



Submission to the Wilcox Review
of the Australian construction industry reforms

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Institute of Public Affairs
December 2008

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Public Affairs**
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Part A: The Review

The Institute of Public Affairs is pleased to respond to the Wilcox discussion paper concerning the intended abolition of the Australian Building and Construction Commission (ABCC) in January 2010 and the transfer of its powers to the specialist Building and Construction Division within Fair Work Australia (FWA).

The ABCC was set up in 2005 as a specialist construction industry enforcement body. It was a key part of the recommendations of the Cole Royal Commission (2002-03) which found wide scale and systemic lawlessness in the construction sector across Australia. The ABCC has been heavily criticised, particularly by construction unions who are most subject to law enforcement activity by the ABCC. In 2007 the federal Labor Party made a commitment to close the ABCC and transfer its powers to a specialist division of FWA. The review by Justice Wilcox is charged with recommending how the transfer should occur. Justice Wilcox has issued a discussion paper inviting submissions.

1. The parameters of the discussion

The discussion paper is robust and challenging. Justice Wilcox intends this. He says “I am deliberately provocative on some issues and open to discussion on them all”. It is within this context that the IPA responds in a similarly forthright manner.

The Wilcox discussion paper operates on two levels:

- First, there is a superficial level where the Review exercise could appear to be an entirely technical one which does not question the appropriateness of the ABCC’s tasks but rather asks how those tasks should be undertaken by a new specialist division within the new Fair Work Australia.
- The second, deeper level is more substantive. The tone and approach of the discussion paper in many places gives the impression that the very reason for having the ABCC or a similar but reconstituted body, is under question. This is probably what Justice Wilcox refers to as his intent to be “provocative”. Specifically, the discussion paper takes as given most of the major criticisms levelled at the ABCC by the union movement and many labour academics and politicians. The allegations are receiving significant media coverage through union-funded, politicized, television and multi-media campaigning. The allegations which the discussion paper seems to accept fall into three broad areas:
 - a) That the ABCC discriminates against unions and breaches Australia’s International Labour Organisation treaty obligations, and that, as a result, unions are ‘victims’ of the ABCC’s powers and activities.
 - b) That the alleged productivity increases and economic benefits resulting from the activities of the ABCC are not real. Justice Wilcox states that there is no ‘hard evidence’ to support the claims of economic benefit.
 - c) That the activities of the ABCC diminish competition in the construction industry.

2. Overview of the IPA's position: The need is to protect competition institutionally

The government intends to deliver on its 2007 election commitment to close the ABCC and transfer its powers to a specialist division of Fair Work Australia. At the same time, the government says that it intends keeping a 'strong cop on the beat' in the construction sector.

The IPA does not believe that the ABCC should be transferred to a specialist division within Fair Work Australia. The problems and issues confronting the construction sector are not primarily ones within the jurisdiction of industrial relations law. Rather, the problems revolve around commercial issues concerning the protection of competition and of consumers.

If the ABCC is to be closed, the IPA believes that its powers should be transferred to a specialist division of the Australian Competition and Consumer Commission (ACCC). We understand that this is not the election undertaking to which the government is committed and that such a proposition is outside the scope of the Wilcox Review. But the election undertaking is fundamentally flawed policy.

The essence of the historical problem of the construction sector is that industrial relations laws and practices have been used as a cover by unions in collusion with some construction businesses to manipulate and distort competition for the purposes of securing market power. Industrial relations practices have been used to thwart the purpose of the *Trade Practices Act* (that is, to protect competition) and to thwart the activities of the ACCC in enforcing the TPA.

The ABCC is modelled along the lines of the ACCC, albeit somewhat more strongly given that it almost has the powers of a standing royal commission. The ABCC is not an industrial relations institution but rather an exceedingly strong institution for protecting competition. The act of transferring the ABCC's powers to an industrial relations institution (Fair Work Australia) must inevitably result in an outcome where the protection of competition in the construction sector is substantially reduced. It is consequently almost inevitable that the sector will return to the old collusive ways that destroy competition.

The challenge for Justice Wilcox in his review is to prove that, in transferring the ABCC's powers to Fair Work Australia, the FWA is capable of preventing and will prevent the destruction of competition in the sector.

The IPA is strongly of the view that if the Building and Construction Division within Fair Work Australia has powers that are watered down from those exercised by the ABCC, the government's promise of keeping a "strong cop on the beat" will be empty words.

There are serious consequences if this occurs. The construction sector is markedly more law-abiding, productive and competitive than it was before the ABCC commenced operations in late 2005. The economic and social benefits delivered in three short years are substantial. In his discussion paper Justice Wilcox denies that there is hard evidence to support the assertion that there have been benefits. He is wrong. If the powers wielded by the new 'cops' are not nearly equivalent to those of the ABCC, the industry will quickly fall backwards into illegality, markedly lower levels of productivity and diminishing competitive standards. The greatest impact will be on government-funded community infrastructure projects such as roads, schools, hospitals and the like, because of increasing costs. As a result, the capacity of government to fund necessary social and economic infrastructure will be diminished.

3. This submission

Within this framework, the IPA submission falls in two parts.

The submission:

- Revisits the justifications for creating the ABCC in the first place and how its powers are part of an interlocked and successful programme to apply the rule of law and competition to the construction industry in Australia.
- Considers some of the technical questions raised in the discussion paper.

4. Background to the ABCC

Set up in late 2005, the ABCC is the key institution designed to bring the rule of law to the construction sector. However, it is only part of the package of reforms that were introduced to change the industry as a result of the findings of the Cole Royal Commission of 2002-03. The Royal Commission found that the industry was beset by lawlessness. In his discussion paper, Justice Wilcox supports the findings of the Commission. He says:

However there can be no doubt that the Royal Commissioner was correct in pointing to a culture of lawlessness, by some union officers and employees, and supineness by some employers, during the years immediately preceding his report. The evidence summarized in the report is too powerful to permit any other view.

Justice Wilcox thus appears to accept the fact that, before 2003, the construction sector operated in an environment of competition destruction.

To overcome the lawlessness the government introduced a set of interlocked measures. These include:

- Limiting the reach of agreements: Banning clauses from industrial instruments that extended the control of instruments to commercial matters. Known as ‘prohibited content rules’ this stopped, for example, an enterprise agreement dictating from where a company was permitted to buy other services. This was/is intended to break the control that unions, for example, could exercise over the supply chains that fed the industry. A typical example was where industrial agreements required builders to purchase their window frames from only specified suppliers.
- Using the government’s commercial influence. Ensuring that all builders who wished to undertake government-funded construction work had to comply with the Commonwealth’s Code of Conduct for the construction sector. This was specifically intended to use the Commonwealth’s major position in the market as a purchaser of construction services to apply commercial pressure to construction firms to ensure compliance with the law. With government-funded construction constituting around one-third of all Australian construction, the government is in a powerful commercial position to require adherence to the law.
- Control of worksites: Creating limitations and controls on unions in terms of their capacity to control worksites. This involved limits on their right to enter construction sites without approval, limits on legal strike activity, and so on.

The role of the ABCC: The ABCC is the enforcement lynchpin acting as a specialist institution that patrols the industry, checking and enforcing adherence to these and other laws. Its powers are broad and sweeping. The activities of the ABCC can only be assessed within the context of the interlocking package of laws it is required to enforce. The union multi-media campaign against the ABCC presents the ABCC as if it is a law unto itself and uncontrolled. This is false. The ABCC operates in a very

similar manner to, and with similar controls over it to, the Australian Consumer and Competition Commission (ACCC) and the Australian Securities and Investment Commission (ASIC). The only difference between the ACCC, ASIC and the ABCC is that the ABCC has direct constraining impact on the lawless behaviour of unions in the construction sector, hence their objection to the ABCC.

Part B

Has the ABCC been successful? Is the construction sector more lawful and competitive than it was before the ABCC? Is there “hard” evidence?

5. The position of Justice Wilcox

In his discussion paper, Justice Wilcox says that there is no hard evidence to support the contention that the industry post-ABCC is more competitive and productive than before. He also suggests that it cannot be proven that the clear and demonstrated reduction in lost days due to strikes post-ABCC can be attributed to the activities of the ABCC. The IPA disagrees, asserting that there is substantial hard evidence on each of these points. The question from the IPA’s perspective is not whether the evidence exists but whether the evidence is accepted as valid or not.

Justice Wilcox has sought to be provocative. The IPA believes it is therefore appropriate to respond in like manner. The Wilcox Review needs to face a challenge. If the evidence that the IPA asserts is available, is nonetheless rejected, where is the hard counter-evidence that the industry is *not* more productive and lawful post-ABCC? Do the critics of the ABCC assert that the construction industry remains unlawful? Or do the critics assert that improvements in the construction sector have come about for reasons unrelated to the activities of the ABCC? If so, what are those other reasons? Justice Wilcox does not canvas these counter-propositions in his discussion paper. They need to be canvassed. For completeness and balance it is incumbent on the Wilcox Review to seek such opinions from opponents of the ABCC.

From the IPA’s point of view, the rejection of the evidence of improvements in the industry by some parties since the ABCC came into being has strong political rather than analytical motivation. This observation does not apply to the Wilcox Review or to Justice Wilcox himself. The observation is that unions and individuals who most benefited from the lawlessness that preceded the operation of the ABCC are using political campaigning and political relationships to facilitate a return to lawlessness for the purposes of favouring their own positions.

The IPA asserts that hard evidence about the benefits for the construction industry, the community and the wider economy *is* readily available and should not be discounted. The IPA has gathered the following evidence.

5.1 The Struggle to Build in Victoria:

In November 2006, the IPA conducted its own comparative analysis of the differences in the construction sector after the ABCC started operating and produced a report, *The Struggle to Build in Victoria*. We case-studied Victoria, taking two major comparative construction projects as our starting point. We compared the construction of the City Link project which was built pre-ABCC with the construction of East Link, the industrial agreements for which were heavily influenced by the pending start-up of the ABCC and whose construction mostly occurred post-ABCC. We identified a projected,

comparative saving for Eastlink of \$295 million on an overall construction budget of \$2.5 billion, representing an 11.8 per cent productivity differential.

We then summarized a wide range of pre-ABCC Victorian projects that had demonstrated losses as a result of lawlessness in the construction industry. We were able to assess productivity and cost implications for the State of Victoria, and found that the benefit of the construction reforms to the Victorian budget over a ten-year period would be in the billions of dollars.

This IPA study has been heavily criticized by construction unions. We include the study as part of our submission and as representing “hard evidence”. We are available to discuss this in more detail and provide supporting documentation.

5.2 To Build or Not to Build: In October 2007, the IPA organized a conference, *To Build or Not to Build*, to look at the construction sector and the differences in the sector post-ABCC. We had presentations from:

- Master Builders Association of Victoria
- Troubleshooters Australia
- Chamber of Commerce and Industry Western Australia
- Australian Constructors Association
- Econtech
- Master Builders Queensland
- The ABCC
- Blake Dawson Waldron

Each organization presented “hard” and compelling evidence of the substantial improvement in the productivity of the construction sector across Australia. We assume that most of these organizations will be making their own submissions to the Review, but to ensure that there is clear “hard” evidence available, we submit copies of each of the presentations as part of our own submission. The evidence is compellingly strong and consistent.

The IPA’s report, *The Struggle to Build in Victoria*, evidence from the ABCC and evidence from Econtech have all been attacked by the CFMEU (in particular) and others in the union movement as not being valid. The attacks that the IPA has seen have not focused on the detail of the evidence but rather have been little more than political attacks from parties whom the Cole Royal Commission identified as the market rorters in the sector.

The IPA is surprised to see, however, the readiness with which the discussion paper seems to dismiss so lightly the evidence presented by Econtech, for example. If this ‘hard’ evidence can simply be dismissed as irrelevant, it raises the prospect that the bar which Justice Wilcox has set in order to be satisfied that hard evidence is indeed hard, is so high as to be impossible to hurdle.

5.3 The Commonwealth Games Rort: In order to provide further evidence, the IPA has undertaken an additional research project. In *The Struggle to Build in Victoria*, mention is made of the additional costs associated with the building the Commonwealth Games facilities. We have sought to verify this information further. Through FOI requests, the IPA has obtained detailed Victorian Government costing and contracts related to the Commonwealth Games Village.

The Games Village required the construction of normal domestic housing for use by the athletes during the games and for sale after the games. Instead of the houses being built by the housing sector, they were built under industrial agreements and conditions applying to the construction sector. Adjusting for the variations required for the Commonwealth Games specifications, the contracts obtained under FOI reveal that an additional cost of 35 per cent was added to the contract cost due to the fact that construction processes were used rather than domestic housing processes. Our report is attached as part of this submission.

The outcome was that the taxpayers of Victoria paid 35 per cent more than they should have for this normal domestic housing construction. This cost differential cannot be ignored or simply dismissed. To dismiss such evidence is irresponsible.

6. Conclusion on the hard evidence

The IPA believes that evidence is available which clearly shows that the activities of the ABCC have produced large productivity gains and economic benefits for the construction sector and the Australian economy and community. The ABCC has only been operating for less than three years. This is insufficient time for its full impact and benefits to be felt. But the ‘hard’ evidence cannot be ignored or discounted.

Having made a contribution on the “hard evidence” issue, the IPA now seeks to address the core policy issue.

Part C

Competition in the construction sector

7. Understanding the construction sector from the perspective of competition policy

This submission argues that the Australian construction sector needs specifically tailored regulation to ensure that a competitive market can function in the sector.

The IPA has actively studied, observed and commented on the construction sector for almost a decade. We make judgements about the construction sector in terms of the extent to which it functions as a competitive market. We see this as the core issue that must be addressed in contemplating the dissolution of the ABCC and the transfer of its powers to FWA.

Our observations and studies bring us to the conclusion that the sector has not functioned as an optimally competitive market in the past. In fact, the construction market was a primary example of a failed and malfunctioning market. It was typified by high levels of illegal behaviour—in particular, collusion designed to prevent or minimize competition and to deliver market power to the colluding parties. Further, it was this endemic market collusion that formed fertile ground upon which lawlessness, including criminality, flourished. The Cole Royal Commission to which Justice Wilcox refers exposed this.

The Cole Royal Commission report should not be read as a commentary on an industrial relations environment. It is more accurately a forensic dissection of the ugliness which follows when a competitive market is rorted by collusive, monopolistic-orientated behaviour to the extent that the sector ceases to function as a competitive market. Construction was, in effect, a controlled market, a

market controlled by ‘inside’ players for their own benefit and to the detriment of the consumer and the wider community.

These inside players consisted of some unions and union officials in collusion with some construction companies and some construction executives and managers. Ordinarily, such collusion would be illegal under the *Trade Practices Act*. Given current proposals to amend the *Trade Practices Act*, such collusion could become punishable by imprisonment. But, in the construction sector, the Australian industrial relations systems and IR laws were used to mask the collusion, thereby giving it a veneer of legality. In actuality, the *Trade Practices Act* and the ACCC were effectively neutered, rendering them incapable of taking action against market manipulative collusion.

The process was sophisticated and complex both in terms of its execution and the subterfuge involved. In its simplest form, it worked something like this:

- Tenders for a construction job (road, building, mine or other) would be advertised.
- Bidders would place their bids for work in what appeared to be an open bidding process.
- Bidders would be assessed not solely on price but on their capacity to undertake the construction successfully.
- Some bidders would have close working relationships with construction unions. These unions and builders entered industrial agreements that effectively set a floor under the price of the tender.
- Those construction companies that had union agreements would only compete between themselves on the marginal issues above the floor.
- If a non-union construction company won the tender, unions would use on-site or off-site violence, intimidation and disruption to building supplies to make sure that the company could not deliver the job within budget and on time. Such intimidation and disruption was designed to cause, and succeeded in causing, companies to go broke. Alternatively, they forced the companies into deals with the unions.
- The violence and intimidation was always undertaken by comparatively small bands of criminal elements in or associated with the unions and was directed at building workers and construction managers. From the union perspective violence against construction workers was necessary to ensure that union disruption of construction activities could be enforced at whim. Violence and intimidation against construction managers were necessary to ensure that they complied with union instructions.
- Eventually, in market segments where this process worked, only companies with union agreements and relationships could or would put in bids for work. This suited the companies because it limited competition against them and maximized their capacity for profit. Effectively, cartels formed between the companies that maintained “good” relationships with unions.
- As the cartels became entrenched in their market segments, relationships between union officials and company managers ceased to be oppositional but instead became bonded. Companies head-hunted union officials to work for them. Executives’ careers were built around the relationships in the cartels. The distinctions between some unions and companies became blurred. Unions would receive regular and direct payments from companies, effectively bribes. Payments would be made to union ‘Christmas picnic’ funds or union-run ‘training’ schemes, ‘redundancy’ funds and the like. Highly placed union officials would “buy” company-built apartments at ‘bargain’ prices.

- The seediness of the corruption and collusion knew no ends. It was all possible for one reason. It was masked and made ‘legal’ through industrial relations arrangements. The cartels met and organized the market manipulation in “industrial relations negotiations” meetings. The agreements were sanctioned and made “legal” through industrial relations agreements which, in many if not most cases, gave legal sanction to union intimidation. The agreements frequently operated across entire industry sectors. None were hidden. They were all open, blatant and public.

There were some companies that tried to defy the system from time to time, but they would be put out of business. Some companies in some market segments successfully defied the system, but such acts of successful defiance were isolated and relatively limited.

The system was not created overnight. Indeed, it evolved over generations to such an extent that it became entrenched behaviour and part of the construction sector’s culture. The culture included a code of silence. Everyone knew that the collusion occurred, knew where it occurred but would never speak the truth because everyone had become commercially involved in the collusion. The lines between normal and acceptable legal market behaviour and illegal collusive activity completely disappeared. The *Trade Practices Act* could not operate effectively in the sector because its application was consistently blocked through jurisdictional play in industrial courts. Because collusive activity was technically defined as an ‘industrial matter’ any legal action was confined to industrial courts where the matter would be sanctioned. The ACCC’s powers were not and remain insufficient to override the jurisdictional reach of industrial courts. The police were largely incapable of acting against violence or intimidation for exactly the same reason—except in the most extreme circumstances.

What is critical to understand is that, even though the construction unions were the primary operators of the system, they were not solely responsible. With the construction sector the collusion was only possible because some companies and many executives willingly and eagerly participated. In fact, the primary commercial beneficiaries were senior union officials and selected senior company executives. And they were untouchable.

The Cole Royal Commission detailed the operation of the collusive system. As detailed as it was, the Commission could not and did not expose everything, because the industry’s code of silence frustrated the investigations. But the Commission did recognize that the essential problem was one of collusive market behaviour that manipulated and delivered market power to certain players. The Commission’s recommendations, which were adopted almost completely, sought to leave as its heritage a regulatory system and enforcement process that would break the back of collusive behaviour and prevent its re-emergence.

The package is as described earlier:

- Significant limitations were placed on what could be included in industrial agreements. This was primarily designed to prevent industrial agreements and the legal processes of the industrial courts from giving intimidation, violence and collusion its legal mask.
- Use of the Commonwealth Government’s commercial clout as a dominant purchaser of construction services to ensure the industry’s adherence to free-market processes.
- Limitations on the entry rights of unions to worksites to constrain their capacity to engage in intimidation and violence.

The ABCC is the policeman charged with enforcing the free-market regulation system. The Cole Royal Commission recognised that the ABCC would need unusually strong powers if the industry's collusive behaviours were to be changed.

For this reason, the ABCC is modelled very much along the lines of the ACCC and ASIC because its purpose is to prevent collusion and protect competition. It is not an industrial relations 'umpire'. It is a competition and market protection institution with considerable powers.

Chief amongst these powers is the much-criticized power of the ABCC to require people to attend interviews or face jail. This power was recommended and given to the ABCC as a key tool for breaking the code of silence in the sector. Anyone called in to interview cannot be prosecuted over information they give to the ABCC. What this power enables the ABCC to do is to draw a broad sweep of individuals into interview with respect to any particular issue or incident. The information that is given is confidential. Because they must attend an interview, every individual is given protection when they tell the truth. Effectively, no-one external to the ABCC knows who has said what. This means that unions do not know who may have 'ratted', and union-collusive company executives are equally ignorant. The code of silence was mostly enforced by company executives who would either shut off managers' careers if they spoke out or deny work to subcontractors who spoke out. Without the knowledge of who may have told the truth, a new code of silence, controlled by the ABCC, has descended on the industry. This time the silence works to promote competition, rather than work against it.

8. Has the ABCC made a difference? What of the future?

The ABCC has only been operating for three years. It should not and could not have been expected that the package of reforms would have transformed the industry in this period. What is surprising is the degree to which change has happened. Justice Wilcox denies that there is hard evidence of change. We have stated that we believe him to be wrong. We are surprised by the high quality evidence that has become available so quickly which demonstrates the changes. But we believe that this change is only the beginning.

To change market-rorting behaviours and deep-seated cultures that have developed over generations takes time. Three years is not enough. For real and lasting behavioural and cultural change to occur, ten years would be a more realistic timeframe. The IPA believes that the government is making a serious mistake in abolishing the ABCC.

The ABCC should be retained for at least another two years as is, then be subject to review based on the state of the industry and retained for another five years. At the end of ten years, the dissolution of the ABCC could be contemplated, with its absorption into the ACCC conditional on the requirement that the ACCC had the powers to prevent the re-emergence of such industrial relations masking of collusion.

The IPA's belief and prediction is that that the absorption of the ABCC into Fair Work Australia will inevitably result in the re-emergence of systemic, collusive, anti-competitive market behaviour in the industry. FWA is intended and designed to be an industrial relations management institution. It does not and will not have as its brief the protection of competitive markets. There is nothing to indicate that the ACCC is, or will be, any better placed than it has been in the past to stop collusive behaviour emerging under the mask of industrial relations law.

The industry will go backwards relatively quickly. Construction unions are waiting to reassert their dominance and intimidation. Some construction executives and companies are likewise waiting to regain the market collusive capacity they enjoyed in the past.

That being said, however, the task of the Wilcox Review is not to question the intent of the government to transfer the ABCC's powers to FWA but rather to comment on how and what powers should be transferred. We turn our commentary to some of the technical issues that Justice Wilcox asked to be addressed.

Part D

Key questions/issues from the Wilcox discussion paper

The following list is our summary of issues raised in the discussion paper.

9. The discussion paper asks if the commercial construction market displayed market failure such that it required special intervention.

Yes. As explained in our earlier discussion on the operations of the construction sector, the sector was a prime and extreme example of market failure. Its failure as a market was immense. As such, it required specialist, dedicated attention from a powerful regulator. This was the key lesson from the Cole Royal Commission.

Is this still the case?

The change in the construction sector has been substantial such that a competitive market has now found a capacity to function. However it is dependent on the continuation of the ABCC (or like body) enforcing laws that allow the market to function. It is still early days in the change process. Behaviours have changed but need to change further.

10. The Wilcox discussion paper says “Many people, especially in the union movement, believe there is no need for a special body to police the building and construction industry”

They are wrong. The construction unions are a prime, though not the only, reason for the market failure that has occurred in the sector. The key problem was the manipulative collusion that occurred between construction unions, some union officials and some construction executives and managers. The collusion was sophisticated using the industrial relations system and laws as a mask for the collusion. This situation would re-emerge quickly if dedicated enforcement was reduced. A specialist body modelled along the lines of the ACCC is required and, if not a specialist body, it should be a well-armed and dedicated division of the ACCC.

11. The discussion paper asks if the BCII laws are discriminatory

To the extent that the laws target the construction sector for the purposes of preventing market manipulative collusion, the laws treat the sector unlike other sectors. It is not surprising that some who are being targeted for their market manipulative collusive behaviour would argue that they are being discriminated against. But this is a linguistic sleight of hand intended to paint the perpetrators of collusion as victims and to garnish public sympathy for the removal of the ABCC and its powers. If there is discrimination, it is practised by those who act collusively in the

construction sector when they engage in discrimination against persons acting lawfully in that sector.

12. The Wilcox discussion paper raises the allegation that the BCII laws breach ILO conventions on Freedom of Association. (p8)

Justice Wilcox says, “The ACTU complained to the ILO that the BCII Act...breaches two ILO Conventions that Australia has ratified. The former Coalition government disputed this claim.” Without drawing a definitive conclusion as to whether ILO Conventions are breached by the BCII, Justice Wilcox lays out in some detail reports made to the ILO Governing Body which he says the Governing Body “supported.” There are several points to be made in this respect.

The IPA understands that the report to the Governing Body of the ILO by one of its committees was an interim report only and formed the basis for further investigation. The committee report was instigated by the ACTU. The ILO is a body that applies exhaustive investigative processes before coming to final decisions. The allegations made by the ACTU are allegations only and the Governing Body has agreed that the allegations should be further investigated. This is reasonable and proper for an international body that needs to make sure it has investigated fully. Allegations should not be dismissed lightly.

However, the Conventions of the ILO, including the Freedom of Association Conventions, are framed in such a way that they must be considered by the ILO with regard to the specifics of national circumstances. In the context of the BCII, the specifics relate to the unique Australian circumstances of the market manipulative collusion operating in the construction sector and the findings of the Cole Royal Commission. It is therefore apparent that the ILO is in the process of considering the operation of the BCII. Views are being considered but no conclusion has been reached in this respect.

Justice Wilcox has not reached or suggested any conclusion other than that ILO Conventions should be adhered to.

It is also important that the ILO position should not be misrepresented. The IPA believes that this is the case in this instance. Far too often the good name of the ILO is used for the purposes of moral posturing, even when the posturing is not warranted.

There is nothing in the BCII or the activities of the ABCC that restricts the right or ability of construction unions to organize lawfully. There are restrictions on the ability of unions to organize unlawfully. For example, unions can hold meetings and enter worksites. Meetings can be held off-site or on-site with appropriate notice and approvals. What construction unions cannot do under the BCII is have the ability to enter sites at whim and roam around sites as they see fit. Entry and access to building sites must be subject to appropriate safety arrangements and workers on sites have a right not to be approached by unions if they do not wish to be approached. Building unions claim that if they do not have unrestricted, at-whim access to building sites and all parts of a building site, that they are therefore restricted in their right to organize. This is nonsense! Unions further claim that such restriction is a breach of ILO Conventions. This is an illegitimate interpretation of ILO Conventions and of the position of the ILO itself.

13. Has the culture in the industry changed such that the problems evidenced by the Cole Royal Commission are no longer evident or of lesser extent? (p 4)

The IPA believes, as discussed earlier, that there is hard evidence that the problems evidenced by the Cole Royal Commission have diminished. However, we do not believe the problems have been purged from the sector. It is clear that attempts at intimidation and collusion are still being made and require continuing policing. Considerably more time is required before it could be said that the laws and policing of the laws following on from the Cole Commission have fully worked. There is much more improvement that has to be made in the sector. The pervasiveness of the culture is such that were the laws to be removed or weakened, the industry would return to its old behaviours with some speed. The ABCC and existing laws would need to be retained for about ten years for their full impact to be realized. Only then, after review, could consideration of closing the ABCC be contemplated.

14. Should the Commonwealth exercise its commercial power in the market place to leverage the industry into lawful behaviour? Wilcox says “...it (the Guidelines) may seriously be affecting competition in the construction sector...” (p14)

Yes, the Commonwealth should use its commercial power to require lawful behaviour. The suggestion that a requirement to comply with the Code of Conduct Guidelines adversely affects competition is like suggesting that a requirement to comply with work safety laws adversely affects competition. Certainly companies that don't comply with work safety laws may achieve an apparent capacity to tender for work at lower cost. But ultimately, the cost will be borne by injured workers. Likewise, non-compliance with the Guidelines could potentially give some companies a competitive advantage in tendering. But the Guidelines are designed specifically to ensure that the Commonwealth benefits from a truly competitive market. If a tenderer does things that reduce competition, the Commonwealth pays through a less competitive commercial environment.

As the largest single consumer of construction sector services, the Commonwealth has a duty to the taxpayer to use all its commercial leverage to ensure that the construction sector market is a free and competitive market.

15. Are the claimed economic and productivity benefits resulting from the construction reforms unsupported by hard evidence? Justice Wilcox says; “The only possible justification of having special restrictive rules for the building and construction industry must be that this is necessary to provide industrial peace and an acceptable level of productivity. Many people assert that the industry’s present happy position, in these respects, is attributable to the BCII Act and the activities of the ABCC. Is there any hard evidence that supports that assertion?” (p 17)

The IPA asserts there is hard evidence as discussed above.

16. Do the BCII operations support safer worksites? Justice Wilcox says, “My first reaction to the ASCC statistics is that they do not give much support to either side’s argument concerning the effect to safety of the WR and BCII Acts.” (p19)

The IPA agrees with this position. Our observations of the industry are that unions, construction firms, workers and managers all have a strong commitment to have safe worksites. There are clear instances where poor behaviour has led to unsafe practices and injuries. It is a constant battle for everyone in the industry to improve safety. The operation of the BCII does not, of itself, directly contribute to safety one way or the other. There is, however, an indirect contribution.

Construction unions have a long history of using safety as a mask for industrial action. Instead of conducting a strike, they down tools alleging a safety breach. The Cole Royal Commission identified this as a major concern. The City Link project in Melbourne was plagued by such behaviour. Safety is too important an issue to be abused. Sham safety allegations risk creating a ‘boy who cried wolf’ syndrome on worksites. Genuine safety issues risk not being treated with the full seriousness they deserve. The BCII activities specifically target ‘sham’ safety allegations. To the extent that this diminishes the ‘boy who cried wolf’ syndrome, the BCII would contribute to safety. But this cannot be observed within, or be detected by, the ASCC’s statistics.

Part E

A CHECKLIST OF QUESTIONS

The following questions are drawn directly from the Wilcox discussion paper. Justice Wilcox has asked for response to these questions in this format.

Content of the law enforced by the Specialist Division

1. Is it desirable to maintain:

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

Yes. Unlawful unprotected industrial action in the construction sector in the past has not been subject to penalties sufficient to deter the unlawful action. If the enforcement Division is to have real teeth it must have available to it strong penalties.

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

The IPA understands the coercive interrogation powers are similar in nature to that available to ACCC and ASIC. They are needed to break the ‘code of silence’ that operated in the industry. There are effectively whistleblower protection powers.

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

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

The code should be maintained in their present form for a considerable period of time. We would recommend review of the Code in the next two years.

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

No. The Code is a guideline for use in the federal government’s commercial tendering activities. To give it a status beyond that would subject the Code to political manipulation or if legal appeal, would create significant inefficiencies in the Commonwealths commercial undertakings.

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

Yes. It is most appropriate and is perhaps the most powerful tool available to ensure a free and competitive market operates in the construction sector.

Structure, accountability and independence

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

The Specialist Division should be a stand alone institution in every respect.

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

The supervision should be similar to that applied to the ABCC, ACCC and ASIC.

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

Yes. The inspectors should be dedicated to the task of protecting competition in the construction sector.

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

Identical to that of the ABCC.

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

None. The relationship between the Minister and the Specialist Division should be of a similar kind between the ACCC and ASIC and their respective Ministers.

Scope of investigation and compliance activities

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

Yes.

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

No comment.

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

No. The specialist division is and should be concerned with protection of effective competitive market conditions in the sector. Identified breaches of employee entitlements and related issues should be referred for resolution to the Workplace Ombudsman or like section in FWA.

Specialist Division powers and affected persons' rights

11. What should be the criteria for the issue of a summons to attend for compulsory interrogation, if this power is to be retained?
The powers should be similar to that available to the ACCC and ASIC.
12. What safeguards are necessary to guard against inappropriate use of the compulsory interrogation power? Is prior concurrence desirable? If so, by whom?
The safeguards should be similar to that available under interrogation from the ACCC and ASIC.
13. Should FWA reimburse summonsed people their expenses and lost wages?
Yes.

External monitoring

14. Should the new legislation provide for external monitoring of the Specialist Division's exercise of its coercive powers? If so, how and by whom? Do you favour the OPI model? If not, why not?
The OPI investigates serious criminal matters. The Specialist Division will be involved in civil issues. Oversight and monitoring should be similar to that applying to the ACCC and ASIC.

Litigation by the Specialist Division

15. Should the Specialist Division be able to bring legal actions in its own name to enforce workplace laws governing the building and construction industry?
Yes.
16. Should the Specialist Division be able to intervene in other parties' litigation? If so, should this be as of right or only by leave of the court or relevant tribunal?
The Specialist Divisions should be able to intervene as of a right where it relates to matters to do with the construction sector.

Use of information and other agencies

17. Should the Specialised Division be able to pass on information to other agencies? If so, to whom and under what circumstances?
Yes. The agency should work closely with other government agencies passing on information concerning breaches of law and cooperating with the agencies to rectify breaches of the law. The specific agencies should include the Australian Taxation Office, Centrelink, state workers compensation and occupational and health and safety authorities.