# The Investigatory Powers of the Australian Building and Construction Commission

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*The Australian Building and Construction Commission (ABCC) was created in 2005 to investigate breaches of and to enforce federal industrial law in the building and construction industry. This article examines the legislative history of the body and its coercive and investigatory powers, including the breadth of such powers and their potential to infringe common law rights. It also compares the investigatory powers of the ABCC with those of other Commonwealth bodies like the Australian Competition and Consumer Commission. In light of this analysis, the article identifies fundamental problems with the investigatory powers of the ABCC that require immediate attention.*

## 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 of the Act 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

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This article is developed from a speech given by the first author at the National Press Club on 25 August 2008. The authors thank the anonymous referees and Colin Fenwick for their comments and suggestions on an earlier draft of this article.

1 Royal Commission into the Building and Construction Industry, *Final Report of the Royal Commission into the Building and Construction Industry*, Vol 1, AGPS, Canberra, 2003, at [17].

2 Ibid, at [16].

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 BCII Act s 5.

6 BCII Act s 37.

is a restriction or limitation on, or a delay in, the performance of the work'.[7] The Act also prohibits coercion[8] and discrimination[9] in the building and construction industry, and empowers the Minister for Employment and Workplace Relations to issue a building code setting out further standards of behaviour that must be observed.[10]

The Act also establishes the Australian Building and Construction Commission (ABCC). This body is empowered to monitor, investigate and enforce breaches by 'building industry participants' of federal industrial law (including the BCII Act, Workplace Relations Act 1996 (Cth) (WRA), Independent Contractors Act 2006 (Cth) (Independent Contractors Act) and Commonwealth workplace agreements and awards) and any building code issued by the Minister. The Australian Building and Construction Commissioner (ABC Commissioner)[11] and any delegates[12] may compel a person to provide them with information or documents[13] or to attend to give evidence[14] before the ABC Commissioner or an assistant.[15] The ABC Commissioner, as well as any Australian Building and Construction Inspectors (ABC Inspectors) appointed by the ABC Commissioner,[16] also has the power to enter and search premises.[17]

In addition to these coercive powers, the ABC Commissioner or an ABC Inspector can initiate court proceedings against a corporation or individual for

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7 BCII Act s 36. This section further defines terms like 'industrially-motivated'.

8 BCII Act ss 43–44, 46.

9 BCII Act s 45.

10 BCII Act s 27. The Building Code is distinct from the National Code of Practice for the Building and Construction Industry, which was issued in 1997. The Minister has yet to issue a Building Code in accordance with s 27 of the BCII Act. See A Forsyth, V Gostencnik, I Ross and T Sharard, *Workplace Relations in the Building and Construction Industry*, Butterworths, Sydney, 2007, at [3.3.6].

11 The ABC Commissioner and Deputy ABC Commissioners are appointed pursuant to s 9 of the BCII Act.

12 Under s 13(1) of the BCII Act, the ABC Commissioner may delegate any of his or her powers under the BCII Act to a Deputy ABC Commissioner, ABC Inspector, SES employee, acting SES employee or a person prescribed by the regulations. However, s 13(2) provides that powers or functions under s 52 may only be delegated to a Deputy ABC Commissioner. On 7 November 2005, the ABC Commissioner, John Lloyd, delegated his powers under s 52 to Ross Dalgleish and Nigel Hadgkiss, Deputy ABC Commissioners. On 30 November 2005, the ABC Commissioner also delegated his powers under s 72 to the same Deputy ABC Commissioners. The Instruments of Delegation are available at Australian Building and Construction Commissioner, *Delegation of Powers under Section 13 of the Building and Construction Industry Improvement Act*, at <http://www.abcc.gov.au/NR/rdonlyres/25E4D121-9FDC-448F-BDCA-AC381AF02AFD/0/Delegation DepCommissionersAll.pdf> (accessed 14 October 2008).

13 BCII Act s 52(1).

14 BCII Act s 52(1).

15 An assistant is defined in s 52(8) as a Deputy ABC Commissioner, ABC Inspector or a person referred to in s 25(1) or (3) who is assisting the ABC Commissioner. Section 25(1) refers to the staff required to assist the ABC Commissioner in the performance of his or her functions. Section 25(3) refers to persons engaged by the ABC Commissioner as consultants. The breadth of this definition is mentioned in the Discussion Paper recently released by the Hon Murray Wilcox QC: M Wilcox, *Proposed Building and Construction Division of Fair Work Australia: Discussion Paper*, Canberra, October 2008, at [23].

16 BCII Act s 57(1)–(2).

17 BCII Act s 59.

a range of civil remedies.[18] These remedies include an interim or final injunction,[19] a pecuniary penalty[20] or compensatory damages.[21] In certain circumstances, the ABC Commissioner may also intervene in court proceedings or proceedings before the Australian Industrial Relations Commission (AIRC).[22]

Since its inception, the ABCC has been the subject of fierce debate. Howe has suggested that the ABCC is founded on the assumption that 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.[23] 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.[24] On the other hand, members of the Coalition Government argued in 2005 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 [Cole] Royal Commission to be endemic in the industry'.[25] The ABCC 'will be able to act even-handedly to protect the public interest in situations where, at present, limited or no attempt is made to secure compliance with the law'.[26]

The Australian Labor Party opposed the enactment of the BCII Act. However, in its August 2007 pre-election *Forward with Fairness Policy Implementation Plan*, the party committed to retaining the ABCC with its current powers until January 2010, after which the ABCC was to be replaced with a specialist building and construction division of the inspectorate of the proposed new workplace regulator, Fair Work Australia.[27] In May 2008, the Rudd Labor Government announced that it had commissioned a report from the Honourable Murray Wilcox QC on matters related to the creation of this specialist division, including its structure and investigatory powers.[28] While

18 BCII Act ss 39, 49. Section 39(1) grants this power to the ABC Commissioner or 'any other person'. Section 49(6) provides that the persons who may make an application to one of the courts set out in s 48(1) (definition of 'appropriate court') are: the ABC Commissioner (or a delegate), an ABC Inspector, a 'person affected by the contravention' or a 'person prescribed by the regulations for the purposes of this section'. Sections 73 and 73A further bestow a power on the ABC Commissioner (or a delegate) and an ABC Inspector to institute proceedings under either the WRA or the Independent Contractors Act.

19 BCII Act ss 39(1), 49(3)(a).

20 Ibid, s 49(1)(a).

21 Ibid, s 49(1)(b).

22 Ibid, ss 71, 72.

23 J Howe, '"Deregulation" of Labour Relations in Australia: Towards a More 'Centred' Command and Control Model' in C Arup et al (Eds), *Labour Law and Labour Market Regulation*, Federation Press, Annandale, 2006, pp 147, 162.

24 See, eg, *Hansard*, Senate, 18 August 2005, pp 55–6 (Senator Wong).

25 Supplementary Explanatory Memorandum, Building and Construction Industry Improvement Bill 2005 (Cth), at [31]. The Royal Commission is discussed further in Part II below.

26 Ibid, at [32].

27 K Rudd and J Gillard, *Forward with Fairness: Policy Implementation Plan*, August 2007, p 24, at <http://www.alp.org.au/download/now/070828_dp_forward_with_fairness___policy_implementation_plan.pdf> (accessed 15 October 2008).

28 Department of Education, Employment and Workplace Relations, *Government Announces*

the Wilcox Inquiry issued a broad-ranging Discussion Paper in October 2008,[29] the question of whether the ABCC should be retained until 2010 or immediately abolished lies outside its terms of reference.[30]

In August 2008, the debate about the appropriateness of the ABCC, and the timing of its abolition, culminated in the introduction into the Senate by the Australian Greens of the Building and Construction Industry (Restoring Workplace Rights) Bill 2008. This bill provides for the repeal of the BCII Act, and thereby the abolition of the ABCC. The bill is currently the subject of an inquiry by the Senate Education, Employment and Workplace Relations Committee.

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, which 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. These powers enable the ABC Commissioner and any delegates to compel a person to provide him or her with information or documents or to attend to give evidence. They may be applied 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 the ABCC's 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

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*Consultation on Transition to Fair Work Australia for Building and Construction Industry*, 2008, Canberra, at <http://www.workplace.gov.au/workplace/Publications/PolicyReviews/WilcoxConsultationProcess/News.htm> (accessed 15 October 2008).

29 Wilcox, above n 15.

30 See Department of Education, Employment and Workplace Relations, *Terms of Reference*, at <http://www.workplace.gov.au/publications/policyreviews/wilcoxconsultationprocess/termsofreference.htm> (accessed 2 September 2008).

a report on behaviour in the building and construction industry.[31] In its report of May 2001, the OEA referred to allegations of money laundering, collusion and intimidation by building unions, theft and resale of building equipment and fraud within the building industry.[32] 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.[33]

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'.[34] Given what it saw as the insufficient funding and staffing of the OEA,[35] 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.[36]

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 Pt VID of the WRA, concerning Australian Workplace Agreements (AWAs) in the building and construction industry, and to take any necessary legal action in relation to both.[37] BIT officers were granted the same powers as 'workplace 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.[38]

## B Final Report of the Royal Commission

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,

31 Parliament of Australia, Parliamentary Library, 'Building Industry Royal Commission: Background, Findings and Recommendations', *Current Issues Brief*, No 30 2002–03, 26 May 2003.

32 Ibid.

33 See Royal Commission into the Building and Construction Industry, *Terms of Reference*, at <http://www.royalcombci.gov.au/docs/tor_letter.pdf> (accessed 26 August 2008).

34 Royal Commission into the Building and Construction Industry, *First Report*, Canberra, 2002, at [9].

35 Ibid, at [10].

36 Ibid, at [12].

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

38 Interim Building Industry Taskforce, *Upholding the Law — One Year On: Findings of the Interim Building Industry Taskforce*, AGPS, Canberra, 2004, p 18.

disregard of and breach of the law in the building and construction industry'.[39] 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.[40] 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'.[41] It also found that existing regulatory bodies had insufficient powers and resources to enforce the law.[42] 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.[43]

The findings of the Royal Commission were subject to challenge. 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':[44]

> 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.[45]

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 previously,[46] and that the findings were reached without credible evidence and the testing of employer allegations.[47] While the Royal Commission made numerous findings against employee organisations and individuals, very few were made against employers.[48]

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

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39 Royal Commission into the Building and Construction Industry, above n 1, Vol 1, at [155].
40 Ibid, Vol 1, at [15].
41 Ibid, Vol 1, at [17].
42 Ibid, Vol 11, at [128].
43 Ibid, Vol 1, at [35].
44 ACTU, *The Royal Commission into the Building and Construction Industry Resolution*, 23 October 2003, at <http://www.actu.asn.au/Archive/ACTUCongress/Congress2003/FinalPolicies/TheRoyalCommissionIntoTheBuildingAndConstructionIndustryResolution.aspx>, at [1] (accessed 30 October 2008). For a further discussion of the alleged anti-union bias of the Royal Commission, see J Marr, *First the Verdict: The Real Story of the Building Industry Royal Commission*, Pluto Press, Melbourne, 2003.
45 ACTU, ibid, at [3].
46 Ibid, at [4].
47 ACTU, Submission No 17 to the Senate Employment, Workplace Relations and Education References Committee, *Building and Construction Industry Inquiry*, 2004, at [227].
48 ACTU, above n 44, at [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, at <http://www.abc.net.au/tv/differenceofopinion/content/2007/s2003972.htm> (accessed 2 September 2008) (Sharan Burrow).

commission gathered evidence and conducted its investigations'.[49] Of particular concern was the curtailment of the rights to legal representation and cross-examination. One critic of the Royal Commission, Marcus Clayton of the law firm Slater and Gordon, stated:

> in relation to cross-examination, for example, the normal thing in royal commissions is that they operate in a similar way to a court, in that a witness is called and those who have leave to appear as a general rule get an opportunity to cross-examine the witness, particularly if the witness is giving evidence adverse to the interests of the client concerned.[50]

The practice of the Royal Commission differed substantially from this general rule. For example, Practice Note No 2 of the Royal 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.[51] Clayton noted the uniqueness of this practice:

> The only example we could find in Australian history — and there have been a lot of royal commissions — was the Lowe Royal Commission into communism in Victoria in 1949. There seemed to be a similar rule then.[52]

These concerns 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.[53]

## 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 recommendations of the Royal

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49 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*, Melbourne, 2004, p 3.

50 *Hansard*, Senate Employment, Workplace Relations and Education References Committee, 19 May 2004, p 99 (Mr Clayton).

51 This practice note was challenged in *Kingham v Cole* (2002) 118 FCR 289; 190 ALR 679 under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act), 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 Heerey J of the Federal Court of Australia.

52 *Hansard*, Senate Employment, Workplace Relations and Education References Committee, 19 May 2004, p 100 (Mr Clayton).

53 D McElrea, CFMEU Industrial Officer, *The Cole Royal Commission — The Case for Bias*, at <http://www.nswccl.org.au/docs/pdf/Cole%20Royal%20Commission.pdf> (accessed 2 September 2008), p 1.

Commission.[54] In the second reading speech the Minister for Employment and Workplace Relations Kevin Andrews described the 2003 Bill as 'a key plank in the most significant reform of the building and construction industry ever attempted'.[55]

The 2003 Bill was passed by the House of Representatives on 4 December 2003. However, it met opposition in the Senate, where the Coalition was in 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'; and:[56]

> 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.[57]

The Australian Democrats, who held the balance of power in the Senate, opposed the 2003 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'.[58] The 2003 Bill lapsed in the Senate when, on 31 August 2004, the Commonwealth Parliament was prorogued for the 2004 federal election.

## D Expansion of the BIT'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.[59] The director complained that the 'effectiveness of [the BIT's] work in achieving the government's goal of changing industry culture and establishing the rule of law'[60] 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'.[61] In particular, BIT investigators

54 The Honourable Murray Wilcox QC has suggested that that the only significant divergence between the recommendations of the Royal Commission and the 2003 Bill related to the structure of the ABCC: Wilcox, above n 15, at [12].

55 *Hansard*, House of Representatives, 6 November 2003, p 22283 (Mr Andrews).

56 Senate Standing Committee on Education, Employment and Workplace Relations, *Beyond Cole — The Future of the Construction Industry: Confrontation or Co-operation?*, Senate Printing Unit, Canberra, 2004, p 73.

57 Ibid, p 74.

58 Senate Standing Committee on Education, Employment and Workplace Relations, 'Australian Democrats Minority Report', *Beyond Cole — The Future of the Construction Industry: Confrontation or Co-operation?* Senate Printing Unit, Canberra, 2004, at [1.20]–[1.21].

59 Interim Building Industry Taskforce, above n 38.

60 Ibid, p 18.

61 Ibid, p 19.

were unable to access particular information about individuals and had encountered problems in entering sites and obtaining documents.[62]

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*[63] 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'.[64]

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'.[65] 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 Pt 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.[66] On 23 June 2005, the secretary delegated these powers to the Director of the BIT.[67]

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

- the BIT was not permitted to use its coercive powers in investigations of 'minor or petty' matters;[68]
- 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;[69]
- the courts were given the capacity to either fine or imprison a person who failed to comply with a notice;[70]
- there was a sunset clause under which the provisions would cease to operate after three years;[71] and,
- the Commonwealth Ombudsman was required to conduct an annual review of the exercise of the BIT's coercive powers.[72]

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62 Ibid, p 20.
63 (2004) 139 FCR 527; 134 IR 343.
64 Ibid, at [40]–[41].
65 *Commonwealth Parliamentary Debates*, House of Representatives, 'Ministerial Statement: Royal Commission into the Building and Construction Industry', 25 March 2004, p 27297 (K Andrews).
66 WRA ss 88AA–88AI (as amended by the Codifying Contempt Act).
67 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*, AGPS, Canberra, 2006, p 3.
68 WRA s 88AA(3) (as amended by the Codifying Contempt Act).
69 Ibid, s 88AA(3A).
70 Ibid, s 88AA(7)(c)–(d).
71 Ibid, s 88AA(1).
72 Ibid, s 88AI.

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;[73] and,
- required the approval of a Federal Court judge before the BIT could exercise its coercive powers.[74]

## 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'.[75] On 9 August 2005, the Coalition Government moved amendments to the 2005 Bill in the House of Representatives 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.[76]

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.[77]

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

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73 *Hansard*, House of Representatives, 11 August 2005, pp 52–3 (Mr Smith). Under s 88AB of the WRA (as amended by 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.

74 *Hansard*, ibid, pp 52–3. Under s 88AA of the WRA (as amended by the Codifying Contempt Act), the Secretary of the Department of Employment and Workplace Relations (and any delegates) had the discretion to require a person to provide him or her with information or documents or to give evidence before him or her.

75 *Hansard*, House of Representatives, 9 March 2005, p 6 (Mr Andrews).

76 *Hansard*, House of Representatives, 11 August 2005, p 49 (Mr Andrews).

77 Section 56 of the 2003 Bill provided that the AIRC '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 provided 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'.

of agreements in the building and construction industry in October 2005'.[78] On 11 August 2005, the Shadow Industrial Relations Minister 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.[79]

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 members, stated that it 'commends this bill to the Senate and urges that it be passed without amendment'.[80] 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 upon which the bill was introduced into the Commonwealth Parliament).[81] The other provisions, including the conversion of the BIT into the ABCC, commenced on the date of royal assent.[82]

## III The Investigatory Powers of the ABCC

Section 52 of the BCII Act gives the ABC Commissioner[83] the power to compel a person to provide him or her with information or documents or to attend to give evidence. The section provides:

> (1) If the ABC Commissioner believes on reasonable grounds that a person:
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> (a) has information or documents relevant to an investigation; or
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> (b) is capable of giving evidence that is relevant to an investigation;
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> the ABC Commissioner may, by written notice[84] given to the person, require the person:
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> (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

78 *Hansard*, House of Representatives, 9 August 2005, pp 89–90 (Mr Smith).

79 *Hansard*, House of Representatives, 11 August 2005, p 51 (Mr Smith).

80 Senate Standing Committee on Education, Employment and Workplace Relations, *Inquiry into the Building and Construction Industry Improvement Bill 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005*, Senate Printing Unit, Canberra, 2005, p 7.

81 BCII Act s 2(1).

82 BCII Act s 2(1).

83 As discussed above at n 12, this power may also be exercised by any Deputy ABC Commissioners to whom the ABC Commissioner delegates this power. However, for ease of reference, 'ABC Commissioner' is used herein to refer to both the ABC Commissioner and any delegates he or she appoints.

84 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 Schs 7.1, 7.6 and 7.7.

(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
(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 ABC Commissioner or an assistant may require any information or answers given by a person 'to be verified by, or given on, oath or affirmation'.[85]

A person required to attend before the ABCC to give information or answer questions is entitled to legal representation of his or her choosing.[86] However, in *Bonan v Hadgkiss (Deputy Australian Building and Construction Commissioner)*,[87] the Federal Court found that the ABC Commissioner has the power to make orders or give directions to ensure the integrity, and to some extent the effectiveness, of the investigation.[88] This may include an order excluding a particular legal practitioner from an examination if the ABC Commissioner concludes, on reasonable grounds and in good faith, that the representative either will, or may, prejudice the investigation.[89] Prior to 2006, it was usual in industrial disputes, which generally involve a large number of employees, for an employer and its employees to each be represented by a single legal team. However, in *Bonan v Hadgkiss*, the court found that, in order to avoid conflicts of interest, it was also appropriate for the ABC Commissioner to make a direction preventing a legal representative from acting for more than one person giving evidence.[90] Of the 121 people examined by the ABCC from 1 October 2005 to 30 September 2008, only 67 have been legally represented.[91] This suggests either that people are unaware of their right to legal representation or are unable to obtain legal representation, whether for financial reasons[92] or because of the logistical problems that can result from each person having to obtain separate legal representation.

The Federal Court also found in *Bonan v Hadgkiss* that as a matter of interpretation of the BCII 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'.[93] It followed that the commissioner has the power

85 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: s 54(6)(b)(iv).
86 Ibid, s 52(3).
87 (2006) 160 FCR 10; 236 ALR 745.
88 Ibid, at [53].
89 Ibid, at [56].
90 Ibid, at [56]–[58].
91 ABCC, *Report on the Exercise of Compliance Powers by the ABCC for the Period 1 October 2005 to 30 September 2008*, 2008, at [5]. The percentage of people legally represented at ABCC hearings has dropped from 65% (55 of 85 people) in the ABCC's previous report (to 31 March 2008) to 55% at 30 September 2008.
92 There is no provision in the BCII Act requiring the ABCC to meet a person's legal expenses, travelling costs or lost wages: Wilcox, above n 15, at [117].
93 (2006) 160 FCR 10; 236 ALR 745 at [37].

to make a non-disclosure direction.[94] In the 2006–2007 Annual Report of the ABCC, the ABC Commissioner 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.[95]

A number of criticisms may be made of the investigatory powers in s 52. First, the powers are conferred in overbroad terms, with limitations on their scope too often left to the discretion of the ABC Commissioner rather than being set out in the BCII Act. The only limitation on the type of evidence, information and documents that the ABC Commissioner may request is that it be '*relevant to* an investigation'. The ABC Commissioner is, for example, empowered to approach an employee in the building and construction industry and require him or her to answer questions about past or present membership of a trade union or even of a political party.[96] Such information might be 'relevant' to determining whether a person was present at a union or political meeting at which a contravention of the BCII Act allegedly occurred, and the level of a person's involvement in that contravention. 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.[97]

The low investigatory threshold of 'relevant to an investigation' means that the ABC Commissioner's powers in s 52 could be used to undertake a 'fishing expedition' or, as Marshall J described the BIT's investigatory powers in *Thorson v Pine*, a 'roving inquiry'. Nothing in the BCII Act prevents this from occurring. The ABCC has published guidelines for the exercise of its compliance powers.[98] They state that the ABCC 'shall not use the powers to conduct a "fishing expedition" for information'.[99] However, according to the guidelines, to prevent this occurring the ABC Commissioner need only believe 'on reasonable grounds'[100] that the investigatory threshold has been met. The consequence is that the only meaningful legal limitation on the

94 Ibid, at [38].

95 ABCC, *2006–2007 Annual Report*, Communications Management Australasia, Melbourne, 2007, p 27.

96 An ABC Inspector would also be empowered to ask such questions pursuant to his or her power of search and entry in s 59 of the BCII Act. Section 59(5)(c) enables an ABC Inspector to interview any person while exercising this power. However, unlike the ABC Commissioner, an ABC Inspector does not have the power to *compel* a person to answer such questions. Under the WRA, 'workplace inspectors' do not have a general power to enter any business premises in order to interview a person believed to have information relevant to compliance purposes. Such a power only exists in relation to the premises set out in s 169(2)(a) of the WRA.

97 The scope of the information that the ABC Commissioner is empowered to request is highlighted by the case of Noel Washington, the first person to be charged with failing to comply with a notice to attend to give evidence. He was asked to give evidence about a union meeting at which a contravention of the prohibition on intimidation allegedly occurred. This case is discussed later in this article at text accompanying n 152.

98 ABCC, *Guidelines in Relation to the Exercise of Compliance Powers in the Building and Construction Industry*, Melbourne, 2005.

99 Ibid, at [4].

100 Ibid.

exercise of the ABC Commissioner's investigatory powers is the definition of an 'investigation'. As is discussed later in this article,[101] this definition is extremely broad. Therefore, in practice, the proper use of the ABC Commissioner's investigatory powers is largely 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.

The ABC Commissioner recently responded to a report published by the Administrative Review Council entitled *The Coercive Information-Gathering Powers of Government Agencies* by conducting a self-review of ABCC procedures against the 20 best practices principles identified in that report. The review concluded that the ABCC legislation and procedures complied with all the applicable principles, including fairness, lawfulness, rationality, transparency and efficiency.[102] These conclusions were, however, immediately brought into question by a decision of the Federal Court in early October 2008. Acting Chief Justice Spender described a case brought by an ABC Inspector against the Communications Electrical Plumbing Union, the Queensland branch of the Plumbers and Gasfitters Employees' Union and the Secretary of the Queensland branch as 'misconceived, . . . completely without merit and should not have been brought'.[103] His Honour went on:

> The promotion of industrial harmony and the ensuring of lawfulness of conduct of those engaged in the industry of building construction is extremely important, but as one [sic] which requires an even-handed investigation and an even-handed view as to resort to civil or criminal proceedings, and that seems very much to be missing in this case.[104]

Rather than bringing proceedings against the three defendants, Spender J stated that the ABC Inspector should have brought proceedings against the plumbing contractor company, Underground, as well as its managing director (described by Spender J as 'a foul-mouthed cowboy') and possibly another director.[105] The corporate arrangement entered into by Underground whereby workers were categorised as independent contractors, instead of employees, was 'a sham, a bogus arrangement' intended to avoid the requirements of the certified agreement.[106] Justice Spender stated that:

> If the evidence admitted by the solicitors for the applicant that was engaged in by the managing director of Underground had been uttered in an industrial context by a union official, it would be extraordinary if that were not the subject of serious investigation and likely prosecution.[107]

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101 See text at nn 197–214.

102 ABCC, 'ABCC Compulsory Power Meets Administrative Review Law Tests', *Email Alert*, 2 October 2008, at <http://www.abcc.gov.au/NR/ rdonlyres/C2540AB6-32E8-4C68-9C34-F19FE4121E9E/0/EA20081002ABCCCompulsoryPowerMeetsAdministrativeReview LawTests.pdf> (accessed 14 October 2008).

103 *Lovewell v O'Carroll*, (unreported, QUD 427/2007, transcript, 8 October 2008) at 88 per Spender ACJ.

104 Ibid, at 89.

105 Ibid, at 88–9.

106 Ibid, at 89.

107 Ibid.

These comments by Spender J further support the argument that, despite the positive findings of the ABCC review, the exercise of the investigatory powers set out in s 52 should not be left to the discretion of the ABC Commissioner. To avoid misuses of power, limitations need to be enshrined in legislation rather than left to the exercise of discretion.

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 ABC Commissioner's investigatory powers. Section 53 of the BCII Act states:

> (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 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 enables the ABC Commissioner's investigatory powers to override, for example, the protection of journalists' sources, privacy law and even the confidentiality of Cabinet proceedings.[108] Section 52(7) also overrides national security laws relating to, for example, the confidential gathering of intelligence by the Australian Security Intelligence Organisation (ASIO).[109] 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.

The common law privilege against self-incrimination has been described as a 'cardinal principle of our system of justice'[110] and a 'bulwark of liberty'.[111] In *Environment Protection Authority v Caltex Refining Co Pty Ltd*,[112] McHugh J noted that the privilege is important in preventing abuses of power

108 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 at 615; 112 ALR 409 at 412, the High Court noted that it is in the 'public interest that the deliberations of Cabinet should remain confidential in order that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made'. However, this common law principle could be overridden by s 52(7) of the BCII Act.

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

110 *Sorby v Commonwealth* (1983) 152 CLR 281 at 294 per Gibbs CJ; 46 ALR 237.

111 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340 per Mason ACJ, Wilson and Dawson JJ; 45 ALR 609.

112 (1993) 178 CLR 477; 118 ALR 392.

by the executive in the exercise of its coercive powers.[113] The privilege also assists by protecting the quality of evidence[114] and by maintaining an accusatorial system of justice in which the burden of proof rests on the prosecution.[115] At an individual level, the privilege protects a person from the 'cruel trilemma' whereby he or she must choose between refusing to provide the evidence, providing the evidence or lying — each of which carries with it the risk of criminal sanction.[116] As Murphy J further stated in *Pyneboard Pty Ltd v Trade Practices Commission*,[117] 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'.[118]

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.[119]

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 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.'[120] Such statements are insufficient to justify the abrogation of an important common law principle.

The absence of an adequate justification for abrogating the privilege against self-incrimination is highlighted by the terms of s 59 of the BCII Act. This section empowers ABC Inspectors to enter specified premises[121] for a range of purposes, for example, to ascertain whether a designated building law has been complied with, or is being complied with, by a building industry participant.[122] While on the premises, the ABC Inspector may, among other things, require a person who has the custody of, or access to, a document to produce the document to the ABC Inspector within a specified period.[123] If a person fails to produce the document as required, the ABC Inspector may, by written notice served on the person, require him or her to produce the

113 Ibid, at CLR 544.
114 Australian Law Reform Commission (ALRC), Report 26, *Evidence (Interim)*, Vol 1, AGPS, Canberra, 1985, p 487.
115 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543; 192 ALR 561 at [31] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
116 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 498 per Mason CJ and Toohey J; 118 ALR 392.
117 (1983) 152 CLR 328; 45 ALR 609.
118 Ibid, at CLR 346.
119 Liberty Victoria — Victorian Council for Civil Liberties Inc, above n 49, p 4.
120 *Hansard*, House of Representatives, 5 September 2005, p 108 (Senator Santoro).
121 BCII Act s 59(3).
122 BCII Act s 59(1).
123 BCII Act s 59(5)(e).

document at a specified place within a specified period of not less than 14 days.[124] Given the express abrogation of the privilege against self-incrimination in s 52, it is 'anomalous'[125] that s 59 does not make any reference to the privilege. As the privilege is available unless abrogated,[126] a person is able to refuse to comply with a notice issued by an ABC Inspector under s 59(6) on the ground that it might tend to incriminate him or her.

It must be noted that protection is given to the rights of people providing evidence or giving information and documents to the ABCC under s 52 through the conferral of 'use' and 'derivative use' immunities in s 53(2) of the BCII Act.[127] This means that neither the information, answers given or documents produced by a person, nor any information, documents or things obtained as a direct or indirect consequence of giving the information, answers or producing the document, is admissible against the person in civil or criminal proceedings.[128] There are, however, several exceptions to this immunity.[129] 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 a person to comply with a notice issued by the ABC Commissioner,[130] the failure to take an oath or affirmation when requested by the ABC Commissioner or an assistant,[131] the failure to answer questions relevant to the investigation when attending as required by the notice,[132] the provision of false or misleading information[133] or documents[134] or the obstruction of a Commonwealth official.[135]

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

124 BCII Act s 59(6).
125 Wilcox, above n 15, at [123].
126 The courts will interpret the privilege against self-incrimination as being abrogated only if the intention to do so is clearly apparent in the legislation. The privilege may be abrogated either by express words or by necessary implication: *Sorby v Commonwealth* (1983) 152 CLR 281 at 289–90 per Gibbs CJ; 309 per Mason, Wilson and Dawson JJ; 46 ALR 237.
127 BCII Act s 53(2).
128 BCII Act s 53(2)(a)–(b).
129 BCII Act s 53(2)(c)–(e).
130 BCII Act s 52(6).
131 BCII Act s 52(6).
132 BCII Act s 52(6).
133 Criminal Code Act 1995 (Cth) s 137.1.
134 Ibid, s 137.2.
135 Ibid, s 149.1.

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.

As noted by the Senate Standing Committee for the Scrutiny of Bills, the inclusion of 'use' and 'derivative use' immunities is not always a sufficient safeguard that can justify abrogation of the privilege against self-incrimination.[136] The committee observed that it was 'reluctant to see the use of provisions abrogating the privilege — even with a use/derivative use indemnity — being used as a matter of course'.[137] The committee preferred to see the use of such provisions 'limited to "serious" offences and to situations where they are absolutely necessary'.[138] These comments by the committee indicate that the key question is whether there is a compelling justification for abrogating the privilege against self-incrimination in the first place, and not whether 'use' and 'derivative use' immunities are an adequate substitute for this privilege.[139] In the case of the BCII Act, a sufficient justification has not been put forward for abrogating the privilege against self-incrimination.

Third, under s 52 of the BCII Act, the ABC Commissioner may compel a person to give evidence, information or documents without him or her having any suspicion that the person has contravened the legislation. The Honourable Murray Wilcox noted that:

> Unlike most of those summonsed by the statutory bodies to which I have referred, the people who are interrogated by the ABCC are usually not people under suspicion of misconduct: they are ordinarily mere witnesses, summonsed in order to enable the ABCC to determine whether there is a case against someone else and, if so, to provide the evidence the ABCC hopes will lead to a conviction. Unlike persons subpoenaed to give evidence in court, court action has not yet been commenced; it may never be commenced.[140]

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136 Parliament of Australia, Senate Standing Committee for the Scrutiny of Bills, *Report on the Operation of the Senate Standing Committee for the Scrutiny of Bills during the 36th Parliament (May 1990–February 1993)*, quoted in Parliament of Australia, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 4 of 2000*, Canberra, AGPS, 5 April 2000, p 12.

137 Ibid.

138 Ibid.

139 Commentators have noted that the protection afforded by the 'use' immunity is not the same as that afforded by the privilege against self-incrimination: S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, Sydney, 2001, at [9.7]. In *Hamilton v Oades* (1989) 166 CLR 486 at 503; 85 ALR 1, Deane and Gaudron JJ stated that 'quite apart from the danger of . . . pre-trial prejudice, there is the possibility that the answer may involve the disclosure of a defence or lead to the discovery of other evidence'. Even with the inclusion of the 'derivative use' immunity, the protection afforded is still less than that afforded by the privilege against self-incrimination. One reason for this is that there is an as yet unresolved question about whether a defendant is required to prove that the evidence *has* been obtained as a result of the information provided to the investigatory body or whether the prosecution is required to prove that it *has not* been derived from that information. In *Sorby v Commonwealth* (1983) 152 CLR 281 at 312; 46 ALR 237, Murphy J stated that 'immunity from derivative use is unsatisfactory, because of the problems of proving that other evidence was derivative'. For a further discussion, see Queensland Law Reform Commission, *Report No 59 — The Privilege Against Self-Incrimination*, Brisbane, December 2004, pp 19–20.

140 Wilcox, above n 15, at [115].

The investigatory powers can be applied to an extremely broad range of people, including: workers in the building 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 far-fetched example, a priest in relation to what someone has told them in the confession box. On 17 December 2007, the *Sydney Morning Herald* reported the 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 past a building site. He was said to have been 'hauled . . . in for several hours of secret questioning' by the ABC Commissioner.[141] The ABC Commissioner's coercive powers might also be used to question union officials and state occupational health and safety inspectors. Applying the investigatory powers to such persons could compromise their industrial and legal responsibilities, such as ensuring health and safety standards on building sites. For example, in July 2008, court proceedings were commenced against a CFMEU official, Robert Mates, for allegedly organising industrial action in response to the refusal of the operator of a work site to immediately appoint an occupational health and safety officer.[142] The ABCC has indicated that 'obtaining information voluntarily is [its] preferred method'.[143] Nonetheless, between 1 October 2005 and 30 September 2008, the ABCC issued 142 notices requiring people to attend and answer questions and four notices requiring the production of documents.[144]

Finally, under s 52(6) of the BCII Act, a person may be subjected to criminal penalties if he or she fails, in response to a notice issued by the ABC Commissioner, 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.[145] The maximum penalty is six months imprisonment.[146]

This penalty has been criticised on two main grounds. First, during the second reading debates on the 2005 Bill, Labor's Stephen Smith criticised the failure to provide for an alternative monetary penalty:

> 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

141 A West, 'Even bystanders feel building watchdog's bite', *Sydney Morning Herald*, Fairfax Digital, Sydney, 15 December 2007.

142 CFMEU, *ABCC prosecutes union official for demanding safe work place*, 14 July 2008, at <http://www.cfmeu.asn.au/construction/press/nat/20080714_abcc.html>.

143 ABCC, above n 95, p 25. The ABCC will generally only issue a notice to provide documents where a request by an ABC Inspector under s 59(5)(e) to a person to provide a document within a specified period has not been complied with.

144 ABCC, *Report on the Exercise of Compliance Powers by the ABCC for the period 1 October 2005 to 30 September 2008*, above n 91, at [3]. To 31 March 2008 only 96 notices had been issued.

145 BCII Act s 52(6). There are also penalties under the Criminal Code Act 1995 (Cth) for the provision of false or misleading information (s 137.1 — 12 months imprisonment) or documents (s 137.2 — 12 months imprisonment) and the obstruction of a Commonwealth official (s 149.1 — 24 months imprisonment).

146 BCII Act s 52(6).

> 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.[147]

This criticism is not entirely correct. There is a 'back-door' mechanism by which a financial penalty instead of a term of imprisonment may be imposed by the courts. Section 4B of the Crimes Act 1914 (Cth) states that if a piece of legislation provides for a term of imprisonment only, the court may, if the contrary intention does not appear in the legislation and the court thinks that it is appropriate in all the circumstances, impose a financial penalty instead of or in addition to a term of imprisonment. No contrary intention is expressed in the BCII Act and therefore it is likely that s 4B would apply to an offence under s 52(6).[148] Section 4B is not, however, the equivalent of a provision in the BCII Act that expressly allows the court to impose a term of imprisonment or a financial penalty. Such a provision would be penalty-neutral. That is, it would not contain a bias in favour of either penalty. By contrast, the starting point for a court in applying s 4B is to assume that the defendant will be subject to a term of imprisonment. The onus then lies on the defendant to satisfy the court (and for the court to explain in its reasons) that it is appropriate in all the circumstances to impose a financial penalty instead of imprisonment.

The second criticism of the penalty in s 52(6) relates to its severity.[149] The penalty has been described as a 'fundamental breach of civil liberties in this country'.[150] The Committee on Freedom of Association of the International Labour Organisation expressed great concern about this penalty 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.[151] The lack of proportionality of the penalty is highlighted by the case of Noel Washington. Washington, a senior official with the CFMEU, was the first person to be charged for failing to cooperate with the ABCC. The ABCC was conducting an investigation into the alleged intimidation of two witnesses who gave evidence to an AIRC hearing in 2007.

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147 *Hansard*, House of Representatives, 11 August 2005, p 51 (Mr Smith).

148 A fact-sheet issued by the ABCC setting out the scope of its compliance powers makes no mention of s 4B. The fact-sheet simply states that the penalty for failing to comply with a notice issued by the ABC Commissioner under s 52 is six months imprisonment: ABCC, *Reforming the Industry: Compliance Powers of the Australian Building and Construction Commission*, Melbourne, 26 February 2008.

149 The failure to produce documents to a workplace inspector exercising powers under the WRA 'without reasonable excuse' is also a criminal offence punishable by imprisonment for up to six months: WRA s 819(1). However, there are two important differences between the WRA and the BCII Act. First, s 169(2) of the WRA only empowers a workplace inspector to compel a person to produce *documents*. It does not empower a workplace inspector to compel a person to answer questions or to give information. Second, s 169(8) of the WRA only abrogates the privilege against self-incrimination. It does not override the secrecy and confidentiality provisions of other legislation. Compliance with such legislation could be a 'reasonable excuse' for the purposes of s 819(1).

150 *Hansard*, House of Representatives, 11 August 2005, p 55 (Mr Emerson).

151 International Labour Organisation, 'Case No 2326 (Australia)', *338th Report of the Committee on Freedom of Association*, GB.294/7/1, Geneva, 2005, at [457(e)].

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'.[152] If Washington is found guilty of an offence under s 52(6) of the BCII Act, he faces a penalty of up to six months imprisonment.

## IV Checks on the ABCC's Investigatory Powers

The power to require a person to provide information, produce documents or attend to give evidence rests entirely in the hands of the ABC 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. Similarly, an ABC Inspector 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.

The ABC Commissioner is appointed by the Minister for Employment and Workplace Relations.[153] The minister also has the power to issue written directions to the ABC Commissioner specifying the manner in which he or she must exercise the powers set out in the BCII Act.[154] While the ABCC is ostensibly an independent body, the ability of the executive to influence the exercise of the ABC Commissioner's investigatory and coercive powers gave rise to criticisms during the term of the Howard Government that the ABCC is a political instrument.[155] The problem is compounded by the breadth of the ABC Commissioner's discretion in exercising his or her investigatory powers and the selectiveness, as for example criticised by Spender ACJ of the Federal Court,[156] in deciding when to initiate an investigation and who to prosecute.

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 the BIT could exercise its investigatory and coercive powers.[157] Some similar form of approval should be required for the exercise of the ABC Commissioner'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 a notice issued by the ABC Commissioner and the abrogation of the right to silence and the privilege against self-incrimination in examinations before the ABCC. It would be problematic if such a broad, unchecked discretion were conferred on a

152 M Grattan, 'Building watchdog charges union boss', *The Age*, Melbourne, 21 June 2008, at <http://www.theage.com.au/national/building-watchdog-charges-union-boss-20080620-2u99.html>.

153 BCII Act s 15(1).

154 BCII Act s 11. See further text at nn 245–248.

155 Senate Standing Committee on Education, Employment and Workplace Relations, above n 56, at [3.19].

156 See text at nn 103–107.

157 See text at n 74.

minister. It is even worse to confer it on an unelected person, such as the ABC Commissioner, who does not require approval for the use of the power and is not accountable to either parliament or the people.

ASIO arguably possesses the most draconian powers of any Australian investigatory body. Such powers are said to be justified by reference to the danger posed by terrorist activities, especially the potential for mass damage to life and property, and the need to act pre-emptively to prevent terrorist attacks from occurring. During the second reading debates on the 2005 Bill, Senator Andrew Murray of the Australian Democrats was careful to point out that the BCII Act did not go nearly so far as Australia's counter-terrorism laws in infringing individual liberties. He stated that it was 'emotive and misleading' to draw a comparison between the investigatory powers of ASIO and those of the ABC Commissioner.[158] However, in terms of the level of oversight of investigatory powers, the BCII Act in fact provides *less* protection than the Australian Security Intelligence Organisation Act 1979 (Cth). The authors do not suggest that the investigatory powers bestowed on ASIO and the ABC Commissioner are identical. For example, ASIO also has a power to detain a person for the purposes of questioning. Rather, we suggest that if the investigatory powers of ASIO in dealing with terrorist activities are subject to executive and judicial oversight, there can be little reason for failing to provide at least the same level of oversight of the ABC Commissioner's powers.

In contrast to the unchecked discretion possessed by the ABC 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.[159] This request is then to be made to a Federal Magistrate or judge appointed as an 'issuing authority'.[160] 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'.[161] Not only is judicial approval required for the exercise of ASIO's investigatory powers, but the threshold for exercising these powers is higher than for the ABC Commissioner — that is, the warrant must 'substantially assist' an investigation as opposed to merely being 'relevant' to an investigation.

Australia's counter-terrorism laws 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 ADJR Act.[162]

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158 *Hansard*, Senate, 22 June 2005, p 112 (Mr Murray).

159 Australian Security Intelligence Organisation Act 1979 (Cth) s 34D.

160 Australian Security Intelligence Organisation Act 1979 (Cth) s 34E(1) and s 34AB (definition of 'issuing authority').

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

162 There is no express mention of judicial review in Div 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'.

Similarly, in *Leghaei v Director-General of Security*,[163] an adverse security assessment prepared by ASIO was the subject of review under that Act. Justice Madgwick of the Federal Court found that the terms of the Australian Security Intelligence Organisation Act 1979 (Cth) do not exclude the rules of procedural fairness.[164] 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 ABC Commissioner's exercise of his or her investigatory powers.

There is no mechanism in the BCII Act for either internal or external review of the merits of a decision by the ABC Commissioner to exercise his or her 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,[165] it is not possible to challenge a decision by the ABC Commissioner to exercise his or her 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; the making of the decision was an improper exercise of power; fraud; the power was exercised in bad faith; and abuse of power. Review of the legality of a decision by the ABC Commissioner to exercise his or her investigatory powers will still be available under the constitutional writs in s 75(v) of the Constitution.[166] However, as members of the High Court have noted, review under the ADJR Act is likely to be wider than review under s 75(v) as the latter is restricted to challenges based on a 'jurisdictional error'.[167]

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.[168] It stated that 'the [ADJR Act] ought to apply to the ABCC, according to its terms'.[169] 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 ABC Commissioner. The committee considered that the 'expansive powers of the ABCC, without clearly defined limits or judicial control, could give rise to serious interference in the internal affairs of trade unions'.[170] It unsuccessfully requested that:

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163 [2005] FCA 1576; BC200511724.

164 Ibid, at [82].

165 ADJR Act Sch 1(a).

166 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; 195 ALR 24. The Federal Court has co-extensive jurisdiction under s 39B of the Judiciary Act 1903 (Cth), subject to certain exceptions relating to criminal prosecutions.

167 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59; [2003] HCA 30; BC200303044 at [27] per McHugh and Gummow JJ. For a further discussion of this issue, see B O'Donnell, 'Jurisdictional error, invalidity and the role of injunction in s 75(v) of the Australian Constitution' (2007) 28 *Aust Bar Rev* 291.

168 Royal Commission into the Building and Construction Industry, above n 1, Vol 11, at [205]–[206].

169 Ibid, at [206].

170 International Labour Organisation, above n 151, at [455].

> 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.[171]

As discussed in the next part of this article,[172] the ABC Commissioner need only satisfy a low threshold before exercising his or her investigatory powers. This is largely a consequence of the broad definition of an 'investigation'. The inclusion of ex post facto judicial review in the BCII Act would have minimal impact unless amendments were also made to the definition of an 'investigation' to limit and more clearly explain the circumstances in which the ABC Commissioner may exercise his or her powers. As the Act presently stands, it would be extremely difficult to establish many of the grounds of review in ss 5 and 6 of the ADJR Act, such as establishing that there were considerations (other than those contained in the definition of an 'investigation') that the ABC Commissioner was bound to take into account in deciding whether to exercise his or her powers.[173]

In the absence of ex post facto judicial review, an alternative check on the investigatory powers of the ABC Commissioner 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 power[174] and to table a report in the Commonwealth Parliament.[175] 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.[176] This was rejected by the Royal Commission on the basis that it would be sufficient for the ABCC to fall within the general jurisdiction of the Commonwealth Ombudsman.[177] 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],

171 Ibid.

172 See text at nn 197–214.

173 See also *Washington v Hadgkiss* (2008) 169 IR 112; [2008] FCA 28; BC200800195. In this case, an investigation by a Deputy ABC Commissioner, allegedly into a breach of s 816 of the WRA, was challenged on the basis that the investigation was improperly motivated. The challenge failed. Justice Marshall applied High Court authority to the effect that impropriety of purpose 'will not be lightly inferred and, by application of a presumption of regularity, will only be inferred if the evidence cannot be reconciled with the proper exercise of the power'. The Honourable Murray Wilcox QC notes that this decision highlights the unsatisfactory nature of the law: Wilcox, above n 15, at [127].

174 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.

175 WRA (as amended by the Codifying Contempt Act) s 88AI.

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

177 Ibid, at [204].

> *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.[178]

The two methods of oversight referred to by the Royal Commission are inadequate by themselves. The requirement that the ABC Commissioner provide the Minister for Employment and Workplace Relations with an annual report on the ABCC's operations,[179] 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.[180] That is, complaints may be made to the Ombudsman by individuals or organisations affected by a decision of the ABC Commissioner[181] and the Ombudsman may investigate these complaints, or the Ombudsman may initiate an ad hoc investigation on its own motion.[182] Given the extraordinary nature and scope of the ABC Commissioner's investigatory powers, there should be a mandatory annual review by the Ombudsman of the use of these powers.

In the absence of adequate safeguards, the ABC Commissioner'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 — that speech constituting 'political communication' — is protected by the Commonwealth Constitution.[183] 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

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178 Royal Commission into the Building and Construction Industry, above n 1, Vol 11, at [209] (emphasis added).

179 BCII Act s 14.

180 Commonwealth Ombudsman, *Ombudsman's office, 2003–present*, at <http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/periodofoffice_2003-present> (accessed 12 September 2008).

181 Ombudsman Act 1976 (Cth) s 7.

182 Ombudsman Act 1976 ss 7A–8.

183 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; 108 ALR 577; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; 108 ALR 681; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; 145 ALR 96 (*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; 146 ALR 126, three members of the court accepted that such a freedom existed: at CLR 91 per Toohey J; 116, 126 per Gaudron J; 142 per McHugh J. In *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; 209 ALR 582, two members of the court accepted that there was a freestanding freedom of association in the Constitution: at [113]–[116] per McHugh J; [286]–[268] per 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: at [150] per Gummow and Hayne JJ, with whom Heydon J agreed.

to the BCII Act. While the slogan 'our rights at work' is today a familiar political refrain, it is largely rhetorical 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)'.[184] The fact that the investigatory powers of the ABC Commissioner 'are based on s 155(7) of the Trade Practices Act'[185] was used by the Coalition Government as a justification for their passage during the second reading debates on the 2005 Bill. The ABCC has also defended itself against the claim that '[t]he compliance powers are extraordinary and only used by law enforcement agencies to combat serious crimes' by stating:

> Compliance powers are not unique and are used extensively by various government bodies. The ABCC's compliance power is modelled on those used by the Australian Consumer and Competition Commission and are [sic] similar to those used by the Australian Securities and Investments Commission.[186]

The investigatory powers of various Commonwealth investigatory bodies (both those responsible for enforcing the criminal law, such as the Australian Crime Commission, and those responsible for enforcing the civil law, such as the ATO and ASIC) are considered in detail in a 2008 report of the Administrative Review Council.[187] Here we examine the ACCC as a comparator because this is the body that the ABC Commissioner's investigatory powers were purportedly modelled on. At first glance, the investigatory powers of the ABC Commissioner and the ACCC might appear to be similar. The ACCC has the power under s 155(1) of the 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 matters. The ACCC may require evidence to be given on oath or affirmation.[188] A legal representative is generally permitted to be present at an examination before the ACCC.[189] 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.[190] Section 155(7) also abrogates the

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

185 *Hansard*, House of Representatives, 22 June 2005, p 112 (Mr Murray).

186 ABCC, 'The Truth about Compliance Powers', *Industry Update*, 1 August 2008, at <http://www.abcc.gov.au/NR/rdonlyres/C6E52237-FBC0-496A-AFD2-7BC6EF390 458/0/IUJuly2008.pdf> (accessed 14 October 2008).

187 Administrative Review Council, *Report No 48 — The Coercive Information-Gathering Powers of Government Agencies*, AGPS, Canberra, 2008.

188 TPA ss 155(3), 155(3A).

189 ACCC, *Section 155 of the Trade Practices Act: information-gathering powers of the ACCC in relation to its enforcement function*, AGPS, Canberra, 2000, p 16.

190 TPA s 155(5).

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.[191]

However, there are significant differences between the investigatory powers of the ABC Commissioner and those of the ACCC:

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 documents[192] and documents containing information the subject of legal professional privilege[193] 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 also may not exempt information or documents the subject of legal professional privilege.[194]
2. The TPA expressly provides that 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 (currently, $2200) or imprisonment for 12 months.[195] As discussed above, the BCII Act provides that the penalty for failing to comply with a notice issued by the ABC Commissioner is six months imprisonment (albeit given the 'back-door' mechanism in s 4B of the Crimes Act for substituting a financial penalty).
3. Judicial review under the ADJR Act is available in relation to decisions by the ACCC to exercise its investigatory powers.[196] Such review is excluded in relation to the BCII Act.

A comparison of the ABC Commissioner's investigatory powers and the powers of the ACCC reveals important differences. In any event, focusing exclusively on the terms of the powers neglects the larger picture. The appropriateness of the ABC Commissioner's investigatory powers must also be judged by reference to their overall context, including the purpose for which the ABCC was established, the types of offences with which the ABCC deals and the circumstances in which these powers may be exercised. From

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191 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 TPA. However, for each of these powers, the freedom from self-incrimination is either expressly available or has not been specifically abrogated.

192 TPA s 155(7A).

193 TPA s 155(7B). The defendant bears an evidentiary burden in relation to this matter.

194 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 s 52 investigative power does not abolish the right to claim legal professional privilege when responding to a notice': ABCC, *Guidelines*, above n 98, at [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: ALRC, *Report 107 — Privilege in Perspective: Client Legal Privilege in Federal Investigations*, ALRC 107, Canberra, 2008.

195 TPA s 155(6A).

196 Only decisions set out in Sch 1 of the ADJR Act are excluded from the operation of that legislation. Decisions made by the ACCC under the TPA are not mentioned in Sch 1.

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 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,[197] all that is required before the ABC Commissioner may exercise his or her investigatory powers is that he or she believe on reasonable grounds that a person has information or documents, or is capable of giving evidence, which is 'relevant to an investigation'.[198] The information, documents or evidence requested by the ABC Commissioner need not be necessary for the investigation to be conducted, nor need they, as in the case in respect of ASIO's investigatory powers, 'substantially assist' the investigation.[199]

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.[200] The main point of distinction, however, between the investigatory powers of the ABC Commissioner and the ACCC is that the legislative provisions enforced by the ABC Commissioner are framed in much broader language (within the context, of course, that the jurisdiction of the ABCC is limited to the building and construction industry whereas the ACCC has the power to investigate contraventions of the TPA in any industry). 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 relevant to a contravention of the prohibition on the making of false and misleading representations by a corporation[201] or the prohibition on the misuse of market position by a corporation.[202]

The broad scope of the matters to which the ABC Commissioner's investigatory 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'.[203] A 'building industry participant' means any individual or organisation that is involved in doing, or arranging for someone else to do, 'building work'; namely, 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

197 Text at nn 96–97.
198 BCII Act s 52(1).
199 Australian Security Intelligence Organisation Act 1979 (Cth) s 34E(1)(b).
200 TPA s 155(1).
201 TPA s 53.
202 TPA s 46.
203 BCII Act s 52(8).

work or arranges for building work to be carried out, a building association or an officer, delegate, representative or employee of a building association.[204] The definition of 'building work' goes beyond the mere 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.[205] 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)'.[206] These were the activities that were the focus of the Royal Commission,[207] on whose recommendations the BCII Act is based. The combined effect of the definitions of 'building industry participant' and 'building work' is that a broad range of individuals and organisations within a range of industries may be the subject of an investigation by the ABC Commissioner.

In addition to the many potential subjects of the ABCC's jurisdiction, there are a large number of pieces of legislation or legislative instruments that may be investigated by the ABC Commissioner. The ABC Commissioner 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 and the WRA — but also contraventions of a 'Commonwealth industrial instrument',[208] 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 [AIRC];
(e) the Australian Fair Pay and Conditions Standard.[209]

In contrast to the investigatory powers of the BIT,[210] there is no prohibition on the use of the ABC Commissioner's investigatory powers to investigate 'minor or petty' contraventions. The ABC Commissioner 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 ABC Commissioner an extremely broad discretion to exercise his or her 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 the work is carried out 'in a manner different from that in which it is

204 BCII Act s 4(1).
205 BCII Act s 5.
206 Australian Industry Group, *Building and Construction Industry Improvement Bill 2003: The Australian Industry Group's Position on the Exposure Draft*, 2003, p 8.
207 Ibid.
208 BCII Act s 4(1).
209 BCII Act s 4(1).
210 WRA (as amended by the Codifying Contempt Act), s 88AA(3).

customarily performed'.[211] As the Honourable Murray Wilcox QC stated: 'Chapter 5 of the BCII Act is unusual, if not unique, in that it imposes substantial monetary penalties upon people in a particular industry who engage in *any* particular industrial action.'[212]

The definition of 'unlawful industrial action' indicates the very low threshold that the ABC Commissioner must satisfy before being able to exercise his or her investigatory powers. It would be within the ABC Commissioner's investigatory powers to require any person who might have information about a strike, a slow-down or even a sick day taken by an employee to provide 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 20 minute meeting organised by the two men to collect money for the widow of a worker crushed to death on a building site.[213]

## B ABCC focuses on breaches of civil, not criminal, law

The Coalition Government stated during the second reading debates on the 2005 bill that the purpose of the BCII Act was to create 'a code of practice with real criminal teeth'.[214] The building and construction industry needed 'a fighter of organised crime'.[215] With such functions, it was argued that the ABC Commissioner 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 ABC Commissioner, such as one requiring him or her to give evidence, provide information or documents or take an oath or affirmation.[216] 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.[217]

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 1000 penalty units (currently, $110,000) if the defendant is a body corporate and 200 penalty units ($22,000) otherwise.[218] A court may also make orders imposing pecuniary penalties, requiring the payment of compensatory damages or any other order that the court considers appropriate.[219] The latter includes issuing a final or interim injunction.[220] These civil remedies apply not only to the person who contravened the BCII Act but to 'a person [including "an industrial association"] who is involved in

211 BCII Act s 36(1) (definition of 'building industrial action').
212 Wilcox, above n 15, at [19].
213 ABCC, ABCC Media Statement, *Hooker Cockram Dispute — Pay Docking*, Melbourne, 23 May 2006.
214 *Hansard*, Senate, 5 September 2005, p 18 (Senator Johnston).
215 Ibid.
216 BCII Act s 52(6). The penalty for this offence is six months imprisonment.
217 BCII Act s 65(2). The penalty for this offence is 12 months imprisonment.
218 BCII Act s 49(2).
219 BCII Act s 49(1). There is no cap on the amount of damages that may be ordered by the court.
220 BCII Act s 39.

a contravention of a civil penalty provision'.[221] 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'.[222]

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'.[223] That is, 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 Royal Commission found that the ACCC provided a 'useful comparison' as it performed 'comparable functions to the proposed ABCC'.[224] Therefore, it recommended that the ABCC be given the same powers as those possessed by the ACCC under s 155 of the TPA.[225]

The Royal 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 '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'.[226] However, the BCII Act only creates two criminal offences, both of which relate to procedural matters, and while the ABC Commissioner has the power to investigate criminal offences under the Independent Contractors Act and the WRA, he or she 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 brought. Criminal proceedings may, for example, be brought against a corporation for making a false representation that goods are of a particular standard or quality[227] or have sponsorship or approval that they do not in fact have.[228] The functions of the ABC Commissioner are not comparable to those of the ACCC in this regard.

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

221 BCII Act s 48(1) (definition of 'person').
222 BCII Act s 48(1).
223 Royal Commission into the Building and Construction Industry, above n 1, Vol 11, at [144].
224 Ibid, Vol 11, at [169], [170].
225 Ibid, Vol 11, at [175].
226 Ibid, Vol 11, at [145].
227 TPA s 75AZC(1)(a).
228 TPA s 75AZC(1)(e).

dealing with contraventions of the civil law and potentially minor breaches of industrial instruments.

## C Selective jurisdiction of the ABCC

The 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'.[229] However, the Royal 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 differences 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 — that is unique to the building and construction industry. The Royal Commission found that the existing non-industry specific bodies had inadequate powers to enforce Commonwealth industrial law.[230] If this is true, then it is a 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'?[231]

In the selectivity of its jurisdiction, the ABCC differs from other bodies possessing investigatory powers. The ACCC, for example, has jurisdiction over all persons and organisations, regardless of the industry in which they work or operate, that contravene the TPA. 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.[232] 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.[233] Only workers and employers in the building and construction industry have their right to silence and the privilege against

229 Royal Commission into the Building and Construction Industry, above n 1, Vol 3, at [11]–[12].

230 Ibid, Vol 3, at [20].

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

232 CFMEU (Construction and General Division), 'Submission No 37 to the Senate Employment, Workplace Relations and Education References Committee', *Building and Construction Industry Inquiry*, 2004, pp 9–10.

233 Under s 169(2) of the WRA, a 'workplace inspector' may only compel a person to produce *documents*. A 'workplace inspector' is not empowered to compel a person to answer questions or to give information. Furthermore, there are a more narrow range of premises that a 'workplace inspector' may enter in order to interview a person believed to have information relevant to compliance purposes (s 169(2)(a)).

self-incrimination abrogated in proceedings before the ABCC.[234] Only workers and employers in the building and construction industry may be penalised by six months imprisonment for failing to cooperate with the ABCC.[235]

## VII Conclusion

The ABCC was established for the stated purpose of 'promoting respect for the rule of law' in the building and construction industry.[236] However, the investigatory powers conferred on the ABC Commissioner in fact undermine the rule of law in Australia.[237] The ABC Commisioner has largely unchecked powers to compel a person to provide him or her 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 or culpability, 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 industrial and other rights and in the imposition of a term of imprisonment for non-compliance. Making this situation even more disturbing is the absence of meaningful safeguards.

The ABC Commissioner's investigatory powers differ from those possessed by other Commonwealth enforcement agencies such as the ACCC. The ACCC is more constrained as to when, and in regard to which matters, its powers can be exercised. The ACCC is 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, overbroad and inadequately checked investigatory power on a body whose principal function is to investigate civil breaches of federal industrial law in a single industry.

Given such fundamental concerns, our view is that the ABCC should be abolished. We further believe that it is inappropriate to create any other body to deal only with the building and construction industry. Contraventions of industrial law by participants in that sector should be investigated by a single

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234 The failure to produce documents to a workplace inspector exercising powers under the WRA 'without reasonable excuse' is a criminal offence punishable by imprisonment for up to six months: WRA s 819(1). Section 169(8) of the WRA abrogates the privilege against self-incrimination. However, unlike s 53 of the BCII Act, it does not override the secrecy and confidentiality provisions of other legislation. Compliance with such legislation could be a 'reasonable excuse' for the purposes of s 819(1). See also text at nn 193–195.

235 While 'workplace' inspectors have some of the same powers under s 169 of the WRA, the WRA is applicable to all industries. The powers bestowed on the ABC Commissioner by s 52 of the BCII Act apply only to the building and construction industry. There is currently an agreement in place between the ABCC and the Office of the Workplace Ombudsman under which the ABCC has the primary role in investigation and enforcement activities relating to building industry participants: see Forsyth et al, above n 10, at [2.11.3].

236 BCII Act s 3(2)(b).

237 For a further discussion of this issue, see Howe, above n 23, pp 147–66.

body with a brief to apply its powers in a non-discriminatory manner to all employers and employees across all industries. That body should have powers necessary for this task which are subject to the appropriate checks and safeguards.

We recognise, however, that this conclusion is inconsistent with the policy of the Rudd Labor Government. While 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,[238] it promised as part of its 2007 election platform to retain the ABCC with its current powers until 2010. The policy states that the ABCC will be replaced from 1 February 2010 with a specialist division within the inspectorate of Fair Work Australia. On 25 August 2008, the Prime Minister Kevin Rudd reiterated this at a Labor Caucus meeting, stating that his government 'will be adhering to all [its] election commitments, including the ABCC'.[239]

Given this commitment, we need to consider how to improve on the ABCC model. What law should this new specialist division of Fair Work Australia apply? What coercive and investigatory powers should it have? What level of independent oversight is necessary to prevent misuses of power?[240]

In relation to the first question, in our view, the law enforced by the specialist division should be limited to the general law of workplace relations. There is inadequate justification for maintaining a special system of industrial law solely for the building and construction industry. As noted by the Honourable Murray Wilcox QC, concerns about the broad scope of the investigatory powers of the ABCC have been met with little 'hard evidence' about the 'utility' of these powers.[241]

This answer assists in resolving the second question, as well as one of the main problems with the ABCC, namely, that the over-breadth of definitions such as 'investigation' and 'unlawful industrial action' mean that the threshold for exercising the s 52 investigatory powers is too low. The coercive and investigatory powers of this new specialist division should be limited to those that are necessary generally to enforce industrial law, with clear criteria being entrenched in the legislation as to the matters that the decision-maker is required to consider before exercising his or her powers. The curtailment of individual liberties like the right to silence and the privilege against self-incrimination should only be considered in regard to the investigation of the most serious criminal offences. Even then, it is not clear that the abrogation of such basic rights can be justified.

The final question relates to the level of independent oversight of the investigatory powers of the new specialist body. We agree with a number of

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238 See, eg, *Hansard*, Senate, 18 August 2005, pp 53–6 (Senator Wong).

239 P Coorey, 'Construction watchdog row splits Labor', *Sydney Morning Herald*, Sydney, 26 August 2008 at <http://www.smh.com.au/news/national/construction-watchdog-row-splits-labor/2008/08/25/1219516370471.html>. The Deputy Prime Minister and Minister for Employment and Workplace Relations also reiterated the Australian Labor Party's commitment to create a new inspectorate to investigate and enforce breaches to commence on 1 January 2010: J Gillard, 'Introducing Australia's New Workplace Relations System', speech delivered at The National Press Club, Canberra, 17 September 2008.

240 These are some of the questions that are currently being considered by the Honourable Murray Wilcox QC: Wilcox, above n 15.

241 Ibid, at [61].

the suggestions made in the Discussion Paper released by the Honourable Murray Wilcox QC.[242] First, it would be beneficial for a divisional supervisory board to be established to determine the policies and programs of the specialist body.[243] Second, before the investigatory powers of the specialist body may be exercised, the person who is to issue the summons should be required to obtain the approval of an independent person or body. As the Honourable Murray Wilcox QC states: 'the person in charge of an investigation is not necessarily the person best placed to weigh its potential burden on others; an independent "second look" is a useful safeguard.'[244] Regardless of which body carries out this task — the divisional supervisory board or an independent judicial or AAT officer — the subject of the summons should be afforded procedural fairness. Third, there should be a mechanism for external review by the courts. The Honourable Murray Wilcox QC noted that such review is 'essential' if the specialist body is to be granted coercive powers.[245] We believe that this function is best carried out by courts applying the grounds of judicial review in ss 5 and 6 of the ADJR Act.

Given the Rudd Government's commitment to retain the ABCC and its powers until January 2010, it should take action now to minimise the potential for misuse of power by the ABCC. The Rudd Government's election commitment is consistent with the investigatory powers of the ABC Commissioner being maintained, but made subject to appropriate safeguards. These might be introduced by amendment to the BCII Act and could include checks found in other contexts, such as the requirement that the ABC Commissioner obtain approval before the use of his or her powers from a member of the executive or the judiciary, or that the exercise of the 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'.

In addition, or as a weaker alternative, the government could apply an existing, if limited, mechanism in the BCII Act for ensuring that the ABC Commissioner'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 ABC Commissioner is similar to the power sometimes conferred by legislation on a member of the executive to give

242 The Honourable Murray Wilcox QC is due to provide his report to the Federal Government by the end of March 2009. This means that the proposed legislative provisions abolishing the ABCC and integrating its functions into the specialist division of Fair Work Australia will not form part of the government's substantive workplace reform legislation, which is likely to be introduced into Parliament in late 2008.

243 Ibid, at [97]–[98].

244 Ibid, at [120].

245 Wilcox, above n 15, at [129].

'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,[246] 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 . . . commit them to a person upon whom the Parliament has not conferred the power'.[247] For example, the written direction must not say that the power of the ABC Commissioner 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 parliament has expressly conferred. For example, the direction must not state that the ABC Commissioner 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'.[248] It would be valid for the minister to issue a written direction requiring, for example, the ABC Commissioner to provide a statement of written reasons before exercising his or her investigatory powers. It would also be valid for the ABC Commissioner to be required to exercise an investigatory power only after considering 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.[249]

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 which we have examined in this article. 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.

246 *Aboriginal Legal Service v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565 at 578 per Tamberlin J; 139 ALR 577.

247 Ibid, at FCR 567 per Black CJ.

248 Ibid.

249 The Honourable Murray Wilcox QC notes that 'the issuing officer is not required to make a judgement as to the need to make that investigation, having regard to the nature and seriousness of the suspected contravention, nor the importance to the investigation of having evidence from this particular person'. He went on to say that he was sure that the ABC Commissioner and any Deputy Commissioner who is called upon to consider exercising the power considers these matters. '[N]onetheless, it might be desirable for the legislation relating to the FWA Specialist Division to impose an express obligation to that effect upon any person empowered to issue a summons . . . If the statute sets out the obligation, these matters are less likely to be overlooked': Wilcox, above n 15, at [119]–[120].