110,000 for a body corporate and of $22,000 for an individual should not be reduced to $33,000 and $6,600 respectively which would result from the Wilcox Report: 'high and distinct penalty levels for the building and construction industry are justified … (the industry)

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37. International Labour Organisation, Committee on the Freedom of Association, *Report of the Committee of Experts on the Application of Conventions and Recommendations* International Labour Conference, 98th Session, 2009. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_103484.pdf
38. S Conroy, 'Return to order: Australian Building and Construction Commissioner', *Senate Hansard*, 24 June 2009, p. 4225, viewed 6 August, 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2009-06-24%2F0169%22

has over the years recorded excessive levels of unlawful industrial action, coercion and discrimination'.[39]

- The proposed FW Act definition of industrial action may allow retrospective agreement by an employer to a period of industrial action, allowing strikers to be paid (unlike paragraph 36(1)(e) of the BCII Act which should be retained).[40]
- The BCII Act at section 44 enables prosecution for 'undue pressure to make, vary or terminate a workplace agreement', whereas Wilcox does not support retention of this provision.[41]
- The BCII Act's requirements on the ABC Commissioner to exercise his power to conduct investigations judiciously means that the ABCC is cautious in its use of the compulsory interrogation power and claims some witnesses would not provide evidence without being compulsorily required to attend and give evidence for fear of retribution.[42]
- Proposals for the video recording of every examination may be expensive in relation to the benefits derived; an option may be to video on a selective basis.[43]
- The Wilcox proposal that the Guidelines be made a disallowable instrument is opposed. The current arrangement of these being an administrative document, whereby new trends and developments can be readily responded to is preferred. A disallowable instrument 'raises the prospect of Parliamentary scrutiny, court and tribunal interpretation'.[44]
- The Wilcox proposal to make ABCC decisions seeking prosecution for breaches of the Code Guidelines to be judicially and administratively reviewable is unjustified.[45]
- The definition of 'building work' as contained in the Guidelines should be emulated in proposed legislation and that certain related manufacturing activities such as the manufacture of pre-cast concrete panels 'very closely resembles on-site building work'.[46]

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39. J Lloyd, Letter to Deputy Prime Minister, Melbourne, 27 April 2009, paragraph 7. The letter was tabled: Senate, *Debates*, 24 June 2009, p.4225. Viewed 8 August 2009. http://parlinfo.aph.gov.au/parlInfo/download/library/jrnart/HKBU6/upload_binary/hkbu60.pdf;fileType=application/pdf#search=%22lloyd%22.
40. J Lloyd, op. cit., paragraph 13.
41. J Lloyd, op. cit., paragraph 14.
42. J Lloyd, op. cit., paragraph 19.
43. J Lloyd, op. cit., paragraph 27.
44. J Lloyd, op. cit., paragraph 32.
45. J Lloyd, op. cit., paragraph 33.
46. J Lloyd, op. cit., paragraph 37.

- The Wilcox proposal for the ABCC's replacement to have a role in investigating phoenix companies is better carried out by other agencies as it would have resource cost issues.[47]
- A statutory right of intervention should be retained as provided in the BCII Act, as the intervention right has been exercised frequently, in 93 AIRC cases and 15 court cases, and courts and tribunals are sometimes unaware of the full range of legal obligations and rights arising under labour laws.

ABCC activities

In the 12 months from 1 June 2007 to 31 July 2008

- The ABCC pursued 225 investigations into a suspected 812 contravention of relevant workplace laws.
- As at 30 June 2008, 49 investigations were ongoing.
- The majority of breaches related to unlawful or unprotected industrial action: 199; right of entry: 156, coercion: 139 and freedom of association: 114.
- The ABCC was involved in 30 penalty proceedings before the courts.
- The ABCC intervened in 17 AIRC proceedings and two court proceedings.
- The ABCC conducted 596 Code site visits, 28 Code inspections and 15 audits. It is estimated that 434 construction sites are now subject to the code.
- The ABCC recorded 2061 enquiries – 1969 of which were responded to within a day, 1610 resolved within three working days.
- The ABCC conducted 293 presentations to approximately 5,100 attendees. [48]

Construction Unions

In a joint submission to the Senate EEWR Committee inquiry into the Bill, the combined construction unions consisting of the CFMEU, AMWU, AWU and CEPU maintain the view that there should be no specific industrial regulation covering the building and construction industry.[49] The combined construction unions urge the Senate EEWR

47. J Lloyd, op. cit., paragraph 39.
48. ABCC, 'ABCC – a year at a glance', *Industry Update*, July 2008, Viewed 8 July 2009, http://www.abcc.gov.au/NR/rdonlyres/C6E52237-FBC0-496A-AFD2-7BC6EF390458/0/IUJuly2008.pdf
49. Combined Construction Unions, Submission No. 18, Senate Education, Employment and Workplace Relations Committee: Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, July 2009, viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=97dafff9-c29c-4b96-9d09-7a7007dbd115

Committee to recommend an immediate repeal of the BCII Act, enabling the FW Act to regulate the industry.[50]

They argue that allegations of criminal conduct have been raised by the media, by the Federal Opposition, by employer groups and by the federal Minister for Education Employment and Workplace Relations to justify retention of the BCII Act. However they contend that the BCII Act deals with industrial law not criminal law. The combined construction unions' submission contends that public debate over a government agency's investigative powers should commence by querying whether those powers are appropriate to the matters under investigation. They claim that such powers have no place in industrial law. Therefore they reject the claim by ABC Commissioner John Lloyd that coercive powers are necessary in part to protect witnesses, alleging the ABC Commissioner provided no evidence that such fear exists, or if it does, that it is well-founded. Without coercive powers it would still be open to a prosecuting authority to protect a witness by subpoenaing them.[51]

If it is decided to retain coercive powers, the legislation should provide a 'switching on' rather than a 'switching off' mechanism. This could be used in exceptional circumstances and subject to other processes and safeguards in the Bill. The combined construction unions argue that the Bill's switching off facility under the Bill's proposed Independent Assessor, restricted to new projects, is arbitrary.[52]

The combined construction unions propose that the threshold of the safeguards be raised to expressly require the Administrative Appeals Tribunal to have regard to both the seriousness of the alleged contravention and the impact on the person to be examined. It should be made clear that examination notices are a last resort, and want the person being issued with the notice to get an opportunity to be heard by the AAT on whether the proposed issuing requirements have been satisfied. Examination notices should have to spell out the documents required.[53]

The combined construction unions argue that the proposal for a separate and autonomous statutory agency working in parallel with, but independent of, the OFWO is not consistent with the relevant Wilcox recommendation – which is that the specialist division be located **within** the office of the OFWO but operate with autonomy.[54]

They also say that the Wilcox recommendation that the specialist division implement policies, programmes and priorities determined (rather than recommended) by an advisory board of public servants and industry representatives for the proposed building

50. Combined Construction Unions, op. cit., paragraph 1.2.
51. Combined Construction Unions, op. cit., paragraphs 2.1–2.8.
52. Combined Construction Unions, op. cit., paragraph 3.11.
53. Combined Construction Unions, op. cit., paragraph 3.16.
54. Combined Construction Unions, op. cit., paragraph 4.2.

inspectorate should be implemented, arguing it would introduce accountability and balance into the work of this agency.[55]

The combined construction unions argue that the government should amend the Bill to reflect the Wilcox recommendation against the new inspectorate retaining a statutory right of intervention in court of FWA proceedings, with the issue of intervention left to the discretion of the relevant court or tribunal.[56]

Committee consideration

The Bill has been referred to the Senate Education, Employment and Workplace Relations Committee on 18 June 2009 for inquiry and report by 10 September 2009.[57]

Financial implications

The Explanatory Memorandum states that the financial impact of the Bill is Budget neutral.[58] However, it is noted that the Ombudsman Office will take on new oversight functions under the Bill. Even though those additional functions fit very well within its existing role, they cannot be performed without adequate resources.

Views of the Opposition and independents

The Coalition is likely to oppose the Bill.[59] Both Senator Xenophon and Senator Fielding have expressed some concerns about the Bill and at least one is expected to vote against it.[60] However, Senator Xenophon has expressed limited support for Minister Gillard's direction concerning resources to the ABC Commissioner.[61]

The ALP on the other hand has always been prepared to stand by its 2007 commitments. Should the Bill be defeated and become the subject of an election debate, then the ALP is

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55. Combined Construction Unions, op. cit., paragraph 4.3.
56. Combined Construction unions, op. cit., paragraph 6.3.
57. Senate Education, Employment and Workplace Relations inquiry website, viewed 6 August 2009, http://www.aph.gov.au/Senate/committee/eet_ctte/abcc/index.htm
58. Explanatory Memorandum, Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, p. 2.
59. M Keenan, Senate stops Gillard from destroying construction watchdog powers, media release, 25 June 2009.
60. S Scott, 'ABCC chief's plea draws claims of bias', *Australian Financial Review*, 27 June 2009, p. 8, viewed 6 August 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FPZYT6%22 and B Schneiders 'Fielding tough on unions', *The Age*, 30 July 2009, p. 2, viewed 6 August 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FX09U6%22 .
61. The Minister's Direction is described in the chronology above.

likely to argue that any future legislation should retain much of the model proposed in this Bill. In other words, the penalties for industrial action in the building industry should be set at the standard of the FW Act. Investigatory powers for the ABCC replacement should be retained, but with appropriate safe guards and support measures for those required to testify at a building industry inspectorate investigation.

Main provisions

Schedule1—Amendments to the *Building and Construction Industry Improvement Act 2005*

Preliminary matters

Item 1 would rename the *Building and Construction Industry Improvement Act 2005* as the *Fair Work (Building Industry) Act 2009*.

Objects section of the Act

Item 2 repeals and replaces **section 3**, the objects section of the BCII Act. The change of emphasis in the Bill is reflected in the new objects section. Whereas the current section is focused on enabling building work to be carried out 'fairly, efficiently and productively' the new objects is to provide a 'balanced framework for cooperative, productive and harmonious workplace relations in the building industry'.

Definitions

Items 3 to **47** are definitions provisions. They are mainly consequential—repealing definitions no longer relevant or adding new definitions of concepts to be inserted by the Bill.[62]

Definition of 'building work'

Item 48 amends the definition of 'building work' in section 5. The term 'building work' is central to the BCII Act as it forms the basis of terms such as *building employee* and *building agreement*, and hence terms such as *building employer* and *building association*.

The definition of *building work* in the BCII Act includes a broad range of activities – whether these are traditionally thought of as 'building' or not – including fit-out, restoration, repair and demolition, any work 'part of or preparatory to' such activities, and 'pre-fabrication of made-to-order components'. Specific exclusions from the definition of 'building work' include mining and extraction activities and domestic building, including

62. For example: removing terms such as ABC Commissioner, ABC Inspector and inserting terms such as enterprise agreement, Fair Work Building Inspector, nominated AAT presidential member.

alteration or extension, except where this is part of a project including at least 5 single-dwelling houses.

Item 48 would amend the definition of 'building work' at **subparagraph 5(1)(d)(iv)** to exclude a reference to off-site pre-fabrication of made-to-order components from the definition. The Explanatory Memorandum states that it is intended that the amended definition will exclude manufacturing that takes place in permanent off-site facilities and is separate from the building project but that pre-fabrication of building components that takes place on auxiliary or holding sites separate from the primary construction site(s) will remain covered by the definition of building work.[63]

Comment on the 'building work' definition

The ACTU submission to the Senate inquiry states that the exclusion of off-site pre-fabrication from the definition of building works is an improvement and will bring greater certainty to the investigation of suspected breaches of the laws.[64] Master Builders, on the other hand, argues the amendment will cause confusion as to the dividing line between when the Bill's provision will or will not apply since many businesses have staff engaged in both on-site and off-site fabrication.[65]

Establishment of the Office of the Fair Work Building Industry Inspectorate

Item 49 repeals **Chapter 2** of the BCII Act, and replaces it with a **new Chapter 2** containing **proposed sections 9** to **26M**. The effect is to abolish the Office of the Australian Building and Construction Commissioner and create a new statutory agency called the Office of the Fair Work Building Industry Inspectorate (the Building Inspectorate). The staff of the Building Inspectorate would be engaged under the *Public Service Act 1999* (**proposed section 26K**).

Building Inspectorate Director's functions and powers

The Building Inspectorate would be headed by a Director appointed by the Minister (**proposed section 9**). The Director's functions are set out in **proposed section 10** and

63. Explanatory Memorandum, p. 5.
64. ACTU, Submission No. 19, Senate Education, Employment and Workplace Relations Committee, 'Inquiry into the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009', p. 6, viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=214b3620-b9ab-4937-be2d-4310444dae53
65. Master Builders Australia, Submission No. 13, Senate Education, Employment and Workplace Relations Committee, 'Inquiry into the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009', p. 9 viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=03c5be87-804e-4d96-b205-c917d8cea782

include the functions of promoting harmonious, productive and cooperative workplace relations in the building industry and promoting compliance with designated building laws[66] and the Building Code including by providing education, assistance and advice to building industry participants. The Director's functions are drafted broadly. Amongst other things, he/she may:

- investigate suspected contraventions of a designated building law, a safety net contractual entitlement or the Building Code
- institute court proceedings or make applications to FWA regarding building laws or safety net contractual entitlements as they relate to building industry participants
- refer matters to other relevant authorities
- provide representation to a building industry participant in court or FWA proceedings if the Director considers that this would promote compliance
- disseminate information, and provide advice and assistance to building industry participants
- make submissions and provide information to the Independent Assessor[67]
- any other functions conferred on the Director by any Act.

A note confirms that the Director also has the functions of an inspector under proposed section 59A.[68]

These functions correspond in many respects to the ABC Commissioner's functions, although note the additional function of inquiring into, investigating, and commencing proceedings in relation to safety net contractual entitlements as they relate to the building industry. This provision would enable the Inspectorate to take action in relation to breaches of a modern award or the National Employment Standards.[69]

Proposed section 11 provides that the Minister may give directions to the Director about the policies, programs and priorities of the Director and about the manner in which the Director is to exercise his or her powers and functions (although not in relation to a particular case). Such directions by the Minister are disallowable instruments. This section corresponds to existing section 11, although the ability of the Minister to give directions about the 'policies, programs and priorities of the Director' is not included in existing section 11. Master Builders sees this as giving the Minister an extension of power which

66. A designated building law means the BCII Act, the *Independent Contractors Act 2006*, the FW Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; or a Commonwealth industrial instrument (section 4).
67. See p. 33of the Digest for information on the role of the Independent Assessor.
68. Proposed section 59A is inserted by item 69 of the Bill.
69. Explanatory Memorandum, p. 6.

could affect the independence of the Inspectorate and therefore recommends that it be removed from the Bill.[70]

Proposed section 13 allows the Director to delegate certain of his or her powers and functions to either a member of the Building Inspectorate staff or to an inspector. A list of all such delegations must be included in the Director's annual report (**proposed section 14).** The Director's powers as an inspector and some examination powers may not be delegated[71] (**proposed subsection 13(2)**). The power to conduct examinations may only be delegated to SES employees (**proposed subsection 13(3)**).

Proposed section 14 deals with annual reporting requirements. The new provision removes some of the existing reporting requirements namely the mandatory requirement to include details of the number, and type of matters investigated by the ABC Commissioner; details of assistance to building employees and building contractors in connection with the recovery of unpaid entitlements; and details of the extent to which the Building Code was complied with during the financial year.

Proposed sections 15 to 22 deal with the terms and conditions of the Director's appointment and are very similar to those for the existing ABC Commissioner.

Comment on the Building Inspectorate and Director's functions

The construction unions' submission notes that the Wilcox inquiry specifically considered the arguments about the structure and location of any specialist agency. Ultimately the Inquiry rejected the model set out in the Bill, namely a separate and autonomous statutory agency working in parallel with, but independently of, the OFWO. Wilcox recommended that the proposed Specialist Division be located within the office of the FWO but with operational autonomy.[72] The unions note that whilst the Wilcox recommendations do not reflect their preferred position, in the absence of any compelling reasons, the Government should not depart from this key finding of the Wilcox Report which it commissioned.[73]

The ACTU submission also questions the rationale of a separate and autonomous statutory agency arguing that an inspectorate that is an administrative unit within the OFWO is more likely to develop a successful culture. The ACTU also fears 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 Inspectorate.[74]

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70. Master Builders Australia, op. cit., pp. 10–11.
71. Specifically, the Director may not delegate the power to apply for an examination notice under section 45 or the power to vary the time for compliance with an examination notice under section 50. See p. 27 of the Digest for an explanation of the examination powers.
72. M Wilcox QC, Report, op. cit., Recommendation 1, p. 6.
73. Combined construction unions, op. cit., paragraph 4.4.
74. ACTU, op. cit., p. 7.

Industry groups are critical of the new section 10 because it gives the Director the function of inquiring into, investigating, and commencing proceedings in relation to safety net contractual entitlements as they relate to the building industry. Master Builders argues that the ABCC has been focussed on restoring the rule of law in the industry and that this new function would be a diversion of resources from the policing obligations to act lawfully.[75] The AiG assert that the Building Inspectorate should not have its resources 'diverted' to underpayment claims and that the skills of the ABCC inspectors are 'not suited' to this work.[76]

Fair Work Building Industry Inspectorate Advisory Board

Proposed sections 23 to **26H** provide for the creation of a Fair Work Building Industry Inspectorate Advisory Board (the Advisory Board). The Advisory Board would be empowered to make recommendations to the Director on policies to guide the performance of the office's functions and exercise of its powers, its priorities and programs, and any other matter at the request of the Minister (**proposed section 24**). The Advisory Board would be comprised of the Director, the Fair Work Ombudsman (FWO), and up to five other part-time members, including one each from a union and employer background, to be appointed by the Minister (**proposed sections 25** and **26**). Terms and conditions of appointment and the processes regarding the Advisory Board's role are set out in **proposed sections 26** to **26H**. There must be at least two meetings in each financial year and a quorum for meetings is to consist of the Chair, the Director and the FWO.[77]

Comment on the Advisory Board

The construction unions' submission supports the introduction of an Advisory Board, noting that its constitution of apolitical public servants and industry representatives, would introduce much-needed accountability and balance into the work of Building Inspectorate.[78] Master Builders, on the other hand, believes the Advisory Board is unnecessary and will prove to be ineffective, cause unnecessary delays and may lead to conflict of interest for the Director over differences in Ministerial directions and Board recommendations.[79]

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75. Master Builders Australia, op. cit., p. 9.
76. AiG, Submission No. 10, Senate Education, Employment and Workplace Relations Committee, 'Inquiry into the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009', pp. 4 and 13, viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=75523ecf-3dd2-4a7a-811b-a17155e9d895
77. Proposed section 26G.
78. Combined construction unions, op. cit., paragraph 4.48.
79. Master Builders Australia, op. cit., p. 13.

Removal of different rules and penalties applying to bargaining and industrial action in the building industry

Item 51 is one of the most significant amendments in the Bill. It removes **Chapters 5** and **6** of the BCII Act dealing with unlawful industrial action, coercion and the associated civil penalties that are specific to the building industry.

The effect of **item 51** is that there would no longer be unlawful industrial action and coercion provisions specific to the building and construction industry. Rather, the industrial action control and penalty regime introduced by the FW Act would apply equally in the case of industrial action by building industry participants.

A major effect of this change is that there will no longer be higher penalties for building industry participants for breaches of industrial law. Maximum penalties will be cut from $22 000 to $6 600 for individuals and from $110 000 to $33 000 for a body corporate.

Comment on removal of difference rules and penalties

The Wilcox Report recommended the removal of Chapters 5 and 6. In relation to the unlawful industrial action provisions in Chapter 5 the Wilcox Report concluded that there was no practical important difference between rules specific to the building industry and those under the FW Act and that retention of the two separate regimes would serve only to complicate the law.[80]

AMMA, in its Senate inquiry submission, disputes this argument and contends that the FW Act is unable to adequately deal with all types of unlawful conduct in the building and construction industry.[81] The submission provides a detailed analysis of the provisions in the FW Act and the BCII Act and concludes for example that section 343 of the FW Act imposes a higher threshold than the BCII Act and may not adequately deal with some of the inappropriate and unlawful conduct that in its view, continues to plague the industry and that reliance on the FW Act may mean that some behaviour in the industry will 'fall under the radar'.[82]

In relation to the different penalty regime in Chapter 7 the Wilcox Report noted that there is no less need to regulate industrial action in industries other than the building and

80. M Wilcox QC, Report, op. cit, paragraph 4.50.
81. AMMA, Submission No. 12, Senate Education, Employment and Workplace Relations Committee, 'Inquiry into the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009', p. 38, viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=3df2ddd2-36c0-47a6-ad48-ca985c44300e
82. AMMA, op. cit., p. 38.

construction industry and recognising the serious consequences of industrial action in any industry, the FW Act contains a number of severe constraints upon its occurrence.[83]

In relation to the higher penalties the Wilcox Report concluded:

> The history of the building and construction industry may provide a case for the retention of special investigative measures, to increase the chance of a contravener in that industry being brought to justice. However, I do not see how it can justify that contravener then being subjected to a maximum penalty greater than would be faced by a person in another industry, who contravened the same provision and happened to be brought to justice. To do that would be to depart from the principle, mentioned by ACTU, of equality before the law.[84]

As noted above, the ABC Commissioner has indicated that in his opinion 'high and distinct penalty levels for the building and construction industry are justified' on the basis of the record of excessive levels of unlawful industrial action, coercion and discrimination. Lower penalties will reduce the deterrence effect of the penalty regime.[85]

ACCI supports the ABC Commissioner's views and maintains that there are good public policy reasons why existing penalty provisions and different industrial law provisions should continue to exist. ACCI submits that equality before the law is not an absolute principle and should not be the dominant justification for removing what it believes to be targeted, appropriate and effective provisions.[86]

Master Builders submission highlights that the Building Inspectorate will have no separate underlying provisions to enforce but will be enforcing provisions of the FW Act in the capacity of an Inspector.

> Without dedicated laws to deal with the subject matter of chapters 5 and 6 and the related penalties for their breach, the work of the ABCC cannot be continued. Content is not only important; it is fundamental to the proper functioning of the successor body.[87]

Master Builders believes that the penalties for taking unlawful industrial action in particular are appropriate considering the harsh consequences for all parties when

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83. M Wilcox QC, Report, op. cit., paragraphs 4.52 and 4.53.
84. M Wilcox QC, Report, op. cit., paragraph 4.64.
85. J Lloyd, op. cit.
86. Australian Chamber of Commerce and Industry, Submission No. 11, Senate Education, Employment and Workplace Relations Committee, *'Inquiry into the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009'* p. 37,viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=b100237d-bbc4-498b-b325-eba6f671e8f5
87. Master Builders Australia, op. cit., paragraph 5.11.2.

unlawful industrial action occurs. It argues that administering the special rules for the industry has been part of the ABCC's success.[88]

AMMA submits that reducing the higher penalties now, before the culture of the industry has changed, will undo those improvements that have occurred since the commencement of the ABCC and the BCII Act.[89]

Against this, the unions and the ACTU strongly support the repeal of the Chapters 5 and 6 on the basis that it will give effect to the fundamental principle of equality before the law.[90]

Power to compulsorily obtain information—examination notices

Item 52 is a key amendment. It repeals and replaces **Part 1** in **Chapter 7** of the BCII Act. It deals with the powers to obtain information (including through compulsorily requiring a person to attend an examination and answer questions) or documents from a person whom the Director believes has information or documents relevant to an investigation. Importantly, and in contrast to existing provisions, use of the powers is dependent upon a nominated presidential member of the Administrative Appeals Tribunal (AAT) being satisfied a case has been made for their use.

The **new Part 1** (**proposed sections 36** to **58)** applies to an investigation by the Director into a suspected breach by a building industry participant of a designated building law[91] or a safety net contractual entitlement (**proposed section 36A**). The compulsory examination powers are available where the Director is investigating a breach of a safety net contractual entitlement, provided there is a reasonable belief that an employer or other party has breached a provision of an NES, modern award or other instrument referred to in subsection 706(2) of the FW Act (**new subsection 36A(2)**).

Examination notices and the role of the AAT presidential member

Central to the new arrangements for compulsorily obtaining information is the concept of an 'examination notice'. **Proposed section 45** sets out the requirements for when and how the Director may apply to a nominated AAT presidential member[92] for issue of an examination notice requiring a person to attend an examination in relation to an investigation. **Proposed subsection 45(1)** provides that the Director may only apply for a notice if he or she believes on reasonable grounds that a person has information or documents or is capable of giving evidence of relevance to an investigation. According to

88. Master Builders Australia, op. cit., paragraph 4.10.
89. AMMA, op. cit., p. 33.
90. ACTU op. cit., p. 10.
91. Described in footnote 66.
92. The Minister nominates an AAT presidential member as set out in **proposed section 44**.

proposed subsection 45(5), applications to the AAT presidential member must be accompanied by an affidavit by the Director including amongst other things:

- details of the investigation (or investigations) to which the application relates
- the grounds on which the Director believes the person has information or documents, or is capable of giving evidence, relevant to the investigation
- details of other methods used to attempt to obtain the information, documents or evidence.

With respect to the issuing of an examination notice, **proposed section 47** requires that the AAT presidential member must be satisfied amongst other things that:

- all other methods of obtaining the material or evidence have been tried or were not appropriate
- the information or evidence would be likely to be of assistance to the investigation
- it would be appropriate, having regard to all of the circumstances, to issue the examination notice, and
- any other matter prescribed by the regulations.

The Minister has stated that it is the Government's intention that the regulations prescribe that the nominated AAT presidential member also considers additional criteria relating to the nature and likely seriousness of the alleged breach and the likely impact upon the person subject to the notice.[93]

It could be asked why these additional criteria are to be in the regulations and not included in the Bill's provisions.

Proposed section 49 requires the Director to notify the Commonwealth Ombudsman when the examination notice has been issued and provide the Ombudsman with a copy.

Proposed section 50 sets out the process by which the Director gives an examination notice to the person to whom it is issued. Amongst other things, it provides the Director with some discretion as to the timing of compliance with the examination notice. **Proposed section 48** describes the form and content of the examination notice.

Conduct of examination

Proposed section 51 sets out the rules for conducting an investigation or examination. These include:

93. J Gillard, (Deputy Prime Minister) Letter, Senate Education, Employment and Workplace Relations Committee, 'Inquiry into the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009', viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=55983d99-62e8-4436-8be5-536a9164ecc6

- the Director or the SES delegate must conduct the examination
- persons summonsed to interview may be represented by a lawyer of their choice
- the Director may require that answers be given under oath or affirmation
- the Director cannot require a person to give an undertaking not to disclose or discuss matters relating to the examination.

Criminal offence—failure to comply with an examination notice

Item 55 repeals section 52 and replaces it with a **new section 52** that creates an offence of failing to comply with an examination notice. The **new subsection 52(1)** effectively replicates the existing subsection 52(6) by making it an offence to fail to comply with requirements imposed by an examination notice to produce documents, information or attend to answer questions. It is also an offence to fail to take an oath or affirmation when required to do so or to refuse to answer questions relevant to the investigation when being examined. The new section retains the BCII Act's six months jail penalty for this offence but adds a note stating that a court can instead of, or in addition to jail, impose a maximum $3 300 fine for breaches, and five times that for a body corporate convicted of an offence.[94]

Significantly, **new subsection 52(2)** provides an exemption from the requirement to provide information or answer questions if the person would be required to disclose information that is subject to either legal professional privilege or would be protected by public interest immunity. The public interest immunity does not exist under the existing provisions.

Other safeguards on the power to compulsorily obtain information or documents

Proposed sections 46, 49, 54A, 58 and **59** contain further checks on the use of the compulsory examination powers. These are:

- people summonsed for examination will be reimbursed for their reasonable expenses, including, upon application to the Director, reasonable legal expenses (**new section 58**)
- the Commonwealth Ombudsman will monitor and review all examinations and provide reports to the Parliament on the exercise of this power (**new sections 49** and **54A**).

94. Under subsection 4B(2) of the *Crimes Act 1914*, to which the note refers, if a Commonwealth statute provides only for a term of imprisonment then a court, if it considered it appropriate, could impose a fine instead of or in addition to a jail term – the maximum of which is according to the formula in the Act (the term of imprisonment set out in months times five).

- the examination powers provision will be subject to a five year sunset clause (**new section 46**). The decision on whether the coercive powers will be extended after five years will be made following a review of their use and ongoing need.[95]

Comment on the compulsory examination powers

The compulsory examinations provisions have generated much debate from the full range of interested parties.

The combined construction unions' submission expresses strong concerns about these coercive powers of investigation noting that they are inappropriate in regard to the types of matters that are being investigated. They note that the BCII Act does not generally deal with criminal conduct, but rather is concerned with certain forms of industrial behaviour.

> Arguments about the need to retain the laws because of widespread violence or threats of violence, criminal damage to property, extortion and the like are not only misplaced but have the effect of distorting the policy debate and the public perception of what the laws are designed to achieve.[96]

The combined construction unions reinforce their argument relying on Professor George Williams and Nicola McGarrity from the Gilbert and Tobin Public Law Centre who in 2008 wrote:

> The ABCC is primarily responsible for monitoring, investigating and enforcing civil law, or more specifically, federal industrial law like the BCII Act and industry awards and agreements. Investigatory powers of the type bestowed on the ABC Commissioner had previously been unheard of in the industrial context. In this light, the powers of the ABCC are not only extraordinary, but unwarranted... Such powers should not be bestowed on a body dealing with contraventions of the civil law and potentially minor breaches of industrial instruments.[97]

As noted above, the ABC Commissioner has advised that the ABCC's compliance powers have been critical to the success of its Court proceedings. The Commissioner also argues for the retention of the coercive powers on the basis that some witnesses have been glad to be 'forced' to give evidence because this gives them some protection from reprisals.[98]

AMMA argues in support of the existing investigative powers stating there is no evidence to suggest they have been misused.[99] They note that the ABC Commissioner's position has been supported by the Wilcox Report. Of considerable importance is the protection

95. Explanatory Memorandum, p. 20.
96. Combined construction unions, op. cit.,, paragraph 2.2.
97. G. Williams and N. McGarrity 'The investigatory powers of the ABCC', *Australian Journal of Labour Law*, v 21, 2008, p. 274.
98. J Lloyd, op. cit.
99. AMMA, op. cit., p. 25.

such power gives to those person who are otherwise willing to assist the ABCC but do not want to be seen to be willing.[100]

The removal of the ability to impose confidentiality undertakings on examinees (proposed subsection 51(6)) has also been debated in Senate inquiry submissions. The combined construction unions' submission argues that the secrecy which has attached to the exercise of the coercive powers is highly objectionable.

> The 'closed' interview process and the ABCC's non-disclosure directions cast a pall over Australian industrial relations and taint it with quasi-criminal overtones. The public interest in having all aspects of industrial relations played out in a public arena overseen by open and independent tribunals far outweighs any perceived benefit to a government agency in its investigation process in being able to impose confidentiality obligations.[101]

Master Builders, on the other hand strongly opposes proposed subsection 51(6) arguing it could have disastrous consequences for an investigation into, for example, widespread unlawful action where the content of the questions and confidential material was put to an examinee. Such a provision departs from normal practices of not sharing such information because it creates scope for witnesses to co-ordinate their responses.[102]

In relation to the public interest immunity from examination, Master Builders oppose it arguing the boundaries for the exemption would be too broad and could be prejudicial to an investigation.[103] AiG also argue that it be removed.[104]

In relation to the five year sunset clause, industry groups such as AiG and AMMA argue there is no evidence that the 'present conditions' in the building and construction industry will not be present in five years, that would justify an automatic repeal at a set date.[105]

In reference to the Ombudsman's role, the combined construction unions argue that Ombudsman oversight, together with the requirement to video tape examinations would be an important, inexpensive and efficient hand-brake on any potential abuses occurring during the interview process.[106]

The Ombudsman Office notes its new oversight functions under the Bill fit very well within its existing role and that its new functions can be performed with comparatively modest additional resources for the office. That said the new function cannot be performed

100. AMMA, op. cit., p. 23.
101. Combined construction unions, op. cit., paragraph 3.20.
102. Master Builders Australia, op. cit., p. 27.
103. Master Builders Australia, op. cit., p. 28.
104. AiG, op. cit., p. 32.
105. AiG, op. cit., p. 27.
106. Combined construction unions, op. cit., paragraph 3.20.

without adequate resources and at this stage there has been no agreement on the resources that will be made available.[107]

Master Builders states that the Ombudsman involvement will impose unreasonable and cumbersome multi-layered bureaucratic procedures on the Director.[108]

Some of the debate about the coercive powers has been based on comparisons with other legislation. Those in support of the powers often point to other statutory bodies such as the ACCC, ATO and ASIO that have similar powers, as a justification for their ongoing use.

Challenging this argument, the Law Institute of Victoria and Professor George Williams share the view of the Wilcox Report which states:

> All the other Australian statutory authorities holding powers of coercive interrogation are concerned with matters of major public importance: national security, the management of the national economy and national tax system, the suspected corrupt behaviour of public officials and the suspected misconduct of police officers. Generally speaking, although not always, the suspected behaviour would amount to serious criminality. In contrast, a notice may be given under section 52 of the BCII Act in order to obtain information relevant to an investigation concerning conduct that may not be, and usually is not, a criminal offence; but merely a contravention of an industrial statute or industrial instrument.[109]

The Law Institute of Victoria argues also for a reduction in the penalty stating:

> […] as Wilcox describes […], a court, not a statutory authority, performs the issuing of a subpoena and a magistrate or judge oversees the giving of evidence by the person subject to subpoena. The Bill does not afford these safeguards to construction workers and union officials upon the issuing of an examination notice, and thus some caution should be taken when imposing penalties for non-compliance.
>
> The LIV supports the view expressed by Wilcox, and recommends that the penalty of six months imprisonment under section 52(1) be amended to reflect the nature of the offence. The LIV submits that a more proportional and appropriate penalty would be a significantly increased monetary fine.[110]

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107. Commonwealth Ombudsman, Submission No. 5, Senate Education, Employment and Workplace Relations Committee, 'Inquiry into the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009', viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=c7922857-6176-48a3-8f17-70ac1186d377 .
108. Master Builders Australia, op. cit., p. 30.
109. M Wilcox QC, Report, op. cit., p. 36.
110. Law Institute of Victoria, Submission No. 17, Senate Education, Employment and Workplace Relations Committee, 'Inquiry into the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009', p.

Professor George Williams and Nicola McGarrity of the Tobin Centre of Public Law in Sydney support all the safeguards on use of the examination powers stating that they recognise that they amount to an impressive, and much needed, set of improvements.

> In particular, conditioning use of coercive powers upon the approval of a presidential member of the Administrative Appeals Tribunal will remove both the possibility and the perception that the powers may be used for inappropriate, even ideological, purposes. Other improvements such as the imposition of a sunset clause, and an expanded role for the Commonwealth Ombudsman are also highly desirable.
>
> However, we note that even with these safeguards the coercive powers provided for in the primary Act are not justified. The safeguards do not, for example, overcome the fact that the coercive powers can be used in an overly-broad set of circumstances, such as in regard to non-suspects and children in the investigation of minor or petty breaches of industrial law and industrial instruments. The coercive powers are not justified in this industrial setting. The preferable course would be to remove the powers entirely and to have a strong and effective enforcement and investigation regime that applies across all industries.[111]

Independent Assessor and exclusion of compulsory examination notice powers from building projects

The Bill at **proposed section 36B (item 52)** creates the statutory office of the Independent Assessor–Special Building Industry Powers (Independent Assessor). The person is to be appointed by the Governor-General providing the Minister is satisfied that the person has suitable qualifications and experience and is of good character (**proposed section 37**). The terms and conditions of this appointment are set out in **proposed sections 37** to **37G**.

Proposed section 39 is a key provision setting out the role of the Independent Assessor. The Independent Assessor may on application from an 'interested person' make a determination that the compulsory examination notice powers set out in section 45 will not apply to a particular building project or projects. **Proposed subsection 36(2)** defines 'interested persons' to be the Minister and any other person prescribed by regulations. In response to concerns about the meaning of 'interested persons', the Minister has advised

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2, viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=174addc7-a579-40ef-ad04-dcbbb0ddb719

111. G. Williams and N. McGarrity, Submission no. 1, Senate Education, Employment and Workplace Relations Committee, 'Inquiry into the provisions of the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009', viewed 6 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=29171ec7-d579-4d58-bc7f-440523c4806a and https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=b173ab96-0e3b-41f9-b571-9fc5066343ac

that the Government's intention is that the regulations would prescribe all 'building industry participants' (as defined by the existing Act) in relation to the project to which the application relates, to be 'interested persons'.[112] This means all project employers, employees, their respective associations and the client(s) would be able to make an application to the Independent Assessor.[113]

In determining whether the examination powers will apply 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, and
- it would not be contrary to the public interest to make the determination (**proposed subsection 39(3)**).

The Minister states that it is the Government's intention that the regulations prescribe the Independent Assessor must be satisfied that the building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, including court or tribunal orders; and that the views of other interested persons in relation to the project have been considered.[114]

Such determinations can only be made in relation to building projects that begin on or after commencement of these provisions (**proposed section 38**)—expected to be 1 February 2010.

Proposed sections 40 to **43** set out the process to be followed in relation to Independent Assessor determinations. Amongst other things:

- applications for a determination may relate to more than one building project and may be made at any time before or after the building project has commenced or after it has been completed (**proposed subsection 40(4)**)
- the Independent Assessor must give the Director a copy of any application and must give the Director a reasonable opportunity to make submissions in relation to an application (**proposed section 41**)
- determinations must be published in the Gazette and take effect from that date of publication (**proposed section 42**)
- the Director may request the Independent Assessor to reconsider determinations made in relation to a building project. Where the Independent Assessor receives such a request he/she must reconsider the original determination and make a determination

112. J Gillard, Letter, op. cit.
113. J Gillard, Letter, op. cit.
114. J Gillard, Letter, op. cit.

affirming or revoking the original determination, or varying the original determination as appropriate (**proposed section 43**).

The Minister's second reading speech elaborates on this power saying:

> In the event that a project where the coercive powers have been switched off experiences industrial unlawfulness the Independent Assessor may rescind or revoke the original decision, thereby switching the powers back on. Additionally, the Director of the Building Inspectorate may request the Independent Assessor reconsider the decision at any time based on changes in circumstances on a specific project.[115]

Comment on the Independent Assessor and the 'switching off powers'

Industry groups, such as AiG, argue that it is not appropriate to permit the compulsory examination powers of the Inspectorate to be 'switched off'. They note that Justice Wilcox recommended extensive safeguards for the compulsory examination powers but he did not recommend that the powers be able to be 'switched off'. Furthermore, under the Bill, applications to the Independent Assessor to 'switch off' the powers can be made before a project commences. AiG argues that before the commencement of a project it is impossible to know whether the powers will be needed. Unless the Bill is amended, unions are likely to make an application to the Independent Assessor before the start of every project.

The combined construction unions' submission argues that the switch off powers provisions create major difficulties and anomalies. They state that given the conclusions of the Wilcox Report that the vast majority of the construction industry is not subject to major industrial misconduct, it would be far more logical if the Bill were based on a presumption that the necessity for coercive powers was the exception rather than the rule. In other words a preferred alternative would be for the powers to be switched off generally but be available to be switched on only in truly exceptional circumstances and only subject to the other processes and safeguards contained in the Bill.[116]

The unions are also critical of the way in which the Bill deals with the timing of 'switch off' applications and the projects in respect of which they can be made is anomalous and unwieldy. They point out that large projects commencing just prior to these amendments with a potential life of many years would be unable to be excluded from the application of the coercive powers even where the record of compliance was exemplary.[117]

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115. J. Gillard, Second reading speech: Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009, House of Representatives, *Debates*, 17 June 2009, p. 6245.
116. Combined construction unions, op. cit., paragraph 3.11.
117. Combined construction unions, op. cit., paragraph 3.12.

Fair Work Building Industry Inspectors

Item 69 repeals Division 2 of Part 2 of Chapter 7 of the Act (which deals with the appointment and powers of ABC Inspectors) and replaces it with **proposed sections 59** to **59G** which provide for the appointment and powers of Fair Work Building Industry Inspectors (inspectors).

Under **proposed section 59**, the Director may appoint employees or office holders of the Commonwealth, or a State or Territory as inspectors. The Director may only appoint a person as an inspector if satisfied he/she is of good character. The Director is also an inspector by force of **proposed section 59A**.

Proposed section 59C provides that an inspector has the same functions and powers as a Fair Work Inspector but may only perform those functions and powers in relation to a building matter[118] and subject to the conditions and restrictions specified in the instrument of appointment.

Proposed subsection 59C(4) provides that, for the purposes of the performance and exercise of the functions and powers of an inspector in relation to a building matter, an Act has effect as if a reference to a Fair Work Inspector were a reference to an inspector and a reference to the FWO were a reference to the Director. The Explanatory Memorandum elaborates on the effect of this provision. For example, in relation to building matters, an inspector may:

- make applications to FWA in relation to persons who hold entry permits for the purpose of exercising rights of entry[119]
- make applications for orders in relation to contraventions of civil remedy provisions contained in the FW Act[120]
- make applications for orders in relation to safety net contractual entitlements[121]
- exercise compliance powers for the compliance purposes as set out in section 706 of the FW Act (including determining whether the FW Act or a fair work instrument has been or is being complied with or whether a safety net contractual entitlement has been contravened)
- issue compliance notices where the inspector reasonably believes that a person has contravened one or more instruments as listed in section 716 of the FW Act.[122]

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118. A matter is a building matter if it relates to a building industry participant (**proposed subsection 59C(3)**).
119. Under Part 3-4 of the FW Act.
120. Section 539 of the FW Act.
121. Section 541 of the FW Act.
122. Explanatory Memorandum, op. cit., p. 28.

The Explanatory Memorandum also elaborates on the compliance powers that could be exercised by an inspector demonstrating how they would be the same as those that could be exercised by a Fair Work Inspector.[123]

Proposed section 59E provides an additional power for inspectors, namely the power to monitor compliance with the Building Code. The inspector's powers and functions for this purpose would be the same as those he/she would have in relation to monitoring compliance with a fair work instrument.

Proposed section 59D provides that the Director has the power to accept a written undertaking in relation to a building matter in the same way that the FWO may accept written undertakings under section 715 of the FW Act.

Miscellaneous matters

Item 74 repeals existing section 64 that deals with certain project agreements that are not enforceable. The Explanatory Memorandum does not explain why this provision has been repealed.

Disclosure of information

In place of existing section 64, **item 74** also inserts **proposed new sections 64** and **64A** that deal with the disclosure of information.

Proposed section 64 provides the Director may disclose, or authorise the disclosure of, information acquired by the Inspectorate if the Director reasonably believes that it is:

- necessary or appropriate to do so for the purposes of the performance of the Director's functions and powers, or
- likely to assist in the administration or enforcement of Commonwealth, State or Territory laws.

The section also permits disclosure of information to the Minister, the Departmental Secretary and SES officers in the Department, and the Advisory Board (**proposed subsections 64(3) to (5)**).

This disclosure provision does not apply to information obtained under an examination notice or an examination (**proposed subsection 64(1)**). Such information is subject to the more restrictive disclosure provisions in existing section 65.

Proposed section 64A deals with disclosure of information by the Federal Safety Commissioner. The Commissioner's disclosure responsibilities are similar to those of the Director.

123. Explanatory Memorandum, op cit., p. 28.

Right to intervene

Items 85 and **86** amend **sections 71** and **72**. Their effect is to allow the Director (as opposed to the ABC Commissioner) to intervene in court proceedings and make submissions to FWA in relation to building industry participants or building work.

In relation to the power to intervene in proceedings, the Wilcox Report recommended against retaining a statutory right of intervention in court or FWA proceedings, noting that

> in order to guard against the case being hijacked, it is better to give the court or FWA discretion to allow intervention. In that way terms may be imposed.[124]

It is the ACTU's view that 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.[125]

> 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.[126]

In contrast, AiG and other industry groups argue strongly for the retention of the Director's right to intervene.[127]

Schedule 2—Transitional and consequential provisions

Schedule 2 allows regulations to be made to:

- deal with matters of a transitional, savings or application nature arising from this Bill (**item 1**)
- amend Acts where the amendments are consequential on or relate to the amendments made by this Bill (**item 2**).

Item 2 would effectively enable delegated legislation to override earlier legislation. The use of these so called 'Henry VIII clauses'[128] can be a source of concern to the Senate Scrutiny of Bills Committee if the provision is considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny. To date, the Senate Committee has made no comment. [129]

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124. M Wilcox QC, Report, op. cit., paragraph 9.15.
125. ACTU, op. cit.,, p. 8.
126. ACTU, op. cit., p. 8.
127. AiG, op. cit., p. 37.
128. A 'Henry VIII' clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation.
129. 8 August 2009.

Item 3 allows regulations to have retrospective effect. This retrospective application is modified to the extent that **subitem 3(2)** provides that if a regulation takes effect before it is registered, a person cannot be convicted of an offence or ordered to pay a penalty in relation to conduct contravening the regulation that occurred prior to registration. Again, the Senate Scrutiny of Bills Committee has to date made no comment.

Concluding comments

The Bill has evinced entrenched positions from both sides of Parliament, with the Coalition parties preferring no change with the BCII Act remaining unamended, while the ALP is committed to aligning regulation of the building and construction industry to the general standards pertaining under the FW Act, while retaining a specialist Fair Work inspectorate to deal with the building industry. It is therefore difficult to avoid the premise accepted by Murray Wilcox, that a replacement of the ABCC needs to be taken as a given, in this debate. The issues of the proposed inspectorate's coercive powers for conducting examinations and ascertaining information and whether a site or enterprise needs to be subject to special regulation, therefore become the focus of debate. In this context, it becomes difficult to disagree with the Williams and McGarrity view that the safeguards introduced by the Bill and its support measures for an individual required to give evidence, videoing interviews, as well as the higher standard of convincing the AAT that such an inquiry is relevant to a matter, all seem to be significant improvements to current arrangements.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library from Steve O'Neill (background) on (02) 6277 2463 and Mary Anne Neilsen (main provisions) on (02) 6277 2438.