



AUSTRALIAN CONSTRUCTORS ASSOCIATION



AUSTRALIAN INDUSTRY
GROUP

5 December 2008

Hon Murray Wilcox QC
Wilcox Consultations Secretariat
Department of Education, Employment and Workplace relations
Location code 10M32
GPO Box 9879
CANBERRA ACT 2601

Dear Mr Wilcox,

On behalf of the Australian Industry Group and the Australian Constructors Association we make this submission to your review, reporting on matters related to the transition from the Office of the Australian Building and Construction Commissioner (ABCC) to the Specialist Division.

Yours faithfully,

Heather Ridout
Chief Executive
Australian Industry Group

Wal King AO
President
Australian Constructors
Association

“The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes.....it also requires that parties comply with the orders made by the courts in determining those disputes.” (Merkel J.)¹

¹ Australian Industry Group v AFMEPKIU [2000] FCA 629 (12 May 2000)

Executive Summary

The Australian Industry Group and Australian Constructors Association believe that the Wilcox Review should give significant weight to the recommendations of the Royal Commission into the Building and Construction Industry.

The implementation of the recommendations of the Royal Commission has largely contained the unlawful and inappropriate conduct that permeated the industry. Whilst behaviour has changed, in our opinion, the change to a new culture has not yet been achieved.

The organisations responsible for the unlawful and inappropriate behaviour identified by Commissioner Cole have given no indication that they wish to make any positive contribution to the reform of the industry, but rather are waging a campaign to allow these inappropriate and unlawful practices to return and spread.

The undertaking by the Government to retain a “strong cop on the beat” must be realised.

The industrial laws arising from the Royal Commission have treated people working in the construction industry differently than people working in other sectors. The different approach reflects the fact that behaviour in the construction industry was so far removed from the standards enjoyed by other working Australians, that strong measures were required.

At some point in the future the special provisions applying to people working in the construction industry may be able to be removed – but not until the conduct in the industry reflects the standards of contemporary Australian society.

The Wilcox Review Discussion Paper examines the coercive powers provided in s52 of the Building and Construction Industry Improvement Act (BCII Act) and seeks evidence from respondents as to why it is desirable to maintain these powers. Yet nowhere in the Discussion Paper is any evidence provided that these powers have ever been used inappropriately, nor is there any evidence provided that the ABCC exercises these powers in a manner inconsistent with other Commonwealth agencies with similar coercive powers.

It is important that the construction industry Specialist Division within the office of the Fair Work Ombudsman retain

- Independent high-level leadership;
- The support of strong legislative powers similar to those contained within the BCII Act;
- A well-trained and well-resourced specialist construction industry inspectorate focussed on compliance and enforcement;
- Strong regulated Commonwealth procurement policy utilising the National Code and Implementation Guidelines.

Introduction

The Federal Government has announced its intention a Specialist Division within the office of the Fair Work Ombudsman, concerned with the building and construction industry. This Division will replace the Office of the Australian Building and Construction Commissioner (ABCC).

It is intended that the ABCC will continue to operate with its existing powers until 31 January 2010.

In June 2008, the Deputy Prime Minister and Minister for Employment and Workplace Relations, appointed Mr Murray Wilcox QC *“to consult and report on matters related to the creation of the Specialist Division”* responding to an extensive Terms of Reference.

The Australian Industry Group and the Australian Constructors Association welcome the opportunity to respond to the Discussion Paper.

Background

In July 2001 the then Prime Minister recommended to the Governor-General that a Royal Commission be established into the construction industry because it was deemed the only public enquiry that could properly investigate the culture of intimidation that had engulfed the industry.

The Honorable Terrence Cole RFD QC, was commissioned to lead the Royal Commission.

Leading up to the Royal Commission, the problems of the construction industry had been highlighted in a number of official inquiries and initiatives including:

- Industry Commission, Construction Costs of Major Projects, 1999;
- The Federal Government’s Construction Industry Development Agency which operated from 1991-1995;
- The Gyles Royal Commission into Productivity in the Building and Construction Industry in New South Wales, 1992;
- The Economic Development Committee, Inquiry into the Building and Construction Industry in Victoria, 1992-1994;
- Productivity Commission, Work Arrangements on Large Capital City Building Projects, 1999; and
- The Commonwealth Building and Construction Industries Action Agenda, 1999.

From August 2001 to October 2002 when the Royal Commission public hearings concluded:

- The Royal Commission had conducted 171 public sitting days and in addition conducted a number of confidential sessions;
- Over 700 witnesses gave evidence to the Commission;
- Over 16,000 pages of transcript were accumulated;
- 1,900 exhibits were tendered;
- 162,000 documents were tendered during the hearings;
- 1,489 summonses and 1,677 notices to produce were issued;
- 18 Discussion Papers were released by the Commission with 140 responses received in response;
- More than 20 general submissions from interested parties were received.

There is little doubt that the Cole Commission was the most comprehensive investigation of the industry ever undertaken in Australia.

Commissioner Cole delivered his final report in February 2003. The extensive 22 volume report made 212 recommendations in four key areas:

1. introduction of an industry-specific Act;
2. establishment of a new body, the Australian Building and Construction Commission;
3. improvements in occupational health and safety through the establishment of a Federal Safety Commissioner and a Federal Accreditation Scheme; and
4. changes to the National Code of Practice for the Construction Industry and the related Australian Government's Implementation Guidelines aimed at improving the effectiveness and reach of the Code.

Commissioner Cole also identified 25 practices which were judged to be either unlawful or inappropriate.

Industry specific legislation was finally passed by the Parliament in September 2005 and the Office of the Australian Building and Construction Commissioner was established in October 2005.

By November 2005 the Office of the Federal Safety Commissioner was accepting applications for provisional registration under the Australian Government Building and Construction Industry OHS Accreditation Scheme.

In November 2005 amendments to the National Code of Practice Implementation Guidelines came into effect.

It is important to understand that these important changes to the regulation of the Australian construction industry and to Federal Government procurement policy have been in effect for little more than three years.

At the time the Labor Government was elected in November 2007, they had been in operation for only 2 years. By the time the Office of the Australian Building and Construction Commissioner closes in January 2010 it will have had just over four years to undertake the reform task envisaged by the Royal Commission.

The reform process has not been easy on any of the parties. The new laws apply equally to employers, employees and representative bodies, and heavy penalties apply for breaches. Companies have needed to implement many changes to their systems and practices and have invested heavily in training.

It has been the combination of five inter-related policy initiatives that have contributed to the reform of the industry. These five key pillars are:

1. ***The Building and Construction Industry Improvement Act (BCII Act);***
2. ***The Australian Building and Construction Commissioner (ABCC);***
3. ***The Federal Safety Commissioner (FSC);***
4. ***The National Construction Code and Implementation Guidelines; and***
5. ***Key elements of the WorkChoices legislation,*** including the provisions which:
 - ban industrial action in pursuit of pattern bargaining;
 - require a secret ballot before industrial action is taken;
 - provide immediate access to courts and the Australian Industrial Relations Commission (AIRC) when unlawful industrial action is threatened or taken;
 - preserve freedom of association;
 - grant appropriate rights to unions to enter workplaces; and
 - provide a flexible workplace agreement-making system.

These five key pillars have combined in a mutually reinforcing manner to achieve the existing very positive environment in the industry. The removal of any of them would be very risky and damaging to the industry.

The Terms of Reference of the review has implications directly or indirectly on the operations of the first four of these pillars. The Government has recently introduced the *Fair Work Bill* into the Parliament. The provisions of this Bill will have important implications for the fifth pillar.

We therefore ask the reviewer to contemplate the context in which these pillars have been developed and in some cases enacted.

It is our view that in the short period that has passed since their establishment, the unlawful and inappropriate conduct identified by the Royal Commission has

largely been contained. However, it is also our view that the cultural change required to move from a period of industrial and commercial anarchy that prevailed prior to the Royal Commission to the development of a more stable and sustainable industrial climate has not yet been reached.

Is the Construction Industry Different?

The building and construction industry has unique characteristics and special circumstances that differentiate it from other industries and justify distinct legislative treatment that recognises such distinctive features.

There is a union presence in significant sectors of the industry that has evolved over time as a result of militant aggressive campaigning for employment entitlements that are superior to those generally enjoyed in other industries. This type of campaigning supported a culture of continual expectation for the expansion of entitlements by use of industrial strength, irrespective of other community standards and the state of the economy.

In the past this culture thrived because of the particular vulnerability of employers in this industry, due in part to the following factors:

- Time is a vital element in virtually all projects because construction contracts apply strict completion requirements that often do not take into account loss time for industrial disruption.
- The need to finish a particular job and collect progress or final payment places an employer in a position where it is easier to grant benefits so as to stave off deliberate delays, than to be engaged in a frustrating industrial dispute that leads to substantial financial losses in all events.
- The “critical path” nature of construction work leads to vulnerable situations where a stoppage with one contractor in one aspect of the project can cause a major hold up to multiply the time lost by different parties.
- The crucial nature of certain steps in the construction process allows inordinate industrial pressure to be applied to employers at particular crucial stages in construction. This situation has been exploited on many occasions over the years to derive the most damaging effects from stoppages of work. There are other similar stages that lead to employers being highly vulnerable at particular times.
- The number of different contractors normally working on a site can lead to worker envy of perceived better comparative entitlements of workers engaged on the same project, if exploited.
- The essential need to continually acquire new projects to replace completed projects, leads to a consciousness of vulnerability by employers that discourages them from doing anything that will attract disapproval by unions and workers. Reporting illegal industrial conduct can result in subsequent vindictive actions that can destroy a business.

Being known to be in “bad grace” with a union can easily dissuade head contractors from engaging a sub-contractor bearing that reputation.

- Generally the place of employment is a temporary site that changes from time to time leading to workforce permanency being rare and lack of familiarity with other workers and employers being common. This factor reduces loyalty of workers.
- Employers rightly or wrongly do not view concessions granted by them to get a job finished, as concessions that will have a long term effect on that particular employer’s business. There is an attitude that getting the job finished is all important irrespective of setting standards that could flow on to the rest of the industry. In fact, concessions that may flow on to the rest of the industry may be viewed by some as being unimportant, as those concessions will have to be passed on by all competitors.
- Shortage of skills in the industry is leading to strong wage pressures, and when this is exacerbated by the pressures applied as a result of industrial action, there is a resultant blow-out in entitlements that is not fair to workers in other industries.

Many of these factors contributed to Commissioner Cole’s desire to break the cycle that linked commercial pressure, unlawful industrial action and damages (see Annexure 1 - Commissioner Cole’s Model of Reform.)

1. Is it desirable to maintain:

(a) the special building and construction industry penalty for unprotected industrial action, as now provided by Chapter 5 of the BCII Act?

Comment:

Industrial disputes in the building and construction industry can be extremely costly. A one-day stoppage on a major project can cost hundreds of thousands of dollars. In addition to the more obvious direct costs of the industrial action, there are numerous hidden costs that arise due to delays in completion resulting from industrial action. These costs include:

- Liquidated damages – up to \$50,000 per day is typical;
- Damage to the contractor’s reputation which may result in the loss of future business;
- Program acceleration expenses, eg. extra overtime;
- Daily costs of hire for rental equipment, such as cranes, mobile plant, sheds, offices and other equipment; and
- The effects of inflated sub-contractor tender prices, which tend to occur on trouble-prone projects.

One area of great concern to contractors is the additional stresses that arise due to accelerated “catch-up” programs, which need to be implemented when delays

have been caused by industrial disputes. Such programs can have a negative effect on safety performance and quality and result in significant overtime penalty costs.

In addition, industrial action taken in the building and construction industry typically creates significant hardship for third parties (both employers and employees) due the inter-related nature of the activities carried out by sub-contractors.

The BCII Act creates additional protection against unlawful industrial action which is only applicable to the building and construction industry. This additional protection is necessary given the unique nature of the building and construction industry and also because of the widespread unlawful industrial behaviour which was occurring in the industry up to 2005 when the Act came into operation. The unions and most of the union officials that were organising such unlawful action are still operating and it is highly probable that they would return to their past ways if the laws were relaxed.

Like the definition of “industrial action” in the *Workplace Relations Act (WR Act)*, the definition of “building industrial action” in the BCII Act excludes industrial action based on a reasonable concern by an employee about a risk to health or safety, where there is no other substituted work available to be done. However, Section 36(2) of the BCII Act places the onus of proving that there was an imminent risk to the safety of employees justifying stoppage of work, on the person alleging this. This was a direct response to findings of the Cole Royal Commission that occupational health and safety was regularly being exploited in the industry to further industrial objectives.

Prior to the enactment of the BCII Act, OHS was often misused by unions as an industrial weapon against employers. It is essential that strong laws remain in place to prevent this highly inappropriate and damaging tactic. Bogus safety disputes have cost the industry dearly over the years and were one of the most significant industrial relations problems in the industry. The misuse of OHS by unions as an industrial weapon fosters an attitude of cynicism amongst employers towards safety concerns raised by union officials and delegates. This, in turn, negatively impacts upon OHS in the industry.

The BCII Act outlaws the misuse of OHS, but the rights of employees to refuse to perform duties which are genuinely unsafe are protected.

The WR Act does not create an offence of taking unlawful industrial action in general terms, but allows orders to be obtained under s.496, which can lead to penalties and injunctions if breached. Also, the WR Act makes it an offence to take industrial action prior to the nominal expiry date of a workplace agreement. In contrast, the BCII Act takes a more direct approach, as recommended by the Cole Royal Commission. Section 38 simply stipulates that a person must not engage in unlawful industrial action and provides for a maximum penalty of \$110,000 for breaches.

In addition to the penalties for unlawful industrial action, a relevant court can award compensation to a person who has suffered damage as a result of the unlawful industrial action and may make other appropriate orders (section 49 of the BCII Act). This is a very significant provision that enables parties suffering financial damage from unlawful industrial action to seek redress from the instigators.

These provisions have proved to be a very effective deterrent against unlawful behaviour and it is vital that they be retained.

The Discussion Paper rightly points out that the BCII Act contains provisions pertaining to construction industry participants (employers and employees) that are more onerous than for employers and employees covered by the WR Act. It was the view of the Royal Commissioner that the problems experienced by the construction industry were so severe that special provisions were required.

It is hoped that given the passage of time, and aided by these strong laws, behaviour in the construction industry will improve to the extent that these special provisions can be removed. However, we do not believe that that time has yet been reached.

We therefore believe it is desirable and appropriate to maintain the special building and construction industry penalty for unprotected industrial action.

(b) the power of coercive interrogation, as in section 52 of the BCII Act? In each case, please give reasons for your answer, with reference to evidence.

Comment:

Much has been made of the ABCC's powers to obtain information which are detailed in s.52 of the BCII Act.

If the ABCC believes on reasonable grounds that a person has information, or documents relevant to an investigation or is capable of giving evidence that is relevant to an investigation, the ABCC may, by giving written notice, require the person to:

- Give the information within a specific time and in the manner and form specified in the notice;
- Produce the documents by the time and in the manner specified in the notice; or
- Attend to be interviewed (with legal representation if the person wishes) at the time and place specified in the notice.

A person commits an offence if he/she fails to give the required information in the

time and manner specified, attend and answer questions at the time and place specified, take an oath or affirmation when required to do so, or answer questions relevant to the investigation while attending as required by the notice. A penalty of imprisonment for six months can apply if the person fails to comply with these requirements (s.52 of the BCII Act). No person has ever been penalised under this provision.

The ABCC regularly publishes reports on the use of its compliance powers. In its most recent report, for the period 1 October 2005 to 30 September 2008, the Office of the ABCC reports:

- 142 s52 Notices issued to attend and answer questions and 121 examinations conducted;
- Four s52 Notices requiring production of documents with documents produced in response to each Notice.

There has been much misinformation circulated concerning a witness' rights to choose his/her own legal representative following the Federal Court's *Bonan v Hadgkiss* decision. In that case the Deputy ABCC excluded a legal representative because that representative had already acted for a different witness in another examination related to the same investigation. The Federal Court upheld the Deputy ABCC's decision.

The industry recognises the need for these powers and believes they have been exercised appropriately, sparingly and with discretion.

For much of its life, the predecessor to the ABCC – the Building Industry Taskforce – did not have the power to require persons to provide information or require them to attend to be interviewed. During this period union officials routinely refused to provide information or answer questions, and they advised their members to do likewise. It is reported that 52% of Taskforce investigations had to be closed due to a lack of cooperation. As soon as the powers were given to the Taskforce it became a far more effective body.

Prior to the enactment of the BCII Act and the establishment of the ABCC, a culture of intimidation in the industry made it very difficult for investigators to gain the cooperation of those affected and the rule of law was severely diminished.

The ABCC has been a very important agency in achieving industrial peace and lawful behaviour in the construction industry. Whilst it is important to have strong laws and strong penalties to deal with unlawful behaviour, it is essential that a well-resourced agency is active in investigating alleged unlawful behaviour and pursuing the prosecution of offenders.

The vast majority of those working in the construction industry believe that the powers of the ABCC are appropriate and have been exercised with discretion.

There is no evidence that the s52 powers governing coercive interrogation have

been misused or abused.

We believe that it is essential to maintain the power of coercive interrogation consistent with the provisions of s52 of the BCII Act.

2. Should the Code and/or Guidelines be retained? If so:

(a) do they need amendment? In what way?

(b) should either document be put on a more formal basis, with provision for disallowance by Parliament and/or access to judicial review and the AAT?

(c) is it feasible to use the Guidelines to provide the control of the industry now sought to be obtained by the BCII Act?

Comment:

The first Code of Practice in Australia, the NSW Government's Code of Practice for the Construction Industry (October 1992), was very much a by-product of the Royal Commission into Productivity in the Building and Construction Industry (Gyles Royal Commission).

Its purpose was to ensure that the construction industry operated within the law and to utilise the government's substantial purchasing power to stimulate reform within the industry².

Since this time, separate Codes have been released for all States and Territories (with the exception of the ACT, where the National Code applies)³.

The National Code of Practice for the Construction Industry was jointly developed by the Commonwealth, States and Territories. It was introduced in 1997. The Commonwealth issued implementation guidelines in 1998 to accompany the Code. Unlike the provisions of the Code, these guidelines were not explicitly agreed to by the States and Territories⁴.

Essentially the National Code set down the standards that the Government, as a client of the industry, expected of its service providers. At that stage its impact on private sector construction was benign. The expectation was that by attempting to lift performance standards in one market, it would make a positive contribution to improving standards in non-government sections of the market.

The Royal Commission final report called for the strengthening and extension of the National Code and Implementation Guidelines and greater rigour in the

² RCBCI Discussion Paper 8, see Note 8, p.9.

³ RCBCI Discussion Paper 8, see Note 8 p.10,11.

⁴ RCBCI Discussion Paper 8, see Note 8, p.10.

Commonwealth's implementation of it. The report also stated that the Commonwealth had put its interests as a purchaser of construction above those of the economy and that the Commonwealth should be prepared to accept some short term commercial pain as a client for the longer term benefits that would flow if it used its purchasing power to drive real change on its own projects.

The Royal Commission Final Report recommended that the role of the National Code of Practice for the Construction Industry and the associated Implementation Guidelines be extended far beyond its former role as a client "standards" document.

The Royal Commission recommended that the National Code and Implementation Guidelines should apply to all projects to which the Commonwealth directly or indirectly provides funds for construction and that the Commonwealth should only agree to do business with those who comply with the National Code and Implementation Guidelines on both publicly and privately funded projects.

The BCII Act (s27) provides the Minister with the power to issue, in one or more documents that together constitute a code of practice, in what is termed the Building Code. All incorporated building contractors would be required to comply with the Code. Other building industry participants would need to comply with the Code if the work was to be carried out in a Territory or Commonwealth place.

There are virtually no constraints placed upon the Minister, under the terms of the Act, with regard to the content of the Code. Further, the exercise of Section 68 of the Act, *Delegation by Minister*, allows the Minister to delegate the power to issue or amend the Building Code to the proposed Australian Building and Construction Commissioner, Deputy Commissioner, the proposed Federal Safety Commissioner and various other persons.

As noted in the Discussion Paper this section of the BCII Act has never been activated. The National Code of Practice and Implementation Guidelines have operated as administrative instruments governing Federal procurement policy for the purchase of construction and related services.

Despite some initial difficulties transitioning to these arrangements, the use of procurement policy by Commonwealth departments and agencies has been an important element in the success of the reform of the construction industry. The use of the Code and Guidelines now enjoy significant industry support.

However, it has always been Ai Group and ACA's view that given the largely regulatory role proposed for the Building Code, the existing Code and Guidelines and the proposed Building Code should have been given effect as a regulation of the Commonwealth pursuant to the *Building and Construction Industry Improvement Act*.

It remains our view that in order to protect the rights of building contractors and other building industry participants, there should be an appropriate degree of Parliamentary and judicial scrutiny of the Code and any amendments made to it.

The Code and Guidelines do cast a wide net. The Discussion Paper notes that “they do not catch employers who have no interest in carrying out federally-funded work”. That is not necessarily correct. The Guidelines require contractors to apply the Code and Guidelines to privately funded projects that commence after they first lodge an expression of interest or tender for Australian Government projects.”⁵ Many Code-compliant contractors require all subcontractors and material suppliers on their privately-funded projects to be Code-compliant. However, we do not believe that the Discussion Paper concern that the use of the Guidelines may be seriously affecting competition in the industry has any substance.

Ai Group and ACA support the right of the Commonwealth, as a client of the industry, and as a financier of infrastructure (through various Commonwealth-State deeds of arrangement) to use its purchasing power to influence the behaviour of those who provide commercial services.

Equally, we support the right of Government’s to enact laws and regulations to regulate the industry. But those laws and regulations must be passed by the Parliament, and they should not deny individuals and organizations the right to seek appropriate review of administrative decisions that affect their businesses.

In summary, Ai Group and ACA support the use of purchasing policy to assist with the reform of the construction industry. However, we do recommend:

- The regulations establishing the Code and Guidelines must be subject to Parliamentary scrutiny;
- The standards by which compliance is assessed must be clear and unambiguous;
- The process of assessment must be transparent, independent and rigorous;
- There must a proper process of appeal or review when administrative decisions made behind closed doors can have deleterious commercial consequences for companies.

To date the Government has been silent on the future of the National Code of Practice and Implementation Guidelines.

The utilisation of the “Building Code” provisions of the BCII Act depend on the continued existence of that legislation and as noted in the Discussion Paper the future of the BCII Act is not clear.

Structure, accountability and independence

3. Should the Specialist Division be subject to direction from the Director of the Inspectorate? If so, to what extent?

⁵ Australian Government Implementation Guidelines, June 2006, p16

4. Should there be a divisional supervisory board for the Specialist Division? If so, how should it be constituted? What should be its role?

5. Should inspectors within the Specialist Division work only within that division?

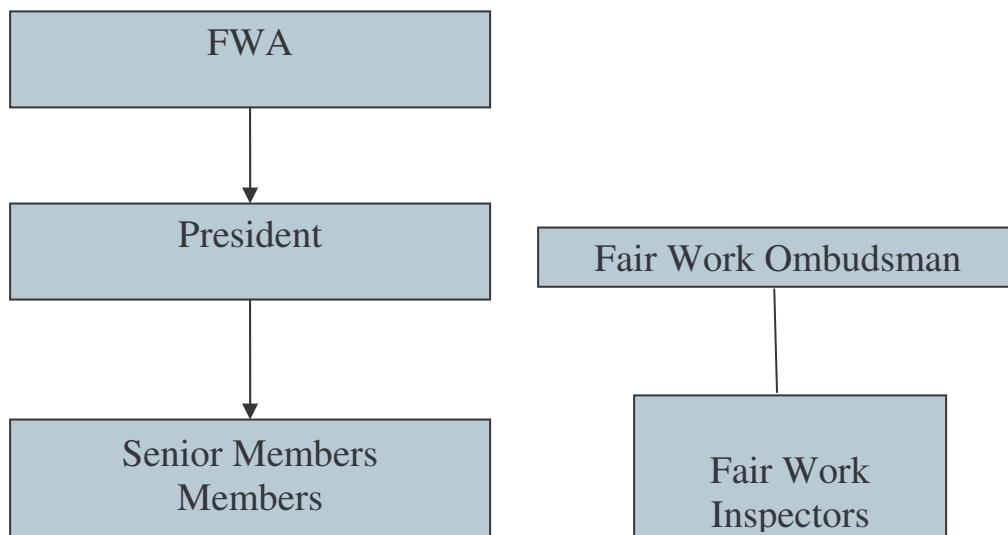
6. What should be the role of the Specialist Division?

7. What power should the Minister have to direct the manner of exercise of the Specialist Division's powers?

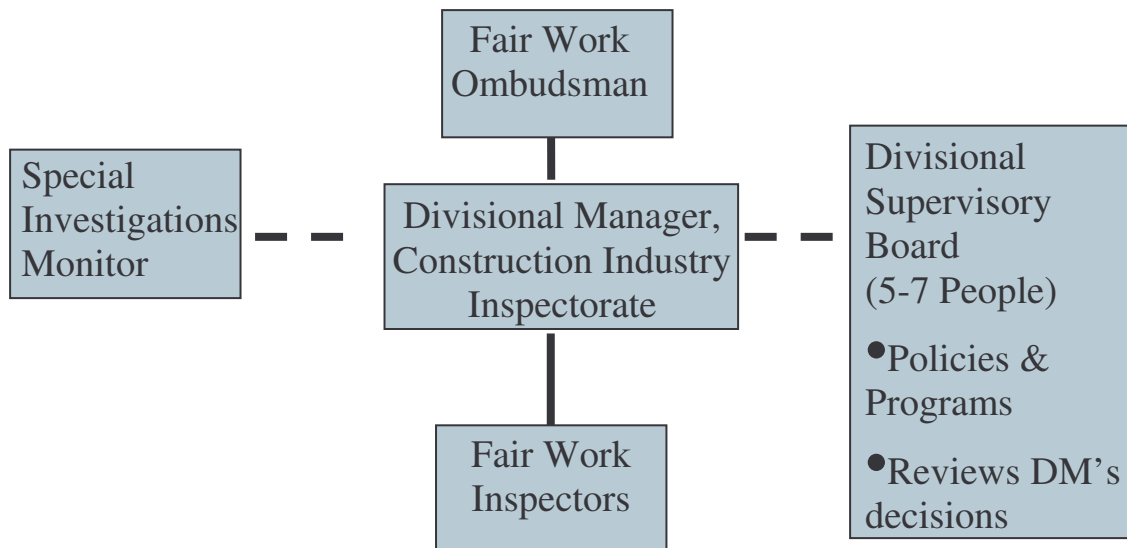
Comment:

Ai Group does not support the administrative arrangements as proposed in the Discussion Paper.

The structure of the proposed Fair Work Australia and its relationship to the Fair Work Ombudsman is illustrated in Figure 1.



The structure of the construction industry Specialist Division proposed in the Discussion Paper is illustrated at Figure 2.



The impact of these proposed administrative arrangements would be that the successor body to the Office of the Australian Building and Construction Commission will have been diminished to such an extent that its ability to function as a “tough cop on the beat” will be seriously compromised.

The proposed transition from the ABCC to the Specialist Division will, in all probability, result in:

- A loss of autonomy;
- The dilution of specialist resources;
- The loss of resources over time;
- A loss of focus.

An effective Inspectorate presence in the construction industry requires:

- An independent high-level leader;
- The support of strong legislative powers;
- Defined resources for the construction inspectorate at current levels for at least five years;
- A well-trained specialist construction industry inspectorate focussed on compliance and enforcement.

The Discussion Paper proposes a construction division of the Inspectorate headed by a mid-tier public servant. The administrative arrangements would leave the resourcing of the Specialist Division open to attack over time.

The concept of both a supervisory board and a Special Investigations Monitor are in our opinion an unnecessary imposition on the operations of the Inspectorate.

Despite a well-orchestrated public campaign aimed at discrediting the ABCC there has been no evidence that it has ever acted other than in strict accordance with the law and with the highest ethical standards.

The Discussion Paper refers to the recently released report *The Coercive Information-Gathering Powers of Government Agencies*⁶ which offers 20 principles as a guide to government agencies exercising coercive powers, and notes that “*The principles contained no reference to external review, possibly because, so it seems, no Commonwealth agency that exercises coercive information-gathering powers is currently subject to any more effective external scrutiny than the ABCC*”.

Ai Group and ACA do not believe that there is any evidence that supports a case for the external monitoring of the ABCC. However the public campaign of misinformation against the ABCC has the potential to influence public confidence in the exercise of coercive powers.

If the Government does want to establish an effective supervisory regime for the new Specialist Division, it is appropriate to return to the model proposed by Commissioner Cole (Recommendation 183 RCBCI).

Commissioner Cole proposed an Australian Building and Construction Commission based on the following principles:

- That it be established as a body corporate by statute;
- That it be constituted by a chairman and a small number of other statutory office holders, each of whom must have appropriate experience, stature and independence, and each of whom is appointed for a fixed but renewable term.
- Only the chairman and members should be able to exercise coercive powers. They should be able to do so individually;
- Regional offices, would operate in Sydney, Melbourne, Brisbane and Perth; and
- Employ suitably qualified lawyers, investigators, financial analysts, industry experts and support staff.

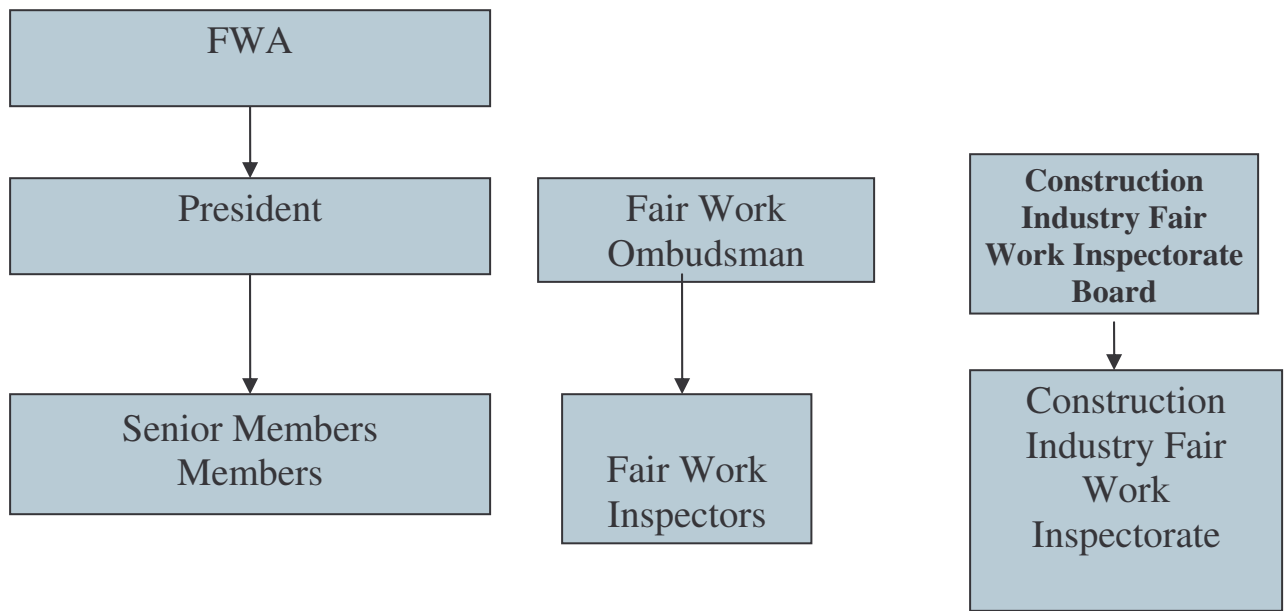
Ai Group and ACA propose that the new Specialist Division be established as a separate agency. It is important that it sit outside the Fair Work Ombudsman. We further propose that:

- The agency – the Construction Industry Fair Work Inspectorate (CIFWI) - be established by the new Fair Work Act;
- That the agency be responsible to a small statutory board (say three people) headed by an eminent person preferably with judicial experience;

⁶ Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, May 2008

- That the agency be provided with powers equivalent to those provided by the BCII Act;
- That the agency have dedicated resources;
- That the agency employ dedicated construction industry inspectors. Ideally these would transition from the Office of the ABCC.
- That the Agency be headed by an officer, equivalent in rank to the Fair Work Ombudsman;
- That the CIFWI Board be charged with the responsibility of exercising coercive powers.

The place of the Construction Industry Fair Work Inspectorate is illustrated in Figure 3.



Scope of investigation and compliance activities

8. Are the ABCC functions set out in section 10 of the BCII Act appropriate for the Specialist Division? If not, what functions ought to be added or omitted?

Comment:

Ai Group and ACA believe that the Functions of the ABC Commissioner as set out in section 10 of the BCII Act are appropriate for that Office.

It is our view that the Fair Work Act will need to make a special provision to establish the Construction Industry Fair Work Inspectorate. In determining the

functions of the Construction Industry Fair Work Inspectorate, we believe that the functions set out in s10 are an appropriate model for the CIFWI.

9. Should documents obtained pursuant to entry and inspection powers be admissible as evidence in other proceedings?

Comment:

A high level of confidentiality should be legislatively applied to material obtained pursuant to entry and inspection powers and appropriate penalties available for breach of that confidentiality. This situation should be qualified to enable use of the material in other proceedings where unlawful conduct has been disclosed or indicated by the material obtained, whether or not the particular proceedings were in contemplation at the time the entry and inspection powers were exercised. This right should be qualified by the need for the original entry and inspection power to have been exercised on proper grounds not consisting of a fishing expedition.

10. In practice, should the Specialist Division concern itself with building employer breaches, such as non payment of employee entitlements; or leave this to the Workplace Ombudsman?

Comment:

Commissioner Cole determined that there was a wide range of unlawful and inappropriate conduct in the building and construction industry. *“The question arises whether the Australian Building and Construction Commission should have responsibility for investigating all such conduct. The guiding principle should be that the Australian Building and Construction Commission is a one stop shop to which anyone complaining of misconduct in the industry may resort.”*⁷

Commissioner Cole went on to comment that this does not mean that every complaint which is received had to be dealt with by the ABCC. He noted that depending on the nature of the complaint, another agency better equipped by way of legislative powers and resources should respond.

However, to maintain the “one stop shop” concept, the ABCC would monitor the progress of the matter and inform the complainant of the outcome.

Ai Group and ACA believe that this is an appropriate model for the new Specialist Division (Construction Industry Fair Work Inspectorate). From time to time the Specialist Division (Construction Industry Fair Work Inspectorate) will have referred to it, or become aware of, potential breaches or offences that should be

⁷ RCBI Final Report, 2003, Vol 1, p157

dealt with by another agency eg the Workplace Ombudsman, a health and safety authority, the Australian Taxation Office etc.

It would be appropriate for the Specialist Division (Construction Industry Fair Work Inspectorate) to make the appropriate reference and to maintain contact with the complainant until the matter is closed out.

Again, much depends on the future of the BCII Act. Ai Group and ACA believe that the powers previously vested in the ABCC should be transferred to the new Specialist Division (Construction Industry Inspectorate) and incorporated within the new Fair Work Act.

Specialist Division powers and affected persons' rights

11. What should be the criteria for the issue of a summons to attend for compulsory interrogation, if this power is to be retained?

Comment:

Currently s.52 of the *Building and Construction Industry Improvement Act 2005* provides that if the ABC Commissioner believes on reasonable grounds that a person has information relevant to an investigation the Commissioner can require that person to give the information to the Commissioner or an assistant etc.

Bearing in mind the safeguards contained in the Act, this hardly seems to be the onerous provision that it has been represented to be by the continuing orchestrated campaign opposing it. On the other hand it provides a suitable means to counter the apprehension that a witness would have as to reprisals for voluntarily giving evidence.

It is a basic concept of the common law that a citizen has a duty to take action in respect of unlawful conduct that comes to the notice of that citizen. The avenues available under s.52 serve to encourage compliance with that duty in situations where there may be a justified reluctance to attract recriminations.

We have submitted that the Construction Industry Fair Work Inspectorate be established as a separate body corporate by statute and that it be constituted by a chairman and small number of other statutory office holders. We suggest that the power to authorise the issue of a summons for interrogation or production of documents or evidence reside in the Chairman or in his absence a member of the Board. We have in mind that officers of the Inspectorate who suspect an offence may have occurred, would then be required to put material before the Chairman or other member, to justify the issue of a summons to interrogate. If the Chairman or member concurred, the summons could be issued. This would create a two tiered process to support the justification for the issue of the notice. Note that we consider that the test should be reasonable suspicion rather than reasonable belief.

Reference could be made in the Act for the Chairman to ensure that proper processes were observed and there could be a complaints procedure included in the Act to enable any aggrieved witness to record specific complaints about the method of interrogation that may have been adopted.

The Report of the Administrative Review Council No 48 *“The Coercive Information-Gathering Powers of Government Agencies”* referred to in paragraph 128 on page 33 of the Discussion Paper clearly finds no objection with the type of process we are suggesting, providing that the principles set out on page xi of that report (as dealt with in detail in the body of the report) are observed.

An examination of those principles indicates that they could be easily adapted to be suitable for application to the processes for coercive powers as proposed above. We propose that one of the functions of the Chairman and Members could be to apply the principles set out in the report of the Administrative Review Council in overseeing the information gathering powers.

We submit that this report is highly authoritative as a guideline for implementation of the processes that are necessary for the Building and Construction Industry, and demonstrates that these processes are not the unique draconian regulation that they have been subjectively depicted as being by unions.

12. What safeguards are necessary to guard against inappropriate use of the compulsory interrogation power?

Is prior concurrence desirable? If so, by whom?

Comment:

As indicated in our response to question 11 we believe that a process whereby the Chairman or a delegated member of the separate corporate body we have supported, must approve any request for the issue of a summons for compulsory interrogation, is appropriate.

This approval process would apply the principles set out in the report of the Administrative Review Council No. 48 referred to above, as adapted for the particular circumstances of the Building and Construction Industry. For example, the officer seeking issue of the summons would be called on to provide a short note setting out the facts leading that officer to suspect that an offence may have been committed. The Chairman or delegated member would record any decision to authorise the issue of a summons and would require regular reports to be supplied to the Board as to the progress of the interrogation.

This would result in a document trail that would protect the integrity of the process, and assist in analysing complaints about how the system is being administered.

We have also suggested in our response to question 11 that there be a process whereby an aggrieved witness can lodge a written complaint with the Board as to the method of conducting the interrogation. The officer responsible would be called on to answer any complaints about the process and the Board would have to convey any finding to the complainant.

13. Should FWA reimburse summonsed people their expenses and lost wages?

Comment:

We consider that there is a good case for the lost wages and expenses of a witness compelled to attend to give evidence, to be paid to that witness subject to a number of qualifications.

Firstly the amount paid must be verified as being an actual lost amount and not an inflated figure. Secondly, the Board should use its best endeavours to minimise the loss of wages etc when fixing the location and time of the interrogation with the witness. The witness should not be reimbursed expenses if they do not cooperate in making cost effective arrangements for carrying out the interrogation. The witness should not be refunded expenses if there is a history of evasion of interrogation, or if the witness is subsequently charged with an offence.

External monitoring

14. Should the new legislation provide for external monitoring of the Specialist Division's exercise of its coercive powers? If so, how and by whom? Do you favour the OPI model? If not, why not?

Comment:

As noted in our response to Discussion Paper Q3-7, Ai Group and ACA propose that the new Specialist Division (Construction Industry Fair Work Inspectorate) be established as a separate agency.

In part we proposed that the agency be responsible to a small statutory board headed by an eminent person preferably with judicial experience.

The Discussion Paper refers to the recently released report *The Coercive Information-Gathering Powers of Government Agencies*⁸ which offers 20 principles as a guide to government agencies exercising coercive powers, and notes that *"The principles contained no reference to external review, possibly because, so it seems, no Commonwealth agency that exercises coercive*

⁸ Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, May 2008

information-gathering powers is currently subject to any more effective external scrutiny than the ABCC”.

Ai Group and ACA do not believe that there is any evidence that supports a case for the external monitoring of the ABCC. Therefore we find no compelling reason to support external monitoring of the operations of the new Specialist Division.

Commissioner Cole (Recommendation 197) recommended that the ABCC be subject to the jurisdiction of the Commonwealth Ombudsman. We have no objection to similar arrangements applying to the operations of the Specialist Division.

We believe that the governance arrangements that we have proposed for the Construction Industry Inspectorate are adequate to ensure proper exercise of the agency’s coercive powers.

Litigation by the Specialist Division

15. Should the Specialist Division be able to bring legal actions in its own name to enforce workplace laws governing the building and construction industry?

Comment:

It is submitted that it is desirable for the Specialist Division to be able to bring legal actions in its own name for enforcement of workplace law in the building and construction industry. In this case the division should be the complainant party and should have all the normal rights of a prosecuting party, including appropriate rights for pursuing civil remedy breaches that are provided for under current workplace legislation.

The practice of names of individual inspectors being used as the complainant party is inappropriate and unfair to the inspector involved. It does not encourage the concept of a prosecution being an official procedure and can lead to difficulties when the prosecuting officer is unavailable for presence in court. It does not allow for easy identification of matters instigated by the authority involved. For a number of such practical reasons it is appropriate for the division to be seen to be the party instigating proceedings.

16. Should the Specialist Division be able to intervene in other parties’ litigation? If so, should this be as of right or only by leave of the court or relevant tribunal?

Comment:

It is submitted that the division should be able to intervene in other parties’ litigation if the subject of that litigation touches on matters in the building and

construction industry involving conduct proscribed by legislation applicable to workplace law.

Situations can also be envisaged where important interpretations of workplace law are at the heart of private litigation and in these circumstances the division should be able to intervene so as to both assist the court with its experience, and to put its views on the relevant matter.

Many other situations could occur where other proceedings could impinge on proceedings being contemplated, or conducted, by the division so as to make it beneficial for the division to be a party in those other proceedings.

Such right of appearance should be subject to leave of the relevant court or tribunal in order that the division may be put to the test as to the necessity for intervention. This will provide a safeguard against excessive use of the power of intervention.

Use of information and other agencies

17. Should the Specialised Division be able to pass on information to other agencies? If so, to whom and under what circumstances?

The Royal Commission proposed (Recommendation 185)⁹ that the Australian Building and Construction Commission should have the following powers:

(a) have standing to commence and prosecute applications in courts for the imposition of penalties for any breaches of the Building and Construction Industry Improvement Act and the *Workplace Relations Act 1996 (C'wth)* arising in the building and construction industry;

(b) have a right of intervention in the Australian Industrial Relations Commission in any proceedings in that Commission arising in the building and construction industry;

(c) have standing to bring proceedings to enforce judgments imposing civil penalties where the respondent has declined or failed to pay the penalty;

(d) have standing to commence and prosecute applications in courts for the cancellation of registration of a registered organisation, or the exclusion of persons from eligibility to hold office in a registered organisation;

(e) have standing to seek and enforce injunctions and to seek and enforce orders under provisions of the Building and Construction Industry Improvement Act modelled on s127 of the *Workplace Relations Act 1996 (C'wth)*;

⁹ RCBI Final Report, 2003, Vol 1, p159

(f) have authority to refer industrial relations matters coming to its attention, where appropriate, to specialist agencies and tribunals which have jurisdiction to deal with such matters;

(g) have a right of access to the records of material, including evidence, information and submissions, presented to this Commission;

(h) have power to obtain information from other agencies (both Commonwealth and State) notwithstanding any relevant secrecy or privacy provisions, and authority to use that information subject to any existing statutory limitations;

(i) be recognised as a law enforcement agency with a right of access to public official records where such access is necessary in order to perform its functions;

(j) have power to enter into protocols with other agencies to facilitate prompt access by it to public official records;

(k) have power to refer information to other agencies with a proper interest in having the information (for example the Australian Crime Commission, the Australian Taxation Office, the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission, the police);

(l) have power to monitor the operation of the Building and Construction Industry Improvement Act and the *Workplace Relations Act 1996 (C'wth)*, and, where it considers it necessary to do so, recommend statutory amendments or other arrangements to the responsible Minister; and

(m) be given statutory immunity for its officers from liability for acts undertaken in good faith in the performance of their duties and exercise of their powers.

We believe that this recommendation provides a good template for the powers of the proposed Construction Industry Inspectorate.

Resources, personnel and transmission

18. Do you wish to comment on:

(a) the likely resources to be required by the Specialist Division and the ways of ensuring those resources are efficiently and effectively allocated;

The ABCC currently has a staff of 150 people. The budget for 2008-09 is \$32.8 million. This was forecast to rise over the next three financial years to \$35 million in 2011-12.

Ai Group and ACA are concerned that the resources currently allocated via the federal budget to support the operations of the ABCC not be lost in the translation to the new Specialist Division.

The autonomy currently vested in the ABCC must be retained within the new Specialist Division. The resourcing of the ABCC has been one of the keys to its success. Should the specialist skills currently available within the ABCC be lost through budgetary measures, the effectiveness of the new Specialist Division would be seriously compromised.

ABCC Staff by State as at 28 August 2008

<i>State</i>	<i>Positions occupied</i>
<i>Adelaide</i>	<i>6</i>
<i>Brisbane</i>	<i>14</i>
<i>Hobart</i>	<i>2</i>
<i>Melbourne</i>	<i>80</i>
<i>Perth</i>	<i>20</i>
<i>Sydney</i>	<i>28</i>
TOTAL	150

ABCC Staff by Division

<i>Division</i>	<i>Positions occupied</i>
<i>Corporate</i>	<i>35</i>
<i>Legal</i>	<i>25</i>
<i>Operations</i>	<i>90</i>
TOTAL	150

(b) the best ways of ensuring high quality personnel are recruited to and retained by the Specialist Division and are properly trained and supervised; and

(c) the best manner of ensuring an orderly transition between the Australian Building and Construction Commissioner and the Specialist Division

The CIFWI should have the power to appoint appropriately qualified people as inspectors of the Specialist Division.

The ABCC currently employs 150 people across Australia. Every endeavour should be made to retain these people within the new Specialist Division, to ensure that the Division commences its operational life with an experienced team of inspectors.

During the course of 2009 there is a risk that the current ABC Inspectors will start to look for new employment as the life of the ABCC draws to a close.

This also poses a risk to the industrial stability of the industry, should the “tough cop on the beat” no longer have an active presence on Australia’s construction sites.

It would be appropriate for transitional employment arrangements to be put in place to provide continuity of employment for those ABC Inspectors who wish to continue employment with the Specialist Division of Fair Work Australia

Other Issues

We have noted in our response to the Discussion Paper that the future of the BCII Act is not clear.

We have recommended a new agency – the Construction Industry Fair Work Inspectorate – that would derive its powers through the new Fair Work Act. Such a change would require an amendment to the BCII Act.

However, the future of the BCII Act has other important implications for the construction industry. The structure of the BCII Act 2005, is as follows:

- Chapter 1 – Preliminary - defines the coverage of the Act and sets out a series of key definitions, including a *building industry participant* and *building work*, which are fundamental to the scope and application of the Act.
- Chapter 2 – Australian Building and Construction Commissioner – establishes the office of the ABCC and sets out the functions and structure of the ABCC. This chapter also includes sections dealing with Functions, Delegations, Minister’s Directions, Reporting, Appointment etc., which need to be considered in the establishment of the proposed Construction Industry Inspectorate.
- Chapter 3 – The Building Code – empowers the Minister to issue a code of practice (the Building Code) to apply to all building contractors that are corporations, together with building industry participants undertaking building work in a Territory or Commonwealth place. As noted earlier in this paper, this provision could be used to normalise the role of the Code and Guidelines should the Government so choose.
- Chapter 4 – Occupational Health and Safety – establishes the office of the Federal Safety Commissioner (FSC) and prescribes the functions and structure of the FSC. This chapter also provides for the establishment of an occupational health and safety accreditation scheme for persons who wish to enter into building contracts with the Commonwealth and Commonwealth authorities. The Accreditation Scheme has been one of the most important

initiatives to arise from the Royal Commission (Recommendation 29) and it is important that it be retained and developed.

- Chapter 5 – Industrial Action – defines “unlawful industrial action” and empowers Courts to issue injunctions where such action is occurring, threatened, impeding or probable. We have commented on the importance of this Chapter of the Act.
- Chapter 6 – Discrimination, Coercion and Unfair Contracts – deals with coercion in relation to the engagement of employees and contractors, coercion in relation to certified agreements and superannuation, discrimination in relation to industrial instruments, and unfair contracts. This has been one of the most important Chapters of the Act and much has been done, utilising these powers, to minimise coercion in the industry. It is essential to the well-being of the industry and the protection of participants, that these provisions be retained.
- Chapter 7 – Enforcement - deals with penalties for contravention of the Act. This chapter also sets out the ABCC’s powers to obtain information, the powers of ABC Inspectors, and the powers of Federal Safety Officers. We note that the powers of ABC Inspectors and Federal Safety Officers are defined in this section. They include the right of entry powers. It is important that these powers be protected in the event of legislative change.
- Chapter 8 – Miscellaneous – includes a range of provisions pertaining to project agreements, the ABCC’s powers of intervention, the jurisdiction of various Courts, and numerous other matters. A number of these matters will need to be reviewed.

Concluding Comments

The Australian Industry Group and the Australian Constructors Association welcome the opportunity to contribute to the review conducted by Mr Wilcox.

We repeat our earlier comment that the successful reform of the construction industry can be attributed to a combination of five inter-related policy initiatives. These five pillars are:

- The Building and Construction Industry Improvement Act (BCII Act);
- The Australian Building and Construction Commissioner (ABCC);
- The Federal Safety Commissioner (FSC);
- The National Construction Code and Implementation Guidelines; and
- Key elements of the WorkChoices legislation.

Each of the five key pillars of the construction industry reforms has been extremely important. They have combined in a mutually reinforcing manner to achieve the existing very positive environment in the industry.

There are a number of provisions of the new *Fair Work Bill*, particularly those related to bargaining and right of entry, which also pose a threat to the five pillars by undermining key elements of the WorkChoices legislation.

The right of entry provisions in the Bill are broader than the existing provisions of the WR Act but in drafting the Bill the Government appears to have been influenced by developments in the award modernisation process. To date the AIRC has not included registered organisations as “parties” to modern awards. The current provisions give a union the right to enter to hold discussions with employees (amongst other requirements) only where the union is party to an award or collective agreement which applies to the employees.

A union official (with a valid permit) has the right to enter to investigate suspected contraventions of the Act, a modern award or an enterprise agreement that relates to or affects a member of that union. While on the premises the union official can interview any person who agrees to be interviewed and whose industrial interests the union is entitled to represent. The union official can also inspect any record or document relevant to the suspected contravention. Ai Group and ACA are concerned about the ability of a union to access records of non-union members and, in the Senate Inquiry into the Bill, we will seek a retention of the existing prohibition in s.484(4) of the WR Act.

Similarly, the bargaining provisions of the *Fair Work Bill*, give rise to concerns that previous inappropriate practices may return, including the return of project agreements, multi-business agreements and pattern bargaining, all of which entrenched union power in the bargaining process.

The reforms resulting from the Cole Royal Commission have supported a positive change in the behaviour of industry participants. The industry has never been a better place in which to work and invest as is evident in the record low level of industrial disputation, high wages growth and higher productivity. Winding back the reforms would be an extremely retrograde step.

In the framing of proposals to establish the new Specialist Division, it is important that the significant benefits that have accrued to all who work in the industry - from rigger to project director – not be lost.

We are available to discuss this submission with Mr Wilcox if required.

Commissioner Cole's Model for Reform

“If the reforms recommended are adopted and implemented, the mechanisms will be in place to restore the rule of law to the building and construction industry. Those who breach the law will be prosecuted and penalised. The penalties will be significant. Those breaching the law will find they can no longer participate in the industry. Those who disregard proper standards of behaviour expressed both in an Act of special application to the building and construction industry, provisionally called the *Building and Construction Industry Improvement Act*, or do not adhere to codes of practice for the industry, will be denied Commonwealth work if they are contractors or subcontractors. Losses caused by unlawful industrial action will be immediately assessed by independent assessors and will be recoverable from those causing loss by an abbreviated form of legal proceedings. No longer will there be any excuse for those who say they suffer loss, not to recover it from those who cause it. I have also recommended the establishment of an independent commission, provisionally called the Australian Building and Construction Commission (ABCC), to monitor conduct in the industry. There will be obligations imposed upon contractors, subcontractors, union officials and workers to advise the ABCC of possible unlawful conduct, be it underpayment or non-payment of wages, taxation avoidance, departures from proper standards of occupational health and safety, breaches of freedom of association provisions, unlawful industrial activity, or any other form of unlawfulness. It will be the responsibility of the ABCC either itself to address this unlawfulness, or where there is another State or Federal body more suited to its investigation, to refer the matter to that body but with the obligation to monitor and ensure any complaint is properly addressed. This body will remove any reason that any participant in the industry has to engage in unlawful or inappropriate conduct. It will also ensure that unlawful conduct comes to the attention of an entity established to ensure the law is adhered to.”

[Volume 1, pp. 13 & 14 of Final Report]

Annexure B

The following submissions have been made by member companies and form part of this submission.