



Building and Construction Industry Improvement Bill 2005

Building and Construction Industry (Consequential and Transitional) Bill 2005

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Law and Bills Digest Section

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This digest comments on the bill as introduced in March 2005, not as amended by the House of Representatives in August 2005. However key provisions of the amended bill were analysed in [Bills Digest No. 129 of 2003-04](#).

Date Introduced: 9 March 2005

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: Provisions prohibiting unlawful industrial action take effect from 9 March 2005. Most of the other provisions take effect from Royal Assent.

Purpose

To enact legislation making certain forms of industrial action in the building and construction industry unlawful, and to provide for additional sanctions against such action in the form of injunctions, financial penalties and compensation.

Background

This Bill replicates the enforcement and penalty provisions, and some of the provisions making certain forms of industrial action unlawful, in the Building and Construction Industry Improvement Bill 2003 ('the 2003 Bill'). The 2003 Bill was passed by the House of Representatives on 4 December 2003. It was also referred to the Senate Employment, Workplace Relations and Education References Committee, which provided its [report](#)¹ on 21 June 2004. The 2003 Bill lapsed when Parliament was prorogued for the 2004 federal election.

The purpose of re-introducing part only of the 2003 Bill is to prohibit industrial action in the building and construction industry aimed at pressuring employers to sign new enterprise agreements before the current round of agreements expire in October 2004.² The Minister for Employment and Workplace Relations, the Hon. Kevin Andrews, said that remaining elements of the 2003 Bill, including the creation of the Australian Building

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and Construction Commission, will be introduced at a later date after further consultation with industry participants.³

According to the Minister, the current Bill:

...will do two things in particular: firstly, it will increase the penalty provisions in the Workplace Relations Act and, secondly, it will finally give the building industry task force the powers it needs to effectively prosecute illegal activity. This bill is intended to send a clear message to employers and unions that the government is serious about taking action in relation to what Justice Cole found in the building and construction industry. For those in the industry who may be contemplating taking unlawful action, it will act as a powerful deterrent. The increased penalties are up to a maximum of \$110,000 for a body corporate and \$22,000 in other cases.⁴

Because the provisions in the current Bill are for the most part taken directly from the 2003 Bill, the commentary below is largely the same as in [Bills Digest 129 2003-04, Building and Construction Industry Improvement Bill 2003](#).⁵ Readers are directed to that digest for background and discussion of the Federal Government's proposed legislation for the building and construction industry in Australia, including reactions from various industry participants and interested groups. **Annex A** to that digest contains a list of key issues for each of the 13 chapters in the 2003 Bill. **Annex B**⁶ in the on-line 'html' version contains a detailed analysis of each of these chapters, including the provisions replicated in the current Bill.

Cole Royal Commission

The Cole Royal Commission was established in July 2001 after a report by the Office of the 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 2002. The final 23 volume report was tabled in Parliament in March 2003, bar the last

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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.

The final report of the Cole Royal Commission is available at <http://www.royalcombcgi.gov.au>. Analysis from the Parliamentary Library can be found in

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[CIB 30 2002-03](#), 'Building Industry Royal Commission: Background, Findings and Recommendations'.⁷ On 6 November 2003 the Minister released a report on the Government's progress in implementing the recommendations of the Cole Royal Commission.⁸

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 proposed Australian Building and Construction Commission. 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 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'.⁹

In the *Workplace Relations Amendment (Codifying Contempt) Offences Act 2004*, the Building Industry Taskforce was given additional powers, including:

- new information gathering powers to investigate crime and corruption in the building and construction industry
- protection for whistleblowers
- fines or imprisonment for up to six months for failing to cooperate, and
- further information gathering powers similar to those of the Australian Competition and Consumer Commission.

These new powers are subject to:

- clear guidelines to be drawn up and approved by the Senate¹⁰
- annual review by the Commonwealth Ombudsman, and
- a three year limit.¹¹

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Protected industrial action

Strikes are ordinarily regarded as illegal at common law because they constitute a breach of contract by the employee, giving the employer the right to terminate the contract of employment and to sue for damages. Striking employees and unions are also generally subject to sanctions provided for by legislation or the provisions of awards or agreements, such as non-payment of wages, fines and bans clauses.¹²

Creighton and Stewart note that in the 1993 reforms to the (then) Industrial Relations Act:

For the first time in the history of the federal system, the legislation...provided for a measure of protection against civil liability in respect of industrial action during a... 'bargaining period'.¹³

The relevant provisions were retained in modified form in the Workplace Relations Act (Part VIB Division 8) introduced in 1996.

A pre-condition for 'protection' is that the party taking 'protected action' has initiated a 'bargaining period' in accordance with section 170 MI of the Workplace Relations Act. Another pre-condition is that such action is preceded by written notice in accordance with section 170 MO of the Act.

In regard to a bargaining period for a certified agreement, an employee or a union (including its officers or employees) can take industrial action against an employer in the form of a strike or work ban (section 170ML(2) Workplace Relations Act). If the prescribed conditions are met, such action is 'protected' from legal action including action in tort (section 170MT). For example, employees who engage in such industrial action can do so without breaching their contract of employment (section 170ML(2)). An employer may take industrial action against its employees in the form of a lockout or by standing down employees, without breaching the employment contract (section 170ML(4)).¹⁴

In addition, employers are prohibited from dismissing or 'injuring' an employee in his or her employment because the employee has taken protected action (section 170MU).

Section 127 of the Workplace Relations Act allows the AIRC to direct that 'industrial action' that is 'happening, or is threatened, impending or probable' should stop or not occur. However section 127 orders are not available in relation to 'protected' action under Part VIB Division 8 of the Act.

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

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construction industry will be covered. It is unclear, for example, whether employees of an 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.¹⁵

Main Provisions

Chapter 1 – Preliminary

Chapter 1 contains key definitions that determine the Bill's coverage. A definition of 'building and construction industry' is not included.

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*.¹⁶

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 pointed 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'.¹⁷

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 to clarify whether or not a particular activity falls within the definition.¹⁸

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.

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.

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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 subclause 72(4)*. The definition of 'industrial dispute' in **subclause 72(4)** is broader 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 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'.

Clause 73 defines 'building industrial action' as 'unlawful' if it is *industrially-motivated* and *constitutionally-connected* and is not '*excluded action*'.

- 'industrially-motivated' is defined in clause 72 as including one or more of the following:
 - supporting or advancing claims by or against an employer in relation to 'the employment of employees'. This includes action by one group of employees in support of claims by another group against a different employer
 - 'advancing industrial objectives of an industrial association', or

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- 'disrupting the performance of work'
- '**constitutionally-connected action**' is defined in **clause 72** as broadly as possible (see section on 'Constitutional Coverage' above).
- '**excluded action**' defines 'building industrial action' that will not be 'unlawful' for the purpose of this Bill. It includes:
 - 'protected action' under the Workplace Relations Act as modified by Chapter 6 Part 3, and
 - industrial action in relation to individual Australian Workplace Agreements (AWAs) under Part VID Division 8 of the Workplace Relations Act.

Part 3 – Protected action

A key clause for this particular Bill is **clause 80**, which provides that industrial action taken prior to the expiry date of a building certified agreement will not be protected action. This clause attempts to override the Federal Court's decision in *Emwest*¹⁹ that a union may take industrial action during the course of a certified agreement in relation to a matter not included in the agreement.

Part 4 – Miscellaneous

In **clause 136**, the Bill proposes increased penalties for contravention of the 'strike-pay' provisions in the Workplace Relations Act. It prohibits employers from making payments and employees from accepting payments in relation to any periods of building industrial action that are industrially-motivated and constitutionally-connected. There is a maximum penalty of \$110,000 (for a body corporate) compared to the current maximum penalty under the Workplace Relations Act of \$33,000. The maximum penalty for an individual will be \$33,000 (compared with \$22,000 in the 2003 Bill).

The Explanatory Memorandum notes that:

Applications in relation to contraventions may be made to the Federal Court by the Minister, a person who has an interest in the matter or any other person prescribed by the regulations. Application may also be made by the employer in relation to contraventions of section 187AB of the WR Act, as modified by this Bill...

Paragraphs 187AD(c) and (d) of the WR Act allow the Federal Court, in respect of contraventions, to make injunctions (including interim injunctions) and any other orders considered necessary to stop the contravention or remedy its effects...²⁰

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Chapter 12 (Part 1)– Enforcement

Proposed Chapter 12 Part 1 outlines the effect and operation of the civil penalty provisions prescribed in the Bill (currently only **clause 74**). The key effect of the proposed chapter is a significant increase in the range of penalties for contraventions of the Bill compared to contraventions of the Workplace Relations Act. It reflects the Government's goal of increasing compliance with the law, following the Cole Royal Commission's finding of 'lawlessness' throughout the building industry.²¹

Increased civil penalties and other remedies

Clause 227 in the current Bill provides for a civil penalty for contravention of **clause 74** of up to 1,000 penalty units for bodies corporate (\$110,000) and 200 penalty units (\$22,000) for individuals. By contrast, the Workplace Relations Act tends to provide maximum pecuniary penalties of \$10,000 for bodies corporate and \$2,000 for individuals.²²

Clause 227 also provides that the court may order compensation be paid to any person who has suffered damage as a result of a contravention. This extends the right to seek compensation over contraventions to third parties who may not be directly involved in the dispute or conduct that gave rise to the contravention. The Workplace Relations Act tends to limit the right to compensation to direct parties, such as employees, employers or industrial associations.

Further, **clause 227** gives the court the power to make any orders it considers appropriate. Presumably this includes orders requiring re-instatement of an employee or granting an injunction to prevent a threatened action.

Parties that may apply for penalty orders

Consistent with the expansion of the class of people who may recover compensation for contraventions of civil penalty provisions, **clause 227** expands the class of people who may apply to a court for penalty orders or remedies to include any person affected by the contravention. As the Minister noted in his Second Reading Speech, an 'eligible person' able to bring an action under clause 227 will include Inspectors under the Workplace Relations Act (including officers of the Building Industry Taskforce and the Australian Building and Construction Commission once established).

Involvement in a contravention

Sub-clause 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 is broadly defined to include:

- aiding, abetting, counselling or procuring the contravention

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- inducing the contravention 'whether by threats or promises or otherwise'
- being 'directly or indirectly' knowingly concerned in or party to the contravention, or
- conspiring with others to effect the contravention.

Interaction between civil penalties and criminal law

Given that several of the civil penalty provisions of the Bill relate to conduct that might also involve criminal offences, such as threat, **clauses 228** and **229** describe the interaction of these provisions with criminal prosecution of the same conduct.²³

Sub-clause 228(1) prevents a person from receiving a double penalty by preventing courts from imposing a penalty for conduct for which that person has already been convicted of an offence. Note, however, that by virtue of **sub-clause 228(3)** this protection does not work in the other direction: someone may be tried for a criminal offence despite already having had a civil penalty imposed against them for the same conduct.

Sub-clause 228(2) requires that proceedings for a penalty order be stayed if criminal proceedings are on foot relating to the same conduct. The civil proceedings may be resumed if the person is not convicted of the criminal offence.

Sub-clause 228(4), a new addition compared to the 2003 Bill, provides that if a person's conduct amounts to a contravention of both section 174 of the Bill and section 170MN of the Workplace Relations Act, proceedings can be instituted under either or both of section 227 of the Bill or section 170NF of the Workplace Relations Act. However a person will not be liable for more than one financial penalty for the same conduct. But as the Explanatory Memorandum notes:

This will not prevent a person who has had a pecuniary penalty imposed on them for a breach of s. 170MN of the *Workplace Relations Act 1996* from having an order made against them to pay damages to a specified person or any other order the court considers appropriate under paragraphs (b) or (c) of subclause 227(1).²⁴

Clause 229 provides that evidence of information given or documents produced by a defendant in proceedings for a civil penalty may not be admitted in a subsequent criminal trial against that defendant relating to the same conduct. This provision seems intended to provide protection from self-incrimination in the course of civil proceedings: that is, to ensure that evidence that a defendant gives in the civil proceedings cannot be used against them in subsequent criminal proceedings. However, it is arguable that the provision could also be used to prevent a defendant from reusing evidence of their innocence in a subsequent criminal trial.

The issue may depend on the interpretation of 'evidence of information'. There is no concern if 'evidence of information' is understood to mean evidence of the record of the proceedings or evidence of oral statements provided to investigators in the course of civil

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proceedings. However, a problem may arise if 'evidence of information' is taken to mean evidence of information provided by the defendant outside the context of civil proceedings. For example, if it is alleged that the defendant verbally threatened another person, evidence of the information provided by the defendant (that is the conversation that took place between the defendant and the other person) may be critical to the case. In this example, it is unclear that the defendant may give evidence of that conversation in both proceedings. This would be a harsh, presumably unintended, consequence of the provision.

Concluding Comments

See comments under this heading in [Bills Digest 129 2003-04](#).

Endnotes

- 1 http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2002-04/building03/index.htm.
- 2 Specialist News 2004, 'Big sanctions start today for unlawful action in construction', *Workplace express*, www.workplaceexpress.com.au, 9 March 2005.
- 3 Kevin Andrews, 'Second reading: Building and Construction Industry Improvement Bill', House of Representatives, *Debates*, 9 March 2005, p. 4.
- 4 Kevin Andrews, 'Question without Notice: Workplace Relations: Building Industry', House of Representatives, *Debates*, 8 March 2005, p. 7.
- 5 <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd129.htm>.
- 6 <http://www.aph.gov.au/library/pubs/bd/2003-04/129-130%20Annex%20A,%20B.htm#annexb>.
- 7 <http://www.aph.gov.au/library/pubs/CIB/2002-03/03cib30.htm>.
- 8 The report is available on the Government's '[Australian Workplace](#)' on-line site (<http://www.workplace.gov.au/Workplace/WPDisplay/0,1280,a3%253D5921%2526a0%253D0%2526a1%253D517%2526a2%253D637,00.html>).
- 9 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.
- 10 Available at the Federal Government's on-line site for Building and Construction Industry reform at: <http://www.workplace.gov.au/Workplace/WPDisplay/0,1280,a0%253D0%2526a1%253D517%2526a2%253D637,00.html>.

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- 11 'Taskforce gets new "clean-up" powers', *industrial law news*, Issue 7, 28 July 2004, p. 5.
- 12 CCH, *Australian Labour Law* para 45-610.
- 13 Creighton and Stewart, *op. cit.*, p. 148.
- 14 CCH, *Australian Labour Law* para 45-610.
- 15 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 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).

- 16 Explanatory memorandum, p. 7 (emphasis added).
- 17 '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>.
- 18 Explanatory memorandum, p. 8.

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- 19 [*Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union* \[2002\] FCA 61 \(6 February 2002\).](#)
- 20 p. 12.
- 21 See Minister's second reading speech and Cole Royal Commission, op. cit., Vol 1, p. 17.
- 22 See for example s 170CR, s 170HI, s 170NF, s 170VV, s 178, s 285F, s 298U and s 533, Workplace Relations Act.
- 23 These provisions appear to be modelled on Regulations 172 – 175 of the Workplace Relations (Registration and Accountability of Organisations) Regulations 2003.
- 24 Explanatory Memorandum, p. 15.

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