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Date introduced: 14 November 2013
House: House of Representatives
Portfolio: Employment
Commencement: Sections 1 and 2 of the main Bill commence on Royal Assent; all other provisions commence on 1 January 2014 or the day after Royal Assent, if that is later. Sections 1 to 3 of the Transitional Bill commence on Royal Assent; all other provisions are tied to the commencement of the main Bill.


When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
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Purpose of the Bills

The purpose of the Building and Construction Industry (Improving Productivity) Bill 2013 (the Bill) is to re-institute a separate workplace relations framework for the building industry based largely on the Building and Construction Industry Improvement Act 2005 (the BCII Act). Among other things the Bill re-establishes the Australian Building and Construction Commissioner, reintroduces provisions dealing with unlawful industrial action, coercion and the associated civil penalties specific to the building industry, and broadens the scope of these provisions. The purpose of the Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013 (the Transitional Bill) is to wholly repeal the Fair Work (Building Industry) Act 2012 (FWBI Act), ¹ to make necessary amendments to other Acts and to provide for the transition to the new arrangements.

Structure of the Bills

The Bill contains nine chapters.

- Chapter 1 contains preliminary material, including definitions which extend the scope of building and construction regulation
- Chapter 2 establishes the Australian Building and Construction Commissioner (the ABC Commissioner)
- Chapter 3 provides the Minister with the power to issue a Building Code
- Chapter 4 establishes the Federal Safety Commissioner
- Chapter 5 deals with unlawful action, including a new offence of unlawful picketing
- Chapter 6 deals with coercion, discrimination and unenforceable agreements
- Chapter 7 deals with powers of the ABC Commissioner and other authorised officers to obtain information
- Chapter 8 deals with enforcement and
- Chapter 9 contains miscellaneous provisions, including provisions to do with handling of information, powers of the ABC Commissioner, and courts.


Background

The Building and Construction Industry Improvement Act 2005

A Royal Commission into the building and construction industry, the Cole Commission, was established in 2001. On the basis of its First Report, the Building Industry Task Force was established in 2002.² The role of the Task Force was to respond to the threatening behaviour of unions by investigating, and taking legal action in relation to, breaches of freedom of association; and to respond to ‘pattern bargaining’ by investigating breaches of the Workplace Relations Act 1996 concerning Australian Workplace Agreements.³

The Cole Commission’s final report was delivered in 2003.⁴ It found widespread disregard of laws and courts, threatening and intimidatory conduct, and underpayment of employees’ entitlements. It catalogued a large number and variety of misbehaviours by unions.

The Cole report noted that the short term interests of construction companies lead to their acceding to union demands which are not in the national economic interest. It found that:

... quick fix solutions driven by commercial expediency supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies.  

The Commission recommended, among other things, separate legislation governing the building and construction industry and the creation of an independent body to enforce the legislation and otherwise to supervise the conduct of the industry. The Building and Construction Industry Improvement Act 2005 (BCII Act):

- created such an independent body, the Australian Building and Construction Commission (ABCC), and the office of Australian Building and Construction Commissioner (ABC Commissioner), with wide ranging coercive information gathering powers
- provided for a Building Code prescribing conditions for bidding for Commonwealth building contracts
- broadened the range of unlawful action in the building and construction industry and
- increased penalties for unlawful action.  

At the time it was introduced, the BCII Act was regarded by many, especially unions, as extreme. To some extent it was ‘normalised’ by the Work Choices legislation later in 2005, which extended some of the BCII Act provisions to the work force more generally. Subsequently, the Fair Work Act 2009 provided for the almost universal extension of enterprise agreements, and made most industrial action during the course of an agreement unlawful in any industry; so that the broader range of unlawful action was also normalised.  

The Wilcox Report and the Fair Work (Building Industry) Act 2012

When the Labor Government came to power in 2007, its policy commitment was to abolish the ABCC but to maintain a separate, specialist inspectorate for the building and construction industry within the new Fair Work Australia (later the Fair Work Commission). It commissioned Murray Wilcox to report on the best way of achieving this.  

Wilcox observed that the ABCC had ‘made a significant contribution to improved conduct and harmony’ in the industry, but that there was more to be done. It was still necessary to have a specialist body focused on the industry. However, he did not believe that there was any justification for different penalties for one industry, noting that the penalties for individual offences could vary with the circumstances and with the record of the offender.  

Wilcox discussed the compulsory interrogation power at some length. Section 52 of the BCII Act gave the ABCC the power to compel a person to provide information, or produce documents, or attend before the ABC Commissioner and answer questions, if the Commissioner believed that the person had the required information or documents or was capable of giving evidence that was relevant to an investigation. A person was not excused from giving information on the grounds that to do would contravene another law or would incriminate the person or would be against the public interest. However, such information could not be used against the person in a later prosecution. Such powers had been given to other Commonwealth agencies such as the Australian Taxation Office, the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, and the Australian Crime Commission.  

Wilcox also discussed some matters to do with Guidelines the Commonwealth had issued under the Building Code, including inconsistencies between Commonwealth and state and territory requirements, coverage of offsite work—when the ostensible purpose was to improve workplace relations on building sites—and criticisms that the Guidelines in effect attempted to ‘micro-manage’ construction site behaviour. He also observed that the Guidelines were merely an instrument issued by the Minister with no review by Parliament. 

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5. Ibid., p. 11.
9. Ibid., op. cit.
10. Ibid., p. 29–30.
11. Ibid., p. 39.
12. Ibid., p. 4–5.
Wilcox noted that the specialist building industry body should investigate complaints against employers for failure to pay employees’ entitlements. The ABCC had referred such matters to the Fair Work Ombudsman.  

Wilcox recommended that some features of the system should be retained, but that some should be changed:  

- a specialist building and construction division should be created within the Office of the Fair Work Ombudsman, with operational autonomy under a Director appointed by the Minister  
- the normal provisions of the Fair Work Act governing conduct and penalties should apply unchanged to the building and construction industry  
- the compulsory interrogation power should be retained, but with safeguards: each interrogation notice should be issued by a member of the Administrative Appeals Tribunal, and the Commonwealth Ombudsman should monitor all compulsory interrogations and report to Parliament annually on them. The expenses of persons summoned for interrogation should be paid and  
- the definition of ‘building work’ should exclude offsite work.  

Fair Work Building and Construction (FWBC) was subsequently created in June 2012 by the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012 along the lines recommended by Wilcox. The BCII Act was in effect repealed and replaced by the Fair Work (Building Industry) Act 2012 (the FWBI Act). One further change was that under sections 73 and 73A of the FWBI Act, FWBC could not initiate or continue with proceedings if the matters had been settled between the parties.  

The Building Code  

In 2011 the Victorian Government, in response to an agreement between the Master Builders' Association of Victoria and the Construction, Forestry, Mining and Energy Union (CFMEU) for pay increases for 30,000 building workers of five per cent per annum for four years plus seven per cent increase in allowances, tightened its construction industry code of practice. The changes to the code meant that when the CFMEU pressured the construction company Grocon to appoint its nominees as safety officers on a new construction project the company was obliged to refuse. The subsequent dispute entailed ugly scenes including picketing the site, and a loss for the union. Some commentators have welcomed the Victorian Government’s approach, believing that it will greatly reduce the cost of building infrastructure in Australia.  

Consistent with Wilcox’s recommendations, the Commonwealth has made the Building Code 2013 as a legislative instrument. It came into operation in February 2013. The Code is based on the National Code of Practice for the Construction Industry 1997. Unlike the previous Code, it provides (subsection 18(2)) that a contractor engaged in enterprise bargaining must not refuse to consider a claim on the grounds that a third party has indicated that it will or will not procure services from a person covered by an industrial instrument that contains proscribed terms. This has been interpreted as directly challenging the Victorian policy, which excludes companies whose enterprise agreements do not meet its guidelines. Meanwhile the Federal Court ruled that the Victorian code breached the Fair Work Act adverse action and coercion provisions. The Victorian Government has appealed the decision.  

13. Ibid., p. 94.  
While using government procurement policies to further general policy goals such as work health and safety has a long history, it may not be the best way to deal with high costs in the industry. Promotion of more competition, if necessary from international firms, could be more effective. Recently an Italian firm described the complexity of the system of procurement for Australian construction projects as ‘almost designed to protect the Australian duopoly [of Leighton and Lend Lease].’

Do the Workplace Relations arrangements matter?

Changing Commissioners

In 2010 a new ABC Commissioner, Mr Leigh Johns, was appointed. Soon after taking office, he announced that the ABCC, rather than the Fair Work Ombudsman, would pursue breaches such as underpayment of wages in the building and construction industry; and he announced an inquiry into sham contract arrangements in the industry. Use of the coercive powers declined, and there were no compulsory examinations in 2012–13.

In October 2013, Mr Nigel Hadgkiss was appointed as the new Director of the Fair Work Building Industry Inspectorate. Mr Hadgkiss had been deputy director of the ABCC. Mr Hadgkiss told a Senate Estimates Committee in November that he had decided, with the Fair Work Ombudsman, to move the wages and entitlements function back to that agency. He spoke of ‘…a return to enforcing the law to its fullest extent. Those who breach the law must face the consequences.’ He is quoted as saying, in a speech to an industrial relations conference, that he would go ‘back to the future’ and crack down on lawlessness, intimidation and thuggery on building sites.

It appears that the nature of building industry supervision can change substantially without any change in the legislation.

Industrial relations

Days lost to industrial disputes per 1,000 workers in the construction industry are shown in Figure 1. Interpreting the picture is not simple.

First, there was no dramatic decline from the time when the Building Industry Task Force, which had many of the functions of the ABCC, began operations in 2002. Second, there have been many more days lost to industrial disputes in the last few years, since the Labor Government began the changes to regulation. However, the peaks in the data appear to correspond to serious disputes in Victoria, which were a result of a tightening, not a loosening, of regulation. Moreover, the changes in the figures for industrial disputes in the construction industry are roughly similar to those for the economy as a whole.

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Figure 1: Working days lost per 1,000 employees, Australia, construction industry

Source: Australian Bureau of Statistics (ABS), Industrial disputes, Australia, various issues, cat. no. 6321.0.55.001, ABS.

The Wilcox report concluded that there had been a significant improvement in workplace relations due to the ABCC. It attributed this in part to the speed with which the ABCC responded to requests for intervention. People interviewed for his study reported that the ABCC:

... had increased their level of job satisfaction and had had a positive effect on their working environment and sense of job security, site industrial relations and productivity and their personal relationships with people on the other side of the industrial divide.28

Productivity

The title of this Bill includes the words ‘improving productivity’ and the Government has several times asserted that the operation of the ABCC led to an improvement in productivity.29

In 2007 the consultancy firm Econtech estimated the impact of the ABCC. The method it used was based on an existing body of work which compares the costs of specific tasks in the non-unionised residential building industry with the costs of those tasks in the unionised civil construction sector. The assumption is that costs would be higher in civil construction because of the union presence, and that the level of unionisation and the regulatory environment could affect the size of the gap. In particular, Econtech argued that if the gap narrowed during the time of operation of the ABCC then it would be because the conduct of unions had been constrained. This methodology has been criticised on the basis that higher costs in construction could be due to other factors such as complexity, longer time frames and extra safety precautions needed on higher buildings, and that changes in costs could be due to changes in the financing environment. However, it has been fairly widely used and accepted.

The Econtech report said:

After averaging 10.7 per cent in the 10 years to the end of 2002, the cost gap has recently closed dramatically to be only 1.7 per cent at 1 January 2007. This is not consistent with claims that the cost gap was due to structural factors. Rather, closing of the cost gap has coincided with the operation of the ABCC and its predecessor the [Building Industry] Taskforce.30

That is, it suggested that 84 per cent of the gap had been closed.

These results were then extrapolated to the wider economy and it was found that:

Consumer prices are lower (by 1.2 per cent), and Australian GDP is higher (by 1.5 per cent) than would have been if the ABCC had not existed...the higher construction productivity leads to an increase in consumer living standards...of about $3.1 billion [a year].

Other researchers challenged these findings and tried to—but could not—replicate them using the original data. Eventually Econtech conceded that it had made an error:

For the original 2007 Econtech Report, some data was inadvertently juxtaposed in extracting it from...hard copy publications.

This made a big difference to the findings, virtually obviating the change that had been found.

There is little other statistical evidence as to the impact of the ABCC. Justice Wilcox concluded that the Econtech report was deeply flawed and should be disregarded, but he noted that in response to his request for hard evidence as to the impact of the ABCC most submissions merely reproduced this work. It has remained in wide circulation, and indeed Econtech has built on it despite having admitted that it was wrong.

The best evidence Wilcox found was that Australian Bureau of Statistics figures showed a modest increase in labour productivity in the building industry in the previous few years. He was prepared to attribute a part of it to improved industrial relations, and a part of that improvement to the ABCC.

Workplace injuries and deaths

It has been claimed that the ABCC resulted in an increase in the number of injuries and deaths in the construction industry. For example, David Noonan of the CFMEU said:

The biggest issue facing construction workers is poor workplace safety. The ABCC of course does not regulate safety, but those state and federal bodies that do are underresourced compared to the ABCC. The last time we saw the ABCC in place, safety suffered—it went downhill and fatalities increased in the construction industry.

Professor David Peetz wrote:

There were 36 fatalities in the construction industry in 2007-08, twice as many as in 2004-05, immediately before the ABCC commenced operations in late 2005. Under the ABCC, construction became the industry with the highest number of deaths. As observance with occupational safety tends to be lower where unions are weaker, this trend is not surprising.

There does seem to have been an increase in the rate of deaths in the years of the ABCC, and a reduction in recent years:

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31. Ibid.
33. Allen, Dungan and Peetz op. cit.
34. Wilcox, op. cit., pp. 41–42, 46.
35. Wilcox, op. cit., p. 58.
**Table 1: Fatality rate, construction and all industries, Australia**

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**Committee consideration**

**Senate Education and Economics Legislation Committee**

The Bills were referred to the Senate Education and Economics Legislation Committee for inquiry and report by 2 December 2013. Details of the inquiry are at the [inquiry web page](#). The Committee’s report recommended that the Bills be passed. In its concluding remarks it says:

> The building and construction industry is an important sector of the Australian economy. Throughout this inquiry the committee has been presented with evidence of increased illegality and disregard for the rule of law in the building and construction industry. It is of the utmost importance that this sector is able to flourish and is not hampered by illegality and a culture of intimidation as evidenced in the inquiry. The committee is also persuaded by evidence that productivity in the sector has declined since the ABCC was abolished by the former government. An independent, empowered, and properly resourced regulator is necessary.

In a dissenting report, Labor Senators strongly recommend that the Bills not be passed: The urgency to re-enact the Australian Building and Construction Committee is not based on genuine requirement for urgent workplace reform, but on political motivation following the change of government. Labor senators feel strongly that the bills are being rushed unnecessarily through the Parliament.

In a further dissenting report, Australian Greens Senators also recommend that the Bills not be passed: The ABCC was biased in its work as it was driven by an ideological attack on construction workers and unions. Further, in recent years Australia’s construction industry laws have been condemned by the International Labour Organisation six times. For these reasons the Australian Greens reject the bills in their entirety.

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**Senate Education and Economics References Committee**

On 4 December 2013 the Senate referred the Government’s approach to re-establishing the Australian Building and Construction Commission for inquiry and report by 27 March 2014. Details of the inquiry are available at the [inquiry web page](#).

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills has raised a large number of concerns about the Bills.

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41. Ibid., p. 15.
42. Ibid., p. 17.
43. Ibid., p. 24.
It notes that the effect of item 2 of Schedule 1 of the Transitional Bill is that decisions made under the Building and Construction Industry (Improving Productivity) Act 2013 will be excluded from the application of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act). While this is similar to provisions in the FWBI Act and the Fair Work Act, the Committee notes that the Administrative Review Council recently concluded that the current exemption of Australian Building and Construction Commission decisions from the application of the ADJR Act should be removed.

The Committee notes a number of instances of delegation of legislative power in the Bill.

Clause 120 of the Bill allows the Minister to make rules by legislative instrument. Clause 5 of the Bill includes a definition of ‘authorised applicant’, which is a person who is entitled to seek an order relating to a contravention of a civil remedy provision. The definition allows the rules to determine that someone is an authorised applicant, and the Committee comments that it is not clear why this should be left to regulation—or indeed why persons other than the ABC Commissioner or persons affected would need to be authorised. Similarly, the ABC Commissioner has a broad power of delegation to ‘a person...prescribed by the rules’ (paragraph 19(1)(d)) and the Federal Safety Commissioner has a similar power under paragraph 40(1)(c).

The Committee questions the provision in subclause 6(4) that allows the rules to prescribe what is ‘building work’, given that this could extend the coverage of the Bill. Subclause 11(2) would similarly allow the regulations to extend the application of the Act in relation to the exclusive economic zone and waters above the continental shelf.

Clause 43 provides that a Work Health and Safety Accreditation Scheme may be established under the rules. The Committee says that too little detail is set out in the Bill, and the explanatory memorandum does not explain why it is appropriate for the Scheme to be established in this way.

Paragraph 70(1)(c) provides that the purposes for which an inspector may exercise compliance powers include ‘purposes of a provision of the rules that confer functions or powers on inspectors’. The Committee considers that the scope of application of the coercive powers should be specified within the primary legislation.

The Committee raises a number of concerns about trespass on personal rights and liberties.

First, there are several instances of reverse onus of proof. For example, action taken by an employee based on health and safety concerns may not be regarded as ‘industrial action’, but the burden of proof is on the employee to prove that the action was based on the employee’s reasonable concern about an imminent risk to his or her health and safety and that he or she did not unreasonably fail to perform other available work (paragraph 7(2)(c) and subclause 7(4)). The Committee notes that equivalent provision in the Fair Work Act which excludes certain action taken for health and safety reasons from the definition of industrial action (paragraph 19(2)(c) of the Fair Work Act) does not reverse the onus of proof. In civil proceedings under clause 57 to do with unlawful picketing, the person has to establish that their actions were not unlawful. Similarly, if a person wishes to rely on an exception or excuse in civil proceedings, under clause 93 they bear the burden of proof.

The Committee’s other concerns about personal rights and liberties include that clause 72 provides for authorised officers to enter premises (including residential premises in some cases) without a warrant. The Committee notes that in general entry should be by consent or under a warrant, and that the explanatory materials do not contain a compelling explanation for a departure from this principle. The Committee notes that subclauses 76(4), 77(4) and 99(8) provide that civil penalties for failure to comply with requests for information do not apply if the person has a reasonable excuse, but that there is no guidance as to what is a reasonable excuse. The Committee notes that the examination powers (clause 61) may trespass on the right to privacy, but that there is a justification for, and some safeguards around, the use of the power. The Committee observes that subclause 120(3) would enable certain rules (made for the purposes of subclauses 6(4), 6(5) or 10(2)) to take effect from the commencement of the subsection if the rules were made within 120 days. This would mean that the rules could operate retrospectively.

The Committee raises the question of whether the provision in clause 86 that the rules of evidence and procedure for civil matters (and not those for criminal matters) apply in relation to the civil remedy provisions is consistent with rights associated with a fair trial, but will wait for any views that may be expressed by the Parliamentary Joint Committee on Human Rights.

The Committee notes that the Bills confer broad powers which in some cases are not sufficiently defined. These include the power of the Minister to appoint a Commissioner who has ‘suitable qualifications or experience’ and is of ‘good character’ (subclause 21(3)); the power of the ABC Commissioner to appoint as a Australian Building and Construction Inspector a ‘consultant’ (paragraph 66(1)(c)) who has ‘suitable qualifications and experience’ to be a consultant (clause 32); and the similar power of the Federal Safety Commissioner (subclause 68(1)(c)). The Committee also notes that clause 28 does not require the Minister to provide reasons when terminating the appointment of a Commissioner.

The Committee raises concerns about the level of penalties in clause 49 and clause 81, noting in particular the great differences between them and similar penalties in other Commonwealth legislation, including the Fair Work Act.

Finally, the Committee notes that the explanatory memorandum is ‘regrettably brief and uninformative’.

Policy position of non-government parties/independents

The Opposition, in the Second Reading Debate in the House of Representatives, opposed the legislation. The Shadow Minister for Employment and Workplace Relations, Mr Brendan O’Connor, described the proposed powers of the ABCC as ‘extreme, unnecessary and undemocratic’ and claimed that they compromise civil liberties. He noted the Government’s reliance on the Cole Commission, which was initiated on allegations of lawlessness but in fact did not lead to any criminal prosecutions. He argued that the performance of FWBC had in fact been superior to the ABCC’s in terms of productivity and industrial disputation.46

The Australian Greens, in the dissenting report on the Senate Education and Economics Committee inquiry, as noted above, recommended that the Bills not be passed. Mr Adam Bandt of the Greens has said of the legislation:

This is the curtain-raiser to the government’s return to Work Choices. They want to wind up on the unions and then they will come after the people’s rights at work. We won’t be part of it.47

Position of major interest groups

Major employer groups including the Master Builders Association (MBA), the Housing Industry Association (HIA), the Australian Chamber of Commerce and Industry (ACCI), and the Australian Industry Group (AiG) have welcomed the Bill, saying that it will restore the rule of law in the building and construction industry. They particularly endorse the extension of the Act to unlawful picketing.48

AiG has expressed reservations about the extension of the scope of the Act to the supply of materials because it may be a vehicle for extending construction industry terms and conditions of employment and the influence of the CFMEU.49 However, HIA welcomes the extension, saying that offsite disputes are as disruptive as onsite action.50

Trade unions oppose the Bill. The Australian Council of Trade Unions (ACTU) opposes any special laws for the building and construction industry. It notes that the assertion that the Bill deals with criminal activity in the industry is incorrect, as the Bill deals with civil actions and penalties. It contests the Government’s assertions about the increase in productivity attributable to the ABCC. It notes that the BCI Act was several times found to be in breach of International Labour Organisation conventions which Australia has ratified. Like the AiG, it is


50. Housing Industry Association, Submission to Senate Education and Employment Legislation Committee Inquiry op. cit., p. 5.
concerned that the extension of the scope of the Bill may bring parts of the transport, warehousing and manufacturing industries into the scope of the ABCC. It opposes the coercive information gathering powers in the Bill, and particularly the removal of safeguards on their exercise. It opposes giving the ABCC the right to intervene in proceedings under the *Fair Work Act* or the *Independent Contractors Act 2006*, or to re-open matters that have been settled. It opposes the transition provision which allows the ABCC to use its new powers in investigations of matters that happened before the Act takes effect, and particularly the provision that the ABCC can pursue matters which were settled before the Act takes effect.  

The CFMEU submission endorses the ACTU’s. It also discusses the ABCC’s far greater focus on illegal activity by unions than by employers.  

**Financial implications**

The Government has committed to providing an additional $35 million over four years to the re-established ABCC.  

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bills’ compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. Noting that the Bills engage the rights to freedom of association, to just and favourable conditions of work, to a fair trial, to peaceful assembly, to freedom of expression, and to privacy and reputation, the Government considers that the Bills are compatible, because to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.  

The ACTU notes the failure of the Statement of Compatibility to address critical comments made by the United Nations Committee on Economic Social and Cultural Rights on the penalties under the *BCII Act*, including six months incarceration for industrial action, and says:

> In light of this observation, as well as the consistent and unequivocal criticism of the former BCI Act by the [International Labour Organisation] supervisory bodies, we find the proposition in the Statement of Compatibility with Human Rights that ‘the Bill will enhance workers’ rights to freedom of association’ to be highly objectionable.  

The Joint Parliamentary Committee on Human Rights, in its first report for the 44th Parliament, noted that the Bill may give rise to significant human rights concerns. It deferred its consideration of the Bill to allow for closer examination of the issues and to take account of submissions made to the inquiry by the Senate Education and Employment References Committee.  

**Key issues and provisions**

The Bill re-establishes the ABCC, with some new (but significant) differences. However, given the similarities between the Bill and the Building and Construction Industry Improvement Bill 2003 and the *BCII Act*, this Bills Digest focuses on the differences and key areas that may attract controversy. It is strongly recommended that readers refer to the following publications, which are cited earlier in this Digest, for additional analysis:


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51. Australian Council of Trade Unions (ACTU), Submission to Senate Education and Employment Legislation Committee Inquiry op. cit.
52. Construction, Forestry, Mining and Energy Union, Submission to Senate Education and Employment Legislation Committee Inquiry, op. cit.
54. The Statements of Compatibility with Human Rights can be found at pages 50–65 of the Explanatory Memorandum to the Improving Productivity Bill, op. cit., and at pages 10-11 of the *Explanatory Memorandum* to the Transitional Bill.
55. ACTU, op. cit., p. 16.
The main issues raised by the Bill, where they differ substantially from the BCII Act, are discussed below.

**Expanded coverage of the Bill**

A number of provisions seek to expand the application of the Bill.

**Geographical jurisdiction**

**Clauses 5, 10, 11 and 12** extend the geographical application of the Act to:
- Australia’s exclusive economic zone (EEZ) and waters above the continental shelf (including resource platforms and ships in the EEZ or those waters) and
- Christmas Island and Cocos (Keeling) Islands.  

**Industry coverage**

**Clause 6** contains the definition of building work, a key term that underpins the operation of the Act. The Bill defines building work as encompassing a broad range of activities including: construction, restoration, repair and demolition, any operation that is ‘part of or preparatory to’ such activities, and ‘pre fabrication of made-to-order components’ whether carried out on-site or off-site.

**Paragraph 6(1)(e)** expands the definition of building work to include the supply and transport of building goods directly to building sites (including resource platforms) for subsequent use in building work. The Explanatory Memorandum states that the expanded definition of building work is ‘not intended pick up the manufacture of those goods’.  

The Bill retains the exclusions for small-scale residential construction projects and mineral exploration activities, contained in the BCII Act and the FWBI Act.

**Ancillary sites**

**Clause 9** defines ancillary sites. Relevantly, this includes sites from which goods are transported or supplied directly to a building site or sites where building industry participants do work relating to building work. This concept was not included in the BCII Act or the FWBI Act.

**Impact of expanded coverage**

The effect of the above provisions is to effectively extend the operation of the Bill to the transport, supply and resources sectors both within Australia and also to operations conducted in Australia’s EEZ waters above the continental shelf, provided there is a relevant connection to building work as defined in the Bill.

**Coercive powers**

**Current coercive powers**

The FWBC retained the powers originally provided by the BCII Act to the then ABCC to require a person to give information, produce documents and attend an interview to answer questions. However, the FWBI Act introduced a number of safeguards on the use of the coercive powers. Importantly these include that:
- the FWBC must apply for an examination notice to a Presidential Member of the Administrative Appeals Tribunal (AAT) who

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57. Christmas Island is also covered by Fair Work Building Industry Act 2012 and was also covered by the Building and Construction Industry Improvement Act 2005 and Building and Construction Industry Improvement (Consequential and Transitional) Act 2005.


59. Paragraphs 6(1)(f), (g) and (h) and subclauses 6(2), (3).

• must be satisfied that a case has been made out for its use.  

The *FWBI Act* also provides that the Commonwealth Ombudsman must be notified whenever an examination notice is issued. Further, the FWBC must provide a report on, and video recording and transcript of, the examination to the Commonwealth Ombudsman, who must then review the examination and provide annual reports to Parliament.

**Proposed coercive powers**

The Bill re-instates the previous coercive investigatory powers of the ABC Commissioner under the *BCII Act*. Where the Commissioner reasonably believes that a person has information or documents relevant to an investigation or is capable of giving evidence relevant to an investigation, Chapter 7, Part 2 of the Bill provides that the Commissioner can require a person to:

• give information or produce documents to the ABC Commissioner
• attend an examination before the ABC Commissioner and
• answer questions or provide information under oath or affirmation.

In addition, where (amongst other reasons) an inspector reasonably believes that the Act, a designated building law or the Building Code is being breached they can:

• enter a premises without force
• require a person to provide their name and address
• inspect any work, process or object
• interview any person
• require a person to produce a record or document
• inspect and make copies of records or documents or
• take samples of any goods or substances

In addition, outside of the powers related to authorised officers power to enter premises, authorised officers can also issue a notice requiring a person to produce documents or records. In contrast, Federal Safety Officers may only exercise such powers for the purpose of ascertaining if relevant bodies meet and comply with the accreditation requirements, or have complied with the conditions of accreditation in respect of building work.

**Ombudsman oversight of use of coercive powers**

Unlike the existing Act, the Bill does not require the ABC Commissioner to apply to the AAT for an examination notice. However, the ABC Commissioner must still provide a report on and video recording and transcript of,

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62. Ibid., section 47.
63. Ibid., section 49.
64. Ibid., section 54A.
65. Paragraphs 61(2)(a), (b).
66. Paragraph 61(2)(c).
67. Subclause 61(5).
68. ‘Designated building law’ is defined at clause 5 of the Bill as:
   (a) the *Independent Contractors Act 1996*, the *Fair Work Act 2009* or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* or
   (b) a Commonwealth industrial instrument (which is separately defined in clause 5).
69. Subclauses 72(1), (2).
70. Clause 76.
71. Subclause 74(1).
72. Clause 77.
73. Subclause 72(2).
74. Clause 61.
the examination to the Commonwealth Ombudsman, who must then review the examination and provide annual reports to Parliament.75

**No privilege against self-incrimination**

Clause 102 removes the privilege against self-incrimination by providing that a person is not excused from providing information to the ABC Commissioner because to do so would contravene another law or might tend to incriminate or otherwise expose the person to a penalty or other liability.

Subclause 102(2) provides both use and derivative use immunity by prohibiting the use of any information, answer given or document produced in proceedings other than those related to clause 62 (failing to comply with an examination notice) or proceedings under the Criminal Code Act 1995 related to giving false or misleading statements or documents or obstructing Commonwealth officials.76 As such, clause 102 effectively replicates section 53 of both the FWBI Act and BCII Act.

**Additional protections**

Clause 103 extends additional protection to persons who comply with an examination notice by providing that any information, documents or answers to questions cannot be used in any proceedings for contravening any other law because of complying with the examination notice. It also provides that they are not liable in any civil proceedings for any loss, damage or injury of any kind suffered as a result of complying with the examination notice. As such, clause 103 effectively replicates section 54 of both the FWBI Act and BCII Act.

**Retrospective operation of coercive investigatory powers**

Item 2 of Schedule 2 of the Transitional Bill provides that the powers related to obtaining information apply in relation to any contravention or alleged contravention of either the BCII Act or the existing FWBI Act that occurred or is alleged to have occurred before the transition time.

**Criminal Offences**

The Bill contains a number of criminal offences similar to those contained in section 52 of the FWBI Act. Under clause 62, it is an offence punishable by six months imprisonment not to comply with an examination notice to:

- provide information
- produce a document
- attend an examination to answer questions
- take an oath or affirmation or
- answer questions during the examination.77

Clause 106 makes it an offence punishable by 12 months imprisonment for an entrusted person to make a record or disclose protected information, except in specific circumstances. It effectively replicates section 65 of both the FWBI Act and BCII Act.

**Civil penalty provisions**

The FWBI Act removed the specific penalties for participants in the building industry, making them subject to the ordinary penalties under the Fair Work Act.78 Like the BCII Act, the Bill would restore specific building industry penalties.

The Bill, like the BCII Act, creates two categories of civil penalties:

- Grade A (maximum penalty of 1,000 penalty units for a body corporate and 200 for a natural person) and

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75. Clauses 64 and 65.
76. ‘Use’ immunity is defined as where a person is required to answer questions which would tend to incriminate or expose him or herself to a penalty, any information or evidence given that would tend to incriminate the person may not be used against him or her directly in court...In comparison, ‘derivative use’ immunity is where any information or evidence given that would tend to incriminate the person may not be used to gather other evidence against that person: Attorney-General’s Department, A guide to framing Commonwealth offences, infringement notices and enforcement powers, Attorney-General’s Department, September 2011, pp. 97, 98, accessed 11 December 2013.
77. In addition, intentionally providing false or misleading information or documents would be an offence (punishable by 12 months imprisonment) under either section 137.1 or 137.2 of the Commonwealth Criminal Code Act 1995.
• Grade B (maximum penalty of 100 penalty units for a body corporate and 20 for a natural person). 79

The civil penalty offences created by the Bill are listed in the table in Appendix A. The offences largely replicate the offences contained in the BCII Act (for example, coercion and discrimination) with the exception of the new unlawful picketing civil penalty offence, discussed elsewhere in this Bills Digest.

**Industrial action**

The Bill, at clause 4, contains its own definition of *industrial action*. It largely replicates the definition contained in section 19 of the Fair Work Act, with one notable difference. **Subclause 7(4)** provides that where a person claims their action was based on a reasonable concern about an imminent risk to their health or safety, they bear the burden of proving their concern and its reasonableness. However, as noted in the Explanatory Memorandum it ‘does not require the employee to prove that there is in fact an imminent risk’. 80 Subclause 7(4) of the Bill replicates subsection 36(2) of the BCII Act.

For ease of comparison, the definitions of *industrial action* contained in the Bill and the FW Act are set out in **Appendix B**. Of note, the Bill does not reinstate the BCII Act requirement of *industrial action* needing to be ‘industrially motivated’ before being unlawful. 81

**Protected industrial action**

Clause 8 narrows the scope of *protected industrial action* in comparison to the definition provided by the Fair Work Act. The clause introduces the concept of *protected persons*, which are:

• an employee organisation or officer of the organisation (within the meaning of the Fair Work Act), that is a bargaining representative for a proposed enterprise agreement

• members of the employee organisation employed by the employer (and who will be covered by the proposed enterprise agreement) or

• an employee who is a bargaining representative for the proposed enterprise agreement. 82

For the purposes of the Bill, action will **not** be *protected industrial action* if it is engaged in in concert with one or more non-protected persons. 83 In addition, action will not be *protected industrial action* if the organisers include one or more non-protected persons. 84

In effect, *industrial action* will not be protected under the Bill where it is supported by persons other than those directly involved in the bargaining for the relevant enterprise agreement. This largely replicates subsections 40(1) and (2) of the BCII Act.

**Constitutionally covered entities**

In New South Wales v Commonwealth (Work Choices case), 85 the constitutional validity of the Workplace Relations Act 1996 (Cth) (as amended by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth)) was challenged. The High Court held that the legislation was a legitimate exercise of the Commonwealth’s corporations power, and as a result, the corporations power is now used as the primary constitutional basis for industrial relations legislation. Since the decision in the Work Choices case, all states other than Western Australia have referred their private sector industrial relations powers to the Commonwealth.86

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79. Clause 5, subclause 81(2) of the Bill. See subsections 4(1) and 49(2) of the BCII Act. Under section 4AA of the Crimes Act 1914, a penalty unit is $170.


81. Building and Construction Industry Improvement Act 2005, subsection 36(1) and section 37(a).

82. Subclause 8(3).

83. Paragraph 8(2)(a).

84. Paragraph 8(2)(b).


86. See: Industrial Relations (Commonwealth Powers) Act 2009 (NSW); Fair Work (Commonwealth Powers) and Other Provisions Act 2009 (Qld); Fair Work (Commonwealth Powers) Act 2009 (SA); Industrial Relations (Commonwealth Powers) Act 2009 (Tas); Fair Work (Commonwealth Powers) Act 2009 (Vic).
Clause 45 provides that the prohibitions against unlawful industrial action and unlawful picketing must relate to a constitutionally covered entity. The interconnected definitions in clause 5 define a constitutionally covered entity as:

- a corporation to which paragraph 51(xx) (the corporations power) of the Constitution applies
- the Commonwealth or a Commonwealth authority within the meaning given by the Commonwealth Authorities and Companies Act 1977
- a body corporate incorporated in a territory or
- an organisation within the meaning given by the Fair Work (Registered Organisations) Act 2009.

The definition in clause 45 and reference to the corporations power is necessary to ensure the prohibitions against unlawful industrial action and unlawful picketing apply as broadly as possible, within Constitutional limits. Without it, there would be a possibility of parts of the legislation being ruled invalid on the basis of overstepping the Commonwealth’s law making powers.

Despite this, 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 unincorporated sub-contractor (which fall outside the corporations power of the Commonwealth to regulate) on a building site would be covered by the Bill, especially if any action they take is only in relation to their own employer. 87

Unlawful industrial action
Clause 5 provides that action is unlawful industrial action if:

- it is industrial action and
- is not protected industrial action.

As noted previously, the Bill does not reinstate the BCII Act requirement of industrial action needing to be ‘industrially motivated’ before being unlawful. 88

Effect of new definitions
The new interconnected definitions of industrial action, protected industrial action and unlawful industrial action exclude any industrial action that is not:

- engaged in and organised solely by protected persons (that is, persons directly involved as bargaining representatives in negotiations for, or who will be covered by, a proposed enterprise agreement) and
- authorised through the required protected action ballot process contained in the Fair Work Act.

Such action will be unlawful industrial action and, under clause 46 of the Bill, attract a Grade A civil penalty ($34,000 for individual, $170,000 for body corporates).

Unlawful Picketing
Under previous and existing legislation there are no prohibitions on picketing.

New unlawful picketing offence
The Bill creates the new offence of engaging in or organising an unlawful picket, punishable by a Grade A civil penalty ($34,000 for individual, $170,000 for body corporates). 89 To be unlawful, a picket must meet the two limbs provided in paragraphs 47(2)(a) and (b) respectively.

First limb of unlawful picketing
The first limb, in paragraph 47(2)(a), relates to the purpose and impact of the picket. For a picket to be unlawful it must:

88. Building and Construction Industry Improvement Act 2005, subsection 36(1) and paragraph 37(a).
89. Subclause 47(1).
have the purpose of preventing or restricting a person from accessing or leaving a building site or ancillary site or
directly prevent or restrict a person from accessing or leaving a building site or ancillary site or
reasonably be expected to intimidate a person accessing or leaving a building site or ancillary site.

However, even if one of the above elements of the first limb is satisfied, a picket will not be unlawful unless it also satisfies one of the four elements contained in the second limb in subclause 47(2). Those elements relate to the motivation or lawfulness of the picket.

Second limb of unlawful picketing

The first two elements of the second limb relate to the motivation of the picket. They provide that (if the first limb is satisfied) a picket will be unlawful where it:

- is motivated for the purpose of supporting or advancing claims against a building industry participant in respect of the employment of employees or
- is motivated for the purpose of supporting or advancing claims against a building industry participant in respect of the engagement of contractors by the building industry participant.

As drafted, a court is required to consider the mental state (motivation) of the participants or organisers of the picket. Due to clause 56, a picket will satisfy either of the above two elements if the reason (or a reason, if there is more than one) it was organised or engaged in was to support one of the specified types of claims against a building industry participant.

As drafted, subparagraph 47(2)(b)(i) is highly unlikely to apply to building industry participants other than building employees, contractors and employee orientated building associations and their officers.

The other two elements of the second limb have a broader scope of application. Relevantly a picket will be unlawful where it:

- is motivated for the purposes of advancing industrial objectives of a building association or
- is unlawful (apart from the operation of clause 47 of the Bill).

In relation to pickets motivated for the purposes of ‘advancing the objectives of a building association’, this would appear to have a broader application than the two elements of the second limb contained in paragraph 47(2)(b)(i) as it can potentially apply to pickets organised or engaged in by persons in support of employer or contractor building associations, and not just to employee building associations.

The final element of the second limb is that the picket is unlawful (apart from the operation of clause 47 of the Bill). The effect of the final element is where persons engage in a picket that:

- is not protected industrial action under the Bill or
- was protected industrial action under the FW Act but subsequently the FWC made an order under section 418 of the FW Act to stop the action

the action is unlawful for the purposes of subparagraph 47(2)(b)(iii) and hence the picket is unlawful. In addition, the final element of the second limb would also be engaged where the picket breaches relevant state or territory:

- legislation governing protests or
- criminal legislation (for example, trespass).

As a result, a picket will attract the penalty proposed by the Bill where it meets the first limb and is otherwise unlawful or where it was organised to advance various industrial claims. The Explanatory Memorandum notes

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90. Subparagraph 47(2)(b)(i).
that clause 47 will not capture pickets that are lawful and organised for non-industrial purposes such as drawing attention to various social, environmental or community issues. 93

In addition to prohibiting unlawful pickets, clause 48 allows a person to apply to a relevant court for an injunction to prevent an unlawful picket from occurring or to stop an unlawful picket already underway.

**Prosecution after settlement of civil disputes**

Section 73 of the FWBI Act prevents the Commissioner from continuing or instituting proceedings in relation to matters that have been settled by the parties. This Bill does not include a similar clause to prevent such action.

In the second reading speech to the Bill, the Minister for Education and Leader of the House stated that:

> The inspectorate was hampered by quite novel restrictions on its ability to initiate or continue with proceedings if matters the subject of litigation had been settled by the parties. These amendments were introduced without any prior notice or forewarning by the Leader of the Opposition when he was the responsible minister. They are equivalent to a person running a red light and causing an accident and then police being unable to charge that person with any offences, including running the red light, if that person has settled with the other person involved in the accident. 94

Hence it appears that the ABC Commissioner will be able to pursue civil or criminal charges in circumstances where civil liability has been settled.

**Clause 20 of Schedule 2** of the Transitional Bill provides that the ABC Commissioner may participate in a proceeding, or institute a proceeding, under the FWBI Act even if the proceeding relates to a matter that was settled before the new Act commences. This is in effect a retrospective provision. It is possible that parties have reached an agreement in good faith on the assumption that that would be the end of the matter, only to have it reopened under a law that was not in force at the time. 95

**Reverse onus of proof**

**Clause 57** of the Bill reverses the onus of proof (in relation to reasons for actions) from the defendant in proceedings related to contraventions of the Bill’s civil penalty provisions.

As a result, in relation to contraventions of the civil penalty provisions (including unlawful picketing), in any proceedings it must be assumed that the relevant action that would constitute a contravention was (or is) being taken by the defendant for the relevant reason or with the relevant intent, unless the defendant proves otherwise. The Explanatory Memorandum refers to section 361 of the Fair Work Act, which provides that where a person brings an application for adverse action under Part 3-1, it must be presumed that the action was taken for the alleged prohibited reason. This presumption can, of course, be displaced by evidence led by the respondent (for example, in a general protections case, of the employee’s unsatisfactory performance).

The presumption arises where the applicant establishes facts that provide the basis for the alleged prohibited conduct by the respondent. 96 Such clauses are not uncommon, and are usually imposed where evidence relevant to the complaint is likely to be held by the defendant and the complaint would be difficult, if not impossible, to establish in the absence of that evidence. As noted by one academic (in relation to proving discrimination claims):

> a reverse onus provision offers a clear advantage over purs[uing] a complaint under anti-discrimination legislation because it requires the employer to articulate the reason for the impugned conduct. **The actual motivation for acting in a particular way is something known, by and large, only to that employer.** Under anti-discrimination law it is usually up to the complainant, in establishing direct discrimination, to prove the [causal] link by adducing evidence to substantiate an alleged reason or to establish the facts from which an inference can be drawn. The

reserve onus mandates greater input by the employer in this process, and will assist individuals in making out a workplace age discrimination complaint. 97 (emphasis added).

It has also been noted that, from the majority of cases dealing with discrimination, a reverse onus of proof is not a panacea for allegations. 98 It appears that similar reasoning is behind the imposition of the reverse onus of proof imposed by the Bill, as the Government has justified it on the basis that:

...in the absence of such a clause, it would be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason. 99

Project agreements
Subclause 59(1) provides that an agreement is unenforceable to the extent that it relates to building employees if:

- the agreement is entered into with the intention of securing standard employment conditions for building employees in respect of building work that they carry out at a particular building site or sites
- not all the employees are employed in a single enterprise
- the agreement is not a Commonwealth industrial instrument (for example, an enterprise agreement or modern award) and
- a party to the agreement is a constitutional corporation.

The effect of subclause 59(1) and the definition of a single enterprise in subclause 59(2), is to prohibit agreements that seek to secure standard employment conditions on a particular building site (or sites) where there are employees employed by a number of different enterprises (for example, employed by subcontractors or joint venture partners). Item 2 of Schedule 2 of the Transitional Bill provides that clause 59 of the Bill applies to agreements entered into after the transition time.

Chapter 3—The Building Code
Clause 34 enables the Minister to issue a Building Code, in similar terms to section 27 of the FWBI Act. As under that Act, the Code is to be a legislative instrument. It may deal with work health and safety matters relating to building work. However, the Bill omits the requirement for the Minister to take into account relevant recommendations of the Federal Safety Commissioner. The existing FWBI Act and the previous BCII Act (at section 27) both included this requirement.

Clause 35 restores a provision that was in the BCII Act (but not the FWBI Act) which allows the Minister to require a written report as to the extent of compliance with the Building Code for particular building work. 100

Chapter 4—The Federal Safety Commissioner
Clause 38 lists the functions of the Federal Safety Commissioner. As is currently the case under section 30 of the FWBI Act, they include the promotion of work health and safety and the promotion of the WHS Accreditation Scheme. In contrast to the current Act and the previous BCII Act they do not include functions of monitoring compliance with, and disseminating information about, health and safety provisions of the Building Code.

Clause 40 deals with delegations and directions to delegates by the Federal Safety Commissioner. It includes a new requirement that such directions that are of a general application are to be legislative instruments (subclause 40(5)).
The Transitional Bill


Schedule 2 contains the transitional provisions. Items 2(3) to 2(5) extend the powers to obtain information in the *Building and Construction Industry (Improving Productivity) Act* (the new Act) to alleged contraventions of the previous *BCII Act* and the existing *FWBI Act* before the commencement of the new Act, even if an investigation was begun under those Acts. Item 2(6) allows the ABC Commissioner to intervene in court proceedings, or make submissions in FWC proceedings, that began before the commencement of the new Act. Neither the Explanatory Memorandum nor the Scrutiny of Bills Committee Alert Digest comments on the retrospective aspect of these provisions. However, the Senate Committee dissenting report by the Labor Senators was critical, arguing that any such powers, if they are to be introduced, should operate prospectively, and not allow the ABCC to initiate or pursue matters (including instigating court proceedings) in respect of matters that were settled prior to the new Act taking effect. The report states ‘it is a fundamental principle of fairness and a basic precept of the rule of law that laws are applied prospectively. Parties should be entitled to rely upon the law as it exists and applies at the time’.101

Items 3 and 4, items 6 to 13, items 15 to 19, and items 21 to 24 provide for continuity of functions.

Item 5 terminates the appointments of members of the Fair Work Building Industry Inspectorate Advisory Board and of the Independent Assessor (though they can be appointed under the new Act).

Item 14 provides for continuation of payments of expenses for attending examinations that were ordered under the old Act, except for legal allowances, which are currently provided for in the *FWBI Act* and Regulation 7.13 of the Fair Work (Building Industry) Regulations 2005.102 (Payments for legal expenses will not be made for new proceedings.)

As discussed above, item 20 allows the ABC Commissioner to participate in, or institute, a proceeding under the *FWBI Act* even if the proceeding relates to a matter that was settled before the new Act commences.

Item 26 provides for the making of rules by the Minister.

Concluding comments

The Bill not only repeals the *FWBI Act* and re-establishes the ABCC, it enlarges both its jurisdictional and industry sector application. It also provides new coercive powers (with retrospective operation), re-introduces a number of criminal and civil penalty offences previously contained in the *BCII Act*, and introduces a new civil penalty offence of unlawful picketing. It provides for penalties for building industry participants which are considerably higher than those available under the *Fair Work Act*.

In effect, the Bill creates (in relation to industrial action and picketing) a new and different set of industrial relations rules that apply only to persons associated with the building and construction industry.

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### Appendix A

#### Table 2: civil penalty offences

<table>
<thead>
<tr>
<th>Offence</th>
<th>Provision</th>
<th>Grade</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engaging in or organising unlawful industrial action</td>
<td>46</td>
<td>A</td>
</tr>
<tr>
<td>Engaging in or organising an unlawful picket</td>
<td>47(1)</td>
<td>A</td>
</tr>
<tr>
<td>Coercion relating to allocations of duties etc.</td>
<td>52</td>
<td>A</td>
</tr>
<tr>
<td>Coercion relating to superannuation</td>
<td>53</td>
<td>A</td>
</tr>
<tr>
<td>Coercion in relation to making, varying, terminating etc. enterprise agreements</td>
<td>54</td>
<td>A</td>
</tr>
<tr>
<td>Taking action against a building employer due to coverage by particular instruments</td>
<td>55</td>
<td>A</td>
</tr>
<tr>
<td>Hindering or obstructing authorised officers</td>
<td>78</td>
<td>A</td>
</tr>
<tr>
<td>Failure to provide Building Code compliance report within specified period</td>
<td>35(2)</td>
<td>B</td>
</tr>
<tr>
<td>Failure to provide name and address of authorised officer</td>
<td>76(3)</td>
<td>B</td>
</tr>
<tr>
<td>Failure to provide records or documents as required by an authorised officer’s notice</td>
<td>77(3)</td>
<td>B</td>
</tr>
<tr>
<td>Failure to comply with compliance notice</td>
<td>99(7)</td>
<td>B</td>
</tr>
<tr>
<td>Making certain payments relating to periods of industrial action</td>
<td>49</td>
<td>N/A\textsuperscript{103}</td>
</tr>
<tr>
<td>Inspector or Federal Safety Officer failing to carry identification card</td>
<td>67</td>
<td>N/A\textsuperscript{104}</td>
</tr>
</tbody>
</table>


\textsuperscript{103}Paragraph 49(c) provides that if specified provisions of the Fair Work Act 2009 are contravened by a body corporate, the maximum penalty is 1,000 penalty units, compared to a maximum of 300 penalty units that would apply directly under the Fair Work Act.

\textsuperscript{104}Subclauses 67(5) and 69(5) respectively provide that the penalty is one penalty unit.
### Appendix B

#### Table 3: definitions of industrial action

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>7 Meaning of industrial action</strong></td>
<td><strong>19 Meaning of industrial action</strong></td>
</tr>
<tr>
<td><strong>(1) Industrial action</strong> is action of any of the following kinds:**</td>
<td><strong>(1) Industrial action means action of any of the following kinds:</strong></td>
</tr>
<tr>
<td>(a) the performance of building work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to building work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;</td>
<td>(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;</td>
</tr>
<tr>
<td>(b) a ban, limitation or restriction on the performance of building work by an employee or on the acceptance of or offering for building work by an employee;</td>
<td>(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;</td>
</tr>
<tr>
<td>(c) a failure or refusal:</td>
<td>(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;</td>
</tr>
<tr>
<td>(i) by employees to attend work, where that work is building work; or</td>
<td>(d) the lockout of employees from their employment by the employer of the employees.</td>
</tr>
<tr>
<td>(ii) to perform any building work at all by employees who attend work, where that work is building work;</td>
<td><strong>Note:</strong> In Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.</td>
</tr>
<tr>
<td>(d) the lockout of employees from their work by their employer, where that work is building work.</td>
<td><strong>(2) However, industrial action does not include the following:</strong></td>
</tr>
<tr>
<td><strong>Note:</strong> In Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.</td>
<td>(a) action by employees that is authorised or agreed to by the employer of the employees;</td>
</tr>
<tr>
<td><strong>(2) However, industrial action does not include the following:</strong></td>
<td>(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;</td>
</tr>
<tr>
<td>(a) action by employees that is authorised or agreed to, in advance and in writing, by the employer of the employees;</td>
<td>(c) action by an employee if:</td>
</tr>
<tr>
<td>(b) action by an employer that is authorised or agreed to, in advance and in writing, by, or on behalf of, employees of the employer;</td>
<td>(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and</td>
</tr>
<tr>
<td>(c) action by an employee if:</td>
<td>(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.</td>
</tr>
<tr>
<td>(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and</td>
<td><em>(3) An employer locks out employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.</em></td>
</tr>
<tr>
<td>(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.</td>
<td><strong>Note:</strong> In this section, employee and employer have</td>
</tr>
<tr>
<td>Building and Construction Industry (Improving Productivity) Bill 2013</td>
<td><em>Fair Work Act 2009</em></td>
</tr>
<tr>
<td>---</td>
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</tr>
</tbody>
</table>
| **When there is a lockout**  
(3) There is a lockout of employees from their work by an employer if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.  
(4) Whenever a person seeks to rely on paragraph (2)(c), the person has the burden of proving the paragraph applies. | their ordinary meanings (see section 11). |
