Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Kevin Andrews MP)
AMENDMENTS TO THE BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

OUTLINE

The proposed Government amendments will further enhance the Government’s legislative response to the Royal Commission into the Building and Construction Industry (the Royal Commission).

The amendments will:

- establish the Australian Building and Construction Commissioner (ABC Commissioner);
- set out the powers and functions of the Federal Safety Commissioner;
- improve the bargaining framework by prohibiting certain coercive and discriminatory conduct; and
- improve the compliance regime, by increasing penalties and enhancing access to damages for unlawful conduct.

Amendments to Chapter 1 insert the main object of the Act. The main object of the Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole. The amendments will also insert additional definitions.

Amendments to insert Chapter 2 are the Government’s response to the Royal Commission’s recommendation to establish the Office of the Australian Building and Construction Commissioner (Office of the ABC Commissioner) as a regulatory body for the building and construction industry. The body is to be headed by the ABC Commissioner and will have wide ranging powers to monitor, investigate and enforce Federal workplace relations law and the Building Code, and refer other matters to the appropriate Federal, State or Territory agency.

Amendments to insert Chapter 3 allow the Minister to issue a Building Code. This will further the Royal Commission’s recommendation that the Commonwealth use its purchasing powers as a building client to foster cultural change in the building and construction industry. The Chapter also sets out obligations to report on Building Code compliance.

Amendments to insert Chapter 4 are the Government’s response to the Royal Commission’s recommendations concerning Occupational Health and Safety (OHS). The Chapter establishes the Federal Safety Commissioner, and provides for the establishment of an OHS accreditation scheme to be administered by the Federal Safety Commissioner. The accreditation scheme will ensure that any person contracting with the Commonwealth for building work must meet certain OHS standards.

Amendments to Chapter 6 provide improved access to sanctions against unlawful industrial action in the form of injunctions and expand the exceptions to protected industrial action.

Amendments to insert Chapter 8 are consistent with recommendations of the Royal Commission designed to eliminate coercion and discrimination in the industry. The amendments prohibit the coercion of persons in relation to the engagement of subcontractors and employees and coercion...
or undue pressure in relation to certified agreements or choice of superannuation fund. Discrimination on the basis of the type of, or parties to, an industrial instrument covering a person’s employees is also prohibited.

Amendments to Chapter 12 will enhance compliance with relevant laws in the building and construction industry by providing an appropriate investigatory and enforcement regime.

Part 1 sets out penalties for contravention of civil penalty provisions, orders that a court may make, and who may apply for these orders.

The measures in Part 1 include:
• giving the ABC Commissioner and Australian Building and Construction Inspectors (ABC Inspectors) standing to bring proceedings for contraventions of civil penalty provisions; and
• introducing a two-tier civil penalty regime – the first tier, which deals with more serious contraventions, provides for a maximum penalty of 1000 penalty units for a body corporate (200 penalty units in other cases); the second tier, which deals with less serious contraventions, provides for a maximum penalty of 100 penalty units for a body corporate (20 penalty units in other cases).
  – By operation of section 4AA of the Crimes Act 1914, the value of a penalty unit is currently $110.

Part 2 sets out the compliance powers of the ABC Commissioner, ABC Inspectors and Federal Safety Officers.

Amendments to Chapter 13 deal with miscellaneous matters, including the following matters identified by the Royal Commission:
• rendering project agreements not certified under the Workplace Relations Act 1996 (the WR Act) unenforceable;
• making organisations responsible for the conduct of their officials, employees and members, unless they take reasonable steps to prevent such conduct;
• the protection and dissemination to other agencies of confidential information; and
• empowering the ABC Commissioner to intervene in court and Australian Industrial Relations Commission (AIRC) proceedings.

FINANCIAL IMPACT STATEMENT

Australian Building and Construction Commissioner and Federal Safety Commissioner
The Commonwealth will incur costs in establishing the Office of the ABC Commissioner and for the role of the Federal Safety Commissioner.

Proper and adequate funding will be provided to establish and perform these functions. The Office of the Federal Safety Commissioner was allocated initial establishment funding of $2.63 million in 2004-05. The ABC Commissioner was allocated $123.93 million to cover establishment and operating costs until June 2009.

The proposed Government amendments will widen the jurisdiction of the Federal Court and Federal Magistrates Court.
REGULATION IMPACT STATEMENT – AMENDMENTS TO THE BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

Overview

This Bill is the Australian Government’s response to the workplace relations recommendations from the 2001 Royal Commission into the Building and Construction Industry (the Royal Commission). The Final Report of the Royal Commission was tabled in Parliament on 26 and 27 March 2003. On 18 September 2003, an exposure draft of the Building and Construction Industry Improvement Bill 2003 (the 2003 Bill) was released and a consultation period of four weeks was established for public comments to be sent to the Department of Employment and Workplace Relations. The Australian Government consulted widely with industry participants – unions, peak employer associations, contractors, employees and small business as well as the general public and State and Territory governments - to seek their views on the proposed reforms. More than 60 submissions were received and as a result, several technical amendments were made to the 2003 Bill. The 2003 Bill was also referred to the Senate Employment, Workplace Relations and Education References Committee, which provided its report on 21 June 2004. The 2003 Bill lapsed with the prorogation of Parliament for the 2004 Federal election.

The Minister announced on 4 November 2004 that the Australian Government would reintroduce building industry specific legislation. On 9 March 2005, the Building and Construction Industry Improvement Bill (the BCII Bill 2005) was introduced into the House of Representatives. Its main features are:

• making industrial action unlawful, other than protected industrial action, with industry participants able to seek damages to recover any losses they suffer due to unlawful action; and
• improving the compliance regime, by increasing penalties for unlawful industrial action and enhancing access to damages for this conduct.

A separate regulation impact statement (RIS) was prepared for the BCII Bill 2005 as introduced to Parliament on 9 March 2005.

The BCII Bill 2005 was referred to the Senate Employment, Workplace Relations and Education Legislation Committee, which provided its report on 10 May 2005.

Following the Minister’s 4 November 2004 announcement, stakeholders were again consulted regarding possible amendments and additions to the BCII Bill 2005. Feedback received was taken into account when the Australian Government developed amendments to the BCII Bill 2005. This RIS only covers these amendments.

Current Situation

1. Participants in the building and construction industry are currently regulated by the Workplace Relations Act 1996 (the WR Act) and an array of State and Territory laws. Employees and employers are subject to a range of obligations imposed by the WR Act and by awards and agreements made under it. The WR Act has been amended on a number of occasions since 1996 to improve its operation.

2. Participants in the building and construction industry are also subject to the Workplace Relations Amendments (Codifying Contempt Offences) Act 2004.

3. This regulation impact statement considers measures included in the amendments to the BCII Bill 2005. The BCII Bill measures described below, in conjunction with other recommended measures, will effect structural and cultural change in the building and construction industry.
Problem

4. The Royal Commission was established to conduct an inquiry into unlawful or otherwise inappropriate conduct in the building and construction industry.

5. The Royal Commission’s inquiry was focussed on the commercial building and construction industry which includes non-residential building and engineering construction sectors and is currently worth around $50 billion per annum. The Royal Commission found an industry characterised by a widespread disregard for the law and an unacceptable record in terms of compliance with occupational health and safety (OHS) regulation. The Royal Commission also identified significant weakness in current structures for enforcing the law in this industry.

6. The final report of the Royal Commission provides compelling evidence of the need for reform in this industry. It catalogues over 100 types of unlawful and inappropriate conduct. The findings demonstrate “an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular. The findings indicate an urgent need for structural and cultural reform.” (Royal Commission Summary of Findings, Vol 1, Page 6, para 16).

7. Existing regulatory bodies have insufficient powers and resources to enforce the law in this industry. The Royal Commission found that currently there is no Australian Government agency that provides complete and effective regulatory coverage of the building and construction industry: some existing Australian Government authorities, such as the OEA, lack the resources and powers to sufficiently enforce regulation in the industry; whereas, some organisations such as the police forces consider ‘industrial matters’ to be outside the scope of their responsibility. Further, current penalties are insufficient to discourage unlawful behaviour.

8. The Building Industry Taskforce commenced operations in October 2002 following a recommendation in the first report of the Royal Commission and became a permanent body on 25 March 2004. The role of the Taskforce is to secure lawful conduct throughout the building and construction industry. As at 30 June 2005, the Taskforce had received 3,037 enquiries, undertaken 2,833 site visits, served 639 Notices to Produce, had 112 active investigations underway and placed 25 matters before the courts.

9. Fifty per cent of complaints received by the Taskforce were made by employers. Trade union officials have been the most prominent group against which complaints have been lodged, comprising 72 per cent of all complaints received by the Taskforce.

10. The current workplace relations system places the onus on the parties to comply and, to a large extent, enforce the law against each other. However, the different focus of the building and construction industry participants, combined with ineffective regulatory bodies, has resulted in a culture of lawlessness that permeates the industry.

11. The pervading lawlessness of the industry results in serious inefficiencies and costs. The building and construction sector contributes around 7 per cent to GDP annually. A Tasman Economics report to the Royal Commission found if productivity in the building industry matched market sector productivity growth, the accumulated gain to real GDP for the period 2003 to 2010 would be in the order of $12 billion.

Objective

12. In considering its response to the findings and recommendations of the Royal Commission, the Australian Government’s primary aim is to restore the rule of law in the building and construction industry. The Australian Government is also seeking to improve industry productivity.
Options

1) Maintaining the status quo

13. This approach would allow participants within a significant Australian industry to continue to disregard the current regulatory framework and OHS performance would remain unacceptable. This would be compounded by the absence of any entity with sufficient legislative powers to efficiently enforce the law within the industry.

2) The Australian Government’s reform proposal

14. These amendments to the BCII Bill 2005 will strengthen elements of the WR Act which have been shown by the Royal Commission to be ineffective in the building and construction industry while maintaining the relevance of the WR Act for the overall regulation of the industry. The BCII Bill focuses attention on some of the areas that were identified by the Royal Commission as requiring reform, and highlights to the industry the significance of the changes being made.

15. The amendments to the BCII Bill 2005, which are the subject of this RIS, include the following provisions:

(a) establishing an independent statutory office for enforcement;
(b) establishing an office to encourage improvement in OHS performance;
(c) providing for a Building Code;
(d) prohibiting industrial action in concert with persons who are not subject to a proposed agreement and provide injunctions against the threat of unlawful industrial action;
(e) prohibiting inappropriate conduct during agreement-making processes, including coercion to engage a particular person, coercion to vary an agreement or discrimination on the basis of the type of industrial instrument; and
(f) improving the accountability of all industry participants for their actions.

Impact Analysis

16. Most of the amendments to the BCII Bill 2005 will not have a direct impact on businesses in the building and construction industry. However, the following two areas of amendment to the BCII Bill 2005 are expected to have an impact for those businesses that are not operating within the law:

(a) establishing the Office of the Australian Building and Construction Commissioner; and
(b) set out the powers and functions of the Federal Safety Commissioner.

General impact of the reform proposal

17. Additional regulatory burdens for industry participants operating within the law will be minimal and cover areas such as obligations of persons to provide information in respect of investigations undertaken by the Australian Building and Construction Commissioner, for example. Those wishing to contract for Commonwealth construction work will need to comply with an OHS accreditation scheme.

18. The impact of these proposals is discussed below in more detail.

Economy wide impacts

19. Economic modelling undertaken by Tasman Economics for the Royal Commission shows that if productivity growth in the building and construction sector matched the average for the
market sector by 2010, the accumulated gain in real GDP would be about $12 billion. All industries would benefit from an increase in output as a result of the reduction in costs to the building and construction industry.

20. The Tasman analysis concluded that “… an increase in labour productivity has a substantial and beneficial impact on the international competitiveness of, and incentives to invest in, most sectors of the economy…An increase in labour costs, without a commensurate increase in productivity, raises capital costs and therefore reduces future investment in Australia relative to the rest of the world.” (Royal Commission Final Report, Vol 3, Page 52, para 8).

21. The likely gains experienced within the economy overall will also be experienced by the small business participants in the industry and are likely to flow on to consumers more broadly. Small business, in the form of sub-contractors, comprises, in raw number terms, approximately 99 per cent of firms in this industry. Given the composition of the industry, the Royal Commission noted that small business are the most exposed to the impact of lawlessness and pressure from the unions (Royal Commission Summary of Findings, Vol 1, Page 12, para 30) so are likely to benefit disproportionately from the reforms. However, it is difficult to accurately quantify the impact likely to be experienced by small business and consumers against each of the specific proposals outlined below.

22. The measures in part, aimed at promoting the development of workplace arrangements at the enterprise level, thereby assisting businesses, particularly small businesses, to achieve workplace arrangements which best suit their needs. To the extent that this is achieved, businesses will no longer be faced with pressure from larger operators and unions in the industry to adopt industry-wide workplace arrangements, including pay and conditions.

**Impact analysis of specific proposals to be implemented under the BCII Bill**

**Proposal:**

**Australian Building and Construction Commissioner (ABC Commissioner)**

23. In its Final Report (tabled in Parliament on 26 and 27 March 2003), the Royal Commission recommended, and the Australian Government has agreed, to the establishment of a new independent body with a range of functions and powers, broadly covering investigation, enforcement and prosecution in the building and construction industry.

24. The ABC Commissioner will head a new statutory agency, responsible for enforcing federal workplace relations laws on building sites. It will operate as a ‘one-stop shop’ for the building and construction industry by either dealing with matters itself or referring them to relevant agencies for action.

25. The main benefits of the ABC Commissioner will be to ensure structural and cultural reform in the industry, principally by taking action to address unlawful conduct in the industry. The ABC Commissioner will work with industry participants to ensure they understand their rights and obligations under the law.

26. The ABC Commissioner will improve current arrangements by being able to act promptly on unlawful industrial action and strategically intervene on behalf of parties to provide cost effective relief when Federal workplace relations laws have been breached.

27. The ABC Commissioner will operate across the country in urban, rural and remote areas. The structural environment that the ABC Commissioner will operate in includes accessing Commonwealth construction sites. The ABC Commissioner may direct ABC Inspectors to target construction sites that are at the greatest risk of industrial action by increasing the number of visits to such sites during the life of a project.
28. The ABC Commissioner will initially have offices in major capital cities. These key offices will also service nearby regional areas and States.

29. The ABC Commissioner’s functions and powers will be regulated by the BCII Bill to provide effective regulatory coverage of workplace relations issues in the building and construction industry. The BCII Bill provides specific statutory powers for the ABC Commissioner such as appropriate investigatory, compliance and enforcement powers, including the appointment of ABC Inspectors. The ABC Inspectors’ powers are similar to those currently provided to inspectors under the WR Act. The ABC Commissioner and ABC Inspectors will be able to bring proceedings under the WR Act in relation to building industry participants.

30. Parties taking unlawful industrial action will be accountable for their actions and the ABC Commissioner will be able to obtain appropriate remedies including penalties and compensation on behalf of those affected.

Impact:

31. The ABC Commissioner will have a significant positive impact on all industry participants, as it will be a body which will have the power to deal with the lawlessness which was found by the Royal Commission to be endemic in the industry.

32. The ABC Commissioner will be able to act even-handedly to protect the public interest in situations where, at present, limited or no attempt is made to secure compliance with the law. This may involve legal action but the effect of the Commissioner’s educative role and the presence of ABC Inspectors on building sites in addressing the current cultural and structural deficiencies will be important.

33. Employers will benefit from the establishment of a ‘one-stop shop’ for the building and construction industry. It will make it easier, for small business in particular, to access information and to find the appropriate regulatory body to handle matters, regardless of location or jurisdictional issues.

34. Employers will also benefit from the ABC Commissioner being sufficiently resourced to provide effective regulatory coverage, as current regulatory bodies such as the OEA, lack the resources and powers to sufficiently police the industry.

35. The ABC Commissioner will provide information in respect of the BCII Bill, the WR Act, the National Code of Practice for the Construction Industry (the National Code), the Guidelines that underpin the National Code and other issues affecting the industry. The Commissioner will promote the benefits of complying with the law. Unions, employees, subcontractors and head contractors will benefit from an understanding of their rights and obligations under the law, and understanding the implications of not observing the law.

36. Any additional compliance costs will be offset by the overall benefits of the ABC Commissioner through greater building and construction industry efficiency, productivity and reduced costs to the community more generally.

37. The Australian Government has ensured that the ABC Commissioner is appropriately resourced and funded until June 2009.

Proposal:

Federal Safety Commissioner (FSC)

38. The Royal Commission found the OHS performance of the building and construction industry to be unacceptable. The construction industry has the second highest incidence of compensated fatalities in the workplace of all industries as well as ranking in the top three for incidence of workplace injuries. Average workers’ compensation premium rates for the
construction industry at 4.81 per cent of payroll are the second highest for all industry classifications and well above the national average for all industries in 2002-03 of under 2.5 per cent.

39. To address the industry’s poor OHS performance, and taking into account the Commonwealth’s limited jurisdiction on OHS matters, the Royal Commission recommended, and the Australian Government has accepted, that the Commonwealth foster a new paradigm where work must be performed safely as well as on budget and on time. To achieve this goal, the Commonwealth will use its influence as a client and provider of capital to act as a ‘model client’.

40. The BCII Bill 2005 sets out the functions and powers of the Federal Safety Commissioner (FSC), including promoting and enhancing OHS in the industry, primarily by promoting better OHS performance on Commonwealth-funded construction projects through:

(a) an OHS accreditation scheme for persons wishing to contract with the Australian Government to perform building work (OHS accreditation scheme) - persons tendering that meet the OHS standards of the accreditation scheme will be able to be selected for work on Australian Government projects;

(b) the FSC which will monitor compliance with any OHS aspects contained in the Building Code; and

(c) integration of safe design into the procurement process.

41. All States and Territories have prequalification schemes for government building and construction work although the approaches taken vary considerably. In developing the Commonwealth scheme, regard will be had to existing State and Territory prequalification requirements relevant to OHS, noting the separate and distinct emphasis on OHS under the proposed Commonwealth arrangements. There may be scope for mutual recognition, recognising the intention to lift OHS performance standards over time.

Impact:

42. Poor OHS is a significant problem in the industry and the Australian Government intends to act as a model client, including in relation to OHS on its projects. Businesses with experience of prequalification schemes are likely to be well equipped to meet the requirements of the Commonwealth scheme.

43. The accreditation scheme is an additional administrative and regulatory burden on contractors and sub-contractors tendering for Australian Government work. However:

- contractors are already obliged to meet significant obligations in respect of OHS management systems under State/Territory legislation – the scheme will focus on complementary management of these requirements;

- those with experience of State accreditation systems will be well equipped to address the requirements of the Commonwealth scheme;

- accreditation is voluntary; and

- it will result in improved OHS and safe design.

44. The Productivity Commission in its 1995 Report found that the average cost of a workplace incident was $27 000. More recently NOHSC reported that the unit cost of work-related injury and illness, by industry of workplace, 2000-2001 to be $109,500 for construction (NOHSC, – The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community – August 2004 table 2.3b, page 25).
45. The community overall will benefit from the proposal through improved occupational safety in the industry and the potentially reduced costs as a consequence. Employees will benefit through improved OHS and the resulting reduction in work-related injury and death rates. Construction employers will also benefit from reduced workers’ compensation premiums through improved OHS performance.

Consultation

46. The Department of Employment and Workplace Relations has undertaken extensive consultation with industry participants and interested parties since the Royal Commission tabled its final report in March 2003.

Consultation on the 2003 BCII Bill

47. On 18 September 2003, an exposure draft of the 2003 BCII Bill was released and a consultation period of four weeks was established for public comments to be sent to the Department. More than 60 submissions were received from employee industrial associations, employer organisations, major contractors and subcontractors. Employer organisations were generally supportive of the main objectives of the 2003 BCII Bill and the intent of its provisions.

48. The Master Builders Association (MBA) commented in its submission regarding the 2003 BCII Bill (Submission by the MBA, p.4) that:

“The Bill will introduce a stronger regulatory regime in building and construction industry workplace relations. Its provisions will facilitate a return to the rule of law for an industry where the Cole Report found there to be a culture where industrial agreements were not honoured and measures not implemented when made. The standards of industrial and commercial conduct exhibited in the building and construction industry must reflect the standards that apply in the rest of the Australian economy. These measures will assist with the process of making that change. This is also the underlying rationale for the separate rules for the industry that will apply in the future.”

49. The Australian Industry Group (Ai Group) argued strongly in its submission regarding the 2003 BCII Bill that:

“a body should be established to monitor conduct in the building and construction industry, to take action to stop unlawful conduct and to pursue prosecutions when the law is breached. The taskforces which operated in the industry in New South Wales and Western Australia were successful in improving compliance with the law and improving workplace relations in the industry. Such taskforces addressed the significant problem of employers being reluctant to enforce their legal rights due to retaliation and victimisation by construction industry unions.” (The Australian Industry Group’s position on the exposure draft, p.7)

50. All the submissions contained comments on specific provisions and possible amendments. Officers from the Department considered these comments and as a result several technical amendments were made to the 2003 BCII Bill.

51. The Australian Council of Trade Unions (ACTU), the Construction Forestry, Mining and Energy Union and the Electrical Trades Union of Victoria each made submissions to the Department. These submissions opposed the introduction of the 2003 BCII Bill into Parliament and argued that there is not a need for industry-specific legislation. These submissions were considered and as a result several technical amendments were made to the 2003 BCII Bill.

52. Several sub-contractors responded during the initial four week period that the 2003 BCII Bill was open for public comment. Comments received from sub-contractors focussed on the need
for the establishment of a new a regulatory body as well as the implementation of an enforcement and penalties process in the industry in order to stamp out unlawful behaviour.

53. The 2003 Bill was also referred to the Senate Employment, Workplace Relations and Education References Committee, which provided its report on 21 June 2004.

Consultation on the 2005 BCII Bill

54. The 2003 BCII Bill lapsed with the prorogation of Parliament for the 2004 Federal election. Following the election, the Australian Government announced its intention to proceed with the 2005 BCII Bill and wrote to stakeholders on 12 November 2004 inviting them to provide feedback on the Bill. Feedback was received from employer organisations, industry associations and law firms.

55. The BCII Bill 2005 was also referred to the Senate Employment, Workplace Relations and Education Legislation Committee, which provided its report on 10 May 2005.

56. In general, stakeholders continued to be supportive. The feedback was carefully considered by the Department of Employment and Workplace Relations while drafting the amendments to the 2005 BCII Bill.

Conclusion and recommended option

57. Option two, the Australian Government’s reform proposal as set out in the BCII Bill 2005 is the recommended option. The main object of the reforms contained in the BCII Bill 2005 is to provide an improved workplace relations framework for the building and construction industry to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole. The provisions of the Bill are directed at addressing both the entrenched culture of lawlessness identified by the Royal Commission and the other inappropriate practices in the industry that act against choice, productivity and safety.

Implementation and review

58. The Department has in place arrangements for monitoring the framework of workplace relations and it will continue to monitor the effectiveness of the legislative changes in the building and construction industry.

59. The BCII Bill 2005 will require the ABC Commissioner to prepare and give to the Minister an annual report on the operations of the ABC Commissioner during that year. The report must include:
   a. details of the number, and type, of matters that were investigated by the ABC Commissioner during the financial year;
   b. details of assistance provided to building employees and building contractors in connection with the recovery of unpaid entitlements; and
   c. details of the extent to which the Building Code was complied with during the financial year.

60. The resourcing and effectiveness of the ABC Commissioner and the FSC, including the benefits for small business, will be monitored on an ongoing basis.
GENERAL NOTE ON CIVIL PENALTY PROVISIONS

Part 1 of Chapter 12 of the Bill deals with contraventions of civil penalty provisions.

Clause 227 of the Bill will allow an action to be brought in relation to contravention of a civil penalty provision. An application may be brought in an “appropriate court” – generally the Federal Court – by an “eligible person” (the ABC Commissioner, an ABC Inspector, a person affected by the contravention and any person prescribed by the regulations).

The Court may order a pecuniary penalty. The maximum pecuniary penalty that may be ordered depends upon whether the relevant provision is a Grade A or a Grade B civil penalty provision.

- The maximum penalty for a Grade A civil penalty provision is 1000 penalty units in the case of a body corporate, or 200 penalty units in other cases.

- The maximum penalty for a Grade B civil penalty provision is 100 penalty units in the case of a body corporate, or 20 penalty units in other cases.

- By operation of section 4AA of the Crimes Act 1914, the value of a penalty unit is currently $110.

The Court may also order:

- damages payable to a specified person;

- any other order the court thinks appropriate (including an injunction or an order for the sequestration of assets).

Subclause 226(2) provides that a person involved in a contravention of a civil penalty provision is taken to have contravened the provision. A person is taken to have been involved in a contravention if they have:

- aided, abetted, counselled, procured or induced the contravention, whether by threats or promises or otherwise; or

- been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.

Clause 247 provides that conduct of members of a building association (where it is authorised by the rules of the association, the committee of management of the association or an officer or agent of the association acting in that capacity) is taken to be conduct of the building association.
NOTES ON AMENDMENTS

Clause 2—Commencement

Item No. 1 – Clause 2, page 2 (table item 1), omit “1 and 2”, substitute “1, 2 and 3”
Item No. 2 – Clause 2, page 2 (after table item 2), insert
Item No. 3 – Clause 2, page 2 (table item 3), omit the table item, substitute

1.1 These items will amend the table in Clause 2 that specifies when the various provisions of the Act are to commence.

1.2 Clauses 1, 2 and 3 of the Act will commence on the day on which the Act receives Royal Assent.

1.3 Chapters 2, 3 and 4 will commence on the day on which the Act receives Royal Assent.

1.4 In Chapter 6, sections 72, 73, 74, 80 and 136 which were included in the Bill as introduced will commence on 9 March 2005. Sections 75 and 79 will commence on the day on which the Act receives Royal Assent.

1.5 Chapter 8 will commence on the day on which the Act receives the Royal Assent.

Clause 3 – Main object of Act

Item No. 4 – Page 2 (after line 12), after clause 2, insert

1.6 This item will insert clause 3 into the Bill. The main object of the Act is to improve the workplace relations framework for the building and construction industry to ensure that building industry participants and the Australian economy benefit from the fair, efficient and productive performance of building work (subclause (1)). The Act’s means of achieving that object are set out in subclause (2) and include:

- improving the bargaining framework so as to further encourage genuine bargaining at the workplace level;
- promoting respect for the rule of law;
- ensuring respect for the rights of all building industry participants;
- ensuring all building industry participants are held accountable for their unlawful conduct;
- providing effective means for investigation and enforcement of relevant laws;
- improving occupational health and safety;
- encouraging the pursuit of high employment in the industry; and
- providing assistance and advice to building industry participants in connection with their rights and obligations under relevant industrial laws.
Clause 4 – Definitions

Item No. 5 – Clause 4, page 2 (line 13) to page 5 (line 27), insert

1.7 This item will amend clause 4 of the Bill to insert additional definitions into the Bill. Only the key definitions are explained here.

1.8 Building agreement is defined to mean any agreement that has application to building work, regardless of whether that agreement also applies to any other kind of work. For example, an agreement dealing with commercial construction and other work will be a building agreement.

1.9 Eligible condition means a condition that relates to:
- the times or days when work is to be performed;
- inclement weather procedures; and
- any other matter prescribed by the regulations for the purposes of the paragraph.

1.10 This definition is relevant to proposed clause 174 relating to discrimination in respect of industrial instruments. The definition allows for matters to be prescribed by regulations to enable other kinds of conditions to be designated eligible conditions.

Item No. 6 – Clause 4, page 4 (line 6), omit the definition of civil penalty provision, substitute

1.11 This item omits the definition of civil penalty provision and replaces it with a new definition. The new definition reflects other amendments to the Bill that establish Grade A and Grade B civil penalty provisions.
CHAPTER 2 – AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER

Item No. 7 – Page 8 (after line 20), after Chapter 1, insert

2.1 This proposed item will insert Chapter 2 into the Bill. Chapter 2 will establish the Office of the Australian Building and Construction Commissioner (ABC Commissioner), with new statutory offices of ABC Commissioner and Deputy ABC Commissioner. The office of the ABC Commissioner will be subject to the Freedom of Information Act 1982 and the Ombudsman Act 1976.

Part 1—Australian Building and Construction Commissioner

Clause 11 – ABC Commissioner and Deputy ABC Commissioners

2.2 Clause 11 provides for the statutory office of the ABC Commissioner. The ABC Commissioner is to be assisted as many Deputy ABC Commissioners as may be appointed.

2.3 Clause 17 provides for the ABC Commissioner and Deputy ABC Commissioners to be appointed by the Minister.

Clause 12 – Functions of the ABC Commissioner

2.4 Clause 12 sets out the ABC Commissioner’s broad functions. These are to:

- monitor, and promote compliance with, this Act, the WR Act and the Building Code;
- refer matters to other relevant agencies and bodies;
- investigate suspected contraventions of this Act, the WR Act, instruments or orders made under that Act, and the Building Code;
- institute, or intervene in, proceedings in accordance with this Act;
- provide advice and assistance to building industry participants about their rights and obligations under this Act and the WR Act;
- provide representation to a building industry participant in proceedings under this Act or the WR Act, where he or she considers that this would promote enforcement; and
- disseminate information relevant to building industry participants.

2.5 The function of ‘monitoring and promoting’ compliance with this Act, the WR Act and the Building Code is further supplemented by specific provisions in these proposed amendments to the Bill, in particular clause 230 which relates to the power of the ABC Commissioner to obtain information.

2.6 To enable the ABC Commissioner to perform his or her functions, the ABC Commissioner will appoint Australian Building and Construction Inspectors (ABC Inspectors) (clause 235). As noted above, the ABC Commissioner will also have investigative powers, and will be able to require people to provide information relevant to an investigation (clause 230).
2.7 The central role of the ABC Commissioner is to monitor the industry and enforce this Act, the Building Code, and where relevant to the building industry, the WR Act. This role is enshrined throughout the proposed amendments to this Bill. For example, the Industrial Registrar must notify the ABC Commissioner of all applications lodged with the AIRC or Industrial Registrar under the WR Act where the application relates to a matter involving a building industry participant or building work; and the outcome of each such application (clause 251).

Clause 13 – Minister’s directions to ABC Commissioner

2.8 Clause 13 allows the Minister to give directions to the ABC Commissioner. Directions are to be published on the Federal Register of Legislative Instruments (FRLI) and will be available for public scrutiny. Details of all directions given during the year must also be included in the ABC Commissioner’s annual report (clause 16).

2.7 Clause 13 only permits the Minister to give general directions. The Minister must not direct the ABC Commissioner how to perform his or her functions in relation to individual matters (subclause (2)).

2.8 A direction by the Minister is a legislative instrument for the purposes of Legislative Instruments Act 2003 (subclause (4)).

2.9 Despite section 44 of the Legislative Instruments Act 2003, a direction by the Minister is a disallowable instrument (subclause (5)).

Clause 14 – Minister may require reports

2.10 Clause 14 allows the Minister to direct the ABC Commissioner to provide specified reports relating to the ABC Commissioner’s functions.

Clause 15 – Delegation by ABC Commissioner

2.11 Clause 15 allows the ABC Commissioner to delegate his or her powers and functions.

2.12 The ABC Commissioner’s powers to obtain information under clause 230 can only be delegated to a Deputy ABC Commissioner.

2.13 All other powers and functions can be delegated to a Deputy ABC Commissioner, an ABC Inspector, a Senior Executive Service (SES) employee, or acting SES employee in the Australian Public Service, or a person prescribed by the regulations.

2.14 In exercising delegated powers or functions the delegate must comply with any directions given by the ABC Commissioner (subclause (3)).

2.15 Details of delegations made under this clause are to be published (for example, on the Internet) “as soon as practicable” after the delegation occurs (subclause (4)).
Clause 16 – Annual report

2.16 Clause 16 requires the ABC Commissioner to provide an annual report for each financial year. The report must be prepared “as soon as practicable” after the end of the financial year (subclause (1)).

2.17 The report must include details of: the number and type of matters investigated by the ABC Commissioner, assistance provided during the financial year to building employees and contractors in connection with recovering unpaid entitlements and the extent of compliance with the Building Code (subclause (2)).

2.18 The report must also include details of: any directions given to the ABC Commissioner by the Minister during the year; and any delegations by the ABC Commissioner during the year and details of any investigations undertaken by the ABC Commissioner (subclause (3)).

2.19 Subclause (4) obliges the Minister to table the report in each House of the Parliament within 15 sitting days of receiving it.

Part 2—Administrative provisions

Clause 17 – Appointment

2.20 Clause 17 provides for the Minister to appoint the ABC Commissioner and Deputy ABC Commissioners by written instrument.

2.21 Subclause (2) provides that the ABC Commissioner is appointed on a full-time basis and that Deputy ABC Commissioners can be appointed on either a full-time or part-time basis.

2.22 Before appointing a person as a Commissioner, the Minister must be satisfied that the person has suitable qualifications or experience, and is of good character (subclause (3)).

2.23 The length of an appointment is to be specified in the instrument of appointment, but cannot be longer than 5 years (subclause (4)). However, a Commissioner can be reappointed for a further term or terms.

Clause 18 – Acting ABC Commissioner

2.24 This clause provides for the appointment by the Minister of an acting ABC Commissioner when necessary, including on a recurring basis.

Clause 19 – Remuneration

2.25 Clause 19 provides for the Remuneration Tribunal to determine the remuneration of Commissioners. In absence of a determination, a Commissioner is to be paid the remuneration and allowances that are prescribed.

2.26 Subclause (3) provides that this clause has effect subject to the Remuneration Tribunal Act 1973. This will ensure that general provisions of the Remuneration Tribunal Act are not displaced by this clause.
**Clause 19A – Application of the Judges’ Pensions Act to a former Judge of the Federal Court who becomes the ABC Commissioner**

2.27 Clause 19A provides for the application of certain provisions of the *Judges’ Pensions Act 1968* to a former Judge of the Federal Court who becomes the ABC Commissioner. It provides that in such circumstances, service as ABC Commissioner would constitute judicial service for the purposes of any entitlement to a pension under the provisions of the *Judges’ Pensions Act 1968*.

2.28 This provision would only apply to a former Judge who has not yet qualified for a judicial pension when resigning from judicial office to take up the appointment as ABC Commissioner. It is not intended to have any effect on the entitlements of a former Judge who is already receiving a pension under the *Judges’ Pensions Act 1968*.

**Clause 19B – Application of the Judges’ Pension Act to a former member of the AIRC who becomes the ABC Commissioner**

2.29 Clause 19B provides for the application of certain provisions of the *Judges’ Pensions Act 1968* to a former member of the AIRC to whom the *Judges’ Pensions Act 1968* applied, who becomes the ABC Commissioner. The provision provides that service as ABC Commissioner would constitute as judicial service for the purposes of any entitlement to a pension under the provisions of the *Judges’ Pensions Act 1968*.

2.30 The provision applies to such a member of the AIRC who has not yet qualified for a judicial pension when resigning to take up the appointment as ABC Commissioner. The provision is not intended to have any effect on the entitlements of a former member of the AIRC who is already receiving a pension under the *Judges’ Pensions Act 1968*.

**Clause 20 – Leave**

2.31 The Remuneration Tribunal is to determine the recreation leave entitlements for full-time Commissioners (subclause (1)).

2.32 Subclause (2) allows the Minister to grant a full-time ABC Commissioner leave of absence, other than recreation leave, on such terms and conditions as he or she determines.

2.33 Subclause (3) allows the Minister to grant a part-time ABC Commissioner leave of absence, including recreation leave, on such terms and conditions as he or she determines.

**Clause 21 – Engaging in other paid employment etc.**

2.34 Clause 21 requires a full-time Commissioner to obtain approval from the Minister before engaging in other paid employment. A part-time Commissioner must not engage in other paid employment that could result in a conflict with his or her duties as a Commissioner.

2.35 These arrangements are complemented by clause 24 which allows the Minister to terminate a Commissioner’s appointment if the requirements of clause 21 are contravened without a reasonable excuse.
Clause 22 – Disclosure of interests

2.36 Clause 22 requires a Commissioner to give the Minister notice of all financial or other interests that could conflict with the Commissioner’s duties.

2.37 This requirement is complemented by clause 24 which allows the Minister to terminate a Commissioner’s appointment if the requirements of clause 22 are contravened without a reasonable excuse.

Clause 23 – Resignation

2.38 Clause 23 provides that a Commissioner may resign by written notice given to the Minister.

Clause 24 – Termination of appointment

2.39 Subclause (1) allows the Minister to terminate the appointment of a Commissioner if the Commissioner:

- becomes bankrupt or takes specified steps related to insolvency;
- contravenes, without reasonable excuse, the requirements relating to engagement in other paid employment (clause 21);
- contravenes, without reasonable excuse, the requirement to disclose to the Minister any interest that could conflict with the Commissioner’s functions (clause 22); or
- in the case of a full-time Commissioner, is absent from duty (except on authorised leave) for 14 consecutive days or for 28 days in any 12 month period.

2.40 Subclause (2) allows the Minister to terminate a Commissioner’s appointment for misbehaviour or on the ground of physical or mental incapacity. Termination on the grounds of physical or mental incapacity may be subject to certain limitations imposed by superannuation legislation (subclauses (3) and (4)).

Clause 25 – Staff and consultants

2.41 Staff to assist the ABC Commissioner in the performance of his or her functions are to be engaged under the Public Service Act 1999 (subclause (1)).

2.42 The ABC Commissioner and the Australian Public Service employees assisting the ABC Commissioner will constitute a Statutory Agency for the purposes of the Public Service Act 1999 (subclause (2)).

2.43 Subclause (3) provides that the ABC Commissioner may engage consultants with suitable qualifications and experience on behalf of the Commonwealth. The terms and conditions of engagement of consultants are to be determined by the ABC Commissioner and recorded in writing.
Clause 25A – Office of the Australian Building Commissioner

2.44 Subclause 25A(1) establishes the Office of the ABC Commissioner. The Office of the ABC Commissioner consists of the ABC Commissioner, the Deputy ABC Commissioners, any staff and consultants (subclause (2)).
CHAPTER 3 – THE BUILDING CODE

Item No. 8 – Page 8, after proposed Chapter 2, insert

3.1 This item will insert Chapter 3 into the Bill.

Clause 26 – Minister to issue Building Code

3.2 Clause 26 authorises the Minister to issue one or more documents that together comprise the Building Code.

3.3 Subclause (2) specifically authorises the Minister to issue one or more documents under subclause (1) that relate to occupational health and safety matters in respect of building work. The Minister must take into account any recommendations of the Federal Safety Commissioner in relation to occupational health and safety matters (subclause (4)).

3.4 Subclause (3) limits the persons who may be required to comply with the Building Code. The Code will set out who is required to comply.

3.5 A document issued under subclause (1) is a legislative instrument for the purposes of Legislative Instruments Act 2003 (subclause (5)). It will be published on the FRLI and be available for public scrutiny.

Clause 30 – Building industry participants to report on compliance with Building Code

3.6 The ABC Commissioner may direct a person required to comply with the Building Code in respect of particular building work to provide a written report about the extent to which he or she has complied with the Building Code in respect of that building work (subclauses (1) and (2)).

3.7 The ABC Commissioner’s direction must be in writing, and specify when the report is to be provided – at least 14 days notice must be provided (subclause (2)).

3.8 Contravention of the requirement to provide a report to the ABC Commissioner in accordance with a direction is subject to a Grade B civil penalty (subclause (3)).

3.9 Given their shared responsibility for the Building Code, the ABC Commissioner must provide the Federal Safety Commissioner with a copy of any report (subclause (4))
CHAPTER 4 – OCCUPATIONAL HEALTH AND SAFETY

Item No. 9 – Page 8, after proposed Chapter 3, insert

4.1 This item will insert Chapter 4 into the Bill.

Part 1 – Federal Safety Commissioner


Clause 31 – Federal Safety Commissioner

4.3 Clause 31 provides for the statutory position of the Federal Safety Commissioner. The Secretary of the Department must, by writing, designate a position in the Department as the position of the Federal Safety Commissioner (subclause 1). This instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003 (subclause (4)).

4.4 The position can only be occupied by a SES employee (subclause (2)).

Clause 32 – Functions of the Federal Safety Commissioner

4.5 Clause 32 sets out the Federal Safety Commissioner’s functions. These are to:

- promote:
  - OHS in relation to building work;
  - the benefits of the accreditation scheme (established by clause 50); and
  - compliance with the OHS aspects of the Building Code;
- disseminate information about the accreditation scheme and the OHS aspects of the Building Code;
- monitor compliance with the occupational health and safety aspects of the Building Code;
- perform functions as the accrediting authority for the accreditation scheme; and
- refer matters to other relevant agencies or bodies.

4.6 Other functions can also be conferred on the Federal Safety Commissioner by this or any other Act, or by the regulations.

Clause 33 – Minister’s directions to the Federal Safety Commissioner

4.7 Clause 33 allows the Minister to give directions to the Federal Safety Commissioner. Directions are to be published on the FRLI and will be available for public scrutiny.
4.8 Clause 33 only permits the Minister to give general directions. The Minister must not direct the Federal Safety Commissioner how to perform his or her functions in relation to particular cases (subclause 2).

4.9 A direction by the Minister is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (subclause (4)).

4.10 Despite section 44 of the *Legislative Instruments Act 2003*, a direction by the Minister is a disallowable instrument (subclause (5)).

**Clause 35 - Delegation by Federal Safety Commissioner**

4.11 Clause 35 allows the Federal Safety Commissioner to delegate his or her powers and functions to a Federal Safety Officer, a Senior Executive Service (SES) employee or acting SES employee in the Australian Public Service, or a person prescribed by the regulations.

4.12 In exercising delegated powers or functions the delegate must comply with any directions given by the Federal Safety Commissioner (subclause (2)).

4.13 Details of delegations made under this clause are to be published (for example, on the Internet) “as soon as practicable” after the delegation occurs (subclause (3)).

**Clause 38 – Acting Federal Safety Commissioner**

4.14 This clause provides that if a SES employee is acting in the position of Federal Safety Commissioner they have and may exercise all the powers and perform all the functions and duties of the Federal Safety Commissioner.

**Clause 45 – Consultants**

4.15 Clause 45 provides that the Secretary of the Department, on behalf of the Commonwealth, may engage persons with suitable qualifications and experience as consultants to the Federal Safety Commissioner (subclause (1)).

4.16 The terms and conditions of engagement of consultants are to be determined by the Secretary and recorded in writing (subclause (2)).

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

**Clause 50 – Accreditation scheme**

4.17 The regulations will provide for an accreditation scheme for persons who wish to enter into Commonwealth building contracts with the Commonwealth or Commonwealth authorities (subclause (1)).

4.18 The Federal Safety Commissioner will be the accrediting authority under the scheme (subclause (2)).
4.19 Fees may be imposed for applications under the accreditation scheme (subclause (3)).

4.20 The Commonwealth, or a Commonwealth authority must not enter into a building contract with a person or persons unless they are accredited at the time of the contract is entered into. The regulations may provide exceptions to this rule (subclause (4)).

4.21 The prohibition in subclause (4) overrides past, current and future Commonwealth provisions (subclause (5)), and a contravention of subclause (4) in respect of a contract does not affect the validity of the contract (subclause (6)).

4.22 The relevant definitions are provided in subclause (7).
CHAPTER 6 – INDUSTRIAL ACTION ETC.

Item No. 10 – Clause 72, page 10 (line 27), omit “Division 1 of”

6.1 This item is a technical amendment which will delete the reference to “Division 1 of” from the definition of ‘excluded action’.

Item No. 11 – Clause 74, page 13 (after line 10), at the end of the clause, add

6.2 This item will add a note to indicate this is a Grade A civil penalty provision.

Clause 75 – Injunction against threatened etc. unlawful industrial action

Item No. 12 – Page 13, at the end of Part 2, add

6.3 This item will insert clause 75 into the Bill. This clause allows the ABC Commissioner, or any other person who becomes aware of unlawful industrial action that is occurring, or threatened, impending or probable, to make application to an appropriate court for an injunction to prevent the occurrence of the unlawful industrial action.

6.4 An appropriate court will be able to grant an interim injunction, pending its determination of the application for the injunction (subclause (2)).

6.5 An appropriate court will be able to grant an injunction regardless of whether it appears to the court that the defendant intends to engage again, continue to engage or has previously engaged in unlawful industrial action and regardless of whether there is an imminent danger of substantial damage to any person if the defendant engages in unlawful industrial action (subclause (3)).

6.6 The term appropriate court is defined in subclause (4) for the purposes of this clause as being the Federal Court, the Federal Magistrates Court, the Supreme Court of a State or Territory or any District or County Court, of a State.

Item No. 13 – Heading to Division 1, page 14 (line 3), omit the heading

6.7 This item will omit the heading “Division 1 Exceptions to protected action” from this Part.

Clause 79 – Action involving extraneous participants

Item No. 14 – Page 14 (before line 4), before clause 80, insert

6.8 This item will insert clause 79 to make it clear that any building industrial action which is engaged in in concert with unprotected persons, or organised by persons including unprotected persons, will itself be unprotected. An unprotected person is anyone other than:

- a negotiating party to the proposed agreement;
- a member of an organisation that is a negotiating party to the proposed agreement and whose employment will be subject to the agreement; or
• an officer or employee of an organisation that is a negotiating party and who is acting in that capacity.
CHAPTER 8 – DISCRIMINATION, COERCION AND UNFAIR CONTRACTS

Item No. 15 – Page 15 (after line 14), after Chapter 6, insert

8.1 This item will insert Chapter 8 into the Bill.

Clause 172 – Coercion in relation to engagement etc. of building employees and building contractors

8.2 Clause 172 is intended to prevent coercion in relation to the engagement and employment of building contractors and building employees. It prohibits persons from organising or taking any action, or from threatening to organise or take action intended to coerce another person to do any of the following:

- employ, or not employ, a person as a building employee;
- engage, or not engage a person as a building contractor;
- allocate, or not allocate, particular responsibilities to a building employee or building contractor; or
- designate a building employee or a building contractor as having, or not having, particular duties or responsibilities.

8.3 This is a Grade A civil penalty provision.

8.4 Subclause (2) sets out the constitutional coverage of the prohibition.

Clause 173 – Coercion of persons to make, vary, terminate etc. certified agreements etc.

8.5 Clause 173 is intended to ensure that persons are not coerced or subject to undue pressure in relation to their certified agreement.

8.6 It provides that a person must not take or threaten to take any action, or refrain or threaten to refrain from taking any action, with intent to coerce another person or with intent to apply undue pressure to another person in relation to various aspects of the agreement-making process. These aspects are the making, varying or terminating, or extending the nominal expiry date of a building agreement under Division 2 or 3 of Part VIB of the WR Act or approving any of these things.

8.7 This is a Grade A civil penalty provision.

8.8 Subclause (2) makes it clear that the prohibition on coercion and undue pressure does not apply to any action that is protected action for the purposes of the WR Act, as modified by the amendments to this Bill.
8.9 Subclause (3) replicates subsection 170NC(3) of the WR Act. It prohibits employers from coercing employees in relation to requests for organisation representation in respect of an agreement being made under section 170LK.

8.10 Subclause (4) prohibits employers from applying undue pressure to employees in relation to requests for organisation representation in respect of an agreement being made under section 170LK.

8.11 This is a Grade A civil penalty provision.

8.12 Section 170NC of the WR Act does not apply in relation to building agreements (subclause (5)).

**Clause 174 – Discrimination against employer in relation to industrial instruments**

8.13 Clause 174 prohibits a person from discriminating against an employer on the basis that the employment of its employees is covered by or proposed to be covered by a particular kind of industrial instrument or an industrial instrument made with a particular person. Examples of the type of conduct this clause is intended to prohibit include:

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

8.14 This is a Grade A civil penalty provision.

8.15 Subclause (2) makes it clear that that the prohibition does not apply to any action that is protected action for the purposes of the WR Act, as modified by the proposed amendments to this Bill.

8.16 Consistent with the views of both the Royal Commissioner and the Productivity Commission in its 1999 Report: *Work Arrangements on Large Capital City Building Projects*, head contractors are to exercise control over certain integral features of a building site such as the site opening hours or inclement weather provisions.

8.17 Subclause (3) therefore provides that the prohibition on discrimination does not apply to prevent conduct by a person that:

- occurs in relation to a proposed agreement or proposed variation to an agreement under which the employer would carry out building work or arrange for building work to be carried out for that person; and
- is engaged in solely for the purpose of encouraging the employer to have eligible conditions in an industrial instrument covering its employees.
8.18 An “eligible condition” is defined in clause 4 of the amendments to this Bill to mean a condition relating to:

- the times or days when work is to be performed; or
- inclement weather procedures; or
- any other matter prescribed by the regulations.

8.19 Subclause (4) identifies the constitutional limitations which apply to the prohibition in subclause (1).

**Clause 175 – Coercion in relation to superannuation**

8.20 Clause 175 is intended to ensure that building employees and building employers are protected from coercion in relation to the payment of superannuation contributions into a particular superannuation fund or scheme.

8.21 Subclause (1) provides that a person must not take, or threaten to take any action, or refrain or threaten to refrain from taking any action, with intent to coerce:

- a building employee to nominate a particular superannuation fund to receive the employee’s superannuation; or
- a building employer to make payments in respect of building employees to a particular superannuation fund.

8.22 This is a Grade A civil penalty provision.

8.23 Subclause (2) makes it clear that subclause (1) does not apply to action that is protected action for the purposes of the WR Act, as modified by this Bill (as amended). This means that a union or employees can still take protected action in order to secure a clause in respect of a particular superannuation fund in a certified agreement.

8.24 Subclause (3) sets out the constitutional limitations which apply to subclause (1).

**Clause 176 – Unfair contracts with building contractors**

8.20 Clause 176 enables applications under sections 127A and 127B of the WR Act in relation to unfair contracts for the performance of building work to be made to the Federal Magistrates Court as well as the Federal Court. Currently the WR Act only allows applications to be made to the Federal Court.
CHAPTER 12 – ENFORCEMENT

Part 1 – Contravention of civil penalty provisions

Item No. 16 – Clause 226, page 16 (lines 7 to 9), omit the definition of appropriate court, substitute

12.1 This item will amend the definition of appropriate court in clause 226.

12.2 Under the revised definition an “appropriate court” is the Federal Court, unless it is an application in the case of a contravention of the prohibition on unlawful industrial action (clause 74) which may be brought in a wider range of courts.

Item No. 17 – Clause 227, page 17 (lines 5 to 7), omit subclause (2), substitute

12.3 This item will amend the maximum pecuniary penalty that may be ordered depending upon whether the relevant provision was a Grade A or Grade B civil penalty provision.

- The maximum penalty for a Grade A civil penalty provision is 1,000 penalty units in the case of a body corporate, or 200 penalty units in other cases.

- The maximum penalty for a Grade B civil penalty provision is 100 penalty units in the case of a body corporate, or 20 penalty units in other cases.

  - By operation of section 4AA of the Crimes Act 1914, the value of a penalty unit is currently $110.

Item No. 18 – Clause 227, page 17 (lines 28 and 29), omit paragraph (6)(a), substitute

12.4 This item will amend the definition of an “eligible person” for the purposes of this section.

- an “eligible person” will be the ABC Commissioner, an ABC Inspector, a person affected by the contravention, or a person prescribed by the regulations (subclause (6)).

Part 2 – Compliance etc. powers

Item No. 19 – Page 19 (after line 15), at the end of Chapter 12, add

12.5 This item will add Part 2 of Chapter 12 containing the compliance powers of the ABC Commissioner, ABC Inspectors and Federal Safety Officers appointed by the Federal Safety Commissioner.
Division 1 – ABC Commissioner’s powers to obtain information etc.

Clause 230 – ABC Commissioner’s powers to obtain information etc.

12.6 The ABC Commissioner may, by written notice, compel a person to produce information or documents or attend before the ABC Commissioner or an assistant and answer relevant questions if certain criteria are satisfied. The criteria are that the ABC Commissioner believes on reasonable grounds that the person:

- has information or documents relevant to an investigation into a contravention by a building industry participant of this Act, the WR Act or a Commonwealth industrial instrument; or

- is capable of giving evidence relevant to such an investigation.

12.7 Subclause (2) requires a notice issued by the ABC Commissioner to allow at least 14 days for a person to comply.

12.8 Non-compliance with a notice or failure to take an oath or affirmation when required to do so under subclause (4) constitutes an offence punishable by a maximum imprisonment of six months (subclause (6)). The Criminal Code allows for a range of circumstances to be pleaded as a defence to criminal offences. Clause 231 limits the grounds for such a defence. However, clause 232 protects persons from certain liabilities that may arise from the disclosure of information or documents pursuant to clause 230.

12.9 Subclause (3) expressly provides that a person may be represented by a legal practitioner when attending before the ABC Commissioner or assistant.

12.10 Subclauses (4) and (5) provide that the ABC Commissioner or an assistant may require information or answers to be verified or given under oath or affirmation.

12.11 Subclause (7) provides that the power of the ABC Commissioner to obtain information is not limited by the secrecy provisions of any other law unless that law expressly excludes the power to gather information by the ABC Commissioner or his or her assistants.

Clause 231 – Certain excuses not available in relation to section 230 requirements

12.12 Clause 231 limits the grounds on which persons can legitimately refuse to comply with a notice from the ABC Commissioner under clause 230, compelling the production of information.

12.13 Subclause (1) provides individuals cannot refuse to provide information on the grounds set out in the subclause, including that it might incriminate that person or contravene another law. However, subclause (2) provides that any information, answers or documents given pursuant to a notice under clause 230 is inadmissible in any court proceedings other than those that relate directly to the giving or failure to give information, answers or documents to the ABC Commissioner.
Clause 232 – Protection from liability

12.14 Clause 232 protects persons who disclose information to the ABC Commissioner, in good faith, in compliance with a notice under clause 230, from proceedings for contravening any other law (such as secrecy provisions in another law) and from civil action for damages because of that disclosure.

Clause 233 – Retention and copying etc. of documents

12.15 Clause 233 provides that the ABC Commissioner may retain documents produced under clause 230 for as long as necessary for the purpose of conducting an investigation.

12.16 However, subclauses (2) and (3) provide that the person is entitled to a certified copy which must be received in all courts as if it were the original. Subclause (4) allows persons access to the original of a document provided to the ABC Commissioner where necessary.

Clause 234 – ABC Commissioner may make and keep copies of documents

12.17 In addition to the making of certified copies under clause 233 the ABC Commissioner may also make and keep copies of documents produced by persons under clause 230.

Division 2 – Powers of ABC Inspectors

Clause 235 – Australian Building and Construction Inspectors

12.18 Clause 235 provides that the ABC Commissioner may appoint persons as “ABC Inspectors”. The only persons who can be appointed as ABC Inspectors are:

- employees of the Commonwealth, a State or a Territory;
- a person who is appointed or holds office under a Commonwealth, State or Territory law; and
- consultants engaged under clause 25.

12.19 In relation to consultants, the ABC Commissioner must be satisfied that the person is an appropriate person to be appointed as an ABC Inspector (subclause (2)).

12.20 Subclause (3) provides that the ABC Commissioner is also an ABC Inspector.

12.21 ABC Inspectors must comply with any direction of the ABC Commissioner (subclause (4)).

12.22 If a direction under subclause (4) is of general application, the direction is a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003 (subclause (5)). If a direction under subclause (4) relates to a particular case, the direction is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003 (subclause (6)). These provisions are merely declaratory of the position under the Legislative Instruments Act 2003 and do not alter the operation of that Act. These provisions have been
provided to assist the reader of the legislation in understanding the status of the directions under the *Legislative Instruments Act 2003*.

**Clause 236 – Identity cards for ABC Inspectors**

12.23 Clause 236 requires the ABC Commissioner to issue ABC Inspectors with identity cards containing a recent photograph (subclause (1)). These cards must be carried when exercising powers or performing functions as an ABC Inspector (subclause (6)).

12.24 The Minister must issue the ABC Commissioner with an identity card (subclause (2)).

12.25 Subclauses (3) to (5) require identity cards to be returned within 14 days of a person ceasing to be an ABC Inspector, unless the person has a reasonable excuse for not doing so. Failure to comply with this requirement is an offence, with a maximum penalty of 1 penalty unit.

**Clause 237 – Power to enter premises etc.**

12.26 Clause 237 sets out the powers of ABC Inspectors. An ABC Inspector can exercise his or her powers for “compliance purposes” namely to: ascertain compliance with a designated building law or the Building Code and ascertain whether a court order relating to a designated building is or has been complied with (subclause (1)).

12.27 The powers may be exercised at any time during ordinary working hours or at any other time at which it is necessary to do so for compliance purposes (subclause (2)).

12.28 The powers available to an ABC Inspector include entering, without force, any premises on which the ABC Inspector has reasonable cause to believe that:

- building work to which a Commonwealth industrial instrument or the Building Code applies or applied; or
- there are documents relevant to compliance purposes; or
- a breach of a designated building law or the Building Code has occurred, is or is likely to occur (subclause (3)).

12.29 ABC Inspectors are not permitted to enter a part of premises that are used for residential purposes (subclause (4)).

12.30 Subclause (5) outlines what an ABC Inspector can do on premises he or she has entered under this clause.

12.31 If a person fails to comply with a requirement to produce a document an inspector may serve written notice on the person to produce the document within a specified period being not less than 14 days (subclause (6)). A person who fails to comply with the requirement to produce a document may contravene the *Criminal Code*.

12.32 Subclause (7) allows an inspector to inspect and copy a document produced under subparagraph (5)(e) or subclause (6). The inspector can retain the document for as long as necessary, provided a receipt is given and access is given to a person otherwise entitled to access to the document or a person authorised by such a person (subclause (8)).
12.33 Subclause (9) also allows an ABC Inspector to enter business premises in which a person ordinarily performs work or conducts business if the inspector has reasonable cause to believe that the person has information relevant to compliance purposes.

12.34 An ABC Inspector who enters under this subclause may interview the person concerned in that place (subclause (11)). However, refusing or failing to be interviewed is not to be treated as conduct covered by section 149.1 of the Criminal Code (subclause (12)).

12.35 Subclause (13) provides that, before entering premises under this clause, the inspector must say that he or she is authorised to enter, and if the occupier or the occupier’s apparent representative is present the inspector must produce his or her identity card to that person for inspection.

12.36 An occupier must not refuse or unduly delay entry to an inspector under this clause. This is a Grade A civil penalty provision (subclause (14)).

Division 3 – Powers of Federal Safety Officers

Clause 238 – Federal Safety Officers

12.37 Clause 238 provides that the Federal Safety Commissioner may appoint persons as Federal Safety Officers. The only persons who can be appointed as Federal Safety Officers are:

- employees of the Commonwealth, a State or a Territory
- a person who is appointed or holds office under a Commonwealth, State or Territory law; and
- consultants engaged under section 45.

12.38 In relation to consultants, the Federal Safety Commissioner must be satisfied that the person is an appropriate person to be appointed as a Federal Safety Officer (subclause (2)).

12.39 Subclause (3) provides that the Federal Safety Commissioner is also a Federal Safety Officer.

12.40 Federal Safety Officers must comply with any direction of the Federal Safety Commissioner (subclause (4)).

12.41 If a direction under subclause (4) is of general application, the direction is a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003 (subclause (5)). If a direction under subclause (4) relates to a particular case, the direction is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003 (subclause (6)). These provisions are merely declaratory of the position under the Legislative Instruments Act 2003 and do not alter the operation of that Act. These provisions have been provided to assist the reader of the legislation in understanding the status of the directions under the Legislative Instruments Act 2003.
Clause 239 – Identity cards for Federal Safety Officer

12.42 Clause 239 requires the Federal Safety Commissioner to issue Federal Safety Officers with identity cards containing a recent photograph (subclause (1)). These cards must be carried when exercising powers or performing functions as a Federal Safety Officer (subclause (6)).

12.43 The Minister must issue the Federal Safety Commissioner with an identity card (subclause (2)).

12.44 Subclauses (3) to (5) require identity cards to be returned within 14 days of a person ceasing to be a Federal Safety Officer, unless the person has a reasonable excuse for not doing so. Failure to comply with this requirement is an offence, with a maximum penalty of 1 penalty unit.

Clause 240 – Powers to enter premises etc. to ascertain compliance with Building Code

12.45 Clause 240 sets out the powers of Federal Safety Officers. A Federal Safety Officer can exercise his or her powers for the “compliance purpose” of ascertaining compliance with the Building Code by a building industry participant (subclause (1)).

12.46 The powers may be exercised at any time during ordinary working hours or at any other time at which it is necessary to do so for compliance purposes (subclause (2)).

12.47 The powers available to a Federal Safety Officer include entering, without force, any premises on which the officer has reasonable cause to believe that:

- building work is being carried out, or has been carried out, being building work to which the Building Code applies or applied; or

- a breach of the Building Code has occurred, is or is likely to occur (subclause (3)).

12.48 Federal Safety Officers are not permitted to enter a part of premises that are used for residential purposes (subclause (4)).

12.49 Subclause (5) outlines what a Federal Safety Officer can do on premises he or she has entered under this clause.

12.50 If a person fails to comply with a requirement to produce a document an officer may serve written notice on the person to produce the document within a specified period being not less than 14 days (subclause (6)). A person who fails to comply with the requirement to produce a document may contravene the Criminal Code.

12.51 Subclause (7) allows an inspector to inspect and copy a document produced under subparagraph (5)(e) or subclause (6). The inspector can retain the document, provided a receipt is given and access is given to a person otherwise entitled to access to the document or a person authorised by such a person (subclause (8)).

12.52 Subclause (9) also allows a Federal Safety Officer to enter business premises in which a person ordinarily performs work or conducts business if the officer has reasonable cause to believe that the person has information relevant to compliance purposes.
12.53 A Federal Safety Officer who enters premises under subclause (9) may interview the person concerned in that place (subclause 11). However, refusing or failing to be interviewed is not to be treated as conduct covered by section 149.1 of the *Criminal Code* (subclause (12)).

12.54 Subclause (13) provides that, before entering premises under this clause, the officer must say that he or she is authorised to enter, and if the occupier or the occupier’s apparent representative is present the officer must produce his or her identity card to that person for inspection.

12.55 An occupier must not refuse or unduly delay entry to a Federal Safety Officer under this clause. This is a Grade A civil penalty provision (subclause (14)).

*Clause 241 – Powers to enter premises etc. to ascertain compliance with accreditation scheme*

12.56 Federal Safety Officers can exercise his or her powers for “compliance purposes” related to the accreditation scheme to:

- ascertain whether a constitutional corporation that is applying for accreditation meets the accreditation requirements;
- ascertain whether a constitutional corporation that is an accredited person has complied with or is complying with the conditions of accreditation;
- ascertain whether a person accredited under the scheme has complied or is complying with the conditions of the accreditation in respect of building work in a Territory or Commonwealth place.

12.57 The powers may be exercised at any time during ordinary working hours or at any other time at which it is necessary to do so for compliance purposes (subclause (2)).

12.58 The powers available to a Federal Safety Officer include entering, without force, any premises on which the officer has reasonable cause to believe that:

- there are documents relevant to compliance purposes;
- building work is being carried out, or has been carried out, by the applicant or accredited person referred to in subsection (1) (subclause (3)).

12.59 Federal Safety Officers are not permitted to enter a part of premises used for residential purposes (subclause (4)).

12.60 Subclause (5) outlines what a Federal Safety Officer can do on premises he or she has entered under this clause.

12.61 If a person fails to comply with a requirement to produce a document an officer may serve written notice on the person to produce the document within a specified period being not less than 14 days (subclause (6)). A person who fails to comply with the requirement to produce a document may contravene the *Criminal Code*. 
12.62 Subclause (7) allows an inspector to inspect and copy a document produced under subclauses (5)(e) or (6). The inspector can retain the document, provided a receipt is given and access is given to a person otherwise entitled to access to the document or a person authorised by such a person (subclause (8)).

12.63 Subclause (9) also allows a Federal Safety Officer to enter business premises in which a person ordinarily performs work or conduct business if the officer has reasonable cause to believe that the person has information relevant to compliance purposes.

12.64 A Federal Safety Officer who enters under subclause (9) may interview the person concerned in that place (subclause (11)). However, refusing or failing to be interviewed is not to be treated as conduct covered by section 149.1 of the *Criminal Code* (subclause (12)).

12.65 Subclause (13) provides that, before entering premises under this clause, the officer must say that he or she is authorised to enter, and if the occupier or the occupier’s apparent representative is present the officer must produce his or her identity card to that person for inspection.

12.66 An occupier must not refuse or unduly delay entry to a Federal Safety Officer under this clause. This is a Grade A civil penalty provision (subclause (14)).

12.67 Subclause (15) defines relevant terms.
CHAPTER 13 – MISCELLANEOUS

Item No. 20 – Page 20 (before line 5), before clause 252, insert

Clause 241A – Project agreements not enforceable

13.1 This item will insert new clause 241A, which makes it clear that project agreements in any form are unenforceable unless certified under the WR Act (subclause (1)). This provision affects agreements only and does not apply to awards, whether made by consent or otherwise. Section 170LC of the WR Act specifies the conditions under which a “multiple business agreement” may be certified.

13.2 Project agreements usually provide standard employment conditions for employees employed in a number of different businesses on a particular building site or sites and provide a means for securing “pattern” outcomes. This is contrary to the WR Act’s focus on bargaining at the enterprise or workplace level.

13.3 Clause 241A is not intended to render unenforceable an agreement securing standard employment conditions for the employees of a single employer working across a number of building sites (paragraph (1)(b)).

13.4 Paragraph 241(1)(c) describes the kinds of agreements that are rendered unenforceable by this clause. Any project agreement will be unenforceable to the extent to which it relates to building employees if at least some of the employees to which the agreement applies are:

- members of an organisation that is party to the agreement; or
- employees of a constitutional corporation that is party to the agreement.

13.5 Section 170LB of the WR Act is to be disregarded when determining whether employees are employed by the same employer (subclause (2)). This is to ensure that the situations set out in section 170LB(2) where two or more employers are taken to be one employer do not apply for the purposes of this clause.

13.6 A provision in the Building and Construction Industry Improvement (Consequential and Transitional) Bill 2005 will preserve the enforceability of project agreements made under State industrial laws before the commencement of section 241A for three years after commencement.

Item no. 21 – Page 20, after proposed clause 241A, insert

Clause 242 – Protection of confidentiality of information

13.7 This item will insert clause 242 which deals with the obligations on a person (in this provision called an “entrusted person”) to protect the confidentiality of information obtained in the course of his or her “official employment” (as defined in subclause (8)).

13.8 Subclause (2) makes it an offence for an entrusted person to make a record of, or disclose, protected information. The maximum penalty is imprisonment for 12 months.
13.9 Subclause (3) sets out exceptions from the offence in subclause (2) where the entrusted person is a “designated official” (as defined in subclause (8)) at the time of the recording or disclosure. The exceptions are that the recording or disclosure is:

- for the purposes of this Act;
- in the course of the performance of duties in the entrusted person’s official employment;
- to assist in the enforcement of a building industry law of the Commonwealth, State or Territory and is made to a person appointed or employed by the Commonwealth, a State or Territory, or an authority of the Commonwealth, a State or Territory; or
- in accordance with the regulations.

13.10 The exceptions in subclause (3), allow for referral of information to other enforcement agencies for investigation.

13.11 It is anticipated that the ABC Commissioner will enter into memoranda of understanding with relevant enforcement agencies dealing with the referral of matters, including follow-up as to action taken.

13.12 Subclause (4) sets out exceptions from the offence in subclause (2) where the entrusted person is not a “designated official” (as defined in subclause (8)) at the time of the recording or disclosure. The exceptions are if the recording or disclosure is:

- for the purposes of this Act;
- made in the course of the performance of duties in the entrusted person’s official employment, where the official employment relates to the enforcement of a building industry law of the Commonwealth, or of a State or Territory; or
- made in accordance with the regulations.

13.13 If a person seeks to rely on any of the exceptions under subclauses (3) and (4) for an alleged breach of subclause (2), that person bears an evidential burden. This reflects the Criminal Code.

13.14 The exceptions in subsections (3) and (4) do not apply where protected information is disclosed to any Minister and the disclosure was not required or authorised by specific provisions of the Bill (subclause (5)). Those provisions require the ABC Commissioner to prepare an annual report and reports in accordance with directions of the Minister.

13.15 The exceptions in subsections (3) and (4) also do not apply where the disclosure of the protected information was made in an annual report or a report required by the Minister and the requirements of clause 243 (which prohibits reports from including information relating to an individual’s affairs) have not been complied with (subclause (6)).

13.16 Subclause (7) provides that disclosure of personal information is taken to be authorised by law for the purposes of the Privacy Act 1988 (ss.14(1)(d) - Information Privacy Principle 11) if the disclosure is made in accordance with subclause (3) or (4).

13.17 Subclause (8) sets out the definitions that apply under this clause.
Item No. 22 – Page 20, after proposed clause 242, insert

Clause 243 – Reports not to include information relating to an individual’s affairs

13.18 This item will insert clause 243 which provides that information relating to the affairs of an individual must not be disclosed in an annual report or report required by the Minister if:

- the individual is named or otherwise specifically identified as the individual to whom the information relates; or

- it is reasonably likely that people generally (other than people to whom the individual has disclosed information relating to the individual’s affairs) would be able to ascertain the identity of the individual to whom the information relates (subclause (1)).

13.19 Subclause (2) provides assistance in interpreting paragraph (1)(b) by providing that the context in which the information appears and information that is otherwise publicly available must be taken into account along with any other relevant matter.

Item No. 23 – Page 20, after proposed clause 243, insert

Clause 243A- ABC Commissioner to publicise non-compliance

13.20 This item will insert clause 243A which allows the ABC Commissioner to publish details of:

- non-compliance with the Building Code, including individuals who have failed to comply; and

- non-compliance by a building industry participant with this Act, including the names of participants who have failed to comply; and

- non-compliance by a building industry participant with the WR Act, including the names of the participants who failed to comply.

if the ABC Commissioner considers that it is in the public interest to do so.

Item No. 24 – Page 20, after proposed clause 243A, insert

Clause 246 – Delegation by Minister

13.21 This item will insert clause 246 to provide that the Minister may delegate any or all of his or her powers and functions under this Act to an SES employee or acting SES employee or a person prescribed by the regulations, other than powers or functions under:

- Chapter 2 – ABC Commissioner, which includes the power to appoint and terminate the appointment of the ABC Commissioner and Deputy Commissioners, give directions to the ABC Commissioner and require reports of the ABC Commissioner;

- Chapter 4 – OHS, which includes the power to appoint and terminate the appointment of the Federal Safety Commissioner, give directions to the Federal Safety Commissioner and require reports of the Federal Safety Commissioner;
• Clause 236 – Identity cards for ABC Inspectors, which requires the Minister to issue an identity card to the ABC Commissioner; and

• Clause 239 – Identity cards for Federal Safety Inspectors, which requires the Minister to issue an identity card to the Federal Safety Commissioner.

13.22 Subclause (2) provides that the Minister may also delegate all or any of the Minister’s powers and functions under Chapter 3 (the Building Code) to:

• the ABC Commissioner

• a Deputy ABC Commissioner; or

• the Federal Safety Commissioner.

13.23 Subclause (3) specifies that in exercising powers or function under delegation, the delegate must comply with any directions of the Minister.

Item No. 25 – Page 20 after proposed clause 246, insert

Clause 247 – Building association responsible for conduct of members etc.

13.24 This item will insert clause 247 which provides that, for the purposes of this Act, conduct of the committee of management of a building association or of an officer or agent of a building association acting in that capacity, is taken to be conduct of the building association (paragraphs (1)(a) and (b)).

13.25 Paragraphs (1)(c) and (d) set out the circumstances where the conduct of a member or group of members of the association is taken to be conduct of the building association:

• where the conduct of the member or group of members is authorised by:
  – the rules of the association; or
  – the committee of management of the association; or
  – an officer or agent of the association acting in that capacity; and

• where the member is acting on behalf of members of the association in dealing with any employer.

13.26 Subclause (2) specifies that the conduct set out in paragraphs (1)(c) and (d) is not taken to be conduct of the association where the committee of management, a person authorised by the committee or an officer of the association, has taken reasonable steps to prevent that action.

13.27 Subclause (3) provides that in this clause “officer of a building association” includes delegates and other representatives and employees of the association.

Item No. 26 – Page 20, after proposed clause 247, insert

Clause 248 – Capacity, state of mind etc. of person being coerced etc.

13.28 This item will insert clause 248 which provides that in applying a provision of this Act that refers to coercing, encouraging, advising or inciting a person to do a particular thing, whether or not the person is able, willing or eligible to do that particular thing is not a relevant
consideration. The conduct of coercing, encouraging etc can be established even if the person being coerced, encouraged etc is not able, willing or eligible to do the thing he or she is being coerced, encouraged etc to do.

Item No. 27 – Page 20, after proposed clause 248, insert

Clause 249 – ABC Commissioner intervention in court proceedings

13.29 This item will insert clause 249. Subclause (1) provides that the ABC Commissioner may intervene in the public interest in a civil proceeding before a court in a matter that arises under this Act or under the WR Act and involves a building industry participant or building work.

13.30 Subclause (2) provides that where the ABC Commissioner intervenes in a civil proceeding, the ABC Commissioner is taken to be a party to the proceeding with all the rights, duties and liabilities of a party.

Item No. 28 – Page 20, after proposed clause 249, insert

Clause 250 – ABC Commissioner intervention in AIRC proceedings

13.31 This item will insert clause 250 which provides that the ABC Commissioner may by writing intervene in a matter before the AIRC that arises under the WR Act and involves a building industry participant or building work.

Item No. 29 – Page 20, after proposed clause 250, insert

Clause 250A – ABC Commissioner or ABC Inspector may institute proceedings under the Workplace Relations Act

13.32 This item will insert clause 250A which authorises the ABC Commissioner or ABC Inspector to institute proceedings under the WR Act.

13.33 Subclauses (1)-(2) provide the ABC Commissioner and ABC Inspectors with powers corresponding to powers of inspectors under the WR Act in matters that involve a building industry participant or building work.

13.34 Subclause (3) provides that directions under subsection 84(5) of the WR Act do not apply to ABC Commissioner or an ABC Inspector in relation to such an application or such proceedings. It is anticipated that the ABC Commissioner will issue direction concerning the exercise of powers by ABC Inspectors.

13.35 Subclauses (4)-(5) provide the ABC Commissioner and ABC Inspectors with powers to make an application in matters related to suspected breaches of the right of entry and freedom of association provisions of the WR Act that involve a building industry participant or building work.

Item No. 30 – Page 20, after proposed clause 250A, insert

Clause 251 – Industrial Registrar must keep ABC Commissioner informed
13.36 This item will insert clause 251 which requires the Industrial Registrar to notify the ABC Commissioner of every application lodged with the AIRC or Industrial Registrar under the WR Act where the application relates to a matter involving a building industry participant or building work and the outcome of each application.

**Item No. 31 – Clause 252, page 20 (after line 20), after subclause (1), insert**

*Additional jurisdiction of the Federal Magistrates Court*

13.37 This item will amend clause 252 to insert subclause (2) which specifies that the Federal Magistrates Court has jurisdiction in matters arising under the WR Act as affected by section 176 of this Act (unfair contracts with building contractors).

**Item No. 32 – Clause 252, page 20 (after line 28), after subclause (3), insert**

*Writ of mandamus etc. against officers of the Commonwealth*

13.38 This item will insert subclauses (4), (5) and (6). For the avoidance of doubt, subclause (4) specifies that subsections 412(2), 412(3) and 415(1) of the WR Act extend to matters in which a writ of mandamus or prohibition, or an injunction, is sought against a Commonwealth officer holding office under the WR Act in relation to the exercise of powers or functions under this Act.

13.39 Subclause (5) provides that for the purposes of section 44 of the *Judiciary Act 1903*, (which empowers the High Court to remit a matter to a federal court where that court has the relevant jurisdiction), the Federal Court is taken to have jurisdiction with respect to any matter in which a writ of mandamus or prohibition, or any injunction, is sought against a Commonwealth officer holding office under this Act.

13.40 Subclause (6) provides that the Federal Court has jurisdiction with respect to matters remitted to under section 44 of the *Judiciary Act 1903*.

**Item No. 33 – Page 21 (after line 17), after clause 252, insert**

*Clause 253 – Court not to require undertaking as to damages*

13.41 This item will insert clause 253 which provides that a court cannot make undertakings as to damages a condition of granting an interim injunction where the ABC Commissioner or an ABC Inspector is an applicant in proceedings under clause 75 (injunction against unlawful industrial action), clause 227 (penalties for contravention of civil penalty provision) or the WR Act.

**Item No. 34 – Page 21, after proposed clause 253, insert**

*Clause 254 – ABC Commissioner etc. not liable for conduct in good faith*
13.42 This item will insert clause 254. Subclause (1) provides that anything done or omitted to be done by certain protected persons, as long as it is done in good faith and without negligence, cannot give rise to liability in civil proceedings for loss, damage or injury of any kind.

13.43 Subclause (2) lists protected persons for the purposes of this clause.

Clause 255 – Regulations

Item 35 – Clause 255, page 21 (after line 28), after paragraph (2)(b), insert
Item 36 – Clause 255, page 21 (after line 28), after subclause (2), add

13.44 These items will add four further matters for which the regulations may make provision:

- the forms of notices that are required or permitted to be given under this Act (subclause 2(c));

- the requirement of a building industry participant to notify the ABC Commissioner of an application made to a court under this Act or the WR Act, and the outcome of the application (subclause 2(ca));

- penalties for offences against the regulations, not exceeding a fine of 10 penalty units (subclause 2(e)); and

- civil penalties for contraventions of the regulations, not exceeding for a body corporate - 25 penalty units; or in any other case - 5 penalty units (subclause 2(f)).