BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

REVISED EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Kevin Andrews MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED
BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

OUTLINE

The Building and Construction Industry Improvement Bill 2005 is the Government’s legislative response to the Royal Commission into the Building and Construction Industry (the Royal Commission) and provides a comprehensive workplace relations reform package for the construction industry.

The Bill 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;
- make certain forms of industrial action unlawful and provide improved access to sanctions against unlawful industrial action in the form of injunctions, pecuniary penalties and compensation for loss; and
- improve the compliance regime, by increasing penalties and enhancing access to damages for unlawful conduct.

Chapter 1 contains 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 Chapter also contains definitions and machinery provisions.

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

Chapter 3 allows the Minister to issue a Building Code. This further enhances 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.

Chapter 4 is the Government’s response to the Royal Commission’s recommendations concerning Occupational Health and Safety (OHS). The Chapter sets out the powers and functions of 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.

Chapter 5 of the Bill defines unlawful industrial action and renders such action subject to a civil penalty provision. Industrial action will not be unlawful if it is protected action or AWA
industrial action within the meaning of the Workplace Relations Act 1996 (WR Act). It also provides:

- improved access to sanctions against unlawful industrial action in the form of injunctions and damages and clarifies the scope of protected industrial action; and
- for increased maximum penalties for breaches of strike pay provisions in Part VIIIA of the WR Act.

This approach is consistent with the Royal Commission recommendation that a new “statutory norm” of industrial action be established to bring greater clarity to the regulation of industrial action. These provisions, subject to constitutional limitations, apply broadly within the building and construction industry.

Chapter 6 is consistent with recommendations of the Royal Commission designed to eliminate coercion and discrimination in the industry. It prohibits 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.

Chapter 7 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 orders that a court may make include an order to pay damages to any person who suffers loss as a result of a contravention of the unlawful industrial action prohibition.

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.

Chapter 8 deals 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;
- provides for various courts to be conferred with the jurisdiction to hear matters under the Building and Construction Industry Improvement Act;
• 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.

This chapter also provides that Regulations can be made prescribing matters under this Act.

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 cover establishment and operating costs. 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 Bill will widen the jurisdiction of the Federal Court and Federal Magistrates Court.
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 BCII Bill 2003) 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 Department). 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 views on the proposed reforms. More than 60 submissions were received and as a result, several technical amendments were made to the BCII Bill 2003. The BCII Bill 2003 was also referred to the Senate Employment, Workplace Relations and Education References Committee, which provided its report on 21 June 2004. The BCII Bill 2003 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. Following the Minister’s announcement, stakeholders were again consulted regarding possible amendments and additions to the BCII Bill.

Current Situation

1. Participants in the building and construction industry are currently regulated by 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.

2. This regulation impact statement outlines specific measures included in the BCII Bill. The BCII Bill measures described below, in conjunction with other recommended measures, will effect structural and cultural change in the building and construction industry, which have not been achieved through existing mechanisms.

Problem

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

4. 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.

5. The final report of the Royal Commission provides compelling evidence of the need for reform in this industry. According to the final report, the industry’s lawlessness is manifested as criminal conduct, unlawful conduct, including breaches of the WR Act and OHS legislation, and a disregard for revenue statutes. The report concludes that at the root of this lawlessness is a reality that “those engaging in unlawful conduct will not be held to account by criminal
proceedings, proceedings for penalties or for loss occasioned to others by unlawful conduct.” (Vol 3 P5.12). 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).

6. Inappropriate conduct is defined by the Royal Commissioner as behaviour that infringes the WR Act, a person’s right of choice or other conduct which departs from recognised norms of civility and behaviour.

7. The Royal Commission concluded that there is a conflict between the short-term project profitability focus of building contractors and clients on the one hand, and the long-term aspirations of the union movement to control and regulate the industry for the benefits of its members. The short-term focus driven by profitability means that quick-fix commercial expediency can supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies. This inequality of bargaining power is sometimes exploited, resulting in high levels of unlawful or inappropriate conduct.

8. The Royal Commission concluded that the mechanisms available to enforce legal rights in relation to unprotected industrial action are time consuming and expensive. The Commissioner identified that the costs of unprotected action are felt by businesses immediately, but recovery of losses incurred could take years. Unlawful industrial action has continued in the building and construction industry because unlawful conduct is not punished and losses are not recovered.

9. Recently unions have been applying pressure to employers in the building industry to renegotiate existing agreements well in advance of their expiry dates. They have also indicated their willingness to take industrial action to influence industry participants to accede to their demands.

10. If unions were to take industrial action during the life of a certified agreement, it would be likely to be unprotected action under the WR Act. However, this and other remedies under the WR Act provide insufficient support for employers to resist the unions’ demands.

11. The pivotal role the industry has in underpinning a modern and competitive economy is threatened by this unlawful conduct which may result in serious inefficiencies and costs.

12. All industries will benefit from an efficient commercial building industry. Econtech found the Australian economy could gain significantly if workplace practice in the construction sector could match the standards in the domestic housing building sector – the Consumer Price Index would be 1 per cent lower, there would be an annual gain in economic welfare of $2.3 billion. The building and construction sector contributed 6.3 per cent to GDP in 2002-03. In a fully efficient industry, Econtech found real GDP would be 1.1 per cent higher.

13. Existing regulatory bodies have insufficient powers and resources to enforce the law in this industry. The Royal Commission found that 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 Office of the Employment Advocate (OEA), lack the resources and powers to sufficiently enforce regulation in the industry; other 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.

14. The Building Industry Taskforce (the 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.

15. 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.

16. 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

17. 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

18. This approach would allow participants within a significant Australian industry to continue disregarding the current regulatory framework and produce unacceptable OHS performance outcomes. This result would be compounded by the absence of any agency with sufficient powers to efficiently enforce the law as it applies to building industry participants.

2) The Australian Government’s reform proposal

19. These reforms strengthen elements of the WR Act which have been shown by the Royal Commission to be ineffective in the building and construction industry, particularly with respect to industrial action, while maintaining the relevance of the WR Act for the overall regulation of the industry.

20. The BCII Bill will:

(a) establish an independent statutory office for enforcement;

(b) encourage improvement in OHS performance;

(c) provide for a Building Code;

(d) expressly prohibit unlawful industrial action, other than protected action;

(e) enable any person to seek damages to recover losses suffered due to unlawful action;
(f) render industrial action taken in concert with persons who are not subject to a proposed agreement unprotected industrial action;

(g) prohibit inappropriate coercive conduct during the agreement-making process;

(h) improve the accountability of all industry participants; and

(i) improve the compliance regime by increasing penalties and enhancing access to damages and other orders such as injunctions.

1. The provisions of the BCII Bill dealing with industrial action and increased penalties for breaches of the strike pay provisions will operate from the date of introduction. Many certified agreements in the building and construction industry are due to expire later in the year. The retrospective character of these aspects of the BCII Bill will ensure that unions that take unlawful industrial action prior to the nominal expiry dates of agreements in the coming months will be subject to the sanctions and greater penalties prescribed by the BCII Bill. Likewise parties who are affected by unlawful industrial action will be able to seek damages to recover any consequential losses.

Impact Analysis

General impact of the reform proposal

2. In general terms, there is very limited additional regulatory burden imposed by the reform proposal. The scope of the BCII Bill reflects the need to capture the unlawful and inappropriate conduct identified by the Royal Commission. The BCII Bill will apply to employees, contractors, employers, employer organisations and unions in the commercial building and construction industry. Its application also ensures that the problems endemic in the industry are not shifted down the contractual chain and that all those involved in the commercial construction industry, whether on-site or supplying essential materials are covered. This means that there will be businesses whose operations are not limited to the commercial construction sector that may be covered by aspects of the BCII Bill.

3. The operations of the ABC Commissioner and the Federal Safety Commissioner will have an impact on businesses within the commercial building and construction sector that are not operating within the law.

4. Additional regulatory burdens for industry participants operating within the law will be minimal. For example, persons may be directed to provide information in relation to an investigation undertaken by the ABC Commissioner. Those wishing to contract for Commonwealth construction work will need to comply with the OHS accreditation scheme.

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

Economy wide impacts

6. The impact of the Government’s reform proposal on the economy as a whole is likely to be beneficial. In general terms, the reform proposals may hasten the realisation of the full potential of the building and construction industry by curbing unlawful behaviour.

7. According to Access Economics, activity in all sectors of the building and construction industry, including engineering and non-residential building, is forecast to increase by over 16 per cent during the period to 2006. The reform proposal will ensure that costly delays caused by unlawful action on projects in the industry do not act as an obstacle to increased productivity.
8. All industries would benefit from an increase in output as a result of the reduction in costs to
the building and construction industry.

9. 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.

10. 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).

11. 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 businesses, in the form of sub-contractors, make up approximately 99 per cent of
businesses in this 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.

12. The measures, in part, are aimed at promoting the development of workplace arrangements
at the enterprise level, thereby assisting businesses, particularly small businesses, to implement
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.

Impact analysis of specific proposals to be implemented under the BCII Bill 2005

Proposal:

Australian Building and Construction Commissioner (ABC Commissioner)

13. 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.

14. The ABC Commissioner will head the 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.

15. The ABC Commissioner will facilitate structural and cultural reform in the industry,
principally by taking action to address unlawful conduct in the industry. The ABC
Commissioner will also work with building industry participants to ensure they understand their
rights and obligations under the law.
16. The ABC Commissioner will improve current arrangements by having the power and capacity to act promptly against unlawful industrial action, and strategically intervene in court proceedings to provide cost effective relief against breaches of Federal workplace relations laws.

17. The ABC Commissioner will operate across the country in urban, rural and remote areas. The ABC Commissioner will be empowered to access Commonwealth construction sites. The ABC Commissioner will also have the power to 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.

18. The ABC Commissioner will initially have offices in major capital cities. These key offices will also service nearby regional areas and States.

19. 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 appointed 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.

20. 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:

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

22. The ABC Commissioner will 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 but is not limited to taking legal action. The effect of the ABC Commissioner’s educative role and the presence of ABC Inspectors on building sites will also be important in addressing the current cultural and structural deficiencies.

23. 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.

24. 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.

25. 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 ABC 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.

26. 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.

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

Proposal:

Federal Safety Commissioner (FSC)

28. 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.

29. 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’.

30. The BCII Bill 2005 sets out the functions and powers of the Federal Safety Commissioner, 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 Federal Safety Commissioner which will monitor compliance with any OHS aspects contained in the Building Code; and

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

31. 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:

32. 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.

33. 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.

34. 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).

35. 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.

Proposal:

Industrial action

36. The Royal Commission found that over the last six years, the level of industrial disputation in the building and construction industry has been at least twice and sometimes five times the national average. Time lost due to industrial action has a significant impact on continuity of work and can substantially increase the costs of a project.

37. Industrial action can affect the reputation of a particular State or of Australia as a good place to invest. The existing legal framework does not adequately address the problem, with employers finding the current remedies available to be cumbersome, slow and costly to pursue. Unions understand the practical delays employers face in seeking to challenge their actions through existing measures provided under the WR Act and know that by adopting tactics such as industrial campaigns they can damage the employer commercially without risking legal repercussions.

38. The BCII Bill seeks to address these issues by clarifying what constitutes unlawful industrial action. If unions or other parties take unlawful industrial action they will be liable for a maximum civil penalty of 1,000 penalty units for a body corporate or 200 penalty units in other cases. A court can also make an order for damages for any loss caused by unlawful industrial action.

39. The BCII Bill reverses the onus relating to action taken in respect of occupational health and safety concerns. This measure will prevent spurious occupational health and safety concerns being used to justify industrial action about other issues.
Impact:

40. Through the preferred option, a reduction in unlawful industrial action and improved access to damages for affected parties would increase productivity and is likely to have flow on benefits for allied industries.

Consultation

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

Consultation on the BCII Bill 2003

42. On 18 September 2003, an exposure draft of the BCII Bill 2003 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 BCII Bill 2003 and the intent of its provisions.

43. The Master Builders Association (MBA) commented in its submission (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.”

44. The Australian Industry Group (Ai Group) argued strongly in its submission 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)

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

46. 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 BCII Bill 2003 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 BCII Bill 2003.
47. Several sub-contractors responded during the initial four week period that the BCII Bill 2003 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.

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

Consultation on the BCII Bill 2005

49. The BCII Bill 2003 lapsed with the prorogation of Parliament for the 2004 Federal election. Following the election, the Australian Government announced its intention to proceed with the 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.

50. 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.

51. In general, stakeholders continued to be supportive. The feedback was carefully considered by the Department while drafting amendments to the BCII Bill.

Conclusion and recommended option

52. The provisions of the Bill are directed at addressing the entrenched culture of lawlessness identified by the Royal Commission.

53. Option two, the Australian Government’s reform proposal as set out in the BCII Bill is the recommended option. The main object of the reforms contained in the BCII Bill 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

54. The Department monitors the overall workplace relations framework, and will also monitor the effectiveness of the legislative changes proposed for the building and construction industry.

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

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

Part 1 of Chapter 7 of the Bill deals with contraventions of civil penalty provisions.

Clause 49 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 48(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 69 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 CLAUSES

CHAPTER 1 – PRELIMINARY

Clause 1 - Short Title

1.10 This is a formal provision specifying the short title of the Act as the Building and Construction Industry Improvement Act 2005.

Clause 2 - Commencement

1.11 Clause 2 sets out a table specifying when the various provisions of the Act are to commence.

1.12 Sections 1, 2 and 3 and anything in this Act not elsewhere covered by the table will commence on the day on which this Act receives Royal Assent.

1.13 Sections 4 to 8 commence at the time of introduction of the Bill into the House of Representatives.

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

1.15 In Chapter 5, sections 36, 37, 38, 41 and 42 will commence on 9 March 2005. Sections 39 and 40 will commence on the day on which the Act receives Royal Assent.

1.16 Chapters 6, 7 and 8 will commence on the day on which the Act receives the Royal Assent.

Clause 3 - Main object of Act

1.17 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

1.18 Clause 4 defines the terms used in the Bill. The definitions appear in alphabetical order in the Bill. However, for the purposes of the Explanatory Memorandum, definitions have been grouped together to aid interpretation. Only key definitions are explained here.

1.19 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.

1.20 Building certified agreement is defined to mean any certified agreement that has application to building work, regardless of whether that certified agreement also applies to any other kind of work. The term certified agreement has the same meaning that it has in section 4 of the WR Act.

1.21 Building association is defined to mean any industrial association (which is defined to have the same meaning that it has in Part XA of the WR Act) whose eligibility rules (rules that relate to the conditions of eligibility for membership) allow membership by at least one of the following groups:

- building employers;
- building employees;
- building contractors.

1.22 An industrial association will be a building association if its eligibility rules allow membership by any of the above groups, regardless of whether the rules also allow membership by any other persons. For example, an industrial association representing a range of businesses including building employers would be a building association.

1.23 Building contractor is defined to mean a person who has entered into, or offered to enter into, a contract for services under which the person carries out building work, or arranges for building work to be carried out. The term encompasses both independent contractors as well as contractors and subcontractors who engage employees or other contractors to perform building work.

1.24 Building employee is defined to mean both a person whose employment consists of, or includes, building work and a person who accepts an offer of engagement as an employee for work that consists of, or includes, building work. An employee that performs some building work and also performs other work will be a building employee for the purposes of this Bill. Employee has the same meaning as in section 4 of the WR Act and does not include a person who is undertaking a vocational placement.

1.25 Building employer is defined to mean an employer who employs, or offers to employ, building employees. Employer has the same meaning as in section 4 of the WR Act and includes a person who is usually an employer and an unincorporated club.

1.26 Building industry participant is a broad term encompassing persons and entities engaged in or involved with the building industry. Each of the following is a building industry participant:
• a building employee;
• a building employer;
• a building contractor;
• a person who enters into a contract with a building contractor under which the building contractor agrees to carry out building work or to arrange for building work to be carried out (that is, a client of a building contractor);
• a building association;
• an officer, delegate or other representative of a building association; or
• an employee of a building association.

1.27 **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.

1.28 This definition is relevant to proposed clause 45 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.

1.29 **Industrial dispute** (except in subsection 36(4)) has the meaning given by section 4 of the WR Act (as affected by Part XV of that Act).

**Clause 5- Definition of building work**

1.30 This definition is integral to the understanding and application of the Bill. It determines the scope of the Bill by forming the basis of terms such as building employee and building agreement, and hence terms such as building employer and building association. The coverage of all provisions of the Bill is ultimately determined by reference to the definition of building work.

1.31 In order to ensure appropriate coverage for the legislation the definition of building work is broad. It is defined to mean any of the activities listed in paragraphs (1)(a) to (d).

1.32 Paragraph (a) covers building activities:

• construction, alteration, extension, restoration, repair, demolition, dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent.

1.33 To avoid doubt, paragraph (b) lists the same activities in relation to railways and docks but makes it clear that such activities in relation to railway rolling stock are excluded.

1.34 Paragraph (c) covers building activities that relate to the fit-out of buildings such as the installation in any building, structure or works of fittings including: heating; lighting; air-
conditioning; ventilation; power supply; drainage; sanitation; water supply; fire protection; security; and communication systems.

1.35 Paragraph (d) covers all activities that are necessarily preparatory to or for the purpose of rendering complete any of the activities listed in paragraphs (a) to (c). Specific examples are provided, but the coverage of paragraph (d) is not limited to those examples.

1.36 Paragraphs (e), (f) and (g) set out exceptions to the definition of building work.

1.37 Paragraphs (e) and (f) exclude extraction and mining activities.

1.38 Paragraph (g) excludes activities associated with domestic building. The Bill intends, as far as possible, to exclude the domestic housing sector from the coverage of the Bill. Any work that is part of a project for the construction, repair or restoration of a single-dwelling house or a building, structure or work associated with a single-dwelling house is excluded from the definition of building work (subparagraphs (1)(g)(i) and(ii)).

1.39 Alteration and extension activities will also be excluded from the definition of building work, where those activities are performed on a single-dwelling house and the resulting structure remains a single-dwelling house (subparagraph (1)(g)(iii)).

1.40 Dismantling and demolition activities will also be excluded from the definition of building work, where they are part of a project for the construction or repair etc. of a single-dwelling house.

1.41 The domestic building sector exception does not apply where the activities are performed as part of a project that is part of a multi-dwelling development consisting of, or including the construction of, at least 5 single-dwelling houses (subclause (2)).

1.42 Regulations may be made to supplement the definition.

1.43 Subclause (3) allows regulations to be made to include additional activities. Subclause (4) allows activities to be excluded from the definition. It is intended that regulations will be made where it is not clear whether or not a particular activity falls within the definition.

**Clause 6 - Definition of office**

1.44 This clause defines the term office in relation to an association.

- In this context, the term “association” includes both an organisation registered under Schedule 1B to the WR Act and an industrial association (as defined in Part XA of the WR Act), as well as a branch of such an organisation or association (subclause (2)).

1.45 The term office is defined in similar terms to the definition of office in Schedule 1B to the WR Act, and covers:

- certain designated positions in organisations and associations or their branches (paragraph (1)(a));
• other positions, the holders of which have direct responsibilities relating to the management, policy determination or rule-making and rule-enforcement functions of organisations, associations and their branches (paragraphs (1)(b), (c), (d) and (e)).

1.46 The definition excludes persons who carry out functions of the kind mentioned above, but only under direction to implement existing policy or decisions (paragraph (1)(c)).

Clause 7 - Extension to Christmas Island

1.47 Clause 7 provides that this Act extends to Christmas Island and applies in relation to Christmas Island with such modifications as are prescribed by the regulations.

Clause 8 - Act to bind Crown

1.48 This clause provides that the Bill applies to the Crown in right of the Commonwealth and each of the States and Territories, but that this does not mean that the Commonwealth or a State or Territory can be prosecuted for an offence under the Bill.
CHAPTER 2 – AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER

2.49 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 9 – ABC Commissioner and Deputy ABC Commissioners

2.50 Clause 9 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.

2.51 Clause 15 provides for the ABC Commissioner and Deputy ABC Commissioners to be appointed by the Minister.

Clause 10 – Functions of the ABC Commissioner

2.52 Clause 10 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.

2.53 The function of ‘monitoring and promoting’ compliance with this Act, the WR Act and the Building Code is facilitated by specific provisions, in particular clause 52 which relates to the power of the ABC Commissioner to obtain information.

2.54 To enable the ABC Commissioner to perform his or her functions, the ABC Commissioner will appoint Australian Building and Construction Inspectors (ABC Inspectors) (clause 57). 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 52).

2.55 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. 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 74).

**Clause 11 – Minister’s directions to ABC Commissioner**

2.56 Clause 11 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 14).

2.57 Clause 11 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)).

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

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

**Clause 12 – Minister may require reports**

2.60 Clause 12 allows the Minister to direct the ABC Commissioner to provide specified reports relating to the ABC Commissioner’s functions.

**Clause 13 – Delegation by ABC Commissioner**

2.61 Clause 13 allows the ABC Commissioner to delegate his or her powers and functions.

2.62 The ABC Commissioner’s powers to obtain information under clause 52 can only be delegated to a Deputy ABC Commissioner.

2.63 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.

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

2.65 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 14 – Annual report

2.66 Clause 14 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)).

2.67 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)).

2.68 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 (subclause (3)).

2.69 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 15 – Appointment

2.70 Clause 15 provides for the Minister to appoint the ABC Commissioner and Deputy ABC Commissioners by written instrument.

2.71 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.

2.72 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)).

2.73 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 16 – Acting ABC Commissioner

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

Clause 17 – Remuneration

2.75 Clause 17 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.
2.76 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 18 – Application of the Judges’ Pensions Act to a former Judge of the Federal Court who becomes the ABC Commissioner**

2.77 Clause 18 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*.

2.78 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 19 – Application of the Judges’ Pensions Act to a former member of the AIRC who becomes the ABC Commissioner**

2.79 Clause 19 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 judicial service for the purposes of any entitlement to a pension under the provisions of the *Judges’ Pensions Act 1968*.

2.80 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**

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

2.82 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.

2.83 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.**

2.84 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.
2.85 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

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

2.87 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

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

Clause 24 – Termination of appointment

2.89 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.

2.90 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

2.91 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)).

2.92 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)).

2.93 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 26 – Office of the Australian Building Commissioner

2.94 Subclause 26(1) establishes the Office of the ABC Commissioner. The Office of the ABC Commissioner consists of the ABC Commissioner, the Deputy ABC Commissioners, staff and any consultants (subclause (2)).
CHAPTER 3 – THE BUILDING CODE

Clause 27 – Minister to issue Building Code
3.95 Clause 27 authorises the Minister to issue one or more documents that together comprise the Building Code.

3.96 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)).

3.97 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.

3.98 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 28 – Building industry participants to report on compliance with Building Code
3.99 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)).

3.100 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)).

3.101 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)).

3.102 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

Part 1 – Federal Safety Commissioner


Clause 29 – Federal Safety Commissioner

1.104 Clause 29 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)).

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

Clause 30 – Functions of the Federal Safety Commissioner.

1.106 Clause 30 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 35); 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.

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

Clause 31 – Minister’s directions to the Federal Safety Commissioner

1.108 Clause 31 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.

1.109 Clause 31 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).
1.110 A direction by the Minister is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (subclause (4)).

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

**Clause 32 - Delegation by Federal Safety Commissioner**

1.112 Clause 32 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.

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

1.114 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 33 – Acting Federal Safety Commissioner**

1.115 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 34 – Consultants**

1.116 Clause 34 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)).

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

**Part 2 – Accreditation scheme for Commonwealth building contracts**

**Clause 35 – Accreditation scheme**

1.118 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)).

1.119 The Federal Safety Commissioner will be the accrediting authority under the scheme (subclause (2)).

1.120 Fees may be imposed for applications under the accreditation scheme (subclause (3)).
1.121 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)).

1.122 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)).

1.123 The relevant definitions are provided in subclause (7).
CHAPTER 5 – INDUSTRIAL ACTION ETC

5.124 Chapter 5 sets out rules relating to industrial action for the building and construction industry. The Chapter:

- renders certain kinds of industrial action unlawful, and
- modifies what may be protected action for the purposes of the WR Act.

Part 1- Preliminary

5.125 This Part contains relevant industrial action definitions for Chapter 6.

Clause 36 – Definitions

building industrial action

5.126 Building industrial action is defined broadly to encompass conduct by employers and employees that adversely affects the performance of building work.

5.127 Paragraphs (e), (f) and (g) describe exceptions to the definition of building industrial action. Paragraph (e) excludes action by employees that has been authorised or agreed to in advance and in writing by the employer of those employees. Paragraph (f) excludes action by an employer that has been authorised or agreed to in advance and in writing by or on behalf of the employees of that employer. The requirement for the action to be authorised or agreed to in advance and in writing is intended to prevent the application of pressure on parties to authorise industrial action retrospectively.

5.128 Paragraph (g) excludes action by an employee where that action is based on a reasonable concern by the employee about an imminent risk to his or her own health and safety and the employee did not unreasonably fail to comply with any direction of his or her employer to perform other available work that was safe for the employee to perform. The employer may direct the employee to perform available work at the same or any other workplace.

constitutionally-connected action

5.129 A definition of constitutionally-connected action is required in order to constitutionally limit the broad operation of building industrial action in circumstances where it is necessary to do so. Only one of the conditions needs to be met in order to provide a constitutional basis for regulating the industrial action.

excluded action

5.130 The term “excluded action” is used to designate the kinds of industrial action that will not be unlawful industrial action under this Bill. Only protected action under the WR Act as modified by this Bill and AWA industrial action will be excluded action. In accordance with the recommendations of the Royal Commissioner, action protected under State and Territory legislation will not be excluded action for the purposes of this Bill.
industrially-motivated

5.131 This term is used to distinguish conduct that is generally recognised as industrial action from conduct that, while technically falling into the broad definition of building industrial action, would not be considered to be industrial action as that term is commonly understood. For example, a mere failure to attend for work may occur for a number of reasons and will not necessarily be considered to be industrial action unless the failure to attend is for one of the reasons, or for reasons including one of the reasons, listed in this definition.

5.132 In order for action to be industrially-motivated, it is not necessary that it be taken solely for one of the reasons listed in the definition, nor must a reason listed in the definition be the dominant purpose for the action. It must merely be one of the purposes for which the action is taken. Where, for example, the purpose is to disrupt the performance of work in order to attain a particular goal, the action will be industrially-motivated.

5.133 For action to be industrially-motivated, it is not necessary for the action to be taken to support or advance claims against the employer of the employees taking the action. Action by employees to support or advance claims by a separate group of employees against a different employer will also be considered industrially-motivated.

5.134 If a person seeks to argue that they have not engaged in industrial action on the grounds that the action falls within the exception for action based on an imminent risk to health and safety, the onus is on that person to prove that the action was based on a reasonable concern about an imminent risk to health and safety (subclause (2)). This provision has been included to prevent persons engaging in industrial action from avoiding responsibility for their actions by relying on spurious health and safety risks.

5.135 Subclause (3) is modelled on subsection 4(9) of the WR Act. Paragraph (3)(a) makes it clear that action, such as the implementation of work bans, by either an employee or employer will still be building industrial action, even if it relates to only part of the duties that an employee is required to perform in the course of employment. Paragraph (3)(b) makes it clear that industrial action may include a course of conduct.

Part 2 – Unlawful industrial action

5.136 This Part contains provisions to prevent the occurrence of unlawful industrial action.

Clause 37 – Definition of unlawful industrial action

5.137 Unlawful industrial action is defined as all constitutionally-connected, industrially motivated building industrial action that is not excluded action (as defined in clause 36). For example, where the reason, or one of the reasons for the industrial action is a demarcation dispute between unions, such action will be unlawful industrial action.

Clause 38 – Unlawful industrial action prohibited

5.138 Clause 38 prohibits a person from engaging in unlawful industrial action. This is a Grade A civil penalty provision.
5.139 Clause 49 of the Bill will allow an action in relation to unlawful industrial action to be brought by any eligible person in the Federal Court, the Federal Magistrates Court, the Supreme Court of a State or Territory or any District or County Court, of a State.

5.140 Subclause 49(4) provides an appropriate court with power, in respect of a contravention of this clause, 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.

**Clause 39 – Injunction against threatened etc. unlawful industrial action**

5.141 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.

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

5.143 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)).

5.144 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.

**Part 3 – Protected action**

5.145 This Part outlines circumstances in which building industrial action will not be protected action for the purposes of the WR Act. These circumstances are in addition to the requirements for protected action under the WR Act.

**Clause 40 – Action involving extraneous participants**

5.146 Clause 40 makes 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.
Clause 41 – Action before nominal expiry date

5.147 Clause 41 makes it clear that where the employment of employees is subject, in any respect, to a building certified agreement or agreements, building industrial action taken prior to the nominal expiry date of any one of those agreements will not be protected action.

5.148 This provision is largely modelled on section 170MN of the WR Act. However, the reference to “in any respect” in subclause (1) is designed to address an apparent anomaly in the WR Act identified by the Federal Court in *Emwest v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2003) FCAFC 183. In that case, the court held that section 170MN of the WR Act did not prevent employees taking protected industrial action in respect of issues not covered by a certified agreement. This is contrary to the intent of the provision.

Part 4 – Miscellaneous

Clause 42 – Payments in relation to periods of building industrial action

5.149 Clause 42 adopts, with modifications, Part VIIIA of the WR Act, which deals with “strike pay”. The effect of this clause is to prohibit employers from making payments, and employees from accepting payments, in relation to any periods of building industrial action that are industrially-motivated and constitutionally-connected.

5.150 This is a civil penalty provisions with a maximum penalty of 1000 penalty units for a body corporate. For cases other than a body corporate, the existing maximum penalty under the WR Act of 300 penalty units will continue to apply.

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

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

5.153 Subsection 187AD(2) of the WR Act makes it clear that the Court must not make an order requiring a person to pay an employer compensation for a contravention of section 187AB if the employer has itself contravened section 187AA by making a payment.
CHAPTER 6 – DISCRIMINATION, COERCION AND UNFAIR CONTRACTS

Clause 43 – Coercion in relation to engagement etc. of building employees and building contractors

6.154 Clause 43 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.

6.155 This is a Grade A civil penalty provision.

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

Clause 44 – Coercion of persons to make, vary, terminate etc. certified agreements etc.

6.157 Clause 44 is intended to ensure that persons are not coerced or subject to undue pressure in relation to their certified agreement.

6.158 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 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. This is a Grade A civil penalty provision.

6.159 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 this Bill.

6.160 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.

6.161 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. This is a Grade A civil penalty provision.

6.162 Section 170NC of the WR Act does not apply in relation to building agreements (subclause (5)).
Clause 45 – Discrimination against employer in relation to industrial instruments

6.163 Clause 45 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.

6.164 This is a Grade A civil penalty provision.

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

6.166 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.

6.167 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.

6.168 An “eligible condition” is defined 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.

6.169 Subclause (4) identifies the constitutional limitations which apply to the prohibition in subclause (1).
Clause 46 – Coercion in relation to superannuation

6.170 Clause 46 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.

6.171 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.

6.172 This is a Grade A civil penalty provision.

6.173 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. 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.

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

Clause 47 – Unfair contracts with building contractors

6.175 Clause 47 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 7 – ENFORCEMENT

Part 1 – Contravention of civil penalty provisions

Clause 48 – Definitions

7.176 Subclause (1) contains relevant definitions for the purposes of Chapter 7 Part 1.

7.177 Subclause (2) outlines the circumstances in which a person is taken to have been “involved in” a contravention of a civil penalty provision.

Clause 49 – Penalties etc. for contravention of civil penalty provision

7.178 An “eligible person” may apply to an “appropriate court” in respect of a contravention of a civil penalty provision.

- an “eligible person” is: the ABC Commissioner, an ABC Inspector, a person affected by the contravention, or a person prescribed by the regulations (subclause (6))
- an “appropriate court” is generally the Federal Court, unless it is an application in the case of a contravention of the prohibition on unlawful industrial action (clause 38) which may be brought in a wider range of courts.

7.179 Subclauses (1)-(3) set out the orders that a court can make against a person who contravenes a civil penalty provision.

7.180 The court may order a pecuniary penalty. The maximum pecuniary penalty that may be ordered depends 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.

7.181 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).

7.182 If a person contravenes clause 38 of the Bill (which prohibits unlawful industrial action), then subclause (4) sets out the circumstances in which the court can grant an injunction restraining a person from engaging in such conduct.
• an action in relation to a breach of clause 38 may be brought in the Federal Court, the Federal Magistrates Court, the Supreme Court of a State or Territory or any District or County Court, of a State.

7.183 A penalty ordered under this clause is payable to the Commonwealth or some other person if the court directs. The penalty may be recovered as if it were a judgment debt (subclause (5)).

7.184 Subclause (7) allows regulations made for the purpose of prescribing a person as an “eligible person” (i.e. a person able to bring proceedings for breach of a civil penalty provision) to limit the circumstances in which the person may make an application.

Clause 50 – Multiple proceedings for same conduct

7.185 To avoid double penalties in respect of the same conduct, subclause (1) prevents a court from making an order for a pecuniary penalty against a person if the person has already been convicted of an offence constituted by substantially the same conduct as the contravention of a civil penalty provision.

7.186 Subclause (2) provides that where criminal proceedings have commenced in respect of conduct that is substantially the same as that relating to proceedings for a pecuniary penalty order for a contravention of a civil penalty provision, the civil proceedings are stayed. If the person is later convicted of the offence, then the proceedings for an order for breach of the civil penalty provisions are dismissed. Otherwise, the proceedings may be resumed.

7.187 Subclause (3) ensures that if an order in respect of a contravention of a civil penalty provision has been made, criminal proceedings relating to substantially the conduct may still be instituted.

7.188 Subclause (4) provides that if a person’s conduct constitutes a contravention of a civil penalty provision and section 170MN of the WR Act, proceedings relating to the contravention may be instituted under either or both section 49 of this Act and section 170NF of the WR Act. However, it provides that the person is not liable to more than one pecuniary penalty in respect of the same conduct. This will not prevent a person who has had a pecuniary penalty imposed on them for a breach of section 170MN of the WR Act from having an order made against them to pay damages to a specified person or any other order the court considers appropriate under paragraphs (b) or (c) of subclause 49(1).

Clause 51 – Evidence given in proceedings for penalty not admissible in criminal proceedings

7.189 Clause 51 prevents admission of evidence in criminal proceedings where the evidence was previously given in proceedings for a pecuniary penalty order relating to contravention of a civil penalty provision and the criminal proceedings relate to substantially the same conduct. An exception is made for criminal proceedings regarding false evidence given in the civil penalty proceedings.
Part 2 – Compliance etc. powers

7.190 This Part contains the compliance powers of the ABC Commissioner, ABC Inspectors and Federal Safety Officers.

Division 1 – ABC Commissioner’s powers to obtain information etc.

Clause 52 – ABC Commissioner’s powers to obtain information etc.

7.191 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.

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

7.193 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 53 limits the grounds for such a defence. However, clause 54 protects persons from certain liabilities that may arise from the disclosure of information or documents pursuant to clause 52.

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

7.195 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.

7.196 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 53 – Certain excuses not available in relation to section 52 requirements

7.197 Clause 53 limits the grounds on which persons can legitimately refuse to comply with a notice from the ABC Commissioner under clause 52, compelling the production of information.

7.198 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 52 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 54 – Protection from liability

7.199 Clause 54 protects persons who disclose information to the ABC Commissioner, in good faith, in compliance with a notice under clause 52, 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 55 – Retention and copying etc. of documents

7.200 Clause 55 provides that the ABC Commissioner may retain documents produced under clause 52 for as long as necessary for the purpose of conducting an investigation.

7.201 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 56 – ABC Commissioner may make and keep copies of documents

7.202 In addition to the making of certified copies under clause 55 the ABC Commissioner may also make and keep copies of documents produced by persons under clause 52.

Division 2 – Powers of ABC Inspectors

Clause 57 – Australian Building and Construction Inspectors

7.203 Clause 57 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.

7.204 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)).

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

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

7.207 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 58 – Identity cards for ABC Inspectors**

7.208 Clause 58 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)).

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

7.210 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 59 – Power to enter premises etc.**

7.211 Clause 59 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)).

7.212 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)).

7.213 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)).

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

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

7.216 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*. 
7.217 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)).

7.218 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.

7.219 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)).

7.220 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.

7.221 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 60 – Federal Safety Officers

7.222 Clause 60 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 34.

7.223 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)).

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

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

7.226 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.
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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 61 – Identity cards for Federal Safety Officer

7.227 Clause 61 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)).

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

7.229 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 62 – Powers to enter premises etc. to ascertain compliance with Building Code

7.230 Clause 62 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)).

7.231 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)).

7.232 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)).

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

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

7.235 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.

7.236 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)).

7.237 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.

7.238 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)).

7.239 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.

7.240 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 63 – Powers to enter premises etc. to ascertain compliance with accreditation scheme**

7.241 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.

7.242 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)).

7.243 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)).

7.244 Federal Safety Officers are not permitted to enter a part of premises used for residential purposes (subclause (4)).
7.245 Subclause (5) outlines what a Federal Safety Officer can do on premises he or she has entered under this clause.

7.246 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*.

7.247 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)).

7.248 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.

7.249 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)).

7.250 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.

7.251 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)).

7.252 Subclause (15) defines relevant terms.
CHAPTER 8 – MISCELLANEOUS

Clause 64 – Project agreements not enforceable

8.253 Clause 64 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.

8.254 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.

8.255 Clause 64 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)).

8.256 Paragraph 64(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.

8.257 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.

8.258 Clause 7 of 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 64 for three years after commencement.

Clause 65 – Protection of confidentiality of information

8.259 This clause 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)).

8.260 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.

8.261 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.

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

8.263 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.

8.264 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.

8.265 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.

8.266 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.

8.267 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 66 (which prohibits reports from including information relating to an individual’s affairs) have not been complied with (subclause (6)).

8.268 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).

8.269 Subclause (8) sets out the definitions that apply under this clause.
Clause 66 – Reports not to include information relating to an individual’s affairs

8.270 This clause 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)).

8.271 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.

Clause 67 – ABC Commissioner to publicise non-compliance

8.272 This clause provides that if the ABC Commissioner considers that it is in the public interest to do so, he or she may 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 or the WR Act, including the names of participants who have failed to comply.

Clause 68 – Delegation by Minister

8.273 This clause 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 58 – Identity cards for ABC Inspectors, which requires the Minister to issue an identity card to the ABC Commissioner; and
- Clause 61 – Identity cards for Federal Safety Officers, which requires the Minister to issue an identity card to the Federal Safety Commissioner.

8.274 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.
8.275 Subclause (3) specifies that in exercising powers or function under delegation, the delegate must comply with any directions of the Minister.

Clause 69 – Building association responsible for conduct of members etc.

8.276 This clause 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)).

8.277 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.

8.278 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.

8.279 Subclause (3) provides that in this clause officer in relation to a building association includes delegates and other representatives and employees of the association.

Clause 70 – Capacity, state of mind etc. of person being coerced etc.

8.280 This clause 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.

Clause 71 – ABC Commissioner intervention in court proceedings

8.281 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.

8.282 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.
Clause 72 – ABC Commissioner intervention in AIRC proceedings

8.283 This clause 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.

Clause 73 – ABC Commissioner or ABC Inspector may institute proceedings under the Workplace Relations Act

8.284 This clause provides that the ABC Commissioner or an ABC Inspector may institute proceedings under the WR Act.

8.285 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.

8.286 Subclause (3) provides that directions under subsection 84(5) of the WR Act do not apply to the 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.

8.287 Subclauses (4)-(5) provide that the ABC Commissioner and ABC Inspectors may make an application under the WR Act in relation to suspected breaches of the right of entry and freedom of association that involve a building industry participant or building work.

Clause 74 – Industrial Registrar must keep ABC Commissioner informed

8.288 This clause 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

Clause 75 – Jurisdiction of courts

8.289 This clause deals with a range of matters affecting the jurisdiction of the courts in relation to provisions of this Act and the WR Act as affected by this Act.

Jurisdiction where Act allows proceedings to be instituted

8.290 Paragraph (1)(a) provides that where a provision of this Act authorises a proceeding to be instituted in a particular court in relation to a matter, that provision is taken to vest the court with jurisdiction in that matter.

8.291 In relation to a State Court, paragraph (1)(b) provides that the jurisdiction vested in the court by a provision of this Act is subject to the same limits as any other jurisdiction of that court.

8.292 Paragraph (1)(c) provides that the jurisdiction vested in the Federal Court or Federal Magistrates Court by a provision of this Act is not subject to any limits which may apply to other jurisdictions of the court.
8.293 In relation to a Territory Court, paragraph (1)(d) provides that the jurisdiction vested in
the court by a provision of this Act is vested only so far as permitted by the Constitution.

Additional jurisdiction of the Federal Magistrates Court

8.294 Subclause (2) specifies that the Federal Magistrates Court has jurisdiction in matters
arising under the WR Act as affected by section 47 of this Act (unfair contracts with building
contractors).

Jurisdiction in relation to modified provisions of Workplace Relations Act

8.295 Subclause (3) specifies that where a court has jurisdiction in relation to a matter under a
provision of the WR Act and that provision is affected by this Act, then that jurisdiction extends
to a matter arising under that WR Act provision as affected by this Act.

Writ of mandamus etc. against officers of the Commonwealth

8.296 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.

8.297 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.

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

Exclusive jurisdiction of Federal Court for certain matters involving organisations etc.

8.299 Subclause (7) is modelled on subsection 414(1) of the WR Act and provides that the
Federal Court has exclusive jurisdiction for certain matters involving building organisations.

Referral of matters to the Full court of the Federal Court

8.300 Subclause (8) provides that a Judge of the Federal Court may, at any stage of a
proceeding in a matter, refer a question of law for the opinion of the Full Court of the Federal
Court or refer the matter to the Full Court of the Federal Court to be heard and determined.

8.301 Where a Judge refers a matter the Full Court of the Federal Court may have regard to
evidence given, or arguments adduced, in the proceeding before the Judge.

8.302 Subclause (9) provides that the Federal Court has jurisdiction to deal with the questions
referred to it under subclause (8).

Clause 76 – Court not to require undertaking as to damages

8.303 This clause 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 39 (injunction against unlawful industrial action), clause 49 (penalties for contravention of civil penalty provision) or the WR Act.

Clause 77 – ABC Commissioner etc. not liable for conduct in good faith

8.304 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.

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

Clause 78 – Regulations

8.306 The Governor-General may make regulations prescribing matters where this Act requires or permits that matters to be prescribed or where it is necessary or convenient for the matters to be prescribed for carrying out or giving effect to this Act.

8.307 Subclause (2) specifies matters for which the regulations may make provision, including:

- 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;
- penalties for offences against the regulations, not exceeding a fine of 10 penalty units; 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.

8.308 Subclause (3) provides that the first Regulations made for the purposes of subclauses 5(3), 5(4) and 7(2) may be expressed to take effect from the date of introduction of the Bill, provided that the regulations must be made within 120 days after the commencement of the relevant subsection.

8.309 This will allow regulations to be made to include or exclude activities from the definition of building work (subclauses 5(3) and 5(4)) or to modify its application to Christmas Island (subclause 7(2)) and for those regulations to take effect from the date of introduction. This approach has been taken due to some items of the Bill taking effect from the date of introduction.