CIVIL CONTRACTORS FEDERATION

Constructing Australia's Infrastructure

SUBMISSION TO

THE SENATE EDUCATION, EMPLOYMENT & WORKPLACE RELATIONS COMMITTEE INQUIRY

INTO

THE BUILDING & CONSTRUCTION INDUSTRY IMPROVEMENT AMENDMENT (TRANSITION TO FAIR WORK) BILL 2009

JULY 2009

National Office
Level 1 / 210 High Street
KEW VIC 3101

Tel: (03) 9851 9900

Contacts:
Chris White- CEO
Julie Abramson- National Policy Director

The Civil Contractors Federation

The Civil Contractors Federation (CCF) welcomes the opportunity to make this further submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 ("the Bill").

The CCF is the member based representative body of civil engineering contractors in Australia providing assistance and expertise in contractor development and industry issues.

Through our Federation we represent over 2000 small, medium and large sized contractors who in turn employ more than 40,000 people.

Our members are involved in a variety of projects and activities including the development and maintenance of civil infrastructure such as roads, bridges, dams, wharves, commercial and housing land development.

Infrastructure development plays a vital role in our national prosperity – a role which has been understood and supported by the Federal Government most recently in the Budget announcements for 2009/2010.

Fundamentally, however and at its heart the delivery of civil infrastructure is reliant upon a productive and industrially peaceful building and construction industry. These are the goals which regulation in this area must be directed to.

The CCF has participated actively in the debate in relation to the need for a strong building and construction regulator. This submission builds on our earlier submission to the previous reference to the Senate Committee, the Wilcox Review and our public statements on the new Bill.

1 Executive summary

The CCF has consistently argued for the need for a strong building and construction regulator ("the regulator").

Our concern with this legislation is that a number of the proposed amendments to the BCII Act will weaken the powers so considerably that it could allow a culture of unlawfulness to return to building and construction sites. We believe that small to medium sized contractors will be particularly impacted by these changes.

This submission deals with the most significant of the amendments proposed by Government to the BCII Act.

On the *positive* we have welcomed:

- The Government's move to create a new dedicated Inspectorate within Fair Work Australia rather than an Inspectorate of the Fair Work Ombudsman;
- The retention of the compulsory powers albeit with new safeguards – our concerns now relate to whether these will impede the work of the regulator.

However, we *oppose:*

- The creation of the Independent Assessor and the power to "switch off" the coercive powers;
- Aspects of the issue of the Examination Notice by the AAT – namely the concept of the AAT being "satisfied" and some of the criteria upon which the Notice will be issued;
- The removal of the specific higher penalties that apply to building industry participants; and
- The automatic 5 year sunset clause.

In view of the policy direction indicated by Government we have however made a number of constructive suggestions to *improve* the Bill, namely:

- Tightening of the definitions in relation to who can apply for a Determination and the project a Determination will cover;
- That Determinations be made through a process similar that used by the ACCC for determining Authorisation applications under the Trade Practices Act, and importantly parties such as subcontractors having the right to make representations; and
- A finite time limit in respect of a Determination to switch off the coercive powers with a review after a period of time to consider whether the Determination should remain on foot.

Finally, in the absence of the Regulations which underpin much of the Bill we also reserve our rights to make a supplementary submission if such regulations are released and if this is possible within the reporting framework of the Committee.

2 Chapter 2, Part 3 Division 2: Role of the Independent Assessor – Special Building Industry powers

2.1 CCF position

The CCF does not support the introduction of a new body/person to be known as the Independent Assessor (IA) nor the proposed switch off power to be exercised by that person. As this is a new introduction into the policy debate we have spent some time in this submission in examining the underlying policy principles.

Accordingly, our commentary on this issue is in two parts: a discussion in relation to the policy underpinnings of the IA and the powers available to this office and a discussion about the practical implementation issues. By necessity it also touches on the role and powers of the Director of the new Inspectorate.

It begins however on our understanding of how the new provisions will work based on the Bill, Explanatory Memorandum and Second Reading Speech. As the legislation is drafted on a principles basis rather than a prescriptive approach it has required us to make some assumptions. Where this has been the case we have noted the same.

2.2 The Independent Assessor ("IA")

We understand that the IA will operate in the following manner:

- The IA will have the power upon the application of "interested parties"[1] to make a determination that on a "building project" the coercive interrogation powers will not apply[2];
- Those powers will only apply to building projects which "commence" on or after 1 February 2010[3];
- In making the determination the IA must be satisfied that it would be appropriate to do so having regard to:
    - the object of the Act; and
    - any matters prescribed by the Regulations (not yet available to us); and
    - it would not be contrary to the public interest to make the determination.[4]
- The Determination may be rescinded or revoked at any time after its grant.[5]

[1] Section 40
[2] Section 38 and 39
[3] Section 38
[4] Section 39 (3)
[5] Section 43

2.3 Why such a Body and why such a power?

(a) Examination of the policy underpinning the new Independent Assessor and new power

We do not see why such a power is needed. We believe the IA and the "switch off" power adds unnecessary complexity and uncertainty to the operations of the Director.

To explain our argument further:

- The Government acknowledges that there is still a clear and immediate need to drive cultural change – the operation of the coercive powers or their potential to apply is a key driver in achieving this change;
- The concept of the "switch off" appears to proceed on the basis of "reward" for good behaviour of industry participants[6];
- At the same time the Government has proposed additional safeguards to the use of the coercive powers which would overcome concerns if they legitimately exist in relation to misuse of these powers. We do not oppose these new safeguards so long as they do not impede the efficient working of the regulator;
- Which leads us to the conclusion that why is such a body and such powers necessary? If behaviour on a particular project is lawful then there is no need for parties to "fear" the application of the powers and hence there is no need for some switch off provision.

[6] Hon Julia Gillard MP in the Second Reading Speech to the Bill 17 June 2009 in referring to the Independent Assessor and the Switch off powers "The Government is determined to encourage lawful behaviour and a change in the industry's culture. These arrangements provide the industry with the opportunity to demonstrate that the requisite lawful culture is in place and the opportunity for the law abiding majority to not be tarred with the same brush as the unlawful rogue elements."

(b) Cultural change

In our view the changes within the culture of the industry are not embedded enough to take the next step of selectively dis-applying them. We make three points in support of this view.

Firstly, recent events in Victoria and Western Australia highlight that concerns of building and construction industry employers are still well founded. We have noted and welcomed the Government's attention to such matters and the specific acknowledgement by the Deputy Prime Minister in the Second Reading Speech that

"… (on discussing the Wilcox findings).. But the reality is there are also problems in this vital sector. There is a clear and immediate need to drive cultural change in some key areas of the industry.

Accordingly, the legislation is aimed at driving cultural change in the industry and focusing compliance activities where those activities where they are most needed."[7]

Secondly, whilst cultural change is about changing long term behaviours it has been recognised for some time that such behaviours will not change in this industry without strong, effective enforcement actions. To found such action requires evidence which is where the coercive powers are so critical.

That this is the case is clearly illustrated by the comments of the current ABC Commissioner Mr John Lloyd in a letter tabled in the Parliament in relation to the use of the coercive powers. He makes the point that not all witnesses subject to the use of the power are hostile witnesses:

[7] Hon Julia Gillard MP, Second Reading Speech 17 June 2009

"It must be recognised that not all persons subject to a compulsory examination are "hostile" witnesses. A significant number of examinees are persons who ask to give information pursuant to this power. They take this approach because they fear reprisals if seen to be cooperating with the ABCC. We consider such a fear to be a genuine concern for many people… We estimate that 33% of examinations are conducted on this basis." [8]

Finally we would make a broader point about cultural change and behaviours. Many laws apply to sections of society regardless of whether parties have good behaviour or not. For example road safety laws apply to all travelling on our roads. Good drivers with no previous penalties or infringements are just as likely to be breath tested or fined for speeding or other traffic offences as other offenders.

Previous good behaviour goes to penalty not the potential to commit an offence. We see no reason in principle why the laws which specifically apply to building and construction should be different.

(c) Particular vulnerability of Small to medium sized contractors

CCF is particularly concerned about the impact of the changes particularly the switch of power upon small to medium sized contractors.

Mr Lloyd had made the point that there are specific characteristics of the industry which make it especially vulnerable to unlawful industrial action, coercion and discrimination. He includes matters such as:

- the apportioning of most risk to contractors;
- the liquidated damages for late completion;
- a union culture of supporting direct action; and

[8] Mr John Llyod letter to the Hon Julia Gillard MP Deputy Prime Minister 27 April 2009 – tabled in the Senate 24 June 2009

- a willingness of some contractors to adopt a short term perspective and to ignore unlawful conduct.[9]

For smaller to medium sized contractors this climate is particularly pernicious. With heavy sunk capital, margins are slim and can be eliminated be a few days of disruption. Small to medium sized contractors when acting as sub-contractors are also in economic terms "price takers". In other words they have little bargaining power and are required to meet industrial demands already negotiated by the head contractor as part of the deal for securing work.

We can foresee a scenario where the head or managing contractor and other parties apply for a switch off determination and small to medium sized contractors will be presented with a fait accompli when they are engaged.[10] It should also be borne in mind that projects can have a long life span with subcontractors regularly being engaged as the project moves through various completion stages. Whilst a power is given to the Director to apply to "switch on" the powers in practice we believe this will be very difficult. This is discussed further at 3.7 (e).

Therefore, whilst we strongly oppose the switch off powers, if they are to remain, special regard must be had to this important section of the Industry and their relative bargaining power. This is dealt with further at 3.7 (a) below.

3 Practical Implementation issues

For the balance of the submission we comment upon the implementation issues and make practical suggestions for improvements to the Bill. Once again we would highlight and caution that our discussion are limited due to the absence of Regulations upon which much of the Bill relies.

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[9] Ibid paragraph 10

[10] The impact that this has on small to medium sized contractors is detailed in Commonwealth of Australia *Final Report into the Building and Construction Industry* February 2003 available at www.royalcombi.gov.au at Vol1 P12 - 13

3.1 Who is an interested party?

Section 40 of the Bill proceeds on the basis of an interested person or persons being able to make the application to the IA to “switch off” the powers. The IA itself cannot instigate such a process. An interested person includes the Minister and a person who is prescribed by regulations.

3.2 Interested party must be a restricted class

We strongly believe that the definition must apply to a restricted class of persons and not be available to persons who have a marginal or “at large” interest.

To illustrate:

- it would be possible for narrow sectarian interest groups such as a civil libertarian or human rights group to apply to suspend the coercive powers for a number of projects because the group saw as its aims the abolition of such a power generally;
- the same could be true of narrowly based political parties who also took such views; and
- Theoretically it is also possible for a state, agency or local government to apply to have all the projects it is involved in removed from the operation of the powers perhaps on the basis of an in principle objection to the operation of the power.

We believe that operation of the provision in this way is undesirable. Without further definition the IA may become involved in protracted and costly processes in relation to standing.

3.3 What could restricted class be based upon?

One definition that might be considered is to base the interested person on a person or persons who have a commercial or financial interest in the project This would then extend to employees who have a financial interest in being paid and also the developers, proponents and contractors involved in the project.

It might be that consideration should also be given to representative rights to parties such as unions or employer organisations who would legitimately have a right to represent classes of people or employers. What must not be allowed is persons who have an interest "at large".

We understand that an alternate consideration is a definition based on a "building industry participant"[11]. We are also supportive of that definition although in our view it should also be clear that it includes an industry association which is registered or designated as having the right to represent a class of persons within an industry.

3.4 Definition of Project

The definition of a building project also needs to be further defined.

At present the Bill contains a definition which is without detail simply referring to the definition of building work.[12]

We believe consideration must be given to the following:

- Major infrastructure projects can have a number of components. For example the Perth to Bunbury Freeway contains 140 km of 8 m wide

[11] The Government has given CCF the permission to refer to the documents provided to the COIL participants on 15 July 2009 in this submission.

[12] We note the definition of building work will be amended in the new Act to remove off site work such as prefabrication in line with the Wilcox Report recommendations

pavement (70km of dual carriageway), 6 interchanges, 6 intersections, 19 bridges, 32 km of pathways for pedestrians and cyclists, 7 shared path underpasses and 14 fauna underpasses.

- They can span over a considerable period of time given the extensive nature of the work; and
- It would be possible for a whole government project stream like the contracts for school modernisation under the Stimulus package to be designated on the current definition as one project.

In our view the definition should apply narrowly, it should be

- site specific although we note there might be a number of sites;
- limited in scope so that whole programmes as referred to previously cannot be included; and
- subject to a time constraint – Consideration should be given to a time constraint dependent on the completion time of the project. How this might operate in practice is outlined in paragraph 3.7 (d) but is based on the concept currently used by other regulators when they exempt parties from strict operation of the law for a prescribed period of time.

3.5 When is a project commenced?

The Determination to switch off the coercive powers only applies to building projects which commence on or after 1 February 2010 thereby excluding pre existing projects. Accordingly a critical question relates to what is commencement?

One view which has been put forward is that an existing project would be defined as one where “on site” activity had commenced prior to 1 February 2010.

In our view this definition is problematic. Is it for example when the first sod of soil is turned, would it be when a site is surveyed? We are also concerned

that as CCF members are invariably the first on site for the earth works that our members could be placed under considerable pressure to commence works to provide evidence which could found an application for the determination.

A preferable definition would be to base commencement on the letting of tenders. This would be consistent with the Implementation Guidelines for the National Code of Practice for the Construction Industry (subsection 2.1).

3.6 Criteria to be used by the IA in making the determination?

(a) What the Bill currently states

The Bill proposes to introduce a new section 39 (3) which states that the Independent Assessor must not make a determination unless satisfied that:

(b) it would be appropriate to make the determination, having regard to
  (i) the object of the Act; and
  (ii) any matters prescribed by regulation; and
(c) it would not be contrary to the public interest to make the determination.

We understand that it is the Government's intention that the Regulations will prescribe that the IA must be satisfied that the building industry participants in connection with the building project have "a demonstrated record of compliance with workplace relations laws including courts or tribunals orders."[13]

We also understand that the regulations will also include a condition that the views of other interested persons in relation to a project must be considered. We consider this last aspect to be absolutely critical for sub-contractors and other parties who are not contractual parties to a head agreement between a

[13] See the Explanatory Memorandum – paragraph 92

major contractor and the project proponents. We have expanded upon this at section 3.7 (a).

(b) Relevant criteria – Previous conduct of the parties seeking the application as a way of supporting appropriate future conduct;

At the outset the previous conduct of the parties seeking the application would be highly relevant. In practice this would be the only way to judge future conduct on a yet to be commenced project – which highlights in our view a fundamental and serious flaw within the concept of the IA.

Factors which could be taken into account in this consideration should include:

- history of participating in threatened or actual unlawful industrial action;
- previous actions by regulatory authorities including the ABCC;
- compliance with current and future code and guidelines.

3.7 What process will apply for the making of the Determination

The Bill contains no detail as to the mechanism by which an Application for Determination will be heard. We believe that the powers are of such significance and importance that broad statements of principle should be made as to how the IA will conduct its operations.

We would prefer to see the following matters reflected in the Bill:

(a) Process of Notification of the Application under Section 40 – right of other interested parties such as subcontractors to be heard in respect of a determination.

The Application should be open and transparent and notification should be given of the Application to parties who may be effected by it. Those other parties should have a right to be heard or to make submissions in respect of the Application.

We see much merit in consideration being given to the process the ACCC adopts in relation to Authorisation applications under the Trade Practices Act.[14] Importantly, those are also provisions which allow the ACCC to disapply the law. The ACCC can grant those applications when it is satisfied that the public benefit from such conduct outweighs the public detriment.

In particular the ACCC:

- will seek the views of participants in an industry either directly or through contacting their representative or trade association;
- gives those parties the right to make submissions; and
- can allow a matter go to a formal conference if required.

In our view the Notification and right to be heard of other parties such as subcontractors is particularly critical.

We note that there is power for the Director to make submissions in respect of an application and presumably the Director would also take into account the interests of other parties such as subcontractors[15].

Indeed, from previous experience we foreshadow that in a number of instances sub contractors and other parties will want to make material

[14] See the Authorisation Guidelines and related material at www.accc.gov.au
[15] Section 41 (1) (b)

available to the Director in confidence, to enable the Director to make representations on their behalf. [16]

However, we also believe that parties such as subcontractors or the industry association acting on their behalf should be directly allowed to make submissions or to be heard.

Circumstances may arise where as part of the Agreement for the overall project the parties to it jointly apply for a Determination to switch off the coercive powers. The subcontractors would have no "say" as the overall agreement would be presented to them as part of the terms and conditions of the project itself. Previous conduct in the industry has shown that sub contractors are particularly vulnerable to coercion and intimidation and their views and concerns are particularly relevant. There must be a mechanism which allows them to put their views.[17]

(b) Hearing of an Application could either be on the basis of written submissions or by way of appearance before the IA.

We do not have strong views in relation to the process by which a determination can be made. However, given the history of the industry, there must be the ability for the IA to receive confidential evidence or to hear evidence in camera .There should likewise be protections for people giving evidence of such a nature.

Additionally, the IA must have the ability to request and receive information from other law enforcement bodies which could inform its decisions. The form in which such information could be supplied and what protections would exist in relation to it must be considered.

As noted above the ACCC Authorisation processes could provide a good precedent for how the IA chooses to operate.

[16] For example the ABCC hot line which allows for the provision of confidential information to the ABCC has been well used. Statistics are available in their Annual Reports.
[17] See our comments earlier at paragraph 2.3 (C)

(c) Requirement to give reasons for decisions in writing

We believe it is critical that the IA give reasons for its decisions in writing. The IA will be exercising significant and important powers. The basis upon which the decision is made will inform other parties in terms of any applications which are made for future projects. Further, as the Director has power to apply to have the powers reintroduced it will be important to know on what evidential basis the original application was either successful or failed. Indeed without this it is hard to know how new information could be provided under Section 40 (5).

(d) Determination should be for a limited time only.

As projects (dependent on the definition) could extend over a significant period of time it is our view that the Determinations should not be open ended. By way of example, the ACCC in issuing Authorisations exempts the parties from the operation of the Trade Practices Act for a specified period of time.

If the Applicants at a certain period of time have to reapply for a continuation of the benefits of the Determination this would support the Government's objectives of rewarding good behaviour. The threat of the removal of the Determination would act as a continual reminder that behaviours had to be kept at a certain standard. Such a provision would coincide with and support the power of the Director to apply for the Determination to be revoked if industrial unrest or disruptions occurred on site. This is discussed in the following paragraph[18]

Dependent on the length of the project we believe that a Determination should have to be sought on a 12 monthly basis at a minimum.

[18] See Section 43

(e) Application by Director to revoke or rescind the Determination

We note that there is provision for the Director to seek reconsideration of the Determination.[19]

Whilst we strongly support such a power we question how the Director would be able to bring evidence to support such an application especially if the behaviour complained of has been intimidation. Evidence of the later is often obtained by the use of the coercive powers and we have referred to the comments of the current ABC Commmissioner as to the fact that not all witnesses who give evidence under the coercive powers are in fact hostile witnesses.

We believe such a power would exist more appropriately with an expiry date on the Determination as suggested in the previous paragraph.

4 Examination Notices – the AAT and the new safeguards

4.1 The Role of the AAT in issuing Examination Notices

The Bill introduces a range of a new safeguards on the use of the coercive powers the primary one being that an Examination Notice be issued by a Presidential Member of the AAT on Application of the Director.

[19] Section 43

4.2 Speedy and Efficient mechanisms to support the use of the powers

As a matter of overall policy the Bill must balance the need for the coercive powers to be exercised against the rights of the person against whom they will be used. One of our primary concerns is that the process for using the powers may become so onerous and complex that the powers will not be used. If this is the case this will be a very poor policy outcome.

In previous submissions we have noted that the coercive powers have played a very important role in improving conduct in the industry. The need for the powers has been supported by the Wilcox Review and also the Government.

In particular, we consider it critical that the AAT be properly resourced to quickly and efficiently deal with Examination Notices. The process must also be outcome focused and not tied up in procedure.

4.3 Criteria for use of the Powers

We further note that under Section 47 of the Bill the AAT must be satisfied in relation to a number of matters prior to issuing the Notice. One of those requirements relates to " any other matter prescribed by the Regulations". The current matters set out in that Section appear appropriate, however we consider that the AAT presidential member should "have regard to" those matters in Section 47 (a) to (g) rather than being satisfied. This would enable the Presidential member to have some flexibility in their decision making and would remove a subjective element.

Paragraph 128 of the Explanatory Memorandum also refers to consideration of additional criteria which "could include whether the alleged breach is sufficiently serious or whether being required to comply with the notice would have an undue impact on the person." [20]

[20] See the Explanatory Memorandum

We do not support the AAT Member having to be satisfied as to either of these criteria for the following reasons.

In relation to the seriousness of the alleged breach – this would require the Member to second guess the Director. The Director would not be pursuing an Examination over a trivial matter. Further, it is the use of the compulsory powers that is no doubt required to uncover whether or not a serious breach of the law has occurred. The Director may have very well founded suspicions but is unable to acquire the evidence to support any prosecution without further inquiry of the person the subject of the Notice. As noted before not all witnesses are hostile – indeed a witness may be very prepared to cooperate but will only do so under compulsion due to fear of intimidation or reprisal.

In relation to the impact upon the person this imposes a totally subjective element. We also note that the statement in the Explanatory Memorandum omits an important qualification proposed in relation to this issue in the Wilcox Review. His Honour actually said "and the likely impact on the person being required to do so, *in so far as this is known.*" (Italics added)[21]

In our view the key issue is whether the person has information that is critical and vital to the matters which the Director is investigating and which they will not provide on a voluntary basis. Persons are not spared compulsion from the law because the process may cause distress and anxiety. In any event if the Government intends to proceed with this criteria (which we oppose) it should be qualified by the words " in so far as this is known."

[21] See the Wilcox Report Recommendation 4 (i) (d)

4.4 Conduct of the Examination.

Section 51 sets out the way in which an Examination is to be conducted. We note that only the Director can carry out an Examination. The Director should be able to delegate that authority albeit only to a deputy or deputies. There may well be circumstances where an Examination must be conducted in relation to an urgent matter when the Director may be unavailable.

We note that His Honour Mr Justice Wilcox recommended in Recommendation 4 (i) (ii) of his Report that the power extend to the Director or Deputy Director.

We would be pleased to receive confirmation that the power may be delegated as indicated to a deputy director.

4.5 Review and Report of the Ombudsman

Section 45A deals with the Review and Report by the Commonwealth Ombudsman. Whilst we do not object to this safeguard we do consider the requirement to video record every interview unnecessary. Video recording should only be required upon the request of the person subject to the Examination Notice.

5 Retention of separate provisions dealing with the Conduct of Building and Construction Industry Participants

CCF continues to support the need for specific laws dealing with the Building and Construction Industry.

We note the Bill reverses this position and removes the existing building industry specific laws that provide:

- higher penalties for building industry participants for breach of industrial law; and
- broader circumstances under which industrial actions attract penalties.

Our position has been previously argued in detail on this and we note the direction of the legislation. However we believe that the comments made by the current ABC Commissioner in his letter of 27 April tabled in the Senate go to the heart of this issue. As Mr Lloyd states at paragraph 9:

"Penalty provisions are designed to deter unlawful conduct… the courts are generally awarding higher penalties as time goes on. A number have exceeded the maximum levels in the Fair Work Act. Also, some organisations and person are repeat offenders. Maximum penalties at the levels proposed will considerably reduce the court's discretion in determining penalties. The deterrence of the penalty regime will be markedly reduced."[22]

CCF is strongly of the view that the existing penalty provisions must be maintained and not reduced by some one third.

We also note that the abolition of the concept of undue pressure in respect of making, varying or terminating Agreements. We believe this should also be retained and again note Mr llyod's comments that:

" Contravention through undue pressure is a lower threshold for a prosecutor to satisfy. This ground has been relied upon in ABCC prosecutions. It should be retained."[23]

Finally, we note that the range of circumstances in which industrial action is unlawful (and consequently attracts penalties) has been narrowed. We do not support this position. We believe that the existing Sections 38 and 39 should be maintained.

[22] Mr John Llyod *opcit* paragraph 6 to 10
[23] Ibid paragraph 14

6 The Intervention power of the Director

We note the change in the capacity of the Director to intervene in proceedings before FWA.

As we understand the Bill the Director may intervene in proceedings before a court hearing a matter in relation to the BCII Act, the FWA Act or Independent Contractors Act. However, the Director cannot intervene in proceedings before FWA he/she can only make submissions.

In our view the Director should have the power to directly intervene in such proceedings.

We note that Mr Llyod has stated that the intervention power before the AIRC has been used on a number of occasions:

" The intervention rights have been exercised frequently. We have intervened in 108 cases – 93 AIRC and 15 court cases."[24]

7 Sunset provision

CCF opposes an automatic sunsetting provision in the BCCI Bill. In our view it preempts the review of the provisions. Sunset provisions create uncertainty and will impact upon the morale and staff retention of the Directorate.

[24] Mr John Lloyd *opcit* paragraph 42

8 Conclusion

The CCF has consistently argued for the need for a strong building and construction regulator. Our concern remains that the Regulator have the rights powers and resources to undertake its work.

On the positive we have welcomed:

- The Government's move to create a new dedicated Inspectorate within Fair Work Australia rather than an Inspectorate of the Fair Work Ombudsman;
- The retention of the compulsory powers albeit with new safeguards – our concerns now relate to whether these will impede the work of the Regulator.

However, we oppose:

- The creation of the Independent Assessor and the power to "switch off" the coercive powers;
- Aspects of the issue of the Examination Notice by the AAT – namely the concept of the AAT being "satisfied" and some of the criteria upon which the Notice will be issued;
- The removal of the specific higher penalties that apply to building industry participants and in particular the removal of Sections 38 and 39 of the current Act; and
- The automatic 5 year sunset clause.

Finally, in the absence of the Regulations which underpin much of the Bill we also reserve our rights to make a supplementary submission if possible on such matters within the reporting framework of the Committee.