



AUSTRALIAN INDUSTRY
GROUP



AUSTRALIAN CONSTRUCTORS ASSOCIATION

15 May 2009

Mr Michael Maynard
Group Manager
Workplace Relations Implementation Group
Department of Education, Employment and Workplace Relations
10 Mort Street
Canberra ACT 2600

Dear Mr Maynard

We are writing in response to your invitation to Ai Group and the ACA to express our views on the recommendations in the report prepared by the Honourable Murray Wilcox QC entitled *Transition to Fair Work Australia for the Building and Construction Industry*.

Ai Group and ACA's involvement in the Wilcox Review

Ai Group / ACA made three submissions during the Wilcox Review, the first in December 2008, and two supplementary submissions in January 2009 and March 2009.

Ai Group met with Mr Wilcox in his very first industry consultation at the start of his inquiry and Mr Wilcox spoke at Ai Group's National PIR Conference in December 2008.

The ACA Board met with Mr Wilcox in September 2008.

Ai Group was also one of the speakers at the University of Melbourne Law School Forum organised by Mr Wilcox in February 2009.

Ai Group and ACA's views on Mr Wilcox's Recommendations

The views of Ai Group and the ACA on each component of Mr Wilcox's Recommendations are set out below.

We are particularly concerned that a series of what may not seem like major changes in themselves will lead to a reversal of the very positive outcomes that have been achieved.

Recommendation 1:

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.

- **Issue 1: That the Specialist Division be located within the Office of the Fair Work Ombudsman but have operational autonomy under a Director, appointed by the Minister**

Mr Wilcox recommends the creation of a Building and Construction Division (“the BCD”) of the Office of the Fair Work Ombudsman (OFWO).

The BCD would be headed by a Director, appointed by the Minister, who would be answerable to the Fair Work Ombudsman (FWO) in relation to administrative, financial and personnel management but not in respect of operational matters.

It is the view of Ai Group and ACA that the Director must be independent and not answerable to the Fair Work Ombudsman.

- **Issue 2: That the Specialist Division 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**

Mr Wilcox recommends the establishment of an advisory board comprising the Director, the FWO and up to five part-time members, being people experienced in the industry and drawn from a variety of locations. He recommends that the board should determine the policies, programs and priorities of the BCD, but not exercise executive powers.

The Australian Building and Construction Commissioner (ABCC) currently convenes an Industry Forum which meets regularly to consult with peak organisations representing building industry participants.

The Federal Safety Commissioner (FSC) convenes an Industry Reference Group which meets regularly with industry experts to discuss the evolution of the Safety Accreditation Scheme and to obtain industry feedback on proposals for developing the Scheme. Both of these reference groups provide an opportunity for consultation but do not inhibit the independence of the two statutory offices.

Ai Group and ACA believe an industry reference group is appropriate but any reference group or Board should not have the power to impose policies, programs or priorities upon the Director. This would compromise the Director’s independence.

Also, a provision along the lines of s.11 of the *Building and Construction Industry Improvement Act* (BCII Act) needs to be retained to preserve the independence of the Director.

- **Issue 3: That funds be allocated each year against an Outcome related only to the Specialist Division**

Mr Wilcox recommends that the BCD should have its own dedicated staff, with specialised knowledge of the building and construction industry and should receive specially earmarked funds approved by the Government and specified in each Workplace Relations Portfolio Budget Statement.

It is proposed that the BCD should investigate and prosecute suspected breaches of federal workplace laws, including industrial instruments, whether by building employers, building employees or unions. It would also undertake industry improvement activities, such as training and OHS awareness programs.

Ai Group and ACA would prefer that low level investigations continue to be undertaken by the Office of the Fair Work Ombudsman, consistent with arrangements currently in place between the ABCC and the Workplace Ombudsman.

The Building and Construction Division needs to have separate resources and staff. Resources need to be at least equal to the ABCC's current resources. If the Building and Construction Division's role is to be expanded to include investigating and prosecuting breaches of industrial instruments then more resources would need to be allocated.

Recommendation 2:

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.

- **Issue 1: That provisions in the *Fair Work Act* governing the conduct of employers, employees and industrial associations apply unchanged to building and construction industry participants**

This recommendation is not supported. The following BCII Act provisions governing the conduct of employers, employees and industrial associations are not contained within the *Fair Work Act* and need to be maintained:

- Section 38 – Unlawful industrial action prohibited (Note: The *Fair Work Act* does not include a general prohibition on unlawful industrial action);

- Section 39 – Injunction against unlawful industrial action (Note: The *Fair Work Act* does not provide a general power re. injunctions relating to unlawful industrial action);
 - Section 65 – Protection of confidentiality of information;
 - Section 69 – Building association responsible for conduct of members etc;
 - Sections 71 to 74 – Intervention rights etc.
- **Issue 2: That penalties for contraventions of the *Fair Work Act* apply unchanged to building and construction industry participants**

Mr Wilcox finds that there is no justification for perpetuating special constraining rules for building employees. Similarly he finds there is no justification for selecting a different maximum penalty, for the same contravention, simply because the offender is in a particular industry. He notes that both the circumstances of the contravention and the offender’s previous contraventions would be taken into account by the relevant court in determining the actual penalty in a particular case; and further notes that this would occur regardless of the offender’s industry. As a result he recommends there be no difference, between building and other employees, in regard to substantive behavioural rules or penalties.

In its submissions to the Review, Ai Group argued that the construction industry faced unique characteristics and special challenges that differentiated it from other industries and justified distinct legislative treatment. We therefore argued that it was desirable and appropriate to maintain the special building and construction industry penalties for unprotected industrial action.

This recommendation is not supported. Given the level of industrial lawlessness that is prevalent in the construction industry and the fact that an enduring change in behaviour has not yet occurred, the higher penalties in the BCII Act should continue to apply.

Recommendation 3:

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

- (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.**

- **Issue 1: That the Director of the Specialist Division be invested with a compulsory interrogation power, similar to that contained in section 52 of the BCII Act**

Ai Group and ACA support this recommendation. The retention of the existing compulsory interrogation power is vital.

In their submissions to the review Ai Group and ACA argued that the vast majority of those working in the construction industry believed that the powers of the ABCC were appropriate and have been exercised with discretion and that it is essential to maintain the power of coercive interrogation consistent with the provisions of s.52 of the BCII Act.

Mr Wilcox determined that the level of industrial unlawfulness in the industry, especially in Victoria and Western Australia, was such that it would be inadvisable not to empower the BCD to undertake compulsory interrogation. He acknowledged that, without such a power, some types of contravention would be almost impossible to prove.

The report recommends that the new legislation should contain a power of compulsory interrogation; but subject to several safeguards, none of which Mr Wilcox observes exist under the BCII Act and none of which need delay an investigation. The objective of the recommendations is to ensure that compulsory interrogation is not used unnecessarily and the interrogated person is treated fairly and courteously.

- **Issue 2: That the compulsory interrogation power be reviewed after 5 years**

Ai Group and ACA believe a review of the compulsory interrogation power after five years is sensible but the power should remain in place until it is clear that the power is no longer necessary. That is, it is essential that there be no sunset clause (see below).

- **Issue 3: That the compulsory interrogation power be made subject to a five year sunset clause**

Ai Group and ACA strongly oppose this recommendation. A sunset clause would require legislative change to maintain the Building and Construction Division. This is not appropriate. The 5 year review should take place in an environment which is free from the pressure that a sunset clause would bring to bear on the Government and other parties.

Recommendation 4:

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

- **Issue 1: That a notice requiring a person to attend for interrogation be issued only by a presidential member of the AAT who is satisfied by written materials that it is appropriate to issue the notice**

Mr Wilcox recommends that the notice to attend for questioning be issued by a presidential member of the Administrative Appeals Tribunal. The member would have to be satisfied:

- as to the importance of the information, evidence or documents likely to be obtained from the person to be summoned to the investigation;
- that it is reasonable to require that person to attend, having regard to the nature and likely seriousness of the suspected contravention;
- any alternative method of obtaining the information, evidence or documents;
- the likely impact of that requirement on that person.

During office hours, police are able to seek a search warrant from any relevant judge. It is assumed that a similar process would apply regarding applications to Presidential Members of the AAT. On this basis it appears that the recommended process is workable. However, if a Presidential Member refuses to issue a notice, the Director of the Building and Construction Division should have the right to seek a review of the decision from the President of the AAT.

It is vital that the process of obtaining a notice be conducted in private to avoid coercion or intimidation of witnesses.

- **Issue 2: That the Director or a Deputy Director of the Specialist Division preside at all compulsory interrogations**

Ai Group and the ACA understand that this is consistent with the existing practices of the Office of the ABCC. At present, the ABC Commissioner or a Deputy Commissioner preside at all compulsory interrogations.

- **Issue 3: That the Commonwealth Ombudsman monitor proceedings at all compulsory interrogations and for that purpose the Director would be required to promptly notify the Ombudsman of the issue of all notices to attend for interrogation and promptly after the interrogation, supply to the Commonwealth Ombudsman a report, a video recording of the interrogation and a copy of any written transcript;**

Ai Group and ACA support this recommendation with the exception of video recordings. This appears to be unnecessary given that a transcript and report would be provided. Obtaining video facilities in regional and remote locations would be difficult and could impede hearings. Also, it would be an unnecessary burden upon the Commonwealth Ombudsman to watch every video of every interrogation.

- **Issue 4: That the Commonwealth Ombudsman report to Parliament annually, and otherwise as required, concerning the exercise of the power of compulsory interrogation.**

Ai Group and ACA support this recommendation.

Recommendation 5:

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.**

- **Issue 1: That persons summoned for interrogation be paid their reasonable expenses (travelling, accommodation and legal, as may be) and any loss of wages or other income**

In his report Mr Wilcox notes that he finds it unacceptable that the BCII Act allows a person attending for interrogation to be legally represented but contains no provision for payment of the cost of representation, the reimbursement of travelling and accommodation expenses or lost wages and recommends that this issue be addressed in legislation.

This recommendation is generally supported but the witness should not be reimbursed expenses if they do not cooperate in making cost effective arrangements for carrying out the interrogation. If legal expenses are to be reimbursed this would need to be tightly controlled to prevent unreasonable claims and a drain on the Building and Construction Division's finances.

- **Issue 2: That there be recognition and availability of client legal privilege and public interest immunity**

Ai Group and ACA support this recommendation.

Recommendation 6:

- (i) **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.**
- (ii) **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.**

- **Issue 1: That a new Division 4 be added to Part 5-2 of the *Fair Work Act* relating to the building and construction industry**

Ai Group and the ACA are not overly concerned about whether separate legislation is maintained for the building and construction industry, as opposed to the relevant provisions being incorporated into the *Fair Work Act*. Whichever approach is adopted it is essential that the following provisions of the BCII Act be maintained:

- Chapter 1 – Preliminary (scope, definitions etc)
- Chapter 2 – Australian Building and Construction Commissioner
- Chapter 4 – Occupational health and safety
- Section 39 of Chapter 5 – Industrial Action etc
- Section 44 of Chapter 6 – Discrimination, coercion and unfair contracts
- Chapter 7 – Enforcement
- Sections 65 and 69 plus 71 to 74 of Chapter 8 – Miscellaneous

Given the breadth of the above legislative provisions it may not be appropriate to deal with such issues in a Division of Part 5-2 of the *Fair Work Act*. The simplest approach would be to maintain the BCII Act.

- **Issue 2: That 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.**

It appears from Mr Wilcox's report that his reference to "off-site work" is a reference to the off-site aspects of paragraph 5(1)(d)(iv) of the BCII Act. If made-to-order components carried out off-site are removed from the definition (eg. products manufactured in an ongoing manufacturing facility), the pre-fabrication of components on-site, or in a temporary yard or other facility set up by a construction contractor to prefabricate substantial parts of a building or structure (eg. pre-castings) should remain covered.

Recommendation 7:

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.

Commissioner Cole in the Final Report of the Royal Commission 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."*¹

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.

We understand that this is the model adopted by the ABCC via an administrative arrangement with the Office of the Workplace Ombudsman. Ai Group and ACA believe that this is an appropriate model for the new Building and Construction Division. From time to time the Building and Construction Division will have referred to it, or become aware of, potential breaches or offences that should be dealt with by another agency eg the Workplace Ombudsman, a health and safety authority, the Australian Taxation Office etc.

The Workplace Ombudsman currently handles investigations and prosecutions relating to underpayments under construction industry awards and agreements. It is sensible for the Fair Work Ombudsman to carry out this task, rather than the Building and Construction Division. Specifically, Ai Group and the ACA propose that:

- Inspectors assigned to the Building and Construction Division should report to the Director of this Division and not deal with underpayments under construction industry awards and agreements;
- Fair Work Inspectors should report to the Fair Work Ombudsman and deal with underpayments under construction industry awards and agreements (consistent with the current arrangements).

¹ RCBI Final Report, 2003, Vol 1, p157

ABC Inspectors are highly skilled and typically carry out complex work. Most have a law enforcement background. It is important that this skill base not be diluted.

Recommendation 8:

Except perhaps in rural and remote areas, the Building and Construction Division have its own dedicated operational staff, including inspectors.

The report notes that it is important that the Building and Construction Division is seen to be focussed on the building and construction industry and should have its own staff with a specialised knowledge of the industry

It further notes that except in rural or remote areas Building and Construction Division D inspectors should not be asked to take on general OFWO duties.

The report also suggests that staffing and resources should at least be equivalent to those currently provided to the ABCC and speculates that it may need more staff (investigators and legal) than the ABCC has now.

Mr Wilcox also notes that he expects the majority of the Building and Construction Division's staff will transfer from the ABCC and carry out "*much the same work as before*".

This position is consistent with the Ai Group and ACA position. We expressed concern 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 Building and Construction Division.

The resourcing of the ABCC has been one of the keys to its success. It noted that should the specialist skills currently available within the ABCC be lost through budgetary measures, the effectiveness of the new Building and Construction Division would be seriously compromised.

We therefore proposed that 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 Building and Construction Division of Fair Work Australia

Ai Group and ACA support Recommendation 8. It is vital that arrangements be implemented to allow for continuity of employment for those ABCC staff who transfer to the Building and Construction Division. Every effort needs to be made to avoid a loss of expertise and focus.

We strongly support the Office of the ABC Commissioner and have great confidence in Commissioner John Lloyd. It is important that there be a seamless transition from the ABCC to the new Building and Construction Division of the Fair Work Ombudsman. Every effort needs to be made to avoid a loss of expertise and focus.

The National Construction Code and Guidelines

Mr Wilcox did not make any formal recommendations about the National Construction Code and associated Implementation Guidelines but he expressed some views about the Code and Guidelines in his report.

Historically, unions in the construction industry have used the commercial risk faced by the contractor as a lever to secure concessions, often obtained through coercion. This resulted in a legacy of restrictive work practices and cost burdens that infected subsequent projects and ultimately became an expense borne by the industry's clients.

As Commissioner Cole pointed out in his Final Report *“there is a tendency for the interests of Government as regulators and their interests as clients to come into conflict,”*² and when this occurs the interests of public sector clients in securing timely completion of projects usually prevails over compliance.

It is therefore difficult to understate the importance of the Code and Guidelines in breaking this cycle. Essentially the Code and Guidelines imposed a new commercial risk on contractors that far outweighed the costs of caving in to the unlawful demands of unions. The threat of being removed from tender lists for public sector construction work was a much greater risk than the short-term benefits to be gained from breaching industrial laws and agreements to secure relief on a distressed project.

Ai Group and the ACA strongly support the retention of the National Construction Code and Implementation Guidelines.

There should be consultation with industry bodies such as Ai Group and the ACA about any changes which the Government proposes to make to the Code and Guidelines.

The Guidelines should focus upon the legal obligations of contractors and service providers, plus practices which are not in the interests of lawful, harmonious and productive workplaces (eg. “no ticket no start” signs, “show card” days, forms requiring an employee to identify their union status and the other practices set out in 8.5.3 of the Guidelines).

The Guidelines should not become the home for all of the Government's “aspirational” policy goals relating to, for example, the employment of women, apprentices, indigenous employment, environmental policies etc. For example, quotas would be highly inappropriate.

Important policy objectives of the Government can more appropriately be dealt with through the pre-qualification stages of a project.

Ai Group and the ACA support Mr Wilcox's suggestion that parties bound by the Guidelines should have access to an independent review of administrative decisions.

² Final Report of the Royal Commission into the Building and Construction Industry, Volume 7, Reform – National Issues Part 1, p73

Federal Safety Commissioner

Chapter 4 of the BCII Act 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 the Office of the Federal Safety Commissioner and the Accreditation Scheme be retained and developed.

Should you require any further clarification of our position please contact Jim Barrett, Associate Director, Construction and Infrastructure, 02 9466 5522, jim.barrett@aigroup.asn.au

Yours faithfully,



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