




Building and Construction Industry (Improving Productivity) Bill 2013

Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013

22 November 2013

Submission to the Senate Education and Employment Legislation Committee

AUSTRALIAN INDUSTRY GROUP

Summary of the Ai Group's position

The Australian Industry Group (Ai Group) welcomes the introduction of the *Building and Construction Industry (Improving Productivity) Bill 2013* ('Bill') and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* ('Transitional Bill') into Parliament.

The Bills repeal the *Fair Work (Building Industry) Act 2012* ('FWBI Act') and reintroduce numerous key provisions of the *Building and Construction Industry Improvement Act 2005* ('BCII Act'). The BCII Act was introduced following the Final Report of the Royal Commission into the Building and Construction Industry ('Cole Royal Commission') in February 2003. The BCII Act introduced reforms which led to a dramatically improved workplace relations environment in the construction industry. The industry had never been a better place to work and invest. Productivity in the industry improved and construction costs were lowered which led to more affordable infrastructure for the community. At the same time, employees benefitted from highly paid jobs and harmonious workplaces.

The community has a legitimate and direct interest in ensuring that construction costs are reasonable and that taxes are well spent, including on roads and other vital infrastructure. The community also has a direct interest in ensuring that the rule of law is upheld. The BCII Act reinforced the rule of law in the industry and the Bill would have a similar very positive effect. As Justice Merkel of the Federal Court said some years ago when penalizing two militant Victorian union leaders for ignoring a Federal Court order:

> *"The rule of law in a democratic society does not permit any member of that society, no matter how powerful, to pick and choose the laws or court orders that are to be observed and those that are not. Maintenance of the rule of law in our society does not only require that parties are able to resort to courts to determine their disputes.....it also requires that parties comply with the orders made by the courts in determining those disputes".*
>
> (*Australian Industry Group v AFMEPKIU and others* [2000] FCA 629 (12 May 2000))

There were four key pillars to the reforms which were introduced in response to the recommendations of the Cole Royal Commission:

1. The Australian Building and Construction Commissioner (ABCC);
2. The BCII Act;
3. Various important recommendations of the Royal Commission which were implemented via the *Workplace Relations Act 1996* and which are now matters dealt with in the *Fair Work Act 2009* (e.g. right of entry, genuine enterprise bargaining, etc); and
4. Construction Industry Codes / Guidelines.

Unfortunately, each of these four pillars have been substantially eroded through ill-conceived changes introduced since 2009, including watering down the legislative provisions, implementing a much less effective building code, and reducing the powers of the Regulator. This has led to many unacceptable work practices of the past being reintroduced to the great detriment of construction industry contractors, subcontractors, clients and the broader community. There have been many recent instances of unlawful coercion by unions and unlawful industrial action and pickets organised by unions.

The Bill includes essential provisions which would:

- Re-establish the ABCC with its former powers;
- Provide for maximum civil penalties of $170,000;
- Implement the former provisions of the BCII Act relating to unlawful industrial action and coercion; and
- Outlaw organising and participating in unlawful pickets.

The Transitional Bill would:

- Repeal the FWBI Act; and
- Implement arrangements to effect a smooth transition to the new laws and .arrangements.

Ai Group strongly supports the Bills and urges Parliament to pass the Bills without delay with the amendments proposed in this submission.

Ai Group's views on specific provisions of the *Building and Construction Industry (Improving Productivity) Bill 2013* are set out in the following table:

Provisions of the Bill	*Position of Ai Group*	*Basis of Ai Group's Position*
Chapter 1 – Preliminary		
Section 3 – Main object of this Act	**Supported**	The Main Object in s.3 is very appropriate.
Section 5 – Definitions	**Supported**	
Section 6 – Meaning of *building work*	**Amendments proposed**	It is important that the definition of *building work* does not incorporate an excessively expansive conception of the construction industry because to do so would create risks for the construction industry and other industries. The risks associated with an overly broad scope of the legislation would include: • The risk that construction industry terms and conditions of employment may *drift* into non-construction sectors over time; • The risk of building costs increasing as a result of higher input costs, due to the above drift; and • The risk of claims by the CFMEU and other construction unions to increase their coverage in line with any new broader conception of the construction industry. There are two provisions in s.6 of the Bill where this issue is particularly relevant – paragraph 6(1)(d)(iv) and paragraph 6(1)(e). **Paragraph 6(1)(d)(iv)** Paragraph 6(1)(d)(iv) provides that *building work* includes: *"the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out <u>on-site or off-site</u>"* Paragraph 6(1)(d)(iv) is identical to the equivalent provision in the BCII Act, even though it is broader than the corresponding provision in the FWBI Act. The provision in the FWBI Act states: *"the <u>on-site</u> prefabrication of made-to-order components to form part of any building, structure or works"*

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		Paragraph 6(1)(e) Paragraph 6(1)(e) is a new provision which states that *building work* includes: *"transporting or supplying goods, to be used in work covered by paragraph (a), (b), (c) or (d), directly to building sites (including any resources platform) where that work is being or may be performed".* The Explanatory Memorandum at paragraph 12 states: *"12. `Paragraph (e) provides that building work includes the transporting or supplying of goods to be used in work covered by paragraph (a), (b), (c) or (d) to sites (including any resource platform) where that work is being or may be performed is building work. This provision was not part of any predecessor Acts, and has been included in the Bill to ensure that the supply and transport of building goods to be used for building work fall within the scope of the Act. It is not intended to pick up the manufacture of those goods."* Since the Bill was introduced into Parliament, some Ai Group Members have expressed concern about the lack of clarity and potential breath of paragraph 6(1)(e) and the meaning of "transporting", "supplying" and "goods". Concerns have also been expressed by some Ai Group members about the potential for paragraph 6(1)(e) to expand the coverage of the Bill into the manufacturing industry, despite the wording in the Explanatory Memorandum. To address these concerns, we propose that: 1. Paragraph 6(1)(e) be amended as follows: *"transporting or supplying goods <u>(not including the manufacture of goods)</u> to be used in work covered by paragraph (a), (b), (c) or (d), directly to building sites (including any resources platform) where that work is being or may be performed".* 2. The Rule-making powers in subsections 6(4) and (5) be utilised to ensure that an appropriate boundary is set for the legislation and that the activities referred to in paragraphs 6(1)(d)(iv) and 6(1)(e) are not interpreted in an unreasonably expansive manner.

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Section 7 – Meaning of *industrial action*	**Supported**	The definition of "*industrial action*" in the Bill incorporates a reverse onus of proof, whereby persons who stop work and allege that their actions are based on a reasonable concern about an imminent risk to their health or safety (s.7(2) and (4)) would bear the onus of proving that such imminent risk existed. Section 7 in the Bill is consistent with the BCII Act. The provision is vital to deal with the construction unions' common tactic of using bogus safety disputes to justify the taking of unlawful industrial action.
Section 8 – Meaning of *protected industrial action*	**Supported**	Importantly, the definition of "*protected industrial action*" extends to action involving extraneous participants as was included in s.40 of the BCII Act. A largely similar provision was included in section 170MM of the *Workplace Relations Act 1996* from 1996 but the provision proved to be very difficult to apply in practice because unions routinely argued that they had not acted "in concert" but rather had separately decided to take industrial action, even though the action was taken at the same time against the same employer. This problem could be addressed through the inclusion of the following additional s.8(4) in the Bill: *"(4) Whenever industrial action is engaged in at the same time against the same employer, the persons taking the industrial action have the burden of proving that the action is not engaged in in concert for the purposes of paragraph (2)(a)."*
Section 9 – Meaning of *ancillary site*	**Supported**	The inclusion of a definition of *ancillary site* within the Bill is important in the context of s.47 which outlaws unlawful picketing. Sections 9 and 47 will enable the ABCC and employers to take action when unlawful picketing occurs on sites that are ancillary to a building site, for example, a site where goods are transported or supplied directly to a building site, or the head office of a building contractor.
Section 11 – Extension of Act to EEZ and waters above the continental shelf	**Supported**	We support this provision which extends the geographical application of the Bill to "*building work*" undertaken off the Australian mainland but within Australian waters.

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Chapter 2 – The Australian Building and Construction Commissioner		
Section 16 – Functions of ABC Commissioner	**Supported**	The functions specified in s.16 are appropriate and important.
Chapter 3 – The Building Code		
Section 34 – Minister may issue Building Code **Section 35 – Building industry participants to report on compliance with Building Code**	**Supported but amendment proposed**	A key recommendation of both the Gyles Royal Commission in New South Wales and the Cole Royal Commission was the importance of using the substantial purchasing power of Government to stimulate reform and ensure that construction industry participants operate within the law. The final report of the Cole Royal Commission recommended a strengthening and extension of the National Construction Code and the National Guidelines and greater rigour in the Australian Government's implementation of them. The 2006 National Guidelines implemented the Royal Commission's recommended approach. Unfortunately, since 2009 the National Guidelines have been progressively watered down with a consequent reintroduction of many inappropriate and unproductive enterprise agreement provisions and site practices as a result of union coercion. A strong and effective Building Code would have real and measurable impacts on the behaviour of building industry participants with consequent benefits for the whole community. Unfortunately the current *Building Code 2013* is benign and ineffective. The current Code needs to be urgently repealed and a more appropriate Building Code implemented. The terms of the Building Code should be based upon the terms of the Victorian, New South Wales and Queensland State Government industrial relations guidelines which are all based on the highly effective 2006 version of the National Guidelines. Unions in the construction industry routinely use the commercial risk faced by contractors as a lever to secure industrial concessions. This results in restrictive work practices and cost burdens which drive up project costs to the detriment of Governments, industry and the wider community. The importance of an appropriate Building Code in breaking this cycle cannot be understated. An appropriate Building

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		Code would have the effect of imposing a commercial risk on contractors that far outweighs the cost of capitulating to the unreasonable demands of unions. To be removed from future tender lists would have catastrophic implications for a major contractor. Billions of dollars of work would be at stake. The 2006 version of the National Guidelines empowered contractors to remain steadfast when faced with union coercion. Code-compliance was essential. Unions came to realise that it was pointless trying to coerce a contractor to breach the National Guidelines because the contractor had no choice other than to comply. Unions also came to realise that the jobs of their own members relied on Code-compliance. Subsections 34(1) and (3) are vital provisions that address two recent decisions of Justice Bromberg[1] which are subject to appeal to the Full Federal Court but which have raised doubts about the ability of Federal and State Governments to implement codes and guidelines outlawing particular unproductive and inappropriate enterprise agreement clauses. As Ai Group interprets s.34, this section requires compliance with the Building Code and as such would constitute *"action authorised by or under….any other law of the Commonwealth"*, for the purposes of s.342(3) of the *Fair Work Act 2009*. Hence, action taken to ensure compliance with the Building Code would not be "adverse action". Bromberg J's decisions relate both to the adverse action provisions and the anti-coercion provisions of the *Fair Work Act 2009*. We note that s.54(5) of the Bill would exclude the operation of s.343 (Coercion) of the *Fair Work Act 2009* as it relates to the making, varying or terminating of an enterprise agreement. However, to any avoid doubt about the interaction between s.34, the anti-coercion provisions in the Bill (s.54) and the anti-coercion (s.343) and undue influence / pressure (s.344) provisions of the *Fair Work Act 2009*, there would be benefit in including a provision along the lines of the following in s.34 or s.54 of the Bill: *"Action organised, taken or threatened by a person (the first person) against another person (the second person) to ensure that the second person complies with the Building Code does not constitute coercion or undue influence or undue pressure for the purposes of this Act, the Fair Work Act 2009, or any other Act."*

[1] *CFMEU v State of Victoria* [2013] FCA 445 and *CFMEU v McCorkell Constructions* [2013] FCA 446.

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Chapter 4 – The Federal Safety Commissioner		
Part 2 – The Federal Safety Commissioner **Part 3 – WHS Accreditation Scheme for Commonwealth building work**	**Supported**	These provisions are appropriate.
Chapter 5 – Unlawful action		
Section 44 – Simplified outline of this Chapter **Section 45 – Action to which this chapter applies** **Section 46 – Unlawful industrial action**	**Supported**	These provisions are vital for an efficient and productive building and construction industry in Australia. The prohibition on unlawful industrial action within section 46 and the substantial civil penalty for breaching the prohibition were key recommendations of the Cole Royal Commission.
Section 47 – Unlawful picketing is prohibited	**Supported but amendment proposed**	We welcome the outlawing of unlawful picketing in the manner described in section 47. Industry and the community were appalled at the unlawful conduct of unions, workers and activists during the Grocon dispute in late 2012. What we saw was a determined push by some construction unions to hold employers and the public to ransom using the old tactics of coercion, the pursuit of unlawful claims, illegal strike action and illegal blockades. In *Davids Distribution Pty Ltd v National Union of Workers* [1999] FCA 1108, the Full Federal Court (Wilcox, Burchett and Cooper JJ) considered the nature of pickets. The following extract is relevant: *"69 A "picket", in the industrial relations setting, is a person who stands outside an establishment to make a protest, to dissuade or to prevent employees, suppliers, clients or customers of the employer from entering the establishment. "To picket" is to post or serve as a picket at an establishment. A "picket line" is a line of persons acting as pickets. As French J pointed out in CEPU, picketing is unlawful only if it involves obstruction and besetting. The*

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		requirements of obstruction and besetting, before picketing will constitute an actionable tort, were discussed by Murphy J in Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia [1986] VR 383 where his Honour said (at 388 - 389): *"I am also satisfied that the acts of all the defendants which have now been repeatedly performed over many months cannot be considered to be a lawful form of picketing, but amount to a nuisance involving, as they do, obstruction, harassment and besetting. The form of picketing which the evidence discloses here is not peaceful but amounts clearly to an interference with the rights of a person wishing to enter or at least to proceed and make deliveries or take supplies to or from the plaintiff's premises. In fact, so often as they are able, the defendants physically prevent persons and vehicles from approaching and entering the plaintiff's premises. This, as I have said, is done by obstruction, threats and besetting, the latter meaning, in this context, to set about or surround with hostile intent. Besetting is appropriately a term applied to the occupation of a roadway or passageway through which persons wish to travel, so as to cause those persons to hesitate through fear to proceed or, if they do proceed, to do so only with fear for their own safety or the safety of their property. ..."* *70 Such conduct constitutes an actionable tort at the suit of the person who is denied entry to the premises of the employer in derogation of that person's right to enter (see Williams v Hursey [1959] HCA 51; (1959) 103 CLR 30 at 77 - 78) or at the suit of the employer: see J Lyons & Sons v Wilkins [1899] 1 Ch 255 (CA) at 267 - 268, 271, 274 and Sid Ross Agency at 767.* *71 As we have already observed, picketing which does not involve obstruction and besetting does not fall within the definition of "industrial action"; it does not relate to the performance of work in the circumstances specified in paragraphs (a), (b), (c) or (d) of the definition. Such conduct does not need the protection of s 170MT(2) because it is not actionable by anyone. Only*

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		picketing which involves obstruction and besetting, and is therefore an actionable tort, gives rise to policy considerations as to whether it was intended to be protected from suit, or should be so covered if the language will permit. *72 Picketing which interferes with a person's liberty and freedom of movement infringes that person's common law rights; in particular, the right to free passage in public places and on public roads and footpaths: see Williams v Hursey at 78 - 79; Melbourne Corporation v Barry [1922] HCA 56; (1922) 31 CLR 174 at 196, 206; City of Keilor v O'Donohue [1971] HCA 77; (1971) 126 CLR 353 at 363; Fourmile v Selpam Pty Ltd (1998) 80 FCR 151 at 186. There is a presumption in the interpretation of statutes that there is no intention to interfere with common law rights or basic common law doctrines unless the words of the statute expressly or necessarily require that result: Baker v Campbell [1983] HCA 39; (1983) 153 CLR 52 at 123.* *73 To interpret para (c) of the definition of "industrial action" in such a way as to include picketing infringing upon the rights and freedoms of others, would be to confer statutory immunity on such conduct; provided only it was engaged in upon proper notice to the employer and for the purposes of negotiating a certified agreement or an AWA. It would authorise interference with the rights, not only of the employer, but also of other affected persons who, but for the immunity, would have a right of action at common law. The interpretation would substitute, for a remedy in common law courts of competent jurisdiction, a mere right to apply to the Commission for an order prohibiting the conduct. Bearing in mind the presumption mentioned in the last paragraph, we do not think the definition should be interpreted in that way. We do not discern a clear indication in the Act that Parliament contemplated that picketing involving obstruction and besetting, and which therefore amounts to an actionable tort, may be protected industrial action, provided only it did not involve, or was not likely to involve, personal injury, wilful or reckless destruction of property or unlawful taking, keeping or use of property.'* (Emphasis added)

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		The following principles can be drawn from the above extract: • Picketing is unlawful only if it involves obstruction, harassment and besetting; • Picketing did not fall within the definition of 'industrial action' in the *Workplace Relations Act 1996* (and would not fall within the definition of 'industrial action' in the *Fair Work Act 2009* or the Bill). It is essential that section 47 is enacted to address unlawful picketing behaviour. Given that the High Court's decision in *Dollar Sweets*, as cited by the Full Federal Court decision in *David's Distribution* referred to "harassment", there would be benefit in s.47(2)(iii) being amended to add the words *"harass or"* before the word *"intimidate".*
Section 48 – Injunction against unlawful industrial action or picket	**Supported**	Section 48 is an important provision to enable timely action to be taken to stop or prevent unlawful industrial action and unlawful picketing.
Chapter 6 – Coercion, discrimination and unenforceable agreements		
Section 52 – Coercion relating to allocation of duties etc. to particular person	**Supported**	Section 52 is in similar terms to s.43 of the BCII Act and s.355 of the FW Act. The outlawing of "nominated labour" claims was a key reform arising from the Cole Royal Commission. Ai Group was instrumental in convincing Commissioner Cole to recommend legislative provisions outlawing "nominated labour" claims and in convincing the Australian Government to include provisions addressing this issue in the BCII Act and *Fair Work Act 2009*. Before "nominated labour" claims were banned, construction unions routinely forced constructors to employ individuals they nominated, as full-time union delegates and work health and safety officers. These individuals were often highly militant with a history of causing industrial problems on projects and of drumming up bogus safety disputes. Employers must be able to hire the best people for the job; those that will contribute to lifting productivity and improving workplace safety, not militant unionists forced on them by unions.

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		From the time that the BCII Act was introduced in 2005 until recently, "nominated labour" claims were not a problem in the industry. During this period, unions accepted that such claims were unlawful and did not press them. However, in recent times these inappropriate and unlawful union claims have again re-emerged as a major problem given the watering down of relevant laws, codes and powers of the Regulator. The *Grocon* dispute in late 2012 centred around this issue. The unions demanded that the company employ individuals nominated by the unions as work health and safety officers, not the persons that the company believed were the most qualified to ensure health and safety on the project.
Section 53 – Coercion relating to superannuation	**Supported but amendments proposed**	While we welcome the reinstatement of the former s.46 (Coercion relating to superannuation) in the BCII Act, coercion to pay into particular superannuation funds is not the most significant current problem relating to coercion and funds. A far more significant problem relates to coercion of employers to pay into construction industry redundancy funds and coercion of employers to pay for particular income protection insurance products where the insurance provider is paying very large (undisclosed) commissions to construction industry unions. Often the income protection insurance products which an employer is forced to pay for are much more costly for the employer and provide fewer benefits to the employees than other products readily available in the market. However, because of the very substantial commissions paid to the unions, the unions typically refuse to accept an employer's offer to provide equivalent or better benefits to employees through an alternative provider (e.g. through an industry superannuation fund or through the insurance company which the company is using for other types of insurance). As union membership revenue has declined, these inappropriate revenue streams have become central to union finances – particularly for construction industry unions. These lucrative revenue streams no doubt result in the fines which militant unions regularly incur for unlawful conduct having a significantly reduced impact on their operations. The Bill provides a very valuable opportunity to address these major problems which were identified by the Cole Royal Commission but which have remained unaddressed and are progressively getting worse.

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		Volume 10 of the Final Report of the Cole Royal Commission analyses some key problems relating to construction industry redundancy funds and income protection insurance products pushed by construction unions, including the following issues: • Some construction industry redundancy funds make hardship payments to employees. In some cases, hardship payments from redundancy funds have been made to employees on strike, which is very inappropriate and closely aligned to the concept of strike pay. • Construction industry redundancy funds often provide various benefits other than redundancy payments (e.g. education grants), but some redundancy funds inappropriately only provide these benefits to union members, which is discriminatory and unfair. • Many construction industry redundancy funds regularly distribute surplus income back to unions and some employer groups. (NB. the only redundancy fund that Ai Group is represented on the Board of is the Australian Construction Industry Redundancy Trust (ACIRT) and its charter expressly prohibits such payments). It is not appropriate for employers to be coerced to pay into funds where a portion of the amount contributed ends up with unions (and some employer associations). In Ai Group's view it is legitimate for construction industry funds to be able to pay reasonable Board fees to Board Members and reasonable commercial rates to promote the fund at relevant industry events and in industry journals. However, it is not legitimate to distribute surpluses back to industrial associations. This issue is analysed in the Volume 10 of the Final Report of the Cole Royal Commission. The following extract is relevant: ***Distribution of surplus income*** *180 Excepting ACIRT, surpluses generated by each of the funds are paid to their sponsors or for other purposes, for example education, welfare and training. ACIRT, instead, distributes any surplus income as a dividend paid annually to employee members. This largely arose from the findings and recommendations in the Gyles Report.*

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		---- *195 Those administering the funds appear to have lost sight of the fundamental premise that employer contributions are to fund redundancy entitlements. It follows that contributions, and returns on investments of the fund, should be held by the fund and distributed only for the purpose of paying redundancy entitlements.* ---- *197 If funds were used only for the purposes for which they were established, contributions could be reduced – thus reducing building costs – or benefits to employees could be increased.* (Emphasis added) • With construction industry redundancy funds there should be a requirement for the level of employer contributions to bear a rational relationship to a reasonable scale of employee redundancy benefits. At present, the employer contribution level is whatever the unions can coerce employers to contribute, typically through industry pattern agreements. This approach drives up construction costs because contribution levels far exceed the level that would be necessary to provide a reasonable level of redundancy benefits to employees. To address some of these problems, the following should occur: • A new section 53A (Coercion and discrimination relating to redundancy funds) should be included in the Bill to: o Outlaw coercion to contribute to a construction industry redundancy fund; o Prohibit a redundancy fund differentiating between union and non-union members when providing any benefits; and o Prohibit a redundancy fund paying hardship payments to any employee who is taking industrial action.

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		• Recommendation 168, 169 and 179 of the Cole Royal Commission, regarding governance arrangements and distribution of surpluses for redundancy funds, should be implemented. • Recommendation 171 of the Cole Royal Commission should be implemented through an appropriate provision in the Bill. This would ensure that when a union makes a bargaining claim (including potentially organising industrial action in support of that claim) it discloses to the employees and to the employer in writing, any direct or indirect financial benefit that the union may derive from the claim. For example, if a union is making a claim for the employer to pay for income protection insurance with a particular provider, the employer and employee (who may be urged by the union to take industrial action in support of the claim) are entitled to know that, say, 30% of the money which will be paid by the employer will not be used to provide an employee benefit but rather will be paid as commission to the relevant union. A provision along the lines of the following is proposed: *"**59A Disclosure of interests during bargaining*** *A bargaining representative for an enterprise agreement, other than an employee or employer covered by the agreement, must disclose in writing to the other bargaining representatives and to the employees covered by the proposed agreement any direct or indirect financial benefit that the bargaining representative would derive from each term of the proposed enterprise agreement. Such disclosure must occur as soon as practicable after a relevant term is proposed for the enterprise agreement and before any application is made for a protected action ballot order and before the enterprise agreement is made.* *Note: An example of a proposed terms covered by section 59A is a term which requires that the employer pay for the cost of income protection insurance benefits for employees through a particular insurance provider which provides commission to the union. The union would be required to disclose to the other bargaining representatives and to the employees the amount of commission which would be paid if the term is included in the agreement."*

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Section 54 – Coercion of persons to make, vary, terminate etc. enterprise agreements etc.	**Supported but consider the interaction with s.34**	This is an important and appropriate provision. It is important that the issues discussed above regarding section 34 of the Bill, and action taken to ensure compliance with the Building Code, are carefully considered in the context of s.54 and appropriate amendments made to the Bill.
Section 55 – Coverage by particular instruments	**Amendments proposed**	Section 354 of the *Fair Work Act 2009* (and the previous s.45 of the BCII Act) outlaw discrimination against an employer because the employees of the employer are covered under a particular *type* or *kind* of industrial instrument (e.g. an award rather than an enterprise agreement), but do not outlaw discrimination because of the content of the employer's industrial instrument. It is not clear what the effect of s.55 is intended to be. For example, is the provision intended to cover action taken: • Because the employees of the employer are covered by a particular *type or kind* of Commonwealth industrial instrument (e.g. an award, an enterprise agreement); and/or • Because the employees of the employer are covered by a Commonwealth industrial instrument with particular content (e.g. content which is consistent with an industry pattern agreement)? If the clause is intended to cover the *content* of Commonwealth industrial instruments then the exclusion in s.45(3)(b) of the BCII Act needs to be included in the Bill regarding "eligible conditions" (see the definition in s.4 of the BCII Act) to enable head contractors to maintain control over important site-wide matters such as the times and days when work is performed and inclement weather procedures. If s.55 is not intended to cover the content of industrial instruments then this should be clarified in the Bill.

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Section 56 – Multiple reasons for action **Section 57 – Reason for action to be presumed unless proved otherwise** **Section 58 – Advising, encouraging, inciting or coercing action**	**Supported**	These provisions are important for the effective operation of the legislation.
Section 59 – Project agreements not enforceable	**Supported**	Section 59 is consistent with s.64 of the BCII Act and Recommendation 13 of the Cole Royal Commission.
Chapter 7 – Powers to obtain information		
Part 1 – Simplified outline of this chapter (s.60) **Part 2 – Examination notices (ss.61-65)** **Part 3 – Powers of Australian Building and Construction Inspectors and Federal Safety Officers (ss.66-79)**	**Supported**	These provisions are appropriate and include substantial safeguards for persons who are required to give information to the ABCC.
Chapter 8 – Enforcement		
Section 81 – Penalty etc. for contravention of civil remedy provision	**Supported**	Subsection 81(2) reinstates the strong penalties for breaches of the legislation which existed under the BCII Act. The maximum pecuniary penalty for a Grade A offence is $170,000 if the defendant is a body corporate or $34,000 for individuals. The maximum pecuniary penalty for a Grade B offence is $17,000 if the defendant is a body corporate or $3,400 for individuals. Given that unlawful union conduct has become far more prevalent since the penalties were reduced under the FWBI Act to one third of what previously existed under the BCII Act, the reinstatement of the previous higher penalties is warranted and important. The other provisions in s.81 are consistent with s.49 of the BCII Act, except that s.81(4) takes account of the new provisions relating to unlawful picketing.

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Section 95 – Actions of building associations	**Supported**	Section 95 of the Bill is similar to section 69 of the BCII Act. This is an important provision as it prevents unions from refusing to accept responsibility for the actions of their officials, employees and delegates. Section 95 implements the following important recommendation of the Cole Royal Commission. ***"Issue*** *In the building and construction industry, industrial action rarely occurs without the presence and encouragement of union officials and delegates. They should be presumed to act for their union as in reality they do. Yet when unions are sued or prosecuted in respect of actions of their officials or delegates, they frequently seek to deny responsibility based on technicalities, including the provisions of their rules. The unions take credit for the benefits of collective action: they should be held liable for losses caused by unlawful industrial action. The Building and Construction Industry Improvement Act should reflect this reality and thus make unions presumptively responsible for the actions of their officials and employees.* ***Recommendation 205*** *The Building and Construction Industry Improvement Act contain, for all relevant purposes, a deeming provision modelled on s298B of the Workplace Relations Act 1996 (C'wth)."*
Section 98 – Enforceable undertakings relating to contraventions of civil remedy provisions	**Supported**	Enforceable undertakings will make a useful and important addition to the ABCC's enforcement options.
Section 99 – Compliance notices	**Supported**	Section 99 in the Bill is largely consistent with s.716 in the *Fair Work Act 2009.*

Provisions of the Bill	*Position of Ai Group*	*Basis of Ai Group's Position*
Chapter 9 - Miscellaneous		
Part 1 – Simplified outline of this chapter **Part 2 – Provisions relating to information** **Part 3 – Powers of ABC Commissioner etc** **Part 4 – Provisions relating to courts** **Part 5 - Miscellaneous**	**No problems identified**	Ai Group has not identified any problems with these provisions.

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