

THE INVESTIGATORY POWERS OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION

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I INTRODUCTION

In 2003 the Cole Royal Commission into the Building and Construction Industry reported that it had identified hundreds of cases of ‘lawlessness’¹ and that there was ‘an urgent need for structural and cultural reform’.² The Howard Government responded through the *Building and Construction Industry Improvement Act 2005* (Cth) (*BCII Act*).³ The stated object was to create an ‘improved workplace relations framework for building work’ so as to ‘ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole’.⁴

The *BCII Act* prescribes standards of behaviour for individuals and corporations who engage in ‘building work’.⁵ It prohibits ‘unlawful industrial action’,⁶ which includes industrially-motivated bans on the performance of building work in connection with an industrial dispute, the failure by a person to attend for building work and the ‘performance of building work in a manner different from that in which it is customarily performed, ... the result of which is a restriction or limitation on, or a delay in, the performance of the work’.⁷ The Act also prohibits coercion⁸ and discrimination⁹ in the building and construction industry, and empowers the

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¹ Royal Commission into the Building and Construction Industry, *Final Report of the Cole Royal Commission into the Building and Construction Industry* (2003), Vol 1, 6 [16].

² *Ibid.*

³ The *BCII Act* was accompanied by the *Building and Construction Industry Improvement (Consequential and Transitional) Act 2005* (Cth).

⁴ *BCII Act* s 3(1).

⁵ *Ibid* s 5.

⁶ *Ibid* s 37.

⁷ *Ibid* s 36. This section further defines terms like ‘industrially-motivated’.

⁸ *Ibid* ss 43-44, 46.

⁹ *Ibid* s 45.

Minister for Employment and Workplace Relations to issue a Building Code setting out further standards of behaviour that must be observed.¹⁰

The Act further establishes the Australian Building and Construction Commission (ABCC). The body is empowered to monitor, investigate and enforce breaches of federal industrial law (including the *BCII Act*, *Workplace Relations Act 1996* (Cth) (*WRA*) and Commonwealth workplace agreements and awards) and any Building Code issued by the Minister. The ABCC may compel people to provide it with information or documents¹¹ and attend to give evidence.¹² It also has the power to search and enter premises.¹³ In addition to its coercive powers, the ABCC can initiate court proceedings against a corporation or individual seeking a range of civil penalties¹⁴ such as an interim or final injunction,¹⁵ a pecuniary penalty¹⁶ or compensatory damages.¹⁷

Since its inception, the ABCC has been the subject of fierce debate. Howe has suggested that the ABCC is founded on an assumption there is widespread employee and union corruption and lawlessness in the building and construction industry that is impeding productivity and competition. This, he says, explains why the focus of the ABCC is upon restricting trade union activities rather than investigating the unlawful activities of employers.¹⁸ Members of the Australian Labor Party have also expressed concerns that the ABCC might use its coercive powers to intimidate union members for the most trivial breaches of the law.¹⁹ On the other hand, members of the Coalition Government in 2005 argued that the ABCC ‘will have a significant positive impact on all industry participants, as it will be a body which will have the power to deal with the lawlessness which was found by the Royal Commission to be endemic in the industry’.²⁰ The ABCC ‘will be able to act even-handedly to protect the public interest in

¹⁰ *Ibid* 27. The Building Code is distinct from the National Code of Practice for the Building and Construction Industry, which was issued in 1997. No decision has yet been made by the Minister to issue a Building Code in accordance with s 27 of the *BCII Act*.

¹¹ *Ibid* s 52(1).

¹² *Ibid*.

¹³ *Ibid* s 59.

¹⁴ *Ibid* s 49.

¹⁵ *Ibid* ss 39(1), 49(3)(a).

¹⁶ *Ibid* s 49(1)(a).

¹⁷ *Ibid* s 49(1)(b).

¹⁸ John Howe, ‘Deregulation’ of Labour Relations in Australia: Towards a More ‘Centred’ Command and Control Model’ in Christopher Arup et al, *Labour Law and Labour Market Regulation* (2006), 147-166, 162.

¹⁹ Parliament of Australia, House of Representatives, *Hansard*, 18 August 2005, 53 (Senator Wong).

²⁰ Supplementary Explanatory Memorandum, *Building and Construction Industry Improvement Bill 2005* (Cth) 7 [31].

situations where, at present, limited or no attempt is made to secure compliance with the law.²¹

The debate over the ABCC has largely been about political and industrial matters. What has been missing is a legal analysis of the coercive and investigatory powers of the ABCC. This is the subject of this article. After setting out the background and legislative history of the ABCC, we examine its most important coercive powers in s 52 of the *BCII Act*. It enables the ABCC to compel a person to provide it with information or documents or to attend before it to give evidence. These powers may be exercised to override basic common law rights, such as the right to silence and the privilege against self-incrimination.

A fundamental aspect of the rule of law is that legislation conferring a power on the executive or one of its agencies which may be used to breach individual rights and liberties should not be granted ‘at large’. The power must be carefully constrained and its exercise subjected to safeguards that ensure the accountable and appropriate use of the power. We assess whether the ABCC’s coercive powers pass this test. We also compare the ABCC’s investigatory powers with analogous powers held by bodies like the Australian Competition and Consumer Commission (ACCC). Our concern, however, is not simply with a direct comparison of the terms in which these powers are expressed. Equally significant is the context in which the powers operate. The ABCC was established to deal with civil breaches of the industrial law within the building and construction industry. It is in this context that the appropriateness of the ABCC’s coercive powers must be considered.

II LEGISLATIVE HISTORY OF THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSION

A Establishment of the Building Industry Taskforce

In April 2001 the Minister for Employment and Workplace Relations Tony Abbott requested the Office of the Employment Advocate (OEA) to produce a report on behaviour in the building and construction industry.²² In its report of May 2001, the OEA referred to complaints of breaches of the *WRA*, including money laundering, collusion and intimidation by building

²¹ *Ibid* 7 [32].

²² Parliament of Australia, Parliamentary Library, ‘Building Industry Royal Commission: Background, Findings and Recommendations’, *Current Issues Brief*, No. 30 2002-2003, 26 May 2003.

unions, theft and resale of building equipment and fraud.²³ In response, former Justice Terence Cole QC was appointed by the Howard Government as Royal Commissioner on 29 August 2001 to investigate unlawful and inappropriate conduct in the industry.²⁴

In August 2002 the Royal Commission presented a preliminary report to the Coalition Government. The Commission noted that '[i]t is important that there be a continuing body during the winding down and after the termination of the Royal Commission, and prior to any legislative establishment of a new national agency'.²⁵ Given what it saw as the insufficient funding and staffing of the OEA,²⁶ the Royal Commission recommended:

the establishment of an interim body to monitor conduct, to investigate and, if appropriate, facilitate proceedings to ensure adherence to industrial, criminal and civil laws pending the delivery and consideration of my final report and establishment of any permanent agency. The interim body should have power to receive material from this Commission, complete investigations and instigate or facilitate any necessary proceedings.²⁷

The Building and Construction Industry Interim Taskforce (BIT) was established on 1 October 2002 as a separate unit within the Department of Employment and Workplace Relations. The role of the BIT was to investigate breaches of freedom of association provisions and Part V1D of the *WRA*, concerning Australian Workplace Agreements (AWAs), and to take any necessary legal action in relation to both.²⁸ BIT officers were granted the powers of 'inspectors' under s 86 and 'authorised officers' under s 83BH of the *WRA*, thereby allowing them to enter premises, inspect documents and interview people of interest.²⁹

B Final Report of the Royal Commission

²³ *Ibid.*

²⁴ The Terms of Reference of the Royal Commission are available at <http://www.royalcombcgi.gov.au/docs/tor_letter.pdf> at 26 August 2008.

²⁵ Royal Commission into the Building and Construction Industry, *First Report*, 5 August 2002, 4 [9].

²⁶ *Ibid* 4 [10].

²⁷ *Ibid* 4 [12].

²⁸ Parliament of Australia, Bills Digest No 139 (2004-2005), *Building and Construction Industry Improvement Bill 2005* (Cth).

²⁹ Interim Building Industry Taskforce, *Upholding the Law – One Year On: Findings of the Interim Building Industry Taskforce* (2004), 18.

The final report of the Royal Commission (comprising 23 volumes – one of which was confidential) was tabled in the Commonwealth Parliament in March 2003. The Commission found that there was ‘widespread disrespect for, disregard of and breach of the law in the building and construction industry’.³⁰ This included: disregard of court and industrial tribunal orders, use of inappropriate industrial power, making and receipt of inappropriate payments and a culture of intimidation.³¹ The Commission concluded that this ‘depart[ure] from the standard of commercial and industrial conduct exhibited in the rest of the Australian economy ... mark[s] the industry as singular’.³² It also found that existing regulatory bodies had insufficient powers and resources to enforce the law.³³ It recommended the establishment of a new body, the ABCC, to, among other things, monitor industrial action in the industry and prosecute unlawful action and breaches of freedom of association laws.³⁴

The findings of the Royal Commission were not accepted without question. Allegations were made by the Congress of the Australian Council of Trade Unions (ACTU), in a resolution passed unanimously in August 2003, that the Royal Commission was ‘politically biased and fanatically anti-union’:³⁵

The report reflects the anti-union nature of the proceedings, the focus of which was on presenting unions in the worst possible light, while denying them any adequate opportunity to counter allegations made by employers and counsel assisting the Commission.³⁶

The ACTU said that this bias was reflected in the findings of the Royal Commission. It said that the majority of the 392 findings of unlawful conduct against employee organisations and individuals concerned technical breaches that had occurred up to seven years ago,³⁷ and that the findings were reached without credible evidence and the testing of employer allegations.³⁸

³⁰ Royal Commission into the Building and Construction Industry, above n 1, Vol 1, 155.

³¹ *Ibid* Vol 1, 5 [15].

³² *Ibid* Vol 1, 6 [17].

³³ *Ibid* Vol 11, 27 [128].

³⁴ *Ibid* Vol 1, [35].

³⁵ Australian Council of Trade Unions, Media Release, *The Royal Commission into the Building and Construction Industry Resolution*, 23 October 2003, [1]. For a further discussion of the anti-union bias of the Royal Commission, see Jim Marr, *First the Verdict: The Real Story of the Building Industry Royal Commission* (Pluto Press, 2003).

³⁶ Australian Council of Trade Unions, above n 35, [3].

³⁷ *Ibid* [4].

³⁸ Australian Council of Trade Unions, Submission No 17 to the Senate Employment, Workplace Relations and Education References Committee, *Building and Construction Industry Inquiry* (2004), 38 [227].

While the Royal Commission made numerous findings against employee organisations and individuals, very few were made against employers.³⁹

The process adopted by the Royal Commission to reach its findings was also criticised. The Victorian Council for Civil Liberties noted that the ‘perception of a political agenda was reinforced by the method in which the Commission gathered evidence and conducted its investigations’.⁴⁰ Of particular concern was the curtailment of the rights to legal representation and cross-examination. For example, Practice Note No 2 of the Commission restricted the right to cross-examination to persons who had been granted leave by the Commissioner and the content of cross-examination ‘to the matters in dispute’ (also determined by the Commissioner). It required a person to provide Counsel Assisting the Royal Commission with a signed statement of evidence advancing material contrary to the evidence of a witness before permitting the person to cross-examine the witness. The signatory to the statement would also be called to give evidence, asked to adopt the statement and examined by Counsel Assisting.⁴¹ The concerns of the Victorian Council for Civil Liberties were echoed by the Construction, Forestry, Mining and Energy Union (CFMEU), which also noted the departure by the Royal Commission from other established rules of evidence and procedure, such as the Commission’s use of hearsay evidence and leading questions.⁴²

C The *Building and Construction Industry Improvement Bill 2003* (Cth)

In November 2003, the Coalition Government introduced the *Building and Construction Industry Improvement Bill* (the 2003 Bill) into the House of Representatives to implement the findings of the Royal Commission. In the Second Reading speech the Minister for

³⁹ Australian Council of Trade Unions, above n 35, [5]. The Royal Commission referred 31 individuals for possible criminal prosecution. However, there was no criminal prosecution of any union officials or employees and only one criminal prosecution of an employer. See Australian Broadcasting Corporation Television, ‘Can the Labor Party keep unions under control and still maintain their traditionally close ties?’, *Difference of Opinion*, 16 August 2007 <<http://www.abc.net.au/tv/differenceofopinion/content/2007/s2003972.htm>> at 2 September 2008 (Sharan Burrow).

⁴⁰ Liberty Victoria – Victorian Council for Civil Liberties Inc, Submission No 67 to the Senate Employment, Workplace Relations and Education References Committee, *Building and Construction Industry Inquiry* (2004), 3.

⁴¹ This practice note was challenged in *Kingham v Cole* [2002] FCA 45 under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), on the basis that the Royal Commission did not have the power to make a practice note restricting the right to cross-examination and further that this restriction violated the rules of natural justice. These arguments were rejected by Hely J.

⁴² David McElrea, CFMEU Industrial Officer, ‘The Cole Royal Commission – The Case for Bias’ <<http://www.nswcccl.org.au/docs/pdf/Cole%20Royal%20Commission.pdf>> at 2 September 2008.

Employment and Workplace Relations Kevin Andrews described it as ‘a key plank in the most significant reform of the building and construction industry ever attempted’.⁴³

The 2003 Bill was passed by the House of Representatives on 4 December 2003. However, it met opposition in the Senate, in which the Coalition was a minority. The majority report of the Senate Committee on Employment, Workplace Relations and Education Committee concluded that cultural change could not be achieved merely by legislative reform. Rather, it ‘needs to be supported at key levels of the industry and enlist the participation and goodwill of the main participants’:⁴⁴

what the Government is presenting in this legislation in the form of the ABCC is a body that is both threatening and impotent, and both dangerous and toothless. It is threatening and dangerous because it has the potential to cause strife through intervention in processes that need to be negotiated between parties. It is impotent and toothless because when the arguments which it has caused come to a head it will be powerless to do anything about them of its own accord.⁴⁵

The Australian Democrats, who held the balance of power in the Senate, opposed the bill on the basis that industry specific legislation was not necessary to achieve greater enforcement of workplace relations law in the field of building and construction. The Democrats said that they would oppose the 2003 Bill outright as it ‘cannot be salvaged or amended’.⁴⁶ The Bill lapsed in the Senate when, on 31 August 2004, the Commonwealth Parliament was prorogued for the 2004 federal election.

D Expansion of the Building Industry Taskforce’s Coercive Powers

In March 2004, the Director of the BIT reported to the Minister for Employment and Workplace Relations on the operation and effectiveness of the BIT.⁴⁷ The Director complained that the ‘effectiveness of [the BIT’s] work in achieving the Government’s goal of changing

⁴³ Parliament of Australia, House of Representatives, *Hansard*, 6 November 2003, 22283 (Kevin Andrews).

⁴⁴ Parliament of Australia, Senate Employment, Workplace Relations and Education Committee, *The future of the construction industry: confrontation or co-operation?* (2004), 73.

⁴⁵ *Ibid* 74.

⁴⁶ Parliament of Australia, Senate Employment, Workplace Relations and Education Committee, *Beyond Cole – The Future of the Construction Industry: Confrontation or Co-operation?* (2004), Australian Democrats Minority Report, 211 [1.20]-[1.21].

⁴⁷ Interim Building Industry Taskforce, above n 29.

industry culture and establishing the rule of law’⁴⁸ has been ‘significantly, invariably critically, impaired by the absence of coercive powers available to agencies like the ACCC, ASIC [Australian Securities and Investments Commission], ATO [Australian Taxation Office] and similar’.⁴⁹ In particular, BIT investigators were unable to access particular information about individuals and had encountered problems in entering sites and obtaining documents.⁵⁰

These complaints by the BIT about the inadequacy of its powers stand in contrast to the criticisms expressed by Marshall J in *Thorson v Pine*⁵¹ of what he saw as the BIT’s already too-expansive powers. Justice Marshall stated that the power of BIT officers to engage in ‘roving inquiries’, even where they ‘might not have a suspicion of anything’, was ‘foreign to the workplace relations of civilised societies, as distinct from undemocratic and authoritarian states’.⁵²

Nonetheless, on 25 March 2004, the Coalition Government responded to the report by the Director of the BIT by announcing that the BIT would become a permanent body and would ‘continue to operate until the Building and Construction Industry Improvement Bill (and the establishment of the ABCC) is passed by this Parliament’.⁵³ In a special sitting of the Commonwealth Parliament on 26 June 2004, the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (Cth) (*Codifying Contempt Act*) was passed, inserting Part VA into the *WRA*. This gave the Secretary of the Department of Employment and Workplace Relations extensive new powers to compel people to provide documents or information or give evidence before the BIT.⁵⁴ On 23 June 2005, the Secretary delegated these powers to the Director of the BIT.⁵⁵

The legislation was passed with the support of the Australian Democrats after a number of amendments were negotiated. The amendments introduced the following safeguards:

⁴⁸ *Ibid* 18.

⁴⁹ *Ibid* 19.

⁵⁰ *Ibid* 20.

⁵¹ [2004] FCA 1316.

⁵² *Ibid* [40]-[41].

⁵³ Parliament of Australia, House of Representatives, *Debates*, ‘Ministerial Statement: Royal Commission into the Building and Construction Industry’, 25 March 2004, 27297 (Kevin Andrews).

⁵⁴ *Codifying Contempt Act* ss 88A-88AI.

⁵⁵ Commonwealth Ombudsman, *Review of the use of compliance powers by the Building Industry Taskforce: Report for the Period 13 January 2005 to 27 March 2006* (2006), 3.

- the BIT was not permitted to use its coercive powers in investigations of ‘minor or petty’ matters;⁵⁶
- a set of guidelines (in the form of a disallowable statutory instrument) would be prepared to govern the exercise of the BIT’s coercive powers;⁵⁷
- the courts were given the capacity to either fine or imprison a person who failed to comply with a notice;⁵⁸
- there was a sunset clause and the provisions would cease after three years;⁵⁹ and,
- the Commonwealth Ombudsman was required to conduct an annual review of the exercise of the BIT’s coercive powers.⁶⁰

Two other amendments proposed by the Labor Opposition were rejected by the Coalition Government. The amendments would have:

- applied the privilege against self-incrimination to investigations conducted by the BIT;⁶¹ and,
- required the approval of a Federal Court judge before the BIT could exercise its coercive powers.⁶²

E The *BCII Act*

The Coalition Government obtained a majority in the Senate as a result of the 2004 federal election, and the *Building and Construction Industry Improvement Bill 2005* (2005 Bill) was introduced into the Commonwealth Parliament in March 2005. The 2005 Bill replicated parts of the 2003 Bill, such as the prohibition on ‘unlawful industrial action’.⁶³ On 9 August 2005, the Coalition Government moved amendments to the 2005 Bill in the House of Representatives

⁵⁶ *Codifying Contempt Offences Act* s 88AA(3).

⁵⁷ *Ibid* s 88AA(3A).

⁵⁸ *Ibid* s 88AA(7)(c)-(d).

⁵⁹ *Ibid* s 88AA(1).

⁶⁰ *Ibid* s 88AI.

⁶¹ Parliament of Australia, House of Representatives, *Hansard*, 11 August 2005, 52-53 (Stephen Smith). Under s 88AB of the *Codifying Contempt Act*, a person was not excused from complying with a notice issued by the Secretary of the Department of Employment and Workplace Relations on the ground that to do so would contravene any other law, tend to incriminate the person or otherwise expose the person to a penalty or would be contrary to the public interest.

⁶² *Ibid*. Under s 88AA of the *Codifying Contempt Act*, the Secretary of the Department of Employment and Workplace Relations has the discretion to require a person to provide him or her with information or documents or to give evidence before him or her.

⁶³ Parliament of Australia, House of Representatives, *Hansard*, 9 March 2005, 6 (Kevin Andrews).

to add the remaining elements of the 2003 Bill. The Minister for Employment and Workplace Relations described the amendments as follows:

The amendments will, firstly, establish an Australian Building and Construction Commissioner; secondly, provide for the Federal Safety Commissioner; thirdly, improve the bargaining framework by prohibiting certain coercive and discriminatory conduct; and, fourthly, improve the compliance regime by increasing penalties and enhancing access to damages for unlawful conduct.⁶⁴

As a result, the 2005 Bill became essentially the same as the 2003 Bill, with the exception of some provisions in the 2003 Bill pertaining to pattern bargaining.⁶⁵

In addition to criticisms of the substantive content of the 2005 Bill, which reflected its earlier criticisms of the 2003 Bill, the Labor Opposition attacked the timing and manner in which the amendments had been introduced. The Opposition questioned the motivations of the Coalition Government, suggesting that the amendments were intended ‘to stymie attempts to negotiate new enterprise agreements prior to the expiry of the current round of agreements in the building and construction industry in October 2005’.⁶⁶ On 11 August 2005, Stephen Smith further stated that, as a result of the 2005 Bill:

The provisions of the *Codifying Contempt Act* referring to the BIT will thus become effectively a dead letter and remove the safeguards previously inserted by the Senate. As I have indicated, Labor in conjunction with the Democrats in the Senate amended the *Codifying Contempt Act* to mitigate the worst elements of the coercive powers to be provided to the Building Industry Taskforce and none of these protections have been included in respect of the ABCC by the government.⁶⁷

The 2005 Bill was passed by the House of Representatives on 11 August 2005. The Senate Committee on Education, Employment and Workplace Relations, now controlled by Coalition

⁶⁴ Parliament of Australia, House of Representatives, *Hansard*, 11 August 2005, 23 (Kevin Andrews).

⁶⁵ Section 56 of the 2003 Bill provided that the Australian Industrial Relations Commission must not certify a building agreement unless it is satisfied that the agreement did not result from pattern bargaining (as defined in s 8). Section 67 provides that an injunction may be granted if the Federal Court is satisfied that a person or industrial organisation is engaging, has engaged or is proposing to engage in pattern bargaining in respect of building employees.

⁶⁶ Parliament of Australia, House of Representatives, *Hansard*, 9 August 2005, 89 (Stephen Smith).

⁶⁷ Parliament of Australia, House of Representatives, *Hansard*, 11 August 2005, 51 (Stephen Smith).

members, stated that it ‘commends this bill to the Senate and urges that it be passed without amendment’.⁶⁸ Opposition was expressed in the report by Labor members and the Australian Democrats on similar grounds as in the Committee’s review of the 2003 Bill. The 2005 Bill was passed by the Senate on 7 September 2005 and received royal assent on 12 September 2005.

The provisions of the *BCII Act* dealing with ‘unlawful industrial action’ had retrospective effect from 9 March 2005 (the date on which the bill was introduced into the Commonwealth Parliament).⁶⁹ The other provisions, including the conversion of the BIT into the ABCC, commenced on the date of royal assent.⁷⁰

III THE INVESTIGATORY POWERS OF THE ABCC

Section 52 of the *BCII Act* gives the ABCC the power to compel a person to provide it with information or documents or to give evidence before it. This section provides:

- (1) If the ABC Commissioner believes on reasonable grounds that a person:
 - (a) has information or documents relevant to an investigation; or
 - (b) is capable of giving evidence that is relevant to an investigation;the ABC Commissioner may, by written notice⁷¹ given to the person, require the person:
 - (c) to give the information to the ABC Commissioner, or to an assistant, by the time, and in the manner and form, specified in the notice; or
 - (d) to produce the documents to the ABC Commissioner, or to an assistant, by the time, and in the manner, specified in the notice;or

⁶⁸ Parliament of Australia, Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Building and Construction Industry Improvement Bill 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005* (2005) 7.

⁶⁹ *BCII Act* s 2(1).

⁷⁰ *Ibid.*

⁷¹ The written notice must give the relevant person at least 14 days to respond: *BCII Act* s 52(2). The form of the notice is set out in the *Building and Construction Industry Improvement Regulations*, Schedules 7.1, 7.6 and 7.7.

- (e) to attend before the ABC Commissioner, or an assistant, at the time and place specified in the notice, and answer questions relevant to the investigation.

The ABCC may require any information or answers given by a person to be verified by, or given on, oath or affirmation.⁷²

A person required to attend before the ABCC to give information or answer questions is entitled to legal representation of his or her choosing.⁷³ However, in *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner)*,⁷⁴ the Federal Court found that the Commissioner of the ABCC has the power to make orders or give directions to ensure the integrity, and to some extent the effectiveness, of the investigation.⁷⁵ This may include an order excluding a particular legal practitioner from the examination if the ABCC Commissioner concludes, on reasonable grounds and in good faith, that the representative either will, or may, prejudice the investigation.⁷⁶ In *Bonan v Hadgkiss*, the Court found that it was also appropriate to prevent a legal representative from acting for more than one person giving evidence to the ABCC.⁷⁷ Despite the general rule in s 52(3) that a person attending before the ABCC is entitled to legal representation, it is troubling that, of the 85 people examined by the ABCC from 1 October 2005 to 31 March 2008, only 55 have been legally represented.⁷⁸

The Federal Court also found in *Bonan v Hadgkiss* that, as a matter of interpretation of the Act, an examination under s 52 was to be conducted in private, as ‘confidentiality is necessary to ensure the effectiveness of an examination and of an investigation which may lead to the ABC Commissioner instituting proceedings for a contravention of the Act and the recovery of a civil penalty’.⁷⁹ It followed that the Commissioner also has the power to make a non-disclosure

⁷² *BCII Act* s 52(4)-(5). It is an offence, subject to six months imprisonment, to refuse to take an oath or affirmation when requested to do so by the ABCC.

⁷³ *Ibid* s 52(3).

⁷⁴ [2006] FCA 1334.

⁷⁵ *Ibid* [53].

⁷⁶ *Ibid* [56].

⁷⁷ *Ibid* [56]-[58].

⁷⁸ Australian Building and Construction Commission, *Report on the Exercise of Compliance Powers by the ABCC for the Period 1 October 2005 to 31 March 2008* (2008), [5]. In its *2006-2007 Annual Report*, the ABCC noted that 19 of the 20 people issued with notices to attend and answer questions chose to be legally represented: Australian Building and Construction Commission, *2006-2007 Annual Report*, 25.

⁷⁹ *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner)* [2006] FCA 1334, [37].

direction.⁸⁰ In the 2006-2007 Annual Report of the ABCC, the Commissioner of the ABCC noted that the general rule is that a direction will be given to a witness and his or her legal representative that they are not to discuss the contents of the examination with third parties until the investigation has concluded.⁸¹

A number of criticisms may be made of the ABCC's powers under s 52. First, the only limitation on the type of evidence, information and documents that the ABCC may request is that it be '*relevant to an investigation*'. An ABCC inspector might be able to approach an employee in the building and construction and ask questions about his or her past or present membership of a trade union or even of a political party. This investigatory power might also be used to require a person to: reveal their phone, email and bank account records, whether of a business or personal nature; report on both their own activities and those of their fellow workers; and, report on discussions in private union meetings or other meetings of workers.

The low investigatory threshold of '*relevant to an investigation*' means that the ABCC's powers could be used to undertake a '*fishing expedition*' or, as Marshall J described the BIT's investigatory powers, a '*roving inquiry*'. Nothing in the *BCII Act* prevents this from occurring. The ABCC has published guidelines for the exercise of its compliance powers.⁸² They state that the ABCC '*shall not use the powers to conduct a "fishing expedition" for information*'.⁸³ However, according to the guidelines, this is merely because that the ABCC Commissioner must have the requisite '*belief on reasonable grounds*'⁸⁴ that the investigatory threshold has been met. The proper use of the ABCC's investigatory powers is thus dependent upon the discretion and goodwill of the holder of the power. This is at odds with the rule of law principle that a power should be limited by law to its justifiable uses and not left subject to the discretion of whoever exercises it.

Second, neither the privilege against self-incrimination nor the provisions of other laws, such as secrecy laws, enable a person to avoid the exercise of the ABCC's investigatory powers. Section 53 of the *BCII Act* states:

⁸⁰ *Ibid* [38].

⁸¹ Australian Building and Construction Commission, *2006-2007 Annual Report*, 27.

⁸² Australian Building and Construction Commission, *Guidelines in relation to the exercise of Compliance Powers in the Building and Construction Industry* (2005).

⁸³ *Ibid* 4 [4].

⁸⁴ *Ibid*.

- (1) A person is not excused from giving information, producing a document, or answering a question, under section 52 on the ground that to do so:
 - (a) would contravene any other law; or
 - (b) might tend to incriminate the person or otherwise expose the person to a penalty or other liability; or
 - (c) would be otherwise contrary to the public interest.

Section 52(7) is particularly remarkable in that it further overrides the ‘secrecy provision of any other law (whether enacted before or after the commencement of this section), except to the extent that the secrecy provision excludes the operation of this section’. ‘Secrecy provision’ is defined as meaning ‘a provision that prohibits the communication or divulging of information’. This section enable that the ABCC’s investigatory powers to override, for example, the protection of journalists’ sources, privacy law and even the confidentiality of Cabinet proceedings.⁸⁵ Section 52(7) also overrides national security laws relating to, for example, the confidential gathering of intelligence by the Australian Security and Intelligence Organisation (ASIO).⁸⁶ Even if the disclosure of the information would be prejudicial to national security, the ABCC is nonetheless empowered to request that information. This elevates the ABCC, and its objective of eliminating unlawful conduct in the building and construction industry, above even the protection of national security.

Some protection is given to the rights of people providing evidence or giving information and documents to the ABCC through the conferral of ‘use’ and ‘derivative use’ immunities in s 53(2) of the *BCII Act*.⁸⁷ This means that neither the information or answer given or the document produced by a person, nor any information, document or thing obtained as a direct or indirect consequence of giving the information or answer or producing the document, is admissible against the person in civil or criminal proceedings.⁸⁸ There are, however, several

⁸⁵ By convention, a Minister may not publicly reveal the position that is put by themselves or other Ministers during Cabinet proceedings. By law, Cabinet documents are accorded ‘public interest immunity’ which protects them in most cases from being produced under compulsion in legal proceedings. In *Commonwealth v Northern Land Council* (1993) 176 CLR 604, the High Court noted that it is in the ‘public interest that deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principles of collective responsibility for any decision which may be made’ (at 615). However, this common law principle could be overridden by s 52(7) of the *BCII Act*.

⁸⁶ The *Australian Security Intelligence Organisation Act 1979* (Cth) does not exclude the operation of s 52(7) of the *BCII Act*.

⁸⁷ *BCII Act* s 53(2).

⁸⁸ *Ibid* s 53(2)(a)-(b).

exceptions to this immunity.⁸⁹ The information, answer, document or thing may be used in proceedings for an offence under the *BCII Act* or the *Criminal Code Act 1995* (Cth) relating to the failure by the person to comply with the notice issued by the ABCC,⁹⁰ the failure to take an oath or affirmation when requested by the ABCC,⁹¹ the failure to answer questions relevant to the investigation when attending as required by the notice,⁹² the provision of false or misleading information⁹³ or documents⁹⁴ or the obstruction of a Commonwealth official.⁹⁵

Section 54 of the *BCII Act* further provides that a person who gives information, produces a document or answers a question is not liable to proceedings for contravening any other law because of that conduct or to civil proceedings for loss, damage or injury suffered by a third party because of that conduct. This section is an adjunct to the ‘use’ and ‘derivative use’ immunities in s 53(2). It protects a person from prosecution on the basis that he or she violated another law, or caused damage to a third party, by the mere fact of giving information to the ABCC. For example, it would apply where another piece of legislation makes it an offence to disclose otherwise confidential information. This section is important because the ‘use’ and ‘derivative use’ immunities do not cover such situations. However, unlike the ‘use’ and ‘derivative use’ immunities, s 54 does not protect a person from proceedings arising out of the *content* of the information, answers or documents that he or she provided to the ABCC. It is this content that the privilege against self-incrimination is chiefly concerned with, and s 54 is a less significant safeguard than s 53(2) in protecting that privilege.

The common law privilege against self-incrimination has been described as a ‘cardinal principle of our system of justice’⁹⁶ and a ‘bulwark of liberty’.⁹⁷ In *Environment Protection Authority v Caltex Refining Co Pty Ltd*,⁹⁸ McHugh J noted that the privilege is important in preventing abuses of power by the executive in the exercise of its coercive powers.⁹⁹ The privilege also assists by maintaining the accusatorial system of justice in which the burden of

⁸⁹ *Ibid* s 53(2)(c)-(e).

⁹⁰ *Ibid* s 52(6).

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ *Criminal Code Act 1995* (Cth) s 137.1.

⁹⁴ *Ibid* s 137.2.

⁹⁵ *Ibid* s 149.1.

⁹⁶ *Sorby v The Commonwealth of Australia* (1983) 152 CLR 281, 294 (Gibbs CJ).

⁹⁷ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340 (Mason ACJ, Wilson and Dawson JJ).

⁹⁸ (1993) 178 CLR 477.

⁹⁹ *Ibid* 544.

proof rests on the prosecution¹⁰⁰ and protecting the quality of evidence.¹⁰¹ At an individual level, the privilege protects an individual from the ‘cruel trilemma’, whereby he or she must to choose between refusing to provide the evidence, providing the evidence or lying – each of which carries with it the risk of criminal sanction.¹⁰² As Murphy J further stated in *Pyneboard Pty Ltd v Trade Practices Commission and Another*,¹⁰³ the privilege ‘protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society’s acceptance of the inviolability of the human personality’.¹⁰⁴

Given these rationales for the privilege against self-incrimination, it should only be abrogated where a compelling justification has been demonstrated. As the Victorian Council for Civil Liberties stated:

Such a justification may arise where investigators are dealing with organised crime and suspected terrorism. For example, in order to fully investigate organised crime, the *Australian Crime Commission Act 2002* abrogates the privilege against self-incrimination at a compulsory examination.¹⁰⁵

However, at no time has a sufficient justification been provided for abrogating the privilege against self-incrimination in regard to the investigation of industrial matters in the building and construction industry. During the Second Reading debates on the 2005 Bill, the Coalition Government only made general comments such as the following: ‘The commissioner clearly needs these improved powers in order to fulfil their mandate – that is, bringing order and a respect for the rule of law to the industry.’¹⁰⁶ Such statements are insufficient to justify the abrogation of such an important common law principle.

Third, the ABCC may request a person to give evidence, information or documents without it having any suspicion that the person has contravened the legislation. The investigatory powers can be applied to an extremely broad range of people, including: workers in the building

¹⁰⁰ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [31] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁰¹ Australian Law Reform Commission, Report 26, *Evidence* (1985), Vol 1, 487.

¹⁰² *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 498 (Mason CJ and Toohey J).

¹⁰³ (1983) 152 CLR 328.

¹⁰⁴ *Ibid* 346 (Murphy J).

¹⁰⁵ Liberty Victoria – Victorian Council for Civil Liberties Inc, above n 40,4.

¹⁰⁶ Parliament of Australia, House of Representatives, *Hansard*, 5 September 2005, *Hansard*, 108 (Senator Santoro).

industry under no suspicion of having acted unlawfully; innocent bystanders; the families (including children of any age) of workers in the building and construction industry; journalists and academics; and, to take what might seem to be a farfetched example, a priest regarding what someone has told them in the confession box. On 17 December 2007, the *Sydney Morning Herald* reported on a case of a bystander being questioned by the ABCC. An academic from the University of Melbourne had witnessed a confrontation between a union official and a building manager while walking passed a building site. He was said to have been ‘hauled ... in for several hours of secret questioning’ by the ABCC.¹⁰⁷ The ABCC has indicated that ‘obtaining information voluntarily is [its] preferred method’.¹⁰⁸ Nonetheless, between 1 October 2005 and 31 March 2008, the ABCC issued 96 notices requiring people to attend and answer questions and 4 notices requiring the production of documents.¹⁰⁹

Finally, a person may be subjected to criminal penalties if he or she fails, in response to an ABCC notice, to: give the required information; produce the required documents; attend to answer questions; take an oath or affirmation; or, answer questions relevant to the investigation while attending as required by the notice.¹¹⁰ The maximum penalty is six months imprisonment.¹¹¹ The severity of the penalty has been described as a ‘fundamental breach of civil liberties in this country’.¹¹² The Committee on Freedom of Association of the International Labour Organisation expressed great concern about this provision when considering a complaint brought by the ACTU in March 2004 about the 2003 Bill. The Committee noted that ‘penalties should be proportional to the gravity of the offence’ and it unsuccessfully requested that the Government consider amending this provision.¹¹³

The failure to provide for an alternative monetary penalty was criticised by Stephen Smith during the Second Reading debates in the House of Representatives:

¹⁰⁷ Andrew West, ‘Even bystanders feel building watchdog’s bite’, *Sydney Morning Herald*, 15 December 2007.

¹⁰⁸ Australian Building and Construction Commission, above n 81, 25.

¹⁰⁹ Australian Building and Construction Commission, *Report on the Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 31 March 2008* (2008), [3]. No notices were issued requiring information to be given to the ABCC.

¹¹⁰ *BCII Act* s 52(6).

¹¹¹ *Ibid.*

¹¹² Parliament of Australia, House of Representatives, *Hansard*, 11 August 2005, 54 (Craig Emerson).

¹¹³ International Labour Organisation, Committee on Freedom of Association, Report No. 338, Australia, (Case No. 2326), [457(e)].

It is simply commonsense to give the court a capacity to impose a monetary penalty instead of a mandatory jail sentence if the court thinks that is appropriate in the circumstances. Imprisonment has the potential to make a martyr of the person who defies a warrant. In any event, it may be that in some cases a high financial penalty may be more of a burden than a short-term imprisonment, but to deprive a court of this sensible exercise of discretion is ludicrous in the extreme.¹¹⁴

The first person to be charged for failing to co-operate with the ABCC was Noel Washington, a senior official with the CFMEU. The ABCC was conducting an investigation into the alleged intimidation of two witnesses who gave evidence to an Australian Industrial Relations Commission hearing in 2007. The ABCC requested that Washington attend to give evidence about what he saw and heard at a union meeting of around 500 members. He refused to attend, describing the ABCC's request that he 'give evidence against a colleague about what was said at a union meeting' as 'un-Australian' and 'undemocratic'.¹¹⁵

IV CHECKS ON THE ABCC'S INVESTIGATORY POWERS

The power to require a person to provide information, produce documents or give evidence to the ABCC rests entirely in the hands of the ABCC Commissioner. He or she is not required to obtain the approval, such as a warrant, of either a member of the Commonwealth executive or the judiciary.¹¹⁶ Similarly, a person appointed by the Commissioner as an inspector of the ABCC may, without any form of external approval, enter premises for one of the purposes set out in s 59 and inspect any object or document, take samples of goods or substances, interview any person, or require a person to produce a document to the ABCC within a specified time.¹¹⁷

The ABCC Commissioner is appointed by the Minister for Employment and Workplace Relations.¹¹⁸ The Minister also has the power to issue written directions to the Commissioner specifying the manner in which he or she must exercise the powers set out in the *BCII Act*.¹¹⁹ Whilst the ABCC is ostensibly an independent body, the ability of the executive to influence the exercise of its investigatory and coercive powers has given rise to criticisms that the ABCC

¹¹⁴ Parliament of Australia, House of Representatives, *Hansard*, 11 August 2005, 51 (Stephen Smith).

¹¹⁵ Michelle Grattan, 'Building watchdog charges union boss', *The Age*, 21 June 2008.

¹¹⁶ *BCII Act* s 52.

¹¹⁷ *Ibid* s 59.

¹¹⁸ *Ibid* s 15(1).

¹¹⁹ *Ibid* s 11.

is a political instrument.¹²⁰ This problem is compounded by the breadth of the ABCC's discretion in exercising its investigatory and coercive powers and the selectiveness involved in deciding when to initiate an investigation and what information to seek.

One of the amendments proposed (but rejected by the Coalition Government) to the *Codifying Contempt Act* in 2004 would have required the approval of a Federal Court judge before BIT could exercise its investigatory and coercive powers. Some form of like approval should be required for the exercise of ABCC's investigatory and coercive powers. This would introduce an independent, apolitical element into the investigatory process. Not only would it assist in dispelling community fears about the politicisation of the ABCC, it is also appropriate given the serious consequences of the use of these powers, including the imposition of a mandatory jail term for failure to comply with an ABCC notice and the abrogation of the right to silence and the privilege against self-incrimination in ABCC examinations. It would be problematic if such a broad, unchecked discretion were conferred on a minister. It is even worse to confer it on an unelected body that does not require approval for the use of its power and is not accountable to Parliament or the people.

During the Second Reading debates on the 2005 Bill, Senator Andrew Murray of the Australian Democrats stated that it was 'emotive and misleading' to draw a comparison between the investigatory powers of the Australian Security and Intelligence Organisation (ASIO) and the powers of the ABCC.¹²¹ However, in contrast to the unchecked discretion possessed by the ABCC Commissioner, both executive and judicial approval is required before a warrant may be issued to ASIO to question an individual. The Director of ASIO must obtain the consent of the Minister before requesting the issue of a questioning warrant.¹²² This request is then to be made to a Federal Magistrate or Judge appointed as an 'issuing authority'.¹²³ The warrant may only be issued if the Federal Magistrate or Judge is satisfied that there are 'reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.¹²⁴ Not only is judicial approval required for the exercise of ASIO's investigatory powers, but the threshold for exercising these

¹²⁰ Senate Committee on Employment, Workplace Relations and Education, above n 46, 56-57 [3.19].

¹²¹ Parliament of Australia, Senate, *Hansard*, 22 June 2005, 112 (Andrew Murray).

¹²² *Australian Security Intelligence Organisation Act 1979* (Cth), s 34D.

¹²³ *Ibid* s 34E(1) and s 314AB (definition of 'issuing authority').

¹²⁴ *Ibid* s 34E(1)(b).

powers is higher than for the ABCC – that is, the warrant must ‘substantially assist’ an investigation as opposed to merely being ‘relevant’ to an investigation.

Australia’s counter-terrorism laws can also offer greater scope for ex post facto judicial review than the *BCII Act*. For example, under the *Criminal Code Act 1995* (Cth), a decision by the Attorney-General to proscribe an organisation as a ‘terrorist organisation’ is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).¹²⁵ Similarly, in *Leghaei v Director-General of Security*,¹²⁶ an adverse security assessment prepared by ASIO was the subject of review under that Act. Justice Madgwick found that the terms of the *Australian Security Intelligence Organisation Act 1979* (Cth) do not exclude the rules of procedural fairness.¹²⁷ If judicial oversight is appropriate under Australia’s counter-terrorism laws, it is difficult to see what the justification could be for excluding such oversight in regard to the ABCC’s exercise of its investigatory powers.

There is no mechanism in the *BCII Act* for either internal or external review of the merits of a decision to exercise the ABCC’s investigatory powers. There is also only limited scope for judicial review of the legality of such a decision. Because Parliament has excluded judicial review under the *ADJR Act*,¹²⁸ it is not possible to challenge a decision by the ABCC to exercise its investigatory powers on the grounds set out in ss 5 and 6 of that Act. These grounds include: breach of the rules of natural justice; failure to observe procedures required by law; making of the decision was an improper exercise of power; fraud; power exercised in bad faith; and, abuse of power. Review of the legality of a decision by the ABCC to exercise its investigatory powers will still be available under the constitutional writs in s 75(v) of the Constitution.¹²⁹ However, as members of the High Court have noted, review under the *ADJR*

¹²⁵ There is no express mention of judicial review in Division 102 of the *Criminal Code*. However, the Explanatory Memorandum to the *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (Cth) states that ‘[t]he lawfulness of the Attorney-General’s decision making process and reasoning is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*’.

¹²⁶ [2005] FCA 1576.

¹²⁷ *Ibid* [82].

¹²⁸ *ADJR Act* Schedule 1(a).

¹²⁹ That is, ‘[i]n which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’. See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. The Federal Court has co-extensive jurisdiction under s 39B of the *Judiciary Act 1903* (Cth), subject to certain exceptions relating to criminal prosecutions.

Act is arguably wider than under review under s 75(v) as the latter is restricted to challenges based on a ‘jurisdictional error’.¹³⁰

The importance of judicial review has been accepted by a number of independent bodies. The Cole Royal Commission recognised in its final report the importance of judicial review being available under *both* the *ADJR Act* and s 75(v) of the Commonwealth Constitution.¹³¹ It stated that ‘the [*ADJR Act*] ought to apply to the ABCC, according to its terms’.¹³² Similarly, the Committee on Freedom of Association of the International Labour Organisation in 2004 noted the potentially dangerous consequences of giving too large an unreviewable discretion to the ABCC. The Committee considered that the ‘expansive powers of the ABCC, without clearly defined limited or judicial control, could give rise to serious interference in the internal affairs of trade unions’.¹³³ It unsuccessfully requested that:

The Government ... introduce sufficient safeguards into the 2005 Act so as to ensure that the functioning of the ABC Commissioners does not lead to such interference and, in particular, requests the Government to introduce provisions on the possibility of lodging an appeal before the courts against the ABCC’s notices prior to the handing over of documents.¹³⁴

In the absence of *ex post facto* judicial review, an alternative check on the discretion of the ABCC would be mandatory review by an independent body. The *Codifying Contempt Act* required the Commonwealth Ombudsman to conduct an annual review of the exercise of the BIT’s main investigatory power¹³⁵ and to table this in the Commonwealth Parliament.¹³⁶ The Australian Industry Group submitted to the Royal Commission in 2003 that a similar mechanism (with a review every three years) be established in relation to any permanent taskforce.¹³⁷ This was rejected by the Commission on the basis that it would be sufficient for

¹³⁰ *Applicant S20/2002* (2003) 198 ALR 59, [27] (McHugh and Gummow JJ). For a further discussion of this issue, see Benjamin O’Donnell, ‘Jurisdictional error, invalidity and the role of injunction in s 75(v) of the Australian Constitution’ (2007) 28 *ABR* 291.

¹³¹ Royal Commission into the Building and Construction Industry, above n 1, Vol 11, 49 [205]-[206].

¹³² *Ibid* 49 [206].

¹³³ International Labour Organisation, above n 113, [455].

¹³⁴ *Ibid*.

¹³⁵ This was the power in s 88AA of the *WRA* (as amended by the *Codifying Contempt Act*) that enabled the BIT to compel a person to provide it with information or documents or to give evidence before it.

¹³⁶ *Codifying Contempt Act* s 88AI.

¹³⁷ Royal Commission into the Building and Construction Industry, above n 1, Vol 11, 49 [203] (Australian Industry Group).

the ABCC to fall within the general jurisdiction of the Commonwealth Ombudsman.¹³⁸ However, this finding was dependent upon the ABCC also being subject to judicial review under the *ADJR Act*. The Royal Commission stated:

These two methods of oversight [that is, the requirement that the ABCC submit an annual report to the Minister and scrutiny by the Commonwealth Ombudsman], *coupled* with the capacity to seek judicial review of the exercise of the ABCC's statutory powers, should prove adequate, while not interfering with its independence. (emphasis added)¹³⁹

The two methods of oversight referred to by the Royal Commission are inadequate by themselves. The requirement that the ABCC Commissioner provide the Minister for Employment and Workplace Relations with an annual report on the ABCC's operations,¹⁴⁰ including the number of investigations and prosecutions, does not compensate for the absence of review by an independent body into specific uses of the ABCC's investigatory powers. Nor does the fact that the ABCC falls within the general jurisdiction of the Commonwealth Ombudsman. The ABCC is treated by the Ombudsman in exactly the same manner as other Commonwealth Government agencies.¹⁴¹ That is, complaints may be made to the Ombudsman by individuals or organisations affected by a decision of the ABCC¹⁴² and the Ombudsman may investigate these complaints, or the Ombudsman may initiate an ad hoc investigation at its own motion.¹⁴³ Given the extraordinary nature and scope of the ABCC's investigatory powers, there should be a mandatory annual review by the Ombudsman of the use of the ABCC's powers.

In the absence of adequate safeguards, the ABCC's investigatory powers have the potential to severely restrict basic democratic rights such as freedom of speech, freedom of association, the privilege against self-incrimination and the right to silence. Australia is particularly vulnerable to the erosion of such rights because, unlike all other democratic nations, it lacks a national bill or charter of rights. Of the aforementioned human rights, only part of the freedom of speech –

¹³⁸ *Ibid* 49 [204].

¹³⁹ *Ibid* 50 [209].

¹⁴⁰ *BCII Act* s 14.

¹⁴¹ Commonwealth Ombudsman, Fact Sheet, 'Ombudsman's office, 2003-present', <http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/periodofoffice_2003-present> at 12 September 2008.

¹⁴² *Ombudsman Act 1976* (Cth) s 7.

¹⁴³ *Ibid* s 7A-8.

that speech constituting ‘political communication’ – is protected by the Commonwealth Constitution.¹⁴⁴ This means that Australia lacks a mechanism to ensure that the worst excesses of legislative and executive power are blunted. This applies with particular force to the *BCII Act*. While the slogan ‘our rights at work’ is today a familiar political refrain, it is merely rhetoric until such rights are incorporated into law.

V UNIQUENESS OF THE ABCC’S INVESTIGATORY POWERS

In its final report, the Cole Royal Commission recommended that ‘the ABCC should be given the same powers as those possessed by the ACCC under ss 155 and 156 of the *Trade Practices Act 1974* (Cth)’.¹⁴⁵ The fact that the investigatory powers of the ABCC ‘are based on s 155(7) of the *Trade Practices Act*’¹⁴⁶ was used by the Coalition Government as a justification for their passage during the Second Reading debates on the 2005 Bill.

At first glance, the investigatory powers of the ABCC and bodies like the ACCC, ATO and ASIC might appear to be similar. To take the ACCC as an example, it has the power under s 155(1) of the *Trade Practices Act 1974* (Cth) (*TPA*) to require a person to provide information or documents or to give evidence where it has reason to believe that the person has information, documents or evidence relating to a contravention of the Act, designated telecommunications matter or certain other decisions.¹⁴⁷ The ACCC may require evidence to be given on oath or affirmation.¹⁴⁸ A legal representative is generally permitted to be present at

¹⁴⁴ The Commonwealth Constitution does not have an express provision relating to freedom of speech. However, the High Court has found an implied freedom of political communication in the Commonwealth Constitution: see, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*Lange*). The High Court has not formally recognised that a freedom of association may be implied from the Constitution. However, in *Kruger v Commonwealth* (1997) 190 CLR 1, three members of the Court accepted that such a freedom existed: 91 (Toohey J), 116, 126 (Gaudron J), 142 (McHugh J). In *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, two members of the Court accepted that there was a freestanding freedom of association in the Constitution: [113]-[116] (McHugh J), [284] (Kirby J). Three other members of the Court accepted that a freedom of association may, to some degree, be a corollary of the freedom of political communication: [364] (Gummow and Hayne JJ, with whom Heydon J agreed).

¹⁴⁵ Royal Commission into the Building and Construction Industry, above n 1, Vol 11, 38 [175]. The only exception was that the Royal Commission recommended that the use immunity in s 155(7) of the *Trade Practices Act 1974* (Cth) (which applied only to criminal proceedings) should be extended to all civil proceedings.

¹⁴⁶ Parliament of Australia, House of Representatives, *Hansard*, 22 June 2005, 112 (Andrew Murray).

¹⁴⁷ See Administrative Review Council, Report No 48, *The Coercive Information-Gathering Powers of Government Agencies* (2008) for a comprehensive overview of the coercive powers of other government agencies.

¹⁴⁸ *Trade Practices Act 1974* (Cth) s 155(3), (3A).

an examination before the ACCC.¹⁴⁹ It is an offence to fail to comply with a notice issued by the ACCC or to knowingly furnish information or give evidence that is false or misleading.¹⁵⁰ Section 155(7) also abrogates the freedom from self-incrimination, although answers given and information or documents provided to the ACCC by a person cannot be used against that person in most criminal proceedings.¹⁵¹

However, there are significant differences between the investigatory powers of the ABCC and those of the ACCC, such as:

1. Although the *TPA* abrogates the privilege against self-incrimination in relation to the ACCC's investigatory powers, it recognises that the confidentiality of some documents should be maintained. For example, cabinet documents¹⁵² and documents containing information the subject of legal professional privilege¹⁵³ are not required to be disclosed to the ACCC. Section 52(7) of the *BCII Act* does not include an exemption for cabinet documents and it may not exempt information or documents the subject of legal professional privilege.¹⁵⁴
2. The penalty for failing to comply with a notice issued by the ACCC or furnishing information or evidence that is false or misleading is either a fine not exceeding 20 penalty units or imprisonment for 12 months.¹⁵⁵ As discussed above, the penalty for failing to comply with a notice issued by the ABCC is six months imprisonment, with no option of a monetary penalty.

¹⁴⁹ Australian Competition and Consumer Commission, *Section 155 of the Trade Practices Act: information-gathering powers of the ACCC in relation to its enforcement function* (2000), 16.

¹⁵⁰ *Trade Practices Act 1974* (Cth) s 155(5).

¹⁵¹ The ACCC also has the power to require a person to provide information or documents or to give evidence under ss 65Q(1), 95ZK, 95S, 151BK of the *Trade Practices Act 1974* (Cth). However, for each of these powers, the freedom from self-incrimination is either available or has not been specifically abrogated.

¹⁵² *Ibid* s 155(7A).

¹⁵³ *Ibid* s 155(7B). The defendant bears an evidential burden in relation to this matter.

¹⁵⁴ There is no express abrogation or inclusion of the legal professional privilege in the *BCII Act*. There has also been no judicial decision as to whether a person is entitled to claim this privilege in response to a notice issued by the ABCC. However, the ABCC has advised that it 'expects that the section 52 investigative power does not abolish the right to claim legal professional privilege when responding to a notice': Australian Building and Construction Commission, above n 82, 9 [35]. The uncertainty surrounding the application of legal professional privilege to the exercise of investigatory powers by federal agencies has been dealt with in a recent report: Australian Law Reform Commission, Report 107, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (2008).

¹⁵⁵ *Trade Practices Act 1974* (Cth) s 155(6A).

3. Judicial review under the *ADJR Act* is available in relation to decisions by the ACCC to exercise its investigatory powers.¹⁵⁶ As discussed above, such review is excluded in regard to the *BCII Act*.

A comparison of the ABCC's powers with the powers of other bodies reveals important differences. In any event, focusing exclusively on the terms of the powers neglects the larger picture. The appropriateness of the ABCC's investigatory powers must also be judged by reference to their overall context, including the purpose for which the ABCC was established, the type of offences with which the ABCC deals and the circumstances in which these powers may be exercised. From this perspective, there are three factors which make it inappropriate to bestow such broad investigatory powers on the ABCC: the matters in regard to which the ABCC can exercise its coercive powers, the fact that the ABCC deals with breaches of the civil (and not criminal) law and, finally, the selectivity of the ABCC's jurisdiction.

A Matters in regard to which the ABCC can Exercise its Investigatory Powers

As discussed above, for the ABCC to exercise its investigatory powers, all that is required is for the Commissioner of the ABCC to believe on reasonable grounds that a person has information or documents, or is capable of giving evidence, 'relevant to an investigation'.¹⁵⁷ An 'investigation' means 'an investigation by the ABC Commissioner into a contravention by a building participant of a designated building law'.¹⁵⁸ The information, documents or evidence requested by the ABCC need not be necessary for the investigation to be conducted, nor must they, as in the case of ASIO's investigatory powers, 'substantially assist' in the collection of intelligence in relation to the investigation.¹⁵⁹

The use of 'relevant to' is not unique to the *BCII Act*. It is also used in the *TPA* to explain the connection that must exist between the information, documents or evidence requested by the ACCC and a contravention of one of the relevant laws, before the ACCC is permitted to exercise its investigatory powers.¹⁶⁰ The main point of distinction, however, between the investigatory powers of the ABCC and the ACCC is that the legislative provisions enforced by

¹⁵⁶ Only decisions set out in Schedule 1 of the *ADJR Act* are excluded from the operation of this Act. Decisions made by the ACCC under the *Trade Practices Act 1974* (Cth) are not mentioned in Schedule 1.

¹⁵⁷ *BCII Act* s 52(1).

¹⁵⁸ *Ibid* s 52(8).

¹⁵⁹ *Australian Security Intelligence Organisation Act 1979* (Cth) s 34E(1)(b).

¹⁶⁰ *Trade Practices Act 1974* (Cth) s 155(1).

the ACCC are more narrowly framed. This means that there is less scope for the ACCC to find that information, documents or evidence may be ‘relevant’ to a contravention of the *TPA* or one of the other pieces of legislation enforced by the ACCC. The ACCC would, for example, be entitled to request information, documents or evidence that are relevant to a contravention of the prohibition on the making of false and misleading representations by a corporation¹⁶¹ or the prohibition on the misuse of market position by a corporation.¹⁶²

The broad scope of the matters to which ABCC’s powers might be applied is indicated by the definition of an ‘investigation’. This means an investigation into a contravention by a ‘building industry participant’ of a ‘designated building law’.¹⁶³ A ‘building industry participant’ means any individual or organisation that is involved in doing, or arranging for someone else to do, ‘building work’: a building employee, employer or contractor, a person who enters into a contract with a building contractor under which he or she agrees to carry out building work or arrange for building work to be carried out, a building association or an officer, delegate, representative or employee of a building association.¹⁶⁴ The definition of ‘building work’ goes beyond merely construction, alteration or demolition of buildings and other structures to include work preparatory to construction, including site clearance, prefabrication and landscaping, as well as the installation of fittings and communications structures.¹⁶⁵ The Australian Industry Group expressed concerns in 2003 that this definition deems ‘a large part of the manufacturing sector, together with various services sectors, as being part of the building and construction industry’, instead of being ‘limited to those activities which are typically recognised within Australia’s workplace relations system as being part of the building and construction industry (eg. those activities that fall within the scope clauses of the major construction industry awards)’.¹⁶⁶ These were the activities that were the focus of the Royal Commission,¹⁶⁷ on whose recommendations the *BCII Act* is based. The combined effect of the definitions of ‘building industry participant’ and ‘building work’ is that an extremely broad range of individuals and organisations, within a range of industries, may be the subject of an investigation by the ABCC.

¹⁶¹ *Ibid* s 53.

¹⁶² *Ibid* s 46.

¹⁶³ *BCII Act* s 52(8).

¹⁶⁴ *Ibid* s 4(1).

¹⁶⁵ *Ibid* s 5.

¹⁶⁶ Australian Industry Group, *Building and Construction Industry Improvement Bill 2003: The Australian Industry Group’s Position on the Exposure Draft* (2003), 8.

¹⁶⁷ *Ibid*.

In addition to the many potential subjects of the ABCC's jurisdiction, there is an over-wide number of pieces of legislation or legislative instruments that can be enforced by an ABCC investigation. The ABCC may investigate a contravention of a 'designated building law'. A 'designated building law' includes not only contraventions of specified legislation – the *BCII Act*, the *Independent Contractors Act 2006* (Cth) (*Independent Contractors Act*) and the *WRA* – but also contraventions of a 'Commonwealth industrial instrument',¹⁶⁸ being:

- (a) an award or transitional award;
- (b) a workplace agreement;
- (c) a pre-reform certified agreement or pre-reform AWA;
- (d) an order of the [Australian Industrial Relations Commission];
- (e) the Australian Fair Pay and Conditions Standard.¹⁶⁹

In contrast to the similar powers of the BIT,¹⁷⁰ there is no prohibition on the use of the ABCC's investigatory powers to investigate 'minor or petty' contraventions. The ABCC is thus entitled to investigate a contravention, regardless of how trivial, of any of these instruments by an individual or organisation satisfying the definition of a 'building industry participant'. This gives the ABCC extremely broad scope for exercising its investigatory powers.

The wide scope of the offences set out in the *BCII Act* is also an issue. For example, 'unlawful industrial action' can capture work that leads to a delay where it is carried out 'in a manner different from that in which it is customarily performed'.¹⁷¹ The problematic nature of the definition is also indicated by the approach taken in the *BCII Act* to occupational health and safety. The onus falls on the employee to prove, on the balance of probabilities, that his or her action lies outside of unlawful industrial action because of 'a reasonable concern by the employee about an imminent risk to his or her health or safety'.¹⁷² However, the difficulty faced by a person in satisfying this burden of proof, in particular in establishing that the risk to

¹⁶⁸ *BCII Act* s 4(1).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Codifying Contempt Offences Act*, s 88AA(3).

¹⁷¹ *BCII Act* s 36(1) (definition of 'building industrial action').

¹⁷² *Ibid.* The employee must also show that he or she 'did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe for the employee to perform'.

his or her health or safety was *imminent*, means that employees may continue working where they nonetheless feel there is a risk to their health or safety.

The definition of ‘unlawful industrial action’ indicates the very low threshold that the ABCC must satisfy before being able to exercise its investigatory powers. It would not be unreasonable for the ABCC to request any person who might have information about a strike, a slow-down or even a sick day taken by an employee to provide it with information or documents or to give evidence under oath. For example, in May 2006, the ABCC issued a declaration that the actions of a CFMEU site representative and a CFMEU organiser had contravened the *BCII Act*. The action being investigated by the ABCC was a twenty-minute meeting organised by these two men to collect money for the widow of a worker crushed to death on a building site.¹⁷³

B ABCC Focuses on Breaches of Civil, and not Criminal, Law

The Coalition Government stated during the Second Reading debates that the purpose of the *BCII Act* was to create ‘a code of practice with real criminal teeth’.¹⁷⁴ The building and construction industry needed ‘a fighter of organised crime’.¹⁷⁵ With such functions, it was argued that the ABCC should be vested with strong investigatory and coercive powers. However, only two criminal offences are created by the *BCII Act*. The first offence is the failure of a person to comply with a notice issued by the ABCC, such as one requiring him or her to give evidence, information or documents or to take an oath or affirmation.¹⁷⁶ The second offence is the recording or disclosure of protected information that a person, such as an employee of the ABCC, has obtained in the course of their official employment.¹⁷⁷

By contrast, the main target of the legislation, unlawful industrial action, is dealt with by way of civil sanctions. The penalty for engaging in unlawful industrial action is 1,000 penalty units if the defendant is a body corporate and otherwise 200 penalty units.¹⁷⁸ A penalty unit is

¹⁷³ Australian Building and Construction Commission, ABCC Media Statement, *Hooker Cockram Dispute*, 23 May 2006.

¹⁷⁴ Parliament of Australia, Senate, *Hansard*, 5 September 2005, 18 (Senator Johnston).

¹⁷⁵ *Ibid.*

¹⁷⁶ *BCII Act* s 52(6). The penalty for this offence is six months imprisonment.

¹⁷⁷ *Ibid* s 65(2). The penalty for this offence is 12 months imprisonment.

¹⁷⁸ *Ibid* s 49(2).

\$110¹⁷⁹ and therefore the maximum penalty for a body corporate is \$110,000 and otherwise \$22,000. A court may also make orders imposing pecuniary penalties or requiring the payment of compensatory damages or any other order that the court considers appropriate.¹⁸⁰ The latter includes issuing a final or interim injunction.¹⁸¹ These civil penalties apply not only to the person who contravened the *BCII Act* but to ‘a person [including ‘an industrial association’] who is involved in a contravention of a civil penalty provision’.¹⁸² This is defined in extremely broad terms to include a person who ‘has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention’.¹⁸³

The types of investigatory and coercive powers bestowed on a body should be appropriate for the contraventions it is required to investigate. The Cole Royal Commission recognised this when it stated that ‘[t]he resources, both human and physical, which are needed to respond to ... varying forms of misconduct will differ’.¹⁸⁴ In other words, strong investigatory and coercive powers may be necessary and appropriate to deal with contraventions of the criminal law, as opposed to contraventions of the civil law. The Commission found that the ACCC provided a ‘useful comparison’ as it performed ‘comparable functions to the proposed ABCC’.¹⁸⁵ Therefore, it recommended that the ABCC be given the same powers as those possessed by the ACCC under s 155.¹⁸⁶

The Commission’s recommendation as to the powers that should be bestowed on the ABCC was based on an assumption that proved to be erroneous. Its recommendation was that the ABCC would ‘monitor, investigate and prosecute any breaches of industrial law, *the criminal law* and aspects of civil law in relation to the building and construction industry’ (emphasis added).¹⁸⁷ However, the *BCII Act* only creates two criminal offences, both of which relate to procedural matters, and while the ABCC has the power to investigate criminal offences under the *Independent Contractors Act* and the *WRA*, it has no power in regard to the general criminal law as it might apply in the industry. By contrast, the ACCC’s governing legislation, the *TPA*, establishes a number of substantive offences for which criminal proceedings may be

¹⁷⁹ *Crimes Act 1914* (Cth) s 4AA.

¹⁸⁰ *BCII Act* s 49(1). There is no cap on the amount of damages that may be ordered by the court.

¹⁸¹ *Ibid* s 39.

¹⁸² *Ibid* s 48(1) (definition of ‘person’).

¹⁸³ *Ibid*.

¹⁸⁴ Royal Commission into the Building and Construction Industry, above n 1, Vol 11, 31 [144].

¹⁸⁵ *Ibid* Vol 11, 37 [169].

¹⁸⁶ *Ibid* Vol 11, 38 [175].

¹⁸⁷ *Ibid* 31 [145].

brought. Criminal proceedings may, for example, be brought against a corporation for making a false representation that goods are of a particular standard or quality¹⁸⁸ or have sponsorship or approval that they do not in fact have.¹⁸⁹ The functions of the ABCC are not comparable to those of the ACCC.

The ABCC is primarily responsible for monitoring, investigating and enforcing civil law or, more specifically, federal industrial law like the *BCII Act* and industry awards and agreements. Investigatory powers of the type bestowed on the ABCC had been unheard of in the industrial context. In this light, the powers possessed by the ABCC are not only extraordinary, they are unwarranted. Extraordinary powers of this kind should never be vested without adequate checks and balances, and even then should only be given to a body required to deal with the serious criminal conduct. Such powers should not be bestowed on a body dealing with contraventions of the civil law and potentially minor breaches of industrial instruments.

C Selective Jurisdiction of the ABCC

The Cole Royal Commission recommended that an industry-specific regime be established to regulate the building and construction industry. It noted that the ‘lawlessness’ characterising the building and construction industry ‘mark[ed] the industry as singular’.¹⁹⁰ However, the Commission was not established to compare the extent to which participants in the building and construction industry as opposed to those in other industries complied with their legal obligations. Its exclusive focus was upon the building and construction industry. It is therefore unclear on what basis the Royal Commission could describe the building and construction industry as ‘singular’.

Any difference between industries is likely to be a matter of degree. For example, there is nothing about the lawlessness identified by the Royal Commission – including breaches of the proper standards of occupational health and safety, application of inappropriate industrial pressure and threatening and intimidatory conduct – which is unique to the building and construction industry. The Commission found that the existing non-industry specific bodies had inadequate powers to enforce Commonwealth industrial law.¹⁹¹ If this is true, then it is a

¹⁸⁸ *Trade Practices Act 1974* (Cth) s 75AZC(1)(a).

¹⁸⁹ *Ibid* s 75AZC(1)(e).

¹⁹⁰ Royal Commission into the Building and Construction Industry, above n 1, Vol 3, 5 [11]-[12].

¹⁹¹ *Ibid* Vol 3, 11 [20].

problem that needs to be rectified for all industries and not simply in the field of building and construction. As Stewart argued in 2003, '[i]f these amendments are worth introducing, why aren't they worth introducing more generally?'¹⁹²

In the selectivity of its jurisdiction, the ABCC differs from other bodies possessing investigatory powers. The ACCC and the ASIC, for example, have jurisdiction over all persons and organisations, regardless of the industry in which they work or operate, that contravene the *TPA* or the *Australian Securities and Investments Commission Act 2001* (Cth), respectively. By contrast, to create a body like the ABCC whose jurisdiction is limited to a single industry is to establish different sets of rules and rights for different workers and employers.¹⁹³ Only workers and employers in the building and construction industry may be compelled to provide information or documents to the ABCC or to give evidence before it. Only workers and employers in the building and construction industry have their right to silence and the privilege against self-incrimination abrogated. Only workers and employers in the building and construction industry may be penalised by six months imprisonment for failing to co-operate with the ABCC.

VII CONCLUSION

The ABCC was established for the stated purpose of 'promoting respect for the rule of law' in the building and construction industry.¹⁹⁴ However, the investigatory powers conferred on the ABCC in fact undermine the rule of law in Australia.¹⁹⁵ These powers enable the ABCC to compel a person to provide it with information or documents or to give evidence where this may be 'relevant to an investigation'. The breadth of these powers is extraordinary. They may be exercised in relation to any person, regardless of their age, who may reasonably be thought to possess relevant information or documents. They may also be exercised in relation to any contravention, regardless of how trivial, of a federal industrial law or award. The exercise of these powers by the ABCC has serious consequences, both in the abrogation of rights taken for granted by the Australian public and in the imposition of a term of imprisonment for non-

¹⁹² Interview with Andrew Stewart on the Building Industry Royal Commission's recommendations in *Workplace Intelligence*, May 2003, <<http://www.cphd.com.au>> at 2 September 2008.

¹⁹³ Construction, Forestry, Mining and Energy Union (Construction and General Division), Submission No 37 to the Senate Employment, Workplace Relations and Education References Committee, *Building and Construction Industry Inquiry* (2004), 9.

¹⁹⁴ *BCII Act* s 3(2)(b).

¹⁹⁵ For a further discussion of this issue, see Howe, above n 18, 147-166,

compliance. Making this situation even more disturbing is the absence of meaningful checks on the ABCC's discretion like judicial review under the *ADJR Act*.

The ABCC's investigatory powers differ from the powers possessed by other Commonwealth enforcement agencies like the ACCC and ASIC. The latter bodies are more constrained as to when and in regard to which matters their powers can be exercised. They are also responsible for enforcing the criminal law, as opposed to the civil law that the ABCC enforces. Finally, bodies like the ACCC deal, in a non-discriminatory manner, with any person and organisation that contravenes their governing legislation. The jurisdiction of the ABCC is, by contrast, limited to the building and construction industry. It is wrong as a matter of legal policy to confer a draconian, over-wide and inadequately checked investigatory power on a body whose principal function is to investigate civil breaches of federal industrial law within a single industry.

The Australian Labor Party was strident in its opposition to the ABCC during the parliamentary debates that led to the enactment of the *BCII Act*.¹⁹⁶ However, as part of its 2007 election platform, it promised to retain the ABCC with its current powers until 2010. The Party said that the ABCC would be replaced from 1 February 2010 with a specialist division within the inspectorate of its new Fair Work Australia. On 25 August 2008, the Prime Minister Kevin Rudd reiterated this promise at a Labor Caucus meeting, stating that his Government 'will be adhering to all [its] election commitments, including the ABCC'.¹⁹⁷ While the Government has announced an inquiry (to report by March 2009) by the Honourable Murray Wilcox QC into the creation and ongoing operation of the building and construction specialist division,¹⁹⁸ the question of whether the ABCC should be retained until 2010 or immediately abolished lies beyond its scope.¹⁹⁹

Given concerns about the ABCC's investigatory authority, action should be taken now to limit the potential for the misuse of its power. While the Rudd Government has committed to retain

¹⁹⁶ See, eg, Parliament of Australia, House of Representatives, *Hansard*, 18 August 2005, 53 (Senator Wong).

¹⁹⁷ Phillip Coorey, 'Construction watchdog row splits Labor', *Sydney Morning Herald*, 26 August 2008.

¹⁹⁸ Minister for Employment and Workplace Relations, Media Release, 'Government Announces Consultation on Transition to Fair Work Australia for Building and Construction Industry', 22 May 2008.

¹⁹⁹ The Terms of Reference are available at: <<http://www.workplace.gov.au/publications/policyreviews/wilcoxconsultationprocess/termsofreference.htm>> at 2 September 2008.

the powers of the ABCC, its election promise does not prevent these powers being made subject to appropriate safeguards. These might be introduced by legislative amendment to the *BCII Act* and could include checks found in other contexts, such as the requirement that the ABCC obtain approval before the use of its powers from a member of the executive or the judiciary, or that the exercise of its powers be subject to review under the *ADJR Act*. Further safeguards could be based on those imposed on the BIT under the *Codifying Contempt Act*, such as that BIT powers not be used to investigate matters that are ‘minor or petty’.

The *BCII Act* contains an existing, if limited, mechanism for ensuring that the ABCC’s powers are exercised in a more accountable and appropriate manner. Section 11 provides:

- (1) The Minister may give written directions to the ABC Commissioner specifying the manner in which the ABC Commissioner must exercise or perform the powers or functions of the ABC Commissioner under this Act.
- (2) The Minister must not give a direction under subsection (1) about a particular case.
- (3) The ABC Commissioner must comply with a direction under subsection (1).

The power of the Minister for Employment and Workplace Relations to give written directions to the Commissioner of the ABCC is similar to the power sometimes conferred by legislation to give ‘general directions’. There are two important restrictions on the scope of the Minister’s power to give a written direction. First, as already reflected in s 11(2), the written direction must establish a general procedure applicable to more than one person. That is, it must not dictate the outcome of a particular case or cases,²⁰⁰ such as by specifying that a particular person is not to be compelled to give evidence. Second, the written direction must not ‘take away elements of the exercise of a power that has been committed to a particular body and to commit them to a person upon whom the Parliament has not conferred the power’.²⁰¹ For example, the written direction must not say that the power of the ABCC to compel a person to give evidence is now to be exercised by the Minister. By analogy, the written direction must not restrict elements of a power that the Parliament has expressly conferred. For example, the

²⁰⁰ *Aboriginal Legal Service v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565, 578 (Tamberlin J).

²⁰¹ *Ibid* 567 (Black CJ).

direction must not state that the ABCC no longer has the power to compel the production of documents. However, ‘limitations on the exercise of a power can, obviously, result from the proper exercise of a power to give general directions’.²⁰² It would be valid for the Minister to issue a written direction requiring, for example, the ABCC to provide a statement of written reasons before exercising its investigatory powers and to accord procedural fairness to an affected person. It would also be valid for the ABCC to be required to exercise its investigatory power only after it had considered a number of relevant factors, such as the age and health of the person, their level of involvement in any contravention and whether the information is available from another source.

The introduction of safeguards on the investigatory powers of the ABCC by legislation or ministerial direction would be a step forward, but not an adequate answer to the many problems with the powers. They should not have been conferred in the first place, and the problems with the powers cannot be remedied merely by greater checks and executive or judicial oversight. The ABCC’s investigatory powers simply have no place in a modern, fair system of industrial relations, let alone one of a nation that prides itself on political and industrial freedoms.

²⁰²

Ibid.