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## Building and Construction Industry Improvement Bill 2003

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I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

Bills Digest  
Nos. 129–130 2003–04

Building and Construction Industry Improvement Bill 2003

Building and Construction Industry Improvement  
(Consequential and Transitional) Bill 2003

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Law and Bills Digest Group  
7 May 2004

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# Building and Construction Industry Improvement Bill 2003

**Date Introduced:** 6 November 2003

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** The main provisions commence on Proclamation, or, if this does not occur within 6 months of Royal Assent, on the first day after the end of that period.

## Purpose

The Building and Construction Industry Improvement Bill introduces additional workplace relations and occupational health and safety regulation specific to the Australian building and construction industry.

## Background

In his Second Reading Speech on 6 November 2003, the Minister for Employment and Workplace Relations, Hon. Kevin Andrews MP, stated that the Bill 'is a key plank in the most significant reform of the building and construction industry ever attempted'. The Minister said the Bill is a response to the Royal Commission into the Building and Construction Industry ('Cole Royal Commission'), noting that 'at the core of the royal commission's findings about the building and construction industry is an entrenched culture of lawlessness, coupled with widespread inappropriate practices that act against choice, productivity and safety'. According to the Minister:

- civil, criminal and industrial laws are breached with impunity in the building and construction industry due to weaknesses in the current enforcement mechanisms
- practices that would not be tolerated in other industries are widespread in the building and construction industry
- 'pattern bargaining' (seeking common employment conditions beyond an individual business) is the norm in the industry and one-size-fits-all 'pattern' agreements are routinely imposed on employers and employees by unions, with no real opportunity to negotiate. Such agreements can increase costs and limit productivity growth

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- choice is denied to construction industry participants. Pressure is applied to contractors and subcontractors to incorporate informal industry-wide or project agreements into their workplace agreements, and
- the standard of occupational health and safety in the industry is a serious concern.<sup>1</sup>

The Minister said that the construction industry – which constitutes around six per cent of the Australian economy – accounted for almost 40 per cent of the working days lost to industrial action in 2002. Analysis by Econtech suggested that if labour productivity in the commercial construction sector matched labour productivity in the domestic housing sector, the CPI would be one per cent lower, GDP would be one per cent higher and consumers would enjoy \$2.3 billion in economic benefits each year.<sup>2</sup>

### Building industry reform and the Cole Royal Commission

In May 1997 the Federal Government with agreement from the States prepared a [National Building Industry Code of Practice](#). The Code restates key provisions of the *Workplace Relations Act 1996* and tailors these for the idiosyncrasies of the building and construction industry.

In July 1997 the (then) Department of Employment, Workplace Relations and Small Business formed a 'Workplace Reform Group' targeting four industries for reform: the meat processing industry, the coal mining industry, the building and construction industry and the waterfront industry.<sup>3</sup> The *Workplace Relations Act* and the *Trade Practices Act 1974* were to provide the legal tools to deliver reform. In essence, this meant re-asserting managerial prerogative within these industries.

The Cole Royal Commission was established in July 2001 after a report by the Office of Employment Advocate highlighting various allegations about the building industry, including:

- breach of 'freedom of association' principles
- money laundering
- maltreatment of illegal immigrants
- collusion and intimidation by building unions
- theft and re-sale of construction equipment, false invoicing and fraud, and
- involvement of criminal figures in the industry.

Terms of reference for the Cole Royal Commission were signed by the Governor-General in August 2001. The Commission provided its first report to the Government in August

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2002. The final 23 volume report was tabled in Parliament in March 2003, bar the last volume containing names of those referred for prosecution and options for dealing with unions.

### **Summary of Cole Royal Commission**

The Royal Commission report contained 212 recommendations, the bulk of which proposed changes to federal workplace relations legislation governing the building and construction industry. The Royal Commissioner found that change was necessary in four key areas:

- all participants must recognise that the rule of law applies within the industry
- unions, contractors and subcontractors must accept that the freedom to choose to join or not join a union is a fundamental right of Australian employees. Breaches should be vigorously prosecuted
- head contractors should resume control of their building sites, control they have largely ceded to the unions, and
- occupational health and safety must be taken seriously by all parties.

The key recommendations of the Cole Royal Commission relating to workplace reform included:

- the introduction of an 'industry specific' Act;
- the establishment of a new independent monitoring and regulatory body to ensure participants comply with industrial, civil and criminal laws
- emphasis on bargaining at the enterprise level, with limitations on 'pattern bargaining'
- any party causing loss to other participants through unlawful industrial action to be held responsible for that loss
- improvements to occupational health and safety, including the establishment of a Federal Safety Commissioner to oversee such issues in the construction industry;
- disputes to be resolved in accordance with dispute resolution procedures rather than by industrial and commercial pressure, and
- changes to the National Building Industry Code of Practice.

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The final report of the Cole Royal Commission is available at <http://www.royalcombc.gov.au>. Analysis from the Parliamentary Library can be found in [CIB 30 2002-03](#), 'Building Industry Royal Commission: Background, Findings and Recommendations'.<sup>4</sup> On 6 November 2003 the Minister released a report on the Government's progress in implementing the recommendations of the Cole Royal Commission.<sup>5</sup>

### Building industry task force

In November 2002, the Interim Building Industry Task Force was set up in response to the first report of the Cole Royal Commission. The task force is the forerunner to the Australian Building and Construction Commission (see below). The role of the Task Force is to:

- investigate freedom of association breaches
- take legal action in relation to freedom of association, and
- investigate breaches of Part VID of the Workplace Relations Act concerning Australian Workplace Agreements (AWAs).

On 3 November 2003 the Building Taskforce achieved its first successful prosecution against a CFMEU organiser for threatening a company manager due to appear in an industrial relations case. It was also reported that the Building Industry Taskforce had eight other matters before the courts.<sup>6</sup>

On 2 April 2003, Federal Cabinet decided to extend the operation of the Building Industry Task Force, pending the establishment of the proposed Australian Building and Construction Commission ('ABCC'). Cabinet also supported separate legislation to regulate the construction industry. On 25 March 2004, the Minister announced that the taskforce 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'.<sup>7</sup>

### Exposure draft

The then Minister for Employment and Workplace Relations, Tony Abbott, released an exposure draft of the current Bill on 17 September 2003. Interested parties had until 17 October 2003 to comment on the Bill.

### The current Bill

The current Bill was introduced into the House of Representatives on 6 November 2003. It proposes:

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- an Australian Building and Construction Commissioner ('ABC Commissioner') and a Federal Safety Commissioner (**Chapter 2 and Chapter 4 Part 1**)
- a mandatory 'Building Code' (**Chapter 3**)
- a new framework for workplace relations negotiation in the construction industry focussed on 'genuine bargaining' at the enterprise level while restricting 'pattern bargaining' and providing for mandatory 'cooling off' periods during which protected industrial action is not permitted (**Chapters 5 and 6**)
- further restrictions beyond those in the Workplace Relations Act on the range of allowable award matters in the construction industry (**Chapter 5**)
- that all industrial action (within constitutional limits) in the construction sector should be unlawful, other than protected industrial action, with industry participants able to recover any losses they suffer due to unlawful action (**Chapter 6**)
- additional freedom of association provisions so a wider range of behaviour identified by the Cole Royal Commission can be effectively dealt with (**Chapter 7**)
- an amended right of entry system spelling out parties' rights and responsibilities (**Chapter 9**)
- limiting the scope for State law to be used to circumvent Federal requirements (eg **Chapters 7 and 9**)
- ensuring that registered organisations are accountable for the actions of their officials and employees (**Chapter 10**), and
- a strengthened compliance regime through higher penalties and greater access to damages for unlawful conduct (**Chapters 12 and 13**).

## Senate inquiry

At the initiative of the Australian Democrats, the Senate Employment, Workplace Relations and Education References Committee is conducting an inquiry into the legislation. The committee is due to present its report on 15 June 2004. Some [90 submissions](#)<sup>8</sup> have been made to the inquiry. This is on top of a large number of submissions on the exposure draft and the Cole Royal Commission.

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## Reactions to the Bill

There have been a diverse range of reactions to the current Bill:

- Peak employer groups strongly support the proposed legislation
- Key unions are just as strongly opposed to it
- Construction companies are unconvinced that the Bill is in their interests
- Other observers (e.g. academics and private law firms) have also criticised the Bill.

### Employer organisations

The **Australian Industry Group** (AIG) believes that the Cole Royal Commission established 'a substantial case for reform in the building and construction industry' and that the Bill 'is an important step forward'. The AIG is concerned that the Bill has not been supported by the non-Government parties, noting that:

proposals for reform either in accord with those of Government or as an alternative to them have not been advanced by the ALP or the Australian Democrats even though the need for urgent reform is apparent.<sup>9</sup>

The **Australian Chamber of Commerce and Industry** strongly supports the 'underpinning rationale' for the legislation, noting that from the current Bill 'much else by way of reform can and should flow':

New, clearer and stronger laws are a precondition for 'on the ground' reform to work practices, attitudes and culture. The success of new regulators, the extent to which additional resources can make a difference, and the effectiveness of enforcement largely depend on the strength of the legal regime and the rights and obligations it provides.<sup>10</sup>

In its submission to the Senate inquiry, **Master Builders Australia** emphasized the need to establish the 'rule of law' in the Australian building and construction industry:

In supporting the Bill, Master Builders is not out to create confrontation – quite the reverse. We are committed to ending the 'rule of the jungle' and to adopting instead, the fairness and equality of the rule of law. A return to the primacy of the rule of law is the theme of this submission. The introduction of the Bill will achieve this end.<sup>11</sup>

Similarly, the **Housing Industry Association** (HIA) stated that the commercial sector of the building and construction industry 'often operates outside of the lawful commercial and regulatory framework that applies to Australian business':

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There has been a lack of accountability or recrimination for industrial and commercial lawlessness involving widespread and repeated behaviour that is intimidatory, coercive and anti-competitive. This endemic behaviour in sectors of the building and construction industry is commercially and socially unacceptable.<sup>12</sup>

The HIA believes the Bill will enable a free and unpressured bargaining climate for workers in the construction industry:

The Bill is not about curbing legitimate union power, the legal right to strike, or removing union rights of representation...It is about placing employers, employees and their representatives in a neutral environment where genuine free choices are available on the basis that all must obey the law of the land and live with the bargains they have made.<sup>13</sup>

## **Unions**

**The Australian Council of Trade Unions (ACTU)** strongly opposes the Bill, stating that it is unnecessary and that 'there is no evidence, either from the Cole Royal Commission, or otherwise, that justifies the application of a draconian regulatory approach to the industry'. The ACTU says the Bill 'should be withdrawn in favour of a tripartite process - involving employer organisations, unions and state and federal governments - to address all the issues facing the building and construction industry'.<sup>14</sup> In March 2004 the ACTU submitted a complaint to the International Labour Organisation, asking whether the Bill contravenes the *Right to Organise and Collective Bargaining Convention 1949*.<sup>15</sup>

**The Construction, Forestry, Mining and Energy Union (CFMEU)** believes the Bill is 'totally one-sided in favour of employer interests':

All but a very limited range of industrial action would be rendered unlawful by the Bill. Trade union activity generally is strictly regulated and curtailed. Penalties are increased tenfold. The discretion of the AIRC is reduced. An agency of the State could be used to suppress action in the nature of political expression. That is an excessive and undemocratic development in Australian industrial relations.<sup>16</sup>

The CFMEU calls for the Bill to be rejected, arguing that 'constructive industry reform should be based on consensus between employers, unions and government at all levels and should build on Australia's reputation as a modern, democratic nation that pays proper regard to fundamental labour rights'.<sup>17</sup>

## **Construction companies**

In its submission to the Senate inquiry, **Multiplex**, one of Australia's leading construction companies, expressed no support for the Bill, calling for creation of a simpler and cheaper dispute resolution process.<sup>18</sup> The Queensland State Manager for the **Walter Construction Group Ltd**, Mr Greg Packer, said he was 'disturbed' when the Government said the building industry is 'full of lawlessness and inappropriate activities':

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I personally reject that view because I have been in the industry for over 30 years and have seen no significant real evidence of management or unions involved in criminal or illegal activities. Our industry is no different to other industries, the police force, or judiciary in that our industry makes up a cross-section of society. We reflect the good and bad of our society and I am pleased to say the good predominates in our industry and if there is a problem, I would say it is very insignificant – I am speaking of the Queensland industry.<sup>19</sup>

Mr Packer said that unions 'have a major and important role to play' in the building industry, especially in relation to wages and safety compliance. He noted that in New Zealand, where unions in the building industry are 'weak or non-existent', there was a major problem with a 'highly underpaid, low motivated workforce' and a 'lack of skilled labour'.<sup>20</sup>

**Action Construction Services Pty Ltd** was concerned that the Bill 'will negatively impact on the construction industry', stating that:

Legislation which is designed to retard building unions ability to access building sites, protect their members safety and act against the many shonks in the industry, will not make the industry any better.<sup>21</sup>

Action Construction was particularly concerned that 'pattern bargaining...should be strengthened, not weakened as this legislation proposes', stating that it 'is very desirable for the construction industry'.<sup>22</sup> **Concept Engineering (Aust) Pty Ltd** had a similar view, noting that:

Pattern Agreements provide industry with a common set of standards of employment thereby ensuring that as an employer in a very competitive industry the means of setting one of the main components of our fixed costs is the same across the industry. This ensures that we are competitive with other companies operating in the same industry.<sup>23</sup>

## **Academics and others**

**Professor Andrew Stewart** from the School of Law at Flinders University argues that the Federal Government needs to demonstrate why the industry's problems were 'so unique' that Parliament should reverse the trend away from specialised institutions. He said the building and construction industry was:

not the only industry in which employers and employees sometimes failed to comply with legal obligations ... it was 'a long way short of being an essential service like police, firefighting, health and power ... building workers were not the only employees with significant industrial muscle ... If these amendments are worth introducing, why aren't they worth introducing more generally?'<sup>24</sup>

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**Professor Ron McCallum**, Dean of the Faculty of Law at the University of Sydney, said he was concerned about the Bill's 'exclusive focus upon single business enterprise bargaining, its asymmetrical approach towards employee conduct and the overly prescriptive nature of many of its provisions'. He believed that

the Building and Construction Industry Improvement Bill 2003 should not be enacted in its present form by the Australian Parliament. In my view, the building and construction industry will be better served by a Bill which adopts a more flexible and less prescriptive approach, and which has a symmetrical approach to employee and employer conduct as does the current Workplace Relations Act 1996.<sup>25</sup>

**Anthony Forsyth**, Lecturer, Law Faculty ANU, suggests that the proposed legislation represents a shift in the Coalition Government's approach from deregulation to increased intervention:

the Cole agenda demonstrates a considerable shift in the Government's approach from its first two terms in office. Instead of deregulation and a reduced role for government, we're now going to see a whole new layer of detailed regulation of labour relations arrangements in a specific industry – through separate legislation and a separate government agency....All of this looks very much like 'uninvited third party intervention' on a whole new scale.<sup>26</sup>

One of the strongest reactions came from the law firm **Slater and Gordon**, which said in its submission to the Senate inquiry that the Bill:

is one of the most serious attacks on workers and unions in Australian history. This is not only a threat to construction workers and their unions. It is clear that the government plans to use this extraordinary assault as a precedent for wider attacks on organised labour....Every democratic-minded Australian should vigorously oppose the Bill becoming law.<sup>27</sup>

## **Main Provisions**

Key provisions in each chapter of the Bill are outlined below. A summary of key issues is at **Annex A**. A more detailed chapter by chapter analysis including additional background and reactions to specific elements of the Bill is at **Annex B**.

### **Constitutional coverage**

The Bill addresses this issue in **clause 72**, which defines '**constitutionally-connected**' industrial action as broadly as possible to bring the maximum number of Australian workers (and employers) within the scope of the 'unlawful industrial action' provisions in **Chapter 6**. It is likely, however, that not all workers and businesses in the building and construction industry will be covered. It is unclear, for example, whether employees of an

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unincorporated sub-contractor on a building site would be covered by the Bill, especially if any action they take is only in relation to their own employer.<sup>28</sup>

## Chapter 1 – Preliminary

**Chapter 1** contains the object of the Bill and key definitions that determine the Bill's coverage.

**Clause 3** states that the object of the Bill is to provide an improved workplace relations framework for building work to ensure this 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'.

**Clause 5** contains the key definition of '**building work**' which:

determines the scope of the Bill by forming the basis of terms such as *building employee* and *building agreement*, and hence terms such as *building employer* and *building association*. The coverage of all provisions of the Bill is ultimately determined by reference to the definition of *building work*.<sup>29</sup>

The definition of *building work* includes a broad range of activities – whether these are traditionally thought of as 'building' or not – including fit-out, restoration, repair and demolition, any work 'part of or preparatory to' such activities, and 'pre-fabrication of made-to-order components'. As the Australian Industry Group points out, this appears to deem 'large parts of the manufacturing sector, together with various service sectors, as being part of the building and construction industry'.<sup>30</sup>

Specific exclusions from the definition of 'building work' include mining and extraction activities and domestic building, including alteration or extension, except where this is part of a project including at least 5 single-dwelling houses. Regulations can be made including or excluding additional activities from the definition of 'building work'. It is intended that regulations would be used 'where it is not clear whether or not a particular activity falls within the definition'.<sup>31</sup>

In **clause 4**, *building agreement*, *building award* and *building certified agreement* include any award or agreement that has application to 'building work', whether or not they also apply to any other kind of work. Similarly, *building employee* means a person whose employment includes 'building work' even if the employee performs other work as well as building work.

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## Chapter 2 and Chapter 12 Part 2 – Australian Building and Construction Commissioner

**Chapter 2** establishes a new regulator, the Australian Building and Construction Commission (ABCC) with extensive powers to investigate and initiate actions for breaches of the law in the building industry. As the Government's summary of the exposure draft said, 'in practical terms, the ABCC will function as the industry "watch dog"<sup>32</sup>. It will either deal with matters itself or refer them to other agencies for action.<sup>33</sup>

The ABC Commissioner will initially have offices in Melbourne, Sydney, Perth and Brisbane. These offices will also service the Northern Territory, South Australia, Tasmania and the Australian Capital Territory and may include a presence on large regional projects.<sup>34</sup>

### Powers of ABC Commissioner

**Chapter 12 Part 2 Division 1** gives the ABC Commissioner a range of powers to compel the provision of information either through oral evidence or the production of documents. Under **clause 230**, it is an offence punishable by 6 months imprisonment not to provide information by the time or in the form required by the Commissioner, or not to answer questions relevant to an investigation. Deliberately providing inaccurate or incomplete information would also be an offence under the **Commonwealth Criminal Code** by virtue of **sections 137.1 or 137.2** ('False or misleading information or documents'; punishment 12 months imprisonment) and **section 149.1** ('Obstruction of Commonwealth public officials'; punishment 2 years imprisonment). The Commissioner can require a person to provide information under oath or affirmation. Stating facts on oath or affirmation while knowing those facts to be false amounts to the crime of 'false swearing' in most Australian jurisdictions.<sup>35</sup>

**Clause 231** provides that a person is not excused from providing information to the ABC Commissioner because they might incriminate themselves or expose themselves to another penalty or liability. Such information can be used in evidence against the person for offences under **clause 230** or under **sections 137.1, 137.2 and 149.1** of the Commonwealth Criminal Code, although not for other offences.

The Bill allows the ABC Commissioner to apply to the AIRC for an order halting building industrial action (**clause 134**), seek penalty orders and compensation for any person affected by a contravention of the Bill (**clause 227**) and apply for deregistration of a building organisation and/or disqualification of its officials (**clauses 215 and 217**). The ABC Commissioner can obtain an injunction to restrain pattern bargaining (**clause 67**). The Commissioner can also assess damages resulting from 'unlawful industrial action' and issue a certificate as prima facie evidence of the loss suffered (**clause 77**).

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Any gaps in the constitutional coverage of the Bill (see above) will mean that some participants in the Australian building and construction industry would be beyond the reach of the ABCC.

### **Powers of ABC inspectors**

**Chapter 12 Part 2 Division 2** provides for the appointment of 'ABC Inspectors'. Under **clause 237** inspectors can enter premises if they reasonably believe a breach of the law (i.e. the Bill, the Workplace Relations Act, an award or agreement made under Commonwealth industrial law, a court order or the Building Code) 'has occurred, is occurring or is likely to occur'. They can also enter premises for the purpose of assessing damages resulting from unlawful industrial action. An ABC Inspector can inspect any work, machinery or other item; take samples of goods; interview any person; take copies of any document; or require a person with custody of a document to produce it within a specified period. An ABC Inspector can also enter other 'business premises' if the inspector has reasonable cause to believe that a person who performs work or conducts business there has information 'relevant to compliance purposes'.

### **The ABCC and Union right of entry**

The ABC Commissioner will have a particular role in monitoring compliance with the proposed new right of entry requirements (**chapter 9**). A permit holder seeking entry will be required to provide a copy of the 'entry notice' or 'exemption certificate' to the ABC Commissioner prior to exercising right of entry (**clauses 190 and 200**). The ABC Commissioner will have a right to be heard in right of entry permit matters before the Industrial Registrar (**clause 208**).

### **Mandatory reporting to the ABCC**

To enable the ABC Commissioner to monitor the building industry and take action to enforce the law, the Bill contains a number of mandatory reporting and similar provisions. These are contained in various chapters.

Employers must notify the ABC Commissioner if they become aware:

- that employees have ceased 'unlawful industrial action' (**clause 76**)
- of action by employees that is 'industrially-motivated' and 'constitutionally-connected' (**clause 135**)
- of any claim for 'strike pay' contravening section 187AA of the Workplace Relations Act (**clause 137**)

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Employers must also notify the ABCC if an employee engages or threatens to engage in strike action on safety grounds – or if the employer makes a payment for a period when an employee has taken such action (**clauses 48 and 49**).

Potential donors must notify the ABCC in writing if they receive any request that a donation exceeding \$500 be made to a 'Commonwealth building organisation' (**clause 213**).

The ABCC must be notified of the above matters within specified time limits. Failure to do so could lead to proceedings by the ABCC with penalties up to \$110,000 (for a body corporate) or \$22,000 (for an individual) (**clause 227**).

The Industrial Registrar must give the ABCC at least seven days notice of hearings relating to the certification of a 'building agreement' (**clause 53**) so the ABCC can decide whether to intervene in the proceedings under **clause 250**. The Industrial Registrar must also notify the ABCC of all applications lodged with the AIRC or Australian Industrial Registry under the Bill or the Workplace Relations Act as affected by the Bill, and the outcome of each such application (**clause 251**).

## Chapter 3 – the Building Code

**Proposed Chapter 3** of the Bill allows the Minister to issue a mandatory code of practice for the building and construction industry. According to the Government, the purpose of Chapter 3 is to allow it to 'more rigorously apply and extend' the National Building Industry Code of Practice introduced in 1997 'to cover all construction projects that have Australian Government funding, subject to certain financial thresholds'.<sup>36</sup>

**Clause 26** provides that the Minister may issue a code of practice ('the Building Code') to be complied with in respect of 'building work'. The clause specifically empowers the Minister to issue documents in relation to occupational health and safety, after consulting the proposed Federal Safety Commissioner (see **Chapter 4**). 'Constitutional corporations' and those undertaking work in a Territory or for the Commonwealth can be required to comply with the Code. The Code must be made publicly available.

The ABC Commissioner can direct a person required to comply with the Code to provide a written report on the extent of compliance (**clause 30**). The ABC Commissioner can publish details of non-compliance with the Code, including names of relevant persons (**clause 28**).

## Chapter 4 and Chapter 12 Part 2 Division 3 – Occupational health and safety

**Chapter 4** is the Government's response to concerns expressed by the Cole Royal Commission about Occupational Health and Safety (OHS) in the Australian building and construction industry. The chapter establishes the Federal Safety Commissioner, and provides for the establishment of an OHS accreditation scheme to be administered by the

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Safety Commissioner. As the Explanatory Memorandum notes, the accreditation scheme will ensure that any person wishing to contract with the Commonwealth for building work must meet certain OHS standards.<sup>37</sup> **Chapter 4** also stipulates the process to be followed in cases where employees stop work due to OHS concerns.

### **Part 1 – Federal Safety Commissioner**

**Clause 32** sets out the Federal Safety Commissioner's functions. **Clause 33** provides that the Minister may direct how the Federal Safety Commissioner is to exercise his or her powers and functions. Such directions by the Minister are disallowable instruments and must be tabled in Parliament within 15 sitting days.

### **Part 2 – OHS action**

**Clause 47** limits the circumstances in which employees can be paid for periods when they refuse to work due to OHS concerns. Penalties will be imposed on both employees and employers if payments are made outside the specified circumstances.

### **Part 3 – Accreditation scheme for Commonwealth building contracts**

**Clause 50** provides for an accreditation scheme for persons who wish to enter into building contracts with the Commonwealth or Commonwealth authorities. **Subclause 50(4)** prohibits such contracts unless each of the persons is an 'accredited person' at the time the contract is made. The accreditation scheme will be set out in regulations. The Federal Safety Commissioner will be the accrediting authority.

### **Powers of federal safety officers**

**Chapter 12 Part 2 Division 3** sets out proposed powers for 'Federal Safety Officers'. Federal Safety Officers can use their powers to determine whether the Building Code or accreditation scheme for Commonwealth building contracts are being complied with (**clauses 240 and 241**). A Federal Safety Officer can enter premises, inspect any item or work on the premises, take samples, interview any person and require a person to produce documents within a specified time. Such officers can also enter any business premises relevant to compliance with the Building Code or accreditation scheme. A person who fails to comply with the requirement to produce a document could be charged with 'obstruction of a Commonwealth public official' under **section 149.1** of the Criminal Code (punishment 2 years imprisonment).

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## Chapter 5 – Awards, certified agreements and other employment conditions

### Part 1 – Awards

**Clause 51** reduces the scope of 'allowable award matters' for the building and construction industry for the purposes of the Workplace Relations Act. The 20 allowable award matters listed in **subclause 51(2)** are less extensive than their equivalents in section 89A of the Workplace Relations Act, i.e. some matters which are able to be included in awards under the Workplace Relations Act have been omitted from this Bill. In addition, **subclause 51(4)** lists specific issues that are not allowable award matters. Comparing **subclause 51(2)** of this Bill and taking into account **subclause 51(4)** produces a list of matters that could not be covered in construction industry awards made under the Workplace Relations Act. This list is included in the more detailed analysis of Chapter 5 at **Annex B**.

**Clause 52** of the Bill requires the AIRC 'to have regard to the desirability of minimising the number, and complexity, of allowances' in relation to any building industrial dispute.

### Part 2 – Certified agreements

**Part 2 Division 1** imposes additional pre-conditions for certification of building agreements under Part VIB of the Workplace Relations Act. Such agreements are linked to the concept of 'protected industrial action' under Part VIB Division 8 of the Workplace Relations Act.<sup>38</sup>

**Clause 53** requires the AIRC to notify the ABC Commissioner and hold a formal hearing before a building agreement can be certified. According to the *Explanatory Memorandum*, 'this will enable the ABC Commissioner to determine whether to intervene in the proceedings under **clause 250** of the Bill'.<sup>39</sup>

Under **clauses 54-58**, the AIRC must not certify a building agreement if it:

- includes any matter not relating to the employment relationship between employer and employees
- has effect for a period other than 3 years
- includes any obligation on the employer to make retrospective payments
- results from 'pattern bargaining' (see below)
- contains 'objectionable provisions' (see below), or
- does not contain the statutory 'freedom of association' statement (set out in **Schedule 1** of the Bill).

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In addition, a building agreement cannot be certified unless notice of a bargaining period has been given in accordance with **section 170MI** of the Workplace Relations Act (**clause 59**). A 'union-related' notice for initiation of a bargaining period has no effect unless all affected employees have the opportunity to vote on whether they wish the union to represent them in the bargaining process (**clause 64**).

**Clause 8** defines 'pattern bargaining' as seeking common wages or other common conditions of employment extending beyond a single business. However, conduct is not 'pattern bargaining' if a person is 'genuinely trying to reach agreement' (**subclause 8(2)**). Under section 170MW of the Workplace Relations Act the AIRC can suspend or terminate a 'bargaining period' if a negotiating party organising or taking industrial action is not 'genuinely trying to reach agreement' with the other parties. In turn, ending a 'bargaining period' takes any such action outside the concept of 'protected industrial action' under Part VIB Division 8 of the Workplace Relations Act, rendering it 'unlawful'.

Under **clause 7**, a provision is 'objectionable' if it:

- requires or permits conduct that would contravene **proposed Chapter 7** (freedom of association)
- *directly or indirectly* requires a person to encourage or discourage another person from becoming or remaining a member of a building association
- indicates *support or opposition* for persons being members of a building association
- requires or permits payment of a bargaining services fee to a building association,
- requires or permits an officer or employee of a Commonwealth or State union to exercise rights covered by **proposed Chapter 9** (union right of entry)

'Objectionable provisions' in a building certified agreement or building award are void (**clause 69**).

**Clause 64** provides that initiation by a union of a bargaining period for a certified agreement has no effect unless all affected employees have the opportunity to vote on whether they wish the union to represent them. The vote must be 'fair' and comply with specified notification requirements. Where there are 10 or more employees affected by the proposed agreement, the vote must be by secret ballot (see **Chapter 6 Part 3** below).

### **Part 3 – Other provisions about employment conditions**

**Proposed Part 3 of Chapter 5** gives the Federal Court power to issue injunctions to stop 'pattern bargaining', makes 'project' or 'site' agreements unenforceable unless certified under the Workplace Relations Act, and provides for substantial penalties for breach of AIRC orders in relation to building awards and agreements.

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**Clause 67** allows the ABC Commissioner 'or any other person' to apply to the Federal Court for an injunction to restrain pattern bargaining in respect of building employees. The Court can grant an injunction in whatever terms it consider appropriate. **Clause 68** limits the enforceability of project or site agreements, with exceptions. It appears to allow project or site agreements covering *individual* employees from different businesses, plus those involving unions or corporations if they do not go beyond sub-contractors hired for the particular building project.

**Clause 71** alters the application of **Part VIII of the Workplace Relations Act** by providing for substantially increased maximum penalties for breach of building awards, building certified agreements and building orders (see **Chapter 12** below for general issue of penalties for non-compliance with the Bill).

## Chapter 6 – industrial action etc

**Chapter 6** makes certain forms of industrial action in the building and construction industry unlawful and provides 'improved access' to sanctions against unlawful industrial action in the form of injunctions, pecuniary penalties and compensation for loss. In addition, it sets down additional requirements for accessing 'protected' industrial action including a mandatory cooling-off period and secret ballots.

### Part 1 – Preliminary

The definition of '**building industrial action**' in **subclause 72(1)** determines the scope of 'unlawful' building industrial action under **Part 2**:

- In contrast to the Workplace Relations Act, it includes industrial action taken not only in relation to agreements and other instruments made under Commonwealth law but also in relation to instruments under State and Territory law (through the definition of 'industrial instrument' in **clause 4**) (see **sub-paragraph (1)(a)(i)** and **paragraph (1)(b)**)
- It includes action taken in relation to an 'industrial dispute' *within the meaning of Chapter 7*. The definition of 'industrial dispute' in Chapter 7 goes further than the definition of the same term in section 4 of the Workplace Relations Act (**sub-paragraph (1)(a)(ii)** and **paragraph (1)(c)**).
- It excludes action by an employee based on a 'reasonable concern...about an imminent risk to his or her health or safety', provided the employee did not unreasonably fail to comply with a direction to perform other work 'that was safe for the employee to perform'. This is a narrower exclusion than in section 4 of the Workplace Relations Act (**paragraph (1)(g)**). In a further change from the Workplace Relations Act, where an employee seeks to rely on paragraph (1)(g) the onus is on the employee to prove

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that the action was based on a reasonable concern about an imminent risk to health and safety (**sub-clause 72(2)**).

The above provisions increase the scope of 'unlawful' industrial action compared to the Workplace Relations Act.

## Part 2 – Unlawful industrial action

In contrast to Part VIB Division 8 of the Workplace Relations Act which defines 'protected' industrial action, **Chapter 6 Part 2** introduces a statutory concept of 'unlawful' industrial action for the building and construction industry.

**Clause 74** prohibits a person from engaging in 'unlawful industrial action'. This is a 'Grade A civil penalty provision', meaning that contravention could lead to a penalty of up to \$110,000 (for a body corporate) or \$22,000 (for an individual).

Under **clauses 75 and 227**, court proceedings in relation to 'unlawful industrial action' can be brought by any 'eligible person' (the ABC Commissioner, a person affected by the action, e.g. an employer, or a person prescribed in regulations). A court can impose a penalty, order the defendant to pay compensation to a person who suffers damage because of the action, or make 'any other order that the court considers appropriate'. A court can also grant an injunction restraining unlawful industrial action.

**Clause 77** allows the ABCC to assess damages resulting from 'unlawful industrial action'. Under **clause 227**, a court can order compensation for any losses. A certificate issued by an ABC inspector under **clause 77** is prima facie evidence of the loss suffered.

## Part 3 – Protected action

**Proposed Division 1 of Part 3** outlines circumstances in which building industrial action will not be 'protected action' for the purposes of the Workplace Relations Act. As the *Explanatory Memorandum* notes, 'these circumstances are in addition to the requirements for protected action under the [Workplace Relations] Act'.<sup>40</sup> See Chapter Analysis at **Annex B** for details.

**Clause 81** provides for an automatic 21-day cooling-off period after two weeks of industrial action. Building industrial action is not 'protected' if it occurs during this period.

### Secret ballots

Under the existing provisions of the Workplace Relations Act, the AIRC can (but is not required to) order a secret ballot to help prevent or settle an industrial dispute, or to ascertain whether a majority of employees are in favour of a proposed certified agreement (section 135). For further background see Chapter Analysis at **Annex B**.

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**Clause 82** provides that building industrial action is not 'protected' unless it is authorised in advance by a secret ballot – with the exception of action by employees under section 170ML(2)(f) of the Workplace Relations Act (i.e. in response to a lockout by an employer).

**Proposed Division 2 of Part 3** contains some 50 clauses setting out the requirements for secret ballots that must occur before any building industrial action is 'protected' action. It is almost identical to item 25 of the Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002 which proposed a new Division 8A for Part VIB of the Workplace Relations Act. See Chapter Analysis at **Annex B** for details.

#### **Part 4 – Miscellaneous**

Similar to section 127 of the Workplace Relations Act, under **clause 134** the AIRC may order building industrial action to cease or to not occur. The AIRC may make such an order of its own motion or on the application of:

- the ABC Commissioner
- a party to the industrial dispute
- a person directly affected by the building industrial action (eg. an employer), or
- an organisation to which a party to the dispute belongs.

**Subclause 134(4)** allows the AIRC to make an interim *order* to stop or prevent industrial action. There is no equivalent in section 127 of the Workplace Relations Act. Under section 127(7), the Federal Court can grant an interim *injunction*, but this is only after the AIRC has made a final order.

**Subclause 134(12)** will allow the Federal Court to issue an injunction where a person or organisation fails to comply with either an order or an *interim order* of the AIRC. This goes beyond section 127 of the Workplace Relations Act.

**Clause 138** provides that notice of industrial action in relation to a proposed building agreement can only be given once. In other words, under this Bill it will only be possible to take protected industrial action once in relation to a proposed building agreement.

#### **Chapter 7 – Freedom of association**

**Chapter 7** strengthens 'freedom of association' laws for the building industry, prompted by the Cole Royal Commission's report that it had 'heard a great deal of evidence of conduct which had as its object undermining freedom of association in the building and construction industry.'<sup>41</sup>

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## Part 2 – Conduct to which this part applies

**Proposed Part 2** aims to cover all conduct that impedes freedom of association within the building industry, regardless of whether the participants' other employment rights and obligations are regulated by Commonwealth or State legislation.<sup>42</sup> To do this a range of constitutional powers have been relied upon, most notably the corporations power<sup>43</sup> through **clause 147**.

## Part 3 - General prohibitions relating to freedom of association

The general prohibitions are:

- a prohibition on **coercion** of a building industry participant to become or not become or remain or cease to be a member or officer of an employer group, union or other association (**clause 151**);
- a prohibition on making **false and misleading statements about membership** of associations: eg saying that a person must or must not become a member or saying that only members can receive the benefit of an award or agreement etc (**clause 152**); and
- a prohibition on **industrial action relating to membership**: that is, taking industrial action because another person is or is not a member of an association (**clause 153**).

## Part 4 – Conduct by building employers etc

**Clause 154** prohibits employers from harming the employment or discriminating against an employee or prospective employee – or independent contractor – or threatening to do so, for a 'prohibited reason'. The 'prohibited reasons' listed in **clause 155** are similar to those in s 298L of the Workplace Relations Act. **Clause 156** prohibits employers or persons engaging contractors from making promises or threats to employees or contractors to belong or not to belong to an association. This differs from the Workplace Relations Act equivalent provision, s 298M, which only prohibits inducements to cease being a member or officer of an association.

## Part 6 – Conduct by building associations

- **Clause 158** prohibits industrial action (or threats of industrial action) intended to coerce an employer to remain a member or officer of an association or to pay a fee to an association
- **Clauses 159, 160 and 161** prohibit prejudicial action by associations against employees, members and contractors when it is done for prohibited reasons.

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- **Clause 162** prohibits associations from advising, inciting or coercing a person to take action in relation to a third person that would involve a contravention of **clause 154(2)** (unlawful discrimination against independent contractors). This provision has no equivalent in the Workplace Relations Act and reflects the Government's response to findings of the Cole Royal Commission of instances of intimidation of contractors by building unions to enforce 'closed shop' arrangements.

### **Part 8 – Relationship with other laws**

**Proposed part 8** sets out the legal relationship between this Chapter and State and Territory laws and the Workplace Relations Act. In particular, it provides that no action may be brought under Part XA of the Workplace Relations Act for conduct for which an action would lie under this Bill. This ensures that the stricter provisions and penalties of this Bill would apply to the building and construction industry.

### **Part 9 – Miscellaneous**

**Clause 170** provides a reverse onus of proof, i.e. it provides that conduct *alleged* to be in contravention of freedom of association provisions *has occurred* for a prohibited reason or with prohibited intent. This is similar to s 298V of the Workplace Relations Act, except that **clause 170** provides that the reverse onus of proof is not to apply where an interim injunction is sought. Under this Bill, the reverse onus of proof provisions are linked to substantially greater financial penalties, which are more likely to be sought against unions than employers in relation to freedom of association breaches.

### **Increased penalties for breaches of freedom of association provisions**

The substantive provisions of **chapter 7 (clauses 151 – 154, 156 – 166)** are 'Grade A civil penalty provisions'. This means that fines may be ordered for contraventions of those provisions of up to \$110,000 for bodies corporate and \$22,000 for individuals.<sup>44</sup> This is a significant increase on penalties which currently apply for similar breaches under the Workplace Relations Act: \$10,000 for bodies corporate and \$2,000 for individuals.<sup>45</sup>

### **Chapter 8 – Discrimination, coercion and unfair contracts**

**Chapter 8** establishes various civil offences relating to discrimination and coercion in the building industry.

**Clause 172** prohibits action, or the threat of action, taken by one person 'with intent to coerce' a second person to employ, engage, or allocate responsibilities to, a particular employee or contractor. This addresses concerns raised by the Cole Royal Commission of a culture in the building industry of union coercion of employers on staffing and contracting issues. Australian industrial law has recognised that unions may have a

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legitimate interest in these issues. In *Re: Cram; Ex parte NSW Colliery Proprietors Association Ltd*<sup>46</sup> the High Court rejected an earlier notion that issues involving the hiring and firing of staff constituted 'managerial prerogative' outside the scope of industrial tribunals or union interference. The Cole Royal Commission recognised that union 'encouragement' of employers on issues of this type is not 'intrinsically wrong', but that it had received evidence that unions 'had crossed the line between encouragement and coercion'.<sup>47</sup>

**Clause 173** prohibits action (other than protected action) and threats of action or inaction intended to coerce a person in relation to the expiry date of a certified agreement. It also forbids action by an employer to coerce an employee not to request union involvement in the bargaining process. **Clause 173** is similar to section 170NC of the Workplace Relations Act, but as well as prohibiting actions *intended to coerce*, it also prohibits *undue pressure*.

*Undue pressure* is a qualitatively different test to *action intended to coerce* as it does not require an assessment of the respondent's state of mind. Whereas *action intended to coerce* looks at the matter from the perspective of the respondent, *undue pressure* examines the point of view of the complainant – would a complainant have felt pressured in the circumstances? In practice, this should widen the scope of the provisions, making prosecutions easier by reducing the elements a complainant must prove.

**Clause 174** prohibits discrimination against an employer on the basis that its employees are covered, or proposed to be covered, by a particular type of industrial instrument (ie award, certified agreement, AWA) or an instrument made with a particular person. This provision is intended to prohibit conduct of the following types:

- a head contractor refusing to give work to a subcontractor because the subcontractor's employees are covered by a non-union agreement
- a head contractor refusing to give work to a subcontractor on the basis that the subcontractor's agreement is or is not made with a particular organisation of employees
- a union disrupting the operations of an employer (other than through 'protected action') on the basis that the employer's employees are covered by a State rather than Federal agreement.<sup>48</sup>

**Clause 175** prohibits threats, actions or inactions intended to coerce employees or employers to contribute to particular superannuation funds.

The new offences in **chapter 8** carry penalties of \$110 000 for bodies corporate and \$22 000 for individuals.

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## Chapter 9 – Union right of entry

The right of union officials to enter workplaces to inspect conditions, standards and documents or talk to employees for purposes of information gathering or recruitment is currently governed by Part IX of the Workplace Relations Act. The Bill makes the following key changes to that regime as it would apply to the building industry:

- **One national regime:** currently, rights of entry and inspection differ under Commonwealth and various State laws. Using the Commonwealth's powers under the Constitution over corporations, territories and Commonwealth places, the Bill attempts to cover unions registered under a State law (through **clause 178**,<sup>49</sup> **subclause 188(2)** and **197(2)-(3)**, and **clause 204**). **Clause 204**, in particular, excludes the operation of State laws which may give more liberal rights of entry, with the exception of occupational, health and safety laws. Note these provisions will only apply to State unions where the employer is a constitutional corporation, is in a territory or is on a Commonwealth place.
- **Conditional permits:** under the Workplace Relations Act, union officials must have a permit issued by the Industrial Registrar before they may exercise rights of entry and inspection. **Clause 181** will allow the Industrial Registrar to impose conditions on a union official's permit. The registrar is to have regard to the factors listed under **clause 182** in deciding whether to impose any conditions.
- **'Fit and proper person':** under **clause 182** the Industrial Registrar must not issue a right of entry permit unless the applicant is a 'fit and proper person'.
- **Revocation, suspension and banning of officials:** **Clauses 184 and 185** expand the circumstances and processes for revocation and suspension of right of entry permits.
- **Involvement of ABCC:** a requirement to notify the ABCC (**clauses 190 and 200**) of use of a right of entry permit and the right of the ABCC to apply for disciplinary measures (**clause 184**) give the ABCC a significant role in policing union entry rights whether or not employers lodge objections.
- **New restrictions on exercise of inspection rights and the right to hold discussions with employees:** **Chapter 9 Part 4** imposes new limitations on the right of union officials to enter premises to investigate suspected breaches of industrial laws, awards or certified agreements, and on the right to enter premises to hold discussions with employees. See Chapter Analysis at **Annex B** for details.

As with other parts of the Bill, the civil penalties for contravention of provisions in **chapter 9** are significantly increased – in comparison to the Workplace Relations Act – to \$110,000 for bodies corporate and \$22,000 for individuals.

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## Chapter 10 – Accountability of organisations

**Chapter 10** contains various provisions imposing restrictions and reporting requirements on registered building organisations (unions, employer associations etc). Key provisions include:

### Donations

- Building organisations must provide an annual statement to the Industrial Registrar and the ABCC detailing any donations they receive greater than \$500. The Industrial Registrar is to provide a report of these statements to the ABCC and the Minister, including an analysis of whether the statements comply with requirements (**clause 212**)
- Building organisations must give the ABCC written notice of any solicitations they make for donations of over \$500 from building clients, employers or contractors (**clause 213**)

### Financial reporting

- The Industrial Registrar must make additional financial reporting guidelines applying only to building organisations (in addition to such requirements under the Workplace Relations Act) (**clause 214**)
- Building organisations must provide operating reports for any related entity (such as a trust or company) or any body in which they have any financial interest (**subclause 214(5)**).

### Compliance with court orders

- The ABCC can seek the deregistration of a building organisation for failure to pay an award of damages for unlawful conduct under the Bill (eg for taking unprotected industrial action) (**clause 215**)
- the Federal Court may order the deregistration of a building organisation where it, or a 'substantial number' of its members, or a 'section or class of members' has failed to comply with an injunction or interim injunction made under the Bill (**clause 216**).
- the Federal Court may 'trace' transactions by building organisations designed to avoid a judgment debt. The Court may order that a person who received assets in those circumstances be required to pay the judgment debt (**clause 218**)

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### Disqualification of union officials

- The ABCC may apply to the Federal Court to disqualify a person from holding an office in a building organisation for a set period if the person:
  - has contravened a civil penalty provision of this Bill or the Workplace Relations Act, or
  - has been disqualified from holding such an office under a State law (**clause 217**).

### Chapter 11 – Demarcation orders

**Chapter 11** gives the AIRC additional power to resolve disputes between unions in the building industry over the right to cover particular workers (demarcation disputes). The chapter builds on the provisions of Schedule 1B Chapter 4 of the Workplace Relations Act. Key differences to the regime in the Workplace Relations Act include:

- the right to seek AIRC determination of a demarcation dispute is extended to 'any person who is, or is likely to be, adversely affected (whether directly or indirectly) by the demarcation dispute (**clause 219**). Currently only organisations, employers or the Minister may apply to the AIRC for demarcation orders
- the need for conciliation to be attempted before an AIRC determination is removed (**clause 220**), and
- failure to comply with an AIRC demarcation order invokes a 'Grade A civil penalty' (**clause 223**).

### Chapter 12 (Part 1)– Enforcement<sup>50</sup>

**Chapter 12 Part 1** introduces a significant increase in the range of penalties for contraventions of the Bill compared to contraventions of the Workplace Relations Act. The chapter establishes one enforcement regime to govern all contraventions of the Bill's civil penalty provisions.

**Clause 227** provides for increased civil penalties:

- Contraventions of 'Grade A civil penalty provisions' can attract a penalty of up to 1,000 penalty units for bodies corporate (\$110,000) and 200 penalty units (\$22,000) for individuals.
- 'Grade B civil penalty provisions' can attract penalties of up to 100 penalty units (\$11,000) for bodies corporate and 20 units (\$2,200) for individuals.

In contrast, the Workplace Relations Act generally provides maximum pecuniary penalties of \$10,000 for bodies corporate and \$2,000 for individuals.<sup>51</sup>

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**Clause 227** also extends the right to seek penalty orders, compensation or 'any other order the court considers appropriate' to any person 'affected by the contravention'. The ABC Commissioner is specifically included as an 'eligible person' for the purpose of seeking such orders. The ABC Commissioner will be able to seek compensation for any person who suffers damage because of a contravention of the Bill. In contrast, the Workplace Relations Act generally limits the right to compensation to direct parties, such as employees, employers or industrial associations.

The ABCC's ability to seek orders under **clause 227** – together with its extensive powers under **Chapter 12 Part 2** (discussed above in relation to **Chapter 2**) – emphasises the central role of the new body in enforcing the provisions of the Bill.

### **'Involvement in' a contravention**

**Subclause 226(2)** provides that a person 'who is *involved in* a contravention of a civil penalty provision' is deemed to have contravened that provision. To be 'involved in' a contravention includes 'inducing' or 'conspiring' or 'aiding, abetting, counselling or procuring' the contravention.

### **Interaction between civil penalties and criminal law**

**Clauses 228** and **229** describe the interaction of civil penalties under the Bill with criminal law.<sup>52</sup> See Chapter Analysis at **Annex B** for details.

## **Chapter 13 – Miscellaneous**

### **Capacity, state of mind of person being coerced**

**Clause 248** applies to provisions in the Bill referring to coercion, undue pressure, encouragement, advice or incitement of another person to do a particular thing. It provides that the ability, willingness or eligibility of the other person to do that thing is irrelevant in determining whether the coercion, undue pressure etc occurred. When seen alongside provisions such as **clause 226** (which deems 'counselling' someone to commit a contravention etc to be the same as an actual contravention of the Bill), this appears to mean that merely encouraging someone to do something that either cannot be done or was not in contemplation can amount to a contravention of the Bill attracting substantial penalties.

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## **Building and Construction Industry Improvement Consequential and Transitional) Bill 2003**

**Date Introduced:** 6 November 2003

**House:** House of Representatives

**Portfolio:** Employment and Workplace Relations

**Commencement:** Clause 11, Schedule 1 and Schedule 2 commence on a date to be fixed by Proclamation or six months after the Bill receives Royal Assent, whichever is sooner. The remaining provisions commence on the day the Bill receives Royal Assent.

### **Purpose**

To make consequential amendments to the *Workplace Relations Act 1996* and other Acts arising from the provisions of the separate Building and Construction Industry Improvement Bill 2003 (BCIIB) and to provide application, saving and transitional provisions concerning the operation of the BCIIB.

### **Main Provisions**

Part 2 – Application and transitional provisions

#### **Application of BCIIB**

**Clause 5** provides that Part 1 of Chapter 5 of the BCIIB, concerning the making of awards by the Australian Industrial Relations Commission (AIRC), applies to disputes currently before the AIRC as well as future disputes.

**Clause 5** also provides that the AIRC must review all awards within 12 months of the commencement of Part 1 of Chapter 5 of the BCIIB to consider whether they contain provisions that are to be excluded from the award by operation of the Part.

#### **Retrospective application**

**Clauses 6, 7, 8 and 10** provide that certain provisions of the BCIIB apply **retrospectively**, that is to conduct, transactions or events that occurred **before** as well as after the commencement of the relevant provisions. Other provisions of the BCIIB will operate **prospectively**, although they will apply to industrial action *occurring* after the

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commencement of the relevant provision, even where the action may have *begun* beforehand.

## Schedule 1 – Amendment of the Workplace Relations Act

**Schedule 1** provides for various amendments to the Workplace Relations Act to give effect to the BCIIB. **Item 42** provides that the AIRC will not have the power to deal with claims for pay for employees while they were engaged in building industrial action that is *constitutionally-connected* (according to proposed Chapter 6 of the BCIIB). Use of this term from the BCIIB allows broad application of the provision.

## Schedule 2 – Amendment of other Acts

**Schedule 2** amends other legislation consequent to the enactment of the BCIIB, including the *Administrative Decisions (Judicial Review) Act 1977* (ADJR) to provide an exemption from that Act for decisions made under the BCIIB. A similar exemption applies for the Workplace Relations Act.

Although it has previously been accepted by Parliament that the Workplace Relations Act should be exempt from the ADJR, new types of administrative decisions will arise under the BCIIB. The proposed Federal Safety Commissioner will act as an accreditation authority for persons wishing to enter into building contracts with the Commonwealth or Commonwealth authorities<sup>53</sup>. The Federal Safety Commissioner will make decisions that significantly affect the rights of parties. The BCIIB also gives expanded powers to the Industrial Registrar in relation to granting, restricting, suspending and revoking right of entry permits to union officials.<sup>54</sup>

Parliament should consider whether the same exemption from ADJR procedures that applies to the Workplace Relations Act should also apply to the BCIIB.

## Concluding Comments

The key issues raised by the Bill are highlighted at **Annex A**.

The proposed legislation continues the policy choices that the Coalition Government has put before Parliament in the area of workplace relations since its election in 1996.

The fundamental issue is the role of organised labour within the Australian industrial relations system. In relation to the evolution of labour law in the United Kingdom and Australia, Creighton and Stewart identify three broad approaches of 'repression, tolerance and accommodation' towards organised labour to describe different periods between the early nineteenth century and the present day.<sup>55</sup>

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Using this hierarchy, it might be said that there was a period of 'accommodation' towards the role of organised labour in Australia in the 1970s and 1980s, followed by a reduced priority on the role of unions in the industrial relations system and a shift towards 'tolerance' with the reforms of the early 1990s. The election of the Coalition Government in 1996 accompanied by the restrictions on collective action in the Workplace Relations Act introduced an era of what could be called 'reluctant tolerance' towards collective labour rights. The provisions in this Bill – further restricting collective action, making broad building agreements less easy to achieve, introducing an industry 'watchdog' in the form of the ABCC and providing substantial penalties including imprisonment for breaches – involve a further move away from 'tolerance' of the role of organised labour in Australia, at least in the case of the building and construction industry.

There is no question that unions in the construction and building industry have been a particular target for workplace relations reform under the Coalition Government. The practice of 'site agreements' requiring workers to be employed under a common set of conditions has been a special focus. Such agreements have evolved because of the unique situation in the building industry where individual construction projects require cooperation amongst a multitude of players (site owner, developer, head contractor, sub-contractor, workers). In March 2004 the *Australian Financial Review* described the heavy constraints in the Bill on use of site agreements, noting, however, that 'for head contractors...site agreements are a way of maintaining order and equity on building sites'.<sup>56</sup>

While site agreements and the role of unions in achieving these can be justified given the nature of the building industry, there are also long-standing and well-publicised issues about compliance with the rule of law in construction projects that culminated in the Cole Royal Commission in 2001. As the *Australian Financial Review* noted in the same article, '12 months on from the \$60 million Cole royal commission, nothing has changed...construction companies will not speak publicly about Cole – not because they are scared of the federal government, but for fear of antagonising the building unions'.<sup>57</sup>

The main theme of the Bill is to tighten the rule of law in the construction industry. Parliament will need to consider whether the state of the Australian building and construction industry and the role of organised labour within it, as revealed by the Cole Royal Commission and reactions to the Cole Commission report, justify the approach in the Bill.

## Unions and the Building and Construction Industry

The key effect of the Bill would be to substantially restrict the role of unions in workplace relations in the building and construction industry. It would do this by, for example:

- Substantially reducing the legal scope for unions to exercise collective industrial power through a broader definition of 'industrial action' and the complex criteria

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for 'protected action' (not least the complicated and compulsory secret ballot requirements) – therefore substantially increasing the scope of 'unlawful' industrial action

- Requiring a 'cooling off period' of three weeks no matter what the subject or nature of the building industrial dispute
- Giving priority to the freedom *not to associate* over the freedom *to associate* encouraged by the International Labour Organisation
- Imposing substantial restrictions on pattern bargaining, site agreements and union right of entry
- Creating the ABC Commissioner, with the ability to conduct investigations into compliance with the Bill, to compel production of information and to prosecute contraventions even where no parties have a complaint
- Extending the right to seek penalties and damages against unions to others besides employers and employees
- Creating additional hurdles before building agreements can be certified, thereby encouraging individual Australian Workplace Agreements in the industry
- Increasing penalties for contraventions and non-compliance, including deregistration or disqualification for officials in some circumstances, and
- Imposing further restrictions on allowable matters in industry wide awards.

### Selective enforcement and overlapping functions

With all regulatory bodies there is potential for selective monitoring and enforcement. Arguably the risk of this is higher in the industrial relations sector where strong ideological divisions have traditionally influenced policy. In relation to the Bill, it has been suggested that 'if the Cole commission had been more even-handed in dealing with unscrupulous employers, the federal government may have had a better chance of reforming the industry'.<sup>58</sup> Democrats Senator Andrew Murray noted that his party did not intend to pass the Bill in its current form, calling for 'improved outcomes for the industry, both for employees and employers'.<sup>59</sup> Senator Murray said a national workplace relations regulator was needed 'to significantly enhance efficiency and equity in the building and construction industry':

The unions need help in making sure that entitlements are paid, that wages and conditions are observed and that health and safety are properly looked after. Unions and employers need help to ensure that people do not defy court and commission

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orders and the law. The employers need help with regulators on call when faced with unreasonable people perverting the law's intent.<sup>60</sup>

The Bill specifies that the ABC Commissioner is to monitor compliance with the law by 'building industry participants' (employees, employers and others), investigating suspected contraventions and instituting proceedings where necessary.<sup>61</sup> The extent to which the ABCC adopts an 'even-handed' approach to this task may be apparent from the list of investigations tabled in Parliament as part of its annual report.<sup>62</sup> In addition, any direction from the Minister to the ABC Commissioner about how the ABCC should undertake its job must be published in the government gazette and will be subject to disallowance by Parliament.<sup>63</sup> Such provisions will impose some constraint in the form of accountability to the public and Parliament on the use of the ABCC in a selective manner.

Despite such measures, perceptions of a one-sided approach to regulation of the building industry appeared sufficient for the Government to announce – in a report on progress with implementing the Cole Royal Commission – the creation of a separate unit within the Department of Employment and Workplace Relations to 'deal with rogue employers who do not meet their obligations'. According to the Minister, the new 'Office of Workplace Services' will:

target the building and construction industry firstly in Victoria, New South Wales and Western Australia with education and compliance programs to ensure employers meet their and employees get their legal obligations.<sup>64</sup>

Parliament might ask what the point is of creating a separate workplace relations regulator for the building and construction industry in the form of the ABCC if an additional body is required to ensure compliance by employers in the building industry with their legal obligations. Moreover, in addition to the ABCC and the Office of Workplace Services, the Office of the Employment Advocate also has a role in relation to monitoring and compliance with the law in the building and construction industry. This includes investigations into breaches of freedom of association and workplace agreement provisions of the Workplace Relations Act,<sup>65</sup> matters also within the scope of the ABCC in relation to the building industry. The relationship between these three government supervisory bodies appears unclear at best.

### **Achieving compliance – punishment versus cooperation**

The restrictions and prohibitions in the Bill affecting the role of organised labour in the building and construction industry are made effective by the substantial penalties for non-compliance. Compared to the Workplace Relations Act, the Bill introduces significantly greater financial penalties for non-compliance (for employers and workers), provides for imprisonment for failure to provide information to the ABCC or for obstructing the ABCC or a Federal Safety Officer, and allows for de-registration for failure to comply with court orders. As well as introducing a wider range of civil and criminal offences in the building

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and construction industry, it also lowers the hurdles for establishing that such offences have been committed.

Compliance problems in the industry highlighted by the report of the Cole Royal Commission might suggest that such a punitive approach is needed to ensure an efficient building and construction sector in Australia.

The risk, however, is that such an approach could have the opposite effect. The 1985 report of the Committee of Review into Australian Industrial Relations Laws and Systems ('the Hancock Report') stated that imposition of fines and imprisonment for strikes and lockouts were not 'a useful aspect of the conciliation and arbitration system' and recommended that the (then) Industrial Relations Act should not contain any provision for such penalties. It proposed instead that there should be more reliance on measures that would foster 'a greater commitment to the overall system, the dispute resolution process and its outcome'.<sup>66</sup>

The Hancock Report was a reaction in part to the era of 'bans clauses' exemplified by the 1969 O'Shea case. Similar in effect to provisions of the current Bill, 'bans clauses' were award provisions that forbade the imposition of bans on work and were widespread in the 1950s and 1960s in Australia. Non-compliance meant – as in the Workplace Relations Act and this Bill – that an affected party could seek a penalty or an injunction to restrain any further breach. Failure to observe the terms of an injunction could lead to further fines and imprisonment (similar to the process expanded and made easier by this Bill). Creighton and Stewart note that the use of such provisions led to a confrontationist approach by employers and unions. In the O'Shea case, the Victorian State Secretary of the Tramways Union was imprisoned for contempt of court for refusal to collect fines outstanding against his union. His imprisonment 'led to widespread industrial disruption and public demonstrations, with the threat of worse to come', followed shortly afterwards by legislation amending the use of bans clauses.<sup>67</sup> As Creighton and Stewart say:

Perhaps the most important lesson to be drawn from the O'Shea affair is that excessive and insensitive use of enforcement procedures – especially procedures that do not accord adequate respect to the right of workers and unions to take industrial action to protect and promote their legitimate social and economic interests – may well be counter-productive both in terms of those who seek to use them and in terms of protecting the integrity of the system of which they are a part.<sup>68</sup>

The Bill takes workplace relations power away from those with a practical interest in a cooperative approach on construction projects – i.e. unions, employers and others directly involved – and places this in the hands of a new industry watchdog, the ABCC, whose *raison d'être* will be to ensure compliance with the Bill and to initiate legal proceedings and seek penalties in the case of non-compliance. Whatever the extent of current problems in the industry, Parliament may wish to consider whether this approach will be the most effective in encouraging a productive and efficient building and construction sector.

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## [Annex A - Summary of Key Issues](#)

## [Annex B – Chapter Analysis](#)

### Endnotes

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- 1 Kevin Andrews (Minister for Employment and Workplace Relations), 'Second reading: Building and Construction Industry Improvement Bill 2003', House of Representatives, Debates, 6 November 2003), p. 22283.
- 2 *ibid.*
- 3 Department of Employment, Workplace Relations and Small Business, 'Response to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee, Senate, *Debates*, 10 February 1999.
- 4 <http://www.aph.gov.au/library/pubs/CIB/2002-03/03cib30.htm>.
- 5 The report is available on the Government's '[Australian Workplace](http://www.workplace.gov.au/Workplace/WPDisplay/0,1280,a3%253D5921%2526a0%253D0%2526a1%253D517%2526a2%253D637,00.html)' on-line site (<http://www.workplace.gov.au/Workplace/WPDisplay/0,1280,a3%253D5921%2526a0%253D0%2526a1%253D517%2526a2%253D637,00.html>)
- 6 *The Age*, 4 November 2003.
- 7 Kevin Andrews (Minister for Employment and Workplace Relations), 'Ministerial statement: Royal Commission into the building and construction industry', House of Representatives, *Debates*, 25 March 2004, p. 27297.
- 8 [http://www.aph.gov.au/Senate/committee/eet\\_ctte/building03/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/eet_ctte/building03/submissions/sublist.htm)
- 9 Australian Industry Group, letter covering submission to Senate Employment, Workplace Relations and Education References Committee Inquiry into Building and Construction Industry Improvement Bill ('Senate inquiry'), 4.11.03.
- 10 ACCI submission to Senate Inquiry November 2003, p. 13.
- 11 Master Builders Australia, submission to Senate inquiry 1.12.03, pp2-3.
- 12 HIA submission to Senate inquiry, 30.11.03, p 3.
- 13 *ibid.*
- 14 ACTU submission to Senate Inquiry December 2003.
- 15 *Workplace Express*, 18.3.04, at <http://www.workplaceexpress.com.au>.
- 16 CFMEU (Construction and General Division) submission to Senate inquiry December 2003, pp 4-5.
- 17 *ibid.*
- 18 *Australian Financial Review*, 3 February 2004, p. 3.

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- 19 Mr Greg Packer, submission to Senate Inquiry 3 February 2004, p. 6.
- 20 *ibid.*
- 21 Letter from Action Constructions to Secretary Senate Inquiry, 22 January 2004.
- 22 *ibid.*
- 23 Concept Engineering (Aust) Pty Ltd, letter to Senate inquiry 25.11.03.
- 24 See interview with Professor Andrew Stewart on the Building Industry Royal Commission's recommendations in *Workplace Intelligence*, May 2003, <http://www.cpd.com.au>
- 25 Professor Ron McCallum, statement to Senate Inquiry.
- 26 Anthony Forsyth, Law Faculty ANU, 'What's in a name? The Federal Government's IR Agenda', *Industrial Law News*, issue 7, 16 July 2003, p. 4.
- 27 Slater and Gordon submission to Senate inquiry, January 2004 p 1:
- 28 The Commonwealth's ability to legislate in the area of workplace relations is based on a combination of powers in the Australian Constitution: primarily s 51(35) 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. As Creighton and Stewart note, however, 'the wording of s 51(35) suggests that the founders of the Constitution intended that the Commonwealth Parliament should have only a limited power to make laws with respect to industrial relations'.

Other provisions in the Constitution have been used in an attempt to broaden the constitutional coverage of Commonwealth workplace relations laws, including s 51(20) corporations, 51(1) trade and commerce and 51(29) external affairs. But compared with the ability of the States to legislate on the full range of industrial and workplace relations matters, Commonwealth coverage in this area remains incomplete. According to Creighton and Stewart, 'relatively few incorporated bodies would now be excluded from the reach of s 51(20)...Nevertheless, there are many small to medium employers in Australia who do not have corporate status, but instead operate as sole traders or partnerships'. Moreover, 'what s 51(1) cannot do is to reach employers engaged only in intrastate trade, many of whom are likely to be the very businesses who would also fall outside the scope of the corporations power.' (*Labour Law, an introduction*, 3rd edition pp 82-4)

The High Court has held that the external affairs power in s 51 (29) can justify legislation – including industrial relations legislation - that is 'reasonably appropriate and adapted to' the implementation of an international instrument (*Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416. Thus, where an international instrument such as an ILO Convention addresses the relevant area, the external affairs power can be used to ensure that workers who might not come within the other heads of power are covered by the Commonwealth legislation. However there is uncertainty about whether the external affairs power can be used to implement anything less than an international 'obligation'.

As Harris states, it should be noted that the court in the *Industrial Relations Case* 'did not find it necessary to decide whether mere recommendations (as opposed to treaties) could form the basis of s51(29) legislation.' (Bede Harris, *Essential Constitutional Law*, p 135). According to Blackshield and Williams, 'despite some peripheral comments on that question in the

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Industrial Relations Act Case, the precise effect of 'recommendations' must still be regarded as open'. (Blackshield and Williams, *Australian Constitutional Law and Theory*, 3rd edition, p. 774).

- 29 Explanatory memorandum, Building and Construction Industry Improvement Bill, p. 22.
- 30 'Ai Group submission on the Building and Construction Industry Improvement Bill' (submission on exposure draft), at <http://www.aigroup.asn.au/scripts/cgiip.exe/ccms.r?Roxy=0x000198c1&PageId=1212>.
- 31 Explanatory memorandum, p. 23.
- 32 <http://www.workplace.gov.au/WP/Content/Files/WP/WR/PublicSector/Technical%20Summary%206%20November.pdf>
- 33 Explanatory memorandum, pp 9-10.
- 34 *ibid.*, p. 10.
- 35 Eg. *Crimes Act 1900 (NSW)* s 330.
- 36 Department of Employment and Workplace Relations, [Information Sheet 11](#), 'Demonstrating Leadership: a new Building Code' at <http://www.workplace.gov.au/WP/Content/Files/WP/WR/General/BuildingIndustryReforminfomationsheet11.pdf>.
- 37 Explanatory memorandum, p. 2.
- 38 While there was provision for 'certified agreements' in earlier legislation, they were given prominence by the 1993 reforms to the Industrial Relations Act 1988 which aimed to encourage bargaining at an enterprise level without the necessary involvement of trade unions. Under the Industrial Relations Act and its successor, the Workplace Relations Act, valid 'certified agreements' prevail over federal and state awards and orders of the AIRC, and displace conditions of employment in prescribed Commonwealth laws. (see Workplace Relations Act, sections 170LY and LZ).
- 39 Explanatory memorandum, p. 43.
- 40 Explanatory memorandum, p. 56.
- 41 Royal Commission into the Building and Construction Industry, *Final Report*, volume 1, p.86, at [http://www.royalcombeci.gov.au/docs/finalreport/V01Summary\\_PressFinal.pdf](http://www.royalcombeci.gov.au/docs/finalreport/V01Summary_PressFinal.pdf).
- 42 Explanatory memorandum, p. 78.
- 43 Constitution section 51 (20).
- 44 Clause 227. See discussion of Chapter 12 below.
- 45 Workplace Relations Act section 298U.
- 46 (1987) 163 CLR 117.
- 47 Cole Royal Commission, *op. cit.*, p. 101.
- 48 Explanatory memorandum, *op. cit.*, p. 86.

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- 49 Through the definition of 'union' which then affects various other clauses.
- 50 Proposed Chapter 12 (Part 2) was discussed above, together with the ABCC (see discussion of Chapter 2)
- 51 See for example Workplace Relations Act s 170CR, s 170HI, s 170NF, s 170VV, s 178, s 285F, s 298U and s 533.
- 52 These provisions appear to be modelled on Regulations 172 – 175 of the Workplace Relations (Registration and Accountability of Organisations) Regulations 2003.
- 53 See BCIIIB Chapter 4 Part 3.
- 54 See BCIIIB Chapter 9.
- 55 Creighton and Stewart, *op. cit.*, p.28.
- 56 'Building taskforce targets Multiplex', *Australian Financial Review*, 31 March 2004, p. 1.
- 57 *ibid.*
- 58 *ibid.*
- 59 Senator Andrew Murray, 'Ministerial statement: Royal commission into the building and construction industry', Senate, *Debates*, 25 March 2004, p. 21971.
- 60 *ibid.*
- 61 Clause 12.
- 62 Clause 16.
- 63 Clause 13.
- 64 Kevin Andrews (Minister for Employment and Workplace Relations), 'Ministerial statement: Royal Commission into the building and construction industry', House of Representatives, *Debates*, 25 March 2004, p. 27297.
- 65 Workplace Relations Act section 83BB.
- 66 This section is drawn from Creighton and Stewart, p. 385.
- 67 *ibid.*, p. 384.
- 68 *ibid.*, p. 385.

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