

ACCI Response - Wilcox Report Recommendations (May 2009)

Preamble

ACCI's response to the Wilcox J Report and Recommendations should be read in conjunction with other ACCI members (MBA, AMMA and CCIWA) involved in the DEEWR consultation process.

ACCI lodged a detailed written submission to the Wilcox J inquiry into the ABCC, and we continue to rely upon that submission (attached).

Recommendations	Comments
<p>Recommendation 1: The proposed Specialist Division be located within the Office of the Fair Work Ombudsman but have:</p> <ul style="list-style-type: none"> (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. 	<p>R1. ACCI supports the retention of the ABCC in its current form. This also includes the Federal Safety Commissioner, <i>Building Construction and Industry Improvement Act 2005</i> (BCIIA), and associated legislation. It was the result of a robust and extensive Royal Commission into the industry. To disturb the existing framework in either a minor or substantive way opens up the possibility for the return to past unlawful practices that Commissioner Cole found in his final report.¹</p> <p>We reiterate our primary thesis that the ABCC has made significant achievements in a short amount of time, with evidence of increased productivity, increased community benefits², decreased periods of unlawful conduct and a demonstrated change of behaviour in many instances.</p> <p>But the evidence also indicates that there is still significant cultural reform to be realised. This will undoubtedly take time. To dislocate the current arrangements by transferring the ABCC into a division of the Fair Work Ombudsman (FWO) would be to put in jeopardy the current work and reform process that has already begun.</p>

¹ Final Report of the Royal Commission into the Building and Construction Industry – Summary of Findings and Recommendations, Volume 1, pp.5-6.

² KPMG Econtech's 2009 report, *Economic Analysis of Building and Construction Industry Productivity*.

However, should the Government continue with its policy to create a Specialist Division (SD), all of the current structures, legislative powers, penalties, procedures and resources should be successfully and smoothly transferred into the new body. It should, for want of a better word, be as close to a “rebadging” exercise as much as possible. Should the Government implement further amendments, such as the safeguards referred to in R4, then it should do so on such a foundation.

We do not support R1 (ii) in its current form. An independent Director, similar to the current ABCC Commissioner should not be required to fulfil its statutory functions under direction of a “advisory board” or similar external source. This is the antithesis of independence – particularly if the board sets operational programs and priorities that allocate time and resources to areas that are dealt with by other agencies (ie. underpayments, OHS etc). This will do a disservice to the continued challenge of implementing a cultural shift which is required in the sector.

It is Parliament’s role to set the statutory responsibilities for a statutory office holder. It is up to that office holder to discharge those functions in a manner according to its own independently determined priorities, programs and policies. This is what occurs in other areas of public regulation, such as the Workplace Ombudsman, the ACCC, ATO. Recalling that public agencies have a finite amount of allocated resources by which they must discharge their functions and duties. The Workplace Ombudsman sets out its on education and compliance campaigns within its broad set of statutory functions. It exercises equivalent powers to the ABCC and does not require a board to do so.

ACCI is also concerned that a board as described in R1(ii), will confuse the demarcation between the Director and the FWO. Furthermore, we are concerned that part-time members may be appointed from industry where they may come (consciously or not) with their own

agendas/biases. This will ultimately impact upon the compliance activities of the Director.

Industry and the community must be reassured that a Director is independent from external influence.

ACCI does not oppose a consultative committee, derived from key stakeholders, which would inform the Director of contemporary issues in the industry and provide constructive feedback on the work of the new SD. This is what currently occurs within the ABCC. It is a concept also used by other regulators. For example, ACCI sits on the ATO's Superannuation Consultative Committee to provide employer feedback to the ATO. It's governed by a Charter and proceedings are minuted. The Australian Fair Pay Commission also has its disability roundtable, which serves to inform the Commissioners in a similar manner.

Similarly, the Board of Taxation is not a governance Board, nor outlines priorities for the Commissioner of Taxation – it merely offers advisory and consultation to the ATO. The Administrative Review Council similarly informs the Attorney-General through its reports. The Government's *“Review of the Corporate Governance of Statutory Authorities and Office Holders”* recommends that the main role of an “advisory board” is to *“contribute a business and broader community perspective to improve the implementation of government policy”*. It is therefore, a passive and not active body, and it is to inform Government not the actual agency on policy implementation.³

We believe that such a Fair Work Building and Construction Industry Consultative Committee would serve as a better mechanism to inform the Director of industry, employee and unions views. It would assist the Director set its own policies and programs, but not necessary impose any requirement for the Director to have regard to those views.

R1 (ii).

ACCI supports adequate Government funding being allocated to the SD. This is essential if the SD is to have an impact in enforcing the rule of law. We would expect

	<p>that the SD would be providing with a similar amount of funding.</p> <p>ACCI member feedback does suggest that more resources are required in certain States, such as WA and Vic, due to the nature and level of industrial action and unlawful conduct.</p> <p>ACCI supports the current ABCC Commissioner and would welcome a continued succession to the new SD, as has occurred with appointments to Fair Work Australia.</p>
<p>Recommendation 2: The provisions of the Fair Work Bill governing:</p> <ul style="list-style-type: none"> (i) the conduct of employers, employees and industrial associations; and (ii) penalties for contraventions of the Fair Work Bill; <p>apply, unchanged, to participants in the building and construction industry.</p>	<p>R2.</p> <p>ACCI continues to support the BCIIA in its current form. We believe that this should be translated into either a separate Act (preferred), or into the <i>Fair Work Act 2009</i> (FW Act).</p> <p>A separate Act would provide a signal that there is a “strong cop on the beat”.⁴ It would also ensure that “the principles of the current framework that aim to ensure lawful conduct of all participants in the building and construction industry will continue”.⁵</p> <p>The current objectives in s.3 should remain, as should:</p> <ul style="list-style-type: none"> - All provisions in the BCIIA that govern unlawful conduct (ie. Part 2, 3, 4, Chapter 6 and 7). - Particularly, ss.36- 49 and s.52(6)’s penalty provision. <p>These are all essential to ensuring that building industry participants adhere to the rule of law and comply with industrial relations rules.</p> <p>ACCI does not support the FW Act applying to the industry. Essentially, this is what occurred prior to the Cole Royal Commission, and is essentially why Cole recommended a specialist enforcer and regime to deal with the industry. Should building industry participants be subject to the FW Act, as other employers, employees and unions are, we fear that unions would ignore orders</p>

⁴ ALP, *Forward with Fairness – Policy Implementation Plan*, p.24.

⁵ *Ibid.*

of FWA and the Courts, just as Cole observed in his report under the *Workplace Relations Act 1996*.⁶ Cole also stated that: “*Section 127 of the [WR Act] has proved to be ineffectual in preventing unlawful industrial action taking place in the building and construction industry*”.⁷

Cole recommended in his report that the existing penalty regime at the time was inadequate, and specifically recommended that penalties for individuals and body corporates be substantially increased.⁸

Cole recommended that “*a comprehensive package of reforms implemented on a long term basis is required*”.⁹

ACCI does not agree with a number of statements in the Wilcox J report, particularly, 1.17 – 1.19 and 4.62. Parliament did not decide on the content of the BCIIA or its replacement when it considered the FW Act. The two issues are separate and were not on the table during the Parliamentary process. There is a very real difference between the unlawful industrial provisions under the FW Act and those under the BCIIA. They are more real than semantic as suggested by Wilcox J. Under s.38 of the BCIIA, unlawful industrial action as defined, is unlawful per se and subject to penalties. Under the WR Act or FW Act, unions engaged in unlawful industrial action (outside of the nominal expiry date of an agreement) would only be subject to a penalty, if it breached an order of Commission or the Courts. This is a very real motivator for unions not to engage in industrial action as defined under the BCIIA.

ACCI also disagrees with the analysis contained in 4.64 to 4.70. We support the current provisions regarding the onus of proof in s.36(1)(g) of the BCIIA. This was specifically included in the BCIIA because unions often rely on OHS grounds (whether legitimately or not) to avoid liability of unlawful industrial action.

⁶ Volume 1, p.63

⁷ Ibid.

⁸ Ibid, at pp.35, 38,86, and 96.

⁹ Ibid, at p.7

	<p>ACCI also strongly supports provisions in the BCIIA that allows the ABCC Commissioner the right to intervene in proceedings. This has been another powerful motivator for all building construction participants.</p> <p>Government should exercise extreme caution before it considers removing the provisions in the BCIIA as Wilcox J has recommended.</p>
<p>Recommendation 3: The Director of the Building and Construction Division be invested with a power, similar to that contained in section 52 of the <i>Building and Construction Industry Improvement Act 2005</i>, to cause people compulsorily to attend for interrogation, but subject to the safeguards contained in Recommendation 4; and</p> <ul style="list-style-type: none"> (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. 	<p>R3. ACCI welcomes the continued retention of s.52 powers.</p> <p>However, we also want to ensure that s.52, which is modelled on s.155 of the <i>Trade Practices Act 1974 (TPA)</i> is translated as consistent as possible. We support the penalty regime associated with a breach of s.52.</p> <p>R3(i). ACCI does not oppose a review of this power after 5 years. However, we oppose R3(ii).</p> <p>R3(ii). Given that Wilcox J has recognised that “<i>there is still a level of industrial unlawfulness in the building and construction industry ... that it would be inadvisable not to empower the BCD to undertake compulsory interrogation</i>” ACCI does not support R3 (ii) if it is an automatic repealing of the coercive power.</p> <p>The coercive powers should continue until Parliament decides to revoke them or modify them, and that should only take place after the 5 year review.</p>
<p>Recommendation 4: The use of compulsory interrogation be subject to the following safeguards:</p> <ul style="list-style-type: none"> (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: <ul style="list-style-type: none"> (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 	<p>R4. ACCI does not believe that additional safeguards have been proven to be necessary. There has not been any evidence of misuse or abuse by the Interim Building Taskforce or the ABCC. The ABCC has its own policy on how it will use its powers which is published. The ABCC also ensures that the use of the s.52 powers is in compliance with the Administrative Review Council’s principles contained in Report No.48 (May 2008).</p>

<p>relevant to that investigation;</p> <p>(c) it is likely to be important to the progress of the investigation that this information or evidence, or those documents, be obtained; and</p> <p>(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;</p> <p>(ii) the Director or a Deputy Director of the Building and Construction Division preside at all compulsory interrogations;</p> <p>(iii) the Commonwealth Ombudsman monitor proceedings at all compulsory interrogations and for that purpose the Director:</p> <p>(a) promptly notify the Commonwealth Ombudsman of the issue of all notices to attend for interrogation; and</p> <p>(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</p> <p>(iv) the Commonwealth Ombudsman report to Parliament annually, and otherwise as required, concerning the exercise of the power of compulsory interrogation.</p>	<p>The structure, content and formulation of s.52, was based upon s.155 of the TPA which was recommended by Cole in his report.¹⁰</p> <p>All other agencies which have similar coercive gathering powers, such as the ATO, APRA, ASIC, ACCC, Centrelink and Medicare, do not have additional safeguards. According to the annual reports of ASIC and the ACCC, these agencies use the powers a greater number of times than has been the case with the ABCC.</p> <p>Currently the Commonwealth Ombudsman can inquire into complaints against decisions and practices of the ABCC. We do not oppose this continuing.</p> <p>ACCI does not support R4. However, we do not oppose the following measures in lieu of R4:</p> <ul style="list-style-type: none"> - The Commonwealth Ombudsman to prepare a report for tabling in Parliament on the exercise of the coercive functions of the SD (Cole Recommendation No. 197) and what essentially occurred under the now repealed s.88AI of the <i>Workplace Relations Act 1996</i>. - The Minister to prepare a report on coercive functions to be tabled in Parliament. (Cole Recommendation No.196). <p>Notwithstanding, we make the following recommendations:</p> <p>R4(i) (c) and (d) are not necessary as it is captured by (a) and (b). (a) and (b) shifts the onus on the AAT to decide matters that would otherwise be considered by the Director. ACCI does not think this additional step is necessary as the Director is able to form these views and the potential for abuse of process remains extremely limited.</p> <p>We also don't support (d) because it requires the AAT to inquire into the "<i>nature or likely seriousness of the suspected contravention</i>" which may be unknown at that</p>
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¹⁰ Recommendation 184, with the addition of the immunity provisions contained in s.6DD of the *Royal Commissions Act 1902*.

	<p>point in time as the coercive power is necessary to obtain that information in the first instance. It also requires the AAT to assess the likely <i>“impact upon the person”</i> which does not go to the heart of the issue as to whether there is relevant information in a person’s possession.</p> <p>It should be made clear in any proposed legislation that the Director may re-apply to the AAT for the issuance of a notice for either the same person or same factual circumstances. An application should not be ousted by virtue that an application has been knocked back previously. An aggrieved applicant should not be able to challenge a subsequent applications on grounds that it may be an abuse of process (or other similar grounds) in the Courts. This should be dealt with in proposed legislation.</p> <p>R4(ii).</p> <p>ACCI does not oppose this recommendation.</p> <p>R4(iii).</p> <p>ACCI does not consider (a) to be necessary, as it would be a regulatory burden on the SD to provide all notices to the Commonwealth Ombudsman. (b) requires a report, video and transcript to be supplied. ACCI does not have an in-principle opposition (subject to ACCI members comments) for a copy of the transcript or report to be supplied. This should be subject to strict confidentiality/secretcy requirements. These additional processes should not, however, invalidate, or have any implications on the lawfulness of the exercise of the coercive power.</p> <p>R4(iv).</p> <p>ACCI supports this recommendations for the reasons articulated above.</p>
<p>Recommendation 5: The legislation authorising compulsory interrogation provide for:</p> <ul style="list-style-type: none"> (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. 	<p>R5 (i).</p> <p>ACCI does not oppose this recommendation, except for the payment of legal expenses. We are not aware of any other agency having to compensate a person for expenses associated with legal costs incurred.</p>

	<p>There is a very real prospect that a person subject to coercive powers will intentionally incur extensive costs with respect to providing instructions, obtaining legal advice from solicitors and counsel, associated expenses (travel, accommodation of legal advisers etc.).</p> <p>ACCI does not oppose the Commonwealth paying (in accordance to an allowance or scale of costs) loss of wages or other income. This should be a matter for the Commonwealth to determine.</p> <p>R5(ii).</p> <p>ACCI notes that the ABCC in its Guide to Compliance Powers, at paragraph 35 “... <i>the ABC Commissioner expects that the section 52 investigative power does not abolish the right to claim legal professional privilege when responding to a notice.</i>” Therefore, it appears that there is no need for a specific provision to address this issue.</p> <p>ACCI is concerned that if public interest immunity should be available, there is a possibility that claimants may unnecessarily invoke this exception to providing information and slow down investigations. There must be an ability for the Director to apply to either the AAT or Court to determine whether something should be subject to public interest immunity.</p>
<p>Recommendation 6:</p> <ul style="list-style-type: none"> (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 <i>Building and Construction Industry Improvement Act 2005</i>, but excluding off-site work. 	<p>R6(i).</p> <p>ACCI supports a separate stand-alone Act which translates the BCIIA consistent with ACCI’s submissions.</p> <p>R6(ii).</p> <p>ACCI does not make any specific submission on this recommendation and refers to ACCI members submissions.</p>
<p>Recommendation 7:</p> <p>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</p>	<p>ACCI does not have an in-principle objection to this, and also refers to ACCI member submissions.</p>

legal proceedings.	
Recommendation 8: Except perhaps in rural and remote areas, the Building and Construction Division have its own dedicated operational staff, including inspectors.	ACCI supports this recommendation. The SD should have dedicated officers who currently work for the ABCC. This also includes support staff, such as lawyers who have developed expertise and skills in this area.

ACCI Response - Wilcox Report Suggestions and Comments on the Guidelines

Comment (paragraph reference)	Comments
It seems desirable to retain the Code and Guidelines as an adjunct to the statutory provisions governing conduct in the industry. (paragraph 7.32(a))	ACCI supports the retention of the Code and Guidelines.
I think it would be preferable to limit the application of the Guidelines to on-site work. (paragraph 7.32(c))	ACCI refers to ACCI member submissions.
I make the suggestion that the Government review the content of the Guidelines, in consultation with industry participants, including the unions and the States and Territories, both to remove existing ambiguities and to include desirable positives. It would be good to have the revised Guidelines take effect when the new regime commences on 1 February 2010. (paragraph 7.32(d))	<p>ACCI refers to ACCI member submissions, however notes the following:</p> <p>ACCI would be concerned that current provisions were removed or watered down which would prejudice the positive contribution it has had to industry, Commonwealth and the community. The guidelines should not simply be amended to be “compatible” or consistent with the FW Act for that goal per se. The criteria should be whether “<i>continue[s] to act as a catalyst for reform in the building and construction industry</i>”. That is the benchmark which the Government should assess the guidelines and by which building industry participants, and the wider community should assess any amendments to the Code/Guidelines.</p>
If the Guidelines are to be retained, either in their present or an amended form, they ought to be made a disallowable instrument, using either the present section 27 or a similar provision in the new Act. (paragraph 7.32(e))	ACCI refers to ACCI member submissions.
To demonstrate code-compliance, the entity would need to show that its industrial instruments comply with the Guidelines and, I suggest, that neither it nor any related entity has been found to have contravened the legislation, or an industrial instrument, within (say) the previous two years. (paragraph 7.32(f))	ACCI refers to ACCI member submissions.

<p>If the [Building and Construction Division] is to have an investigative role in relation to contraventions, it makes sense for it to be responsible for determining whether an entity is code-compliant. (paragraph 7.32(h))</p>	<p>ACCI refers to ACCI member submissions.</p>
<p>Whether the Guidelines are to be retained in their present form or amended, it is my opinion that decisions taken under them should be made judicially reviewable under the ADJR Act and administratively reviewable by the AAT. (paragraph 7.32(i))</p>	<p>ACCI refers to ACCI member submissions.</p>