Building and Construction Industry Improvement Bill 2003

The Australian Industry Group's position on the exposure draft

OCTOBER 2003

AUSTRALIAN INDUSTRY GROUP

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2003

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Foreword

The Australian Industry Group (Ai Group) has been a major supporter of the work of the Royal Commission. Ai Group was extensively involved during the course of the Royal Commission and, in a very comprehensive submission in July 2003, Ai Group expressed support for the bulk of Commissioner Cole's Recommendations.

The majority of the Royal Commission's recommendations have been translated into the provisions of the Exposure Draft of the *Building and Construction Industry Improvement Bill 2003*. As the representative organisation for most of the major construction companies through the Australian Constructors Association (ACA) and through our broad construction membership, Ai Group is uniquely placed to provide informed advice on the Bill.

The Australian construction industry has consistently demonstrated its capacity to build world-class infrastructure and to attain and maintain productivity levels to match the best in the world.

However, in some sectors and in some parts of Australia the industry has been brought into disrepute by unsatisfactory and inappropriate industrial practices that have created a culture, which has the potential to hold back growth and investment. Such industrial practices must be addressed. While it can be expected that different parties will have different views about the approach which should be taken to reform, it is untenable for any party to argue that reform is not needed. The case for reform has undeniably been established in the 7000 pages of the Royal Commission's Final Report.

One message to take from the Cole Royal Commission is that while it is possible for an industry to prosper within a difficult environment, no industry should be forced to deal with unlawful behaviour on top of all the other natural barriers to success. No one is above the law and this is as true in the construction industry as it is in any other walk of life.

We have looked carefully and critically at the provisions of the Bill in order to develop a constructive response, which we hope, can deliver sustained reform.

Ai Group has endeavoured to articulate clearly its members' concerns and to map policy paths that we believe can deliver a productive outcome for the industry. Our objective is to work with all of the relevant parties to develop a programme of sustainable reform for Australia's building and construction industry.

R N Herbert
Chief Executive

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1.0 Executive Summary

Ai Group was extensively involved during the course of the Royal Commission. Ai Group made three comprehensive general submissions and was the only organisation to make a submission on all 18 discussion papers. Following the release of the Final Report in July 2003, Ai Group prepared a very comprehensive 150 page analysis setting out its views on the 212 Recommendations (referred to in this document as Ai Group's *"July 2003 submission").*

This further comprehensive submission sets out Ai Group's views on the Exposure Draft of the *Building and Construction Industry Improvement Bill 2003.*

Amongst the provisions of the Bill, those dealing with the following areas required the most thorough consideration:

- The approach taken in the Bill to defining the *"building and construction industry"* for the purposes of coverage of the Bill;
- The role and powers of the proposed Australian Building and Construction Commissioner and Federal Safety Commissioner;
- The provisions relating to the proposed *"Building Code"* and its role in regulating workplace relations and occupational health and safety in the industry; and
- The provisions relating to pattern bargaining.

Ai Group's broad position on the key issues dealt with in the Bill is as follows:

- **The Concept of Industry-specific Legislation**

  Whilst Ai Group supports industry-specific legislation being enacted to deliver a reform package for the building and construction industry, the definitions used within the Bill to define the coverage of the legislation are inappropriate for workplace relations legislation. The Bill deems a large part of the manufacturing sector, together with various services sectors, as being part of the building and construction industry. Such an approach could lead to construction industry terms and conditions flowing into other industry sectors. Ai Group is constantly faced with claims by unions such as the Construction, Forestry, Mining and Energy Union (CFMEU), the Australian Manufacturing Workers Union (AMWU) and the Communications, Electrical and Plumbing Union (CEPU) to extend construction industry terms and conditions to areas outside of the commonly accepted boundaries of the building and construction industry. The legislation, as drafted, would increase the risk of the unions' claims succeeding. The coverage of the legislation should be limited to those activities which are typically recognised within Australia's workplace relations system as being part of the building and construction industry (eg. those activities that fall within the scope clauses of the major construction industry awards). These are the activities which were the subject of the Royal Commission's investigations.

- **Australian Building and Construction Commissioner**

  Ai Group supports the appointment of an Australian Building and Construction Commissioner (ABC Commissioner), as proposed in the Bill. In its submissions to the Royal Commission, Ai Group argued strongly 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. The proposed powers of the ABC Commissioner are appropriate (with a few exceptions which are set out in this submission).

- **The Building Code**

Ai Group supports the right of the Commonwealth as a client to clearly articulate the standards expected of its service providers and to promote reform in the building and construction industry via its role as a client. To date, the centrepiece of the Federal Government's strategy in this regard has been the *National Code of Practice for the Construction Industry* and the supporting *Implementation Guidelines*. The Bill extends the role of the National Code far beyond a role as a client guidance document. In view of the broader regulatory role prescribed in the Bill for the *Building Code*, the Code should be given effect as a regulation of the Commonwealth pursuant to the Bill. This would ensure an appropriate degree of Parliamentary and judicial scrutiny in respect of any amendments made to the provisions of the Code or amended interpretations of the provisions.

- **Occupational Health and Safety (OHS)**

Ai Group supports the appointment of a Federal Safety Commissioner, as proposed in the Bill. The safe performance of work should be a prerequisite to the completion of work on time and within budget. Whilst the incidence of injuries and fatalities in the construction industry remains unacceptably high, the Royal Commission acknowledged that the trend is one of improvement. At the present time, OHS is almost entirely regulated through State and Territory laws. Employers are required to comply with onerous legislation, regulations, codes of practice and standards which differ from State to State, and very substantial penalties apply where the requirements are breached. It is essential that the Commonwealth, States and Territories continue to strive to

achieve consistency amongst OHS laws. It is also vital that any reforms implemented to improve occupational health and safety in the construction industry do not simply result in the imposition of another layer of regulation which would lead to further confusion about which of the various federal and state laws, regulations, codes and standards apply (as would occur if detailed OHS requirements were to be inserted into the proposed *Building Code*). Rather than contributing to better OHS performance, the creation of further complexity and confusion could compromise the safety of employees because employers would be unlikely to understand what is required of them. Ai Group strongly supports the provisions of the Bill which address the misuse of occupational health and safety issues in an industrial relations context.

- **Awards, Certified Agreements and Other Conditions of Employment**

Pattern bargaining in the building and construction industry is highly damaging and must be addressed. Ai Group supports the direction of the proposed reforms but has proposed a series of (mainly technical) amendments to ensure that the objectives of the Bill are achieved.

- **Industrial Action**

Industrial disputes in the building and construction industry can be extremely costly and often industrial action creates significant hardship for third parties (both employers and employees) due the inter-related nature of the activities carried out. Given the uniqueness of the industry, it is appropriate that the industry be treated differently under the laws relating to the taking of industrial action and the remedies available when unlawful industrial action is taken. Ai Group strongly supports the provisions of the Bill in this area (with a few exceptions which are set out in this submission).

- **Freedom of Association**

  Freedom of choice is a fundamental tenet of our democracy. All employers and employees should be free to decide whether or not they wish to belong to a union or employer association. The Bill's provisions reinforce these freedoms in the building and construction industry.

- **Discrimination, Coercion and Unfair Contracts**

  One of the most significant workplace relations problems in the construction industry relates to the coercion of employers to employ specific persons nominated by unions. The coercion typically takes the form of the relevant union refusing to sign an industrial agreement with the head contractor or major subcontractor on a project, and refusing to allow work to commence, until agreement has been reached that the employer will hire specific persons nominated by the union (and agreement reached on the assignment of key roles, such as that of OHS representatives, to such persons). Many of the individuals nominated are highly militant and have a history of contributing to poor workplace relations on previous construction projects. It is essential that employers have the ability to employ the most appropriately qualified person for each job. Employers carry the risk for OHS on a project and must be able to employ the persons who are best qualified to assist in achieving a high level of OHS performance – not the persons forced upon them by unions for industrial purposes. The Bill adopts proposals that Ai Group argued strongly for in its submissions to the Royal Commission and which were recommended by Commissioner Cole in his Final Report.

- **Union Right of Entry**

  Unions have an important representative role to play. Accordingly, an appropriate balance needs to be struck between protecting employers from the misuse by unions of right of entry and inspection powers, which the Royal Commission held to be highly prevalent in the industry, and retaining an entry and inspection regime which enables unions to represent their members effectively. The provisions of the Bill strike an appropriate balance.

In preparing this submission, the provisions of the Bill were analysed in detail. Ai Group supports the vast majority of the Bill's provisions. Some provisions, however, require further analysis before implementation while others do not carry sufficient support from companies in the building and construction industry to be implemented.

2.0 Introduction

2.1 About Ai Group

Ai Group represents approximately 10,000 employers, large and small, in every State and Territory. Members provide more than $100 billion in output, employ more than 1 million people and produce exports worth some $25 billion.

The Australian Industry Group has a large membership in the construction sector including both major builders and large and small subcontractors. The Australian Constructors Association (ACA) is an affiliate of the Australian Industry Group and the two organisations are working closely together on matters relating to the Royal Commission.

Ai Group has long-standing relationships with all stakeholders in the construction industry including the owners of projects, head contractors and subcontractors. Many of these stakeholders are members of Ai Group in their own right, as well as clients who retain the services of Ai Group for specific projects.

Ai Group's members have significant involvement in engineering, building and civil construction.

2.2 Ai Group's Involvement in the Royal Commission and its Consultation Process with Member Companies

Ai Group was extensively involved during the course of the Royal Commission. Ai Group:

- Met with Commissioner Cole in November 2001 and again in December 2001;
- Made detailed submissions to the Royal Commission in November 2001, March 2002 and June 2002;
- Made submissions on each of the Royal Commission's 18 discussion papers – the only organisation which did so;
- Participated in a two day Occupational, Health and Safety forum convened by the Royal Commission in September 2002; and
- Responded to numerous Royal Commission requests for information about various projects and other matters.

Following the release of the Final Report in July 2003, Ai Group prepared a very comprehensive 150 page analysis setting out its views on the 212 Recommendations (referred to in this document as Ai Group's *"July 2003 submission"*).

This further comprehensive submission sets out Ai Group's views on the Exposure Draft of the *Building and Construction Industry Improvement Bill 2003.* In preparing this submission, Ai Group consulted with its member companies in the construction industry, together with members in other industries likely to be impacted upon by the provisions of the Bill.

In developing its response to the outcomes of the Royal Commission, Ai Group's consultation process has involved:

- In April 2003, Ai Group conducted meetings of member companies in Sydney, Melbourne and Brisbane to discuss the Final Report of the Royal Commission;
- Ai Group held meetings of its National Construction and Contractors Council on 16 April, 7 May, 16 May and 25 June 2003 to consider the Final Report and Ai Group's response to it;
- Ai Group focussed on the Royal Commission Outcomes at its National PIR Group Conference which was held in Canberra in mid-April 2003;
- Ai Group consulted with the Board of the Australian Constructors' Association (ACA) about the Final Report at Board Meetings on 2 May and 28 August, and at a Special Board Meeting held on 20 June 2003 to consider Ai Group's comprehensive draft response to the Final Report;
- The Final Report was considered by Ai Group's Branch Councils and National Executive at meetings in April, May and June 2003;
- Ai Group focussed on the provisions of the *Building and Construction Industry Improvement Bill 2003* at its National PIR Group Conference which was held in Canberra in September 2003;
- Ai Group held a joint meeting of its National Construction and Contractors Council and the ACA Industrial Relations Working Party via Video-conference in Sydney, Melbourne and Brisbane on 13 October 2003 to consider the *Building and Construction Industry Improvement Bill 2003* and to consider Ai Group's submission in response to it;
- The Bill was considered by Ai Group's Branch Councils at meetings in New South Wales, Victoria and Queensland in September and October 2003.

2.3 Overview

On 18 September 2003, the Minister for Employment and Workplace Relations released an Exposure Draft of the *Building and Construction Industry Improvement Bill 2003*, for a period of public consultation, expiring on 17 October 2003.

The majority of the recommendations of the Royal Commission into the Building and Construction Industry have been translated into the provisions of the Bill. The 212 recommendations of Commissioner Cole are set out in a 23 Volume Final Report - 22 Volumes of which were released by the Minister in March 2003.

The Royal Commission inquiry process was exhaustive and the Final Report and Recommendations were constructive, comprehensive and balanced. During the course of the Royal Commission, the Federal Court upheld the legality and fairness of the Commission's processes when such processes were challenged by the Construction, Forestry, Mining and Energy Union (CFMEU) in two separate proceedings[1].

Ai Group agrees with the Royal Commission's assessment that significant structural, cultural and attitudinal changes must be made to increase productivity in the building and construction industry and restore the rule of law. It is time to draw a line in the sand so that the full growth potential of this key sector of the Australian economy can be realised. The following description by Commission Cole of his reform package highlights the interwoven and interdependent nature of the various key elements:

[1] The February 2002 decision of Heerey J and the November 2002 decision of Branson J are reproduced in full in Volume 2, Appendices 18 and 19 of the Final Report.

Commissioner Cole's Model for Reform – Extract from Final Report [Volume 1, pp. 13 & 14 of Final Report]

"If the reforms recommended are adopted and implemented, the mechanisms will be in place to restore the rule of law to the building and construction industry. Those who breach the law will be prosecuted and penalised. The penalties will be significant. Those breaching the law will find they can no longer participate in the industry. Those who disregard proper standards of behaviour expressed both in an Act of special application to the building and construction industry, provisionally called the Building and Construction Industry Improvement Act, or do not adhere to codes of practice for the industry, will be denied Commonwealth work if they are contractors or subcontractors. Losses caused by unlawful industrial action will be immediately assessed by independent assessors and will be recoverable from those causing loss by an abbreviated form of legal proceedings. No longer will there be any excuse for those who say they suffer loss, not to recover it from those who cause it.

I have also recommended the establishment of an independent commission, provisionally called the Australian Building and Construction Commission (ABCC), to monitor conduct in the industry. There will be obligations imposed upon contractors, subcontractors, union officials and workers to advise the ABCC of possible unlawful conduct, be it underpayment or non-payment of wages, taxation avoidance, departures from proper standards of occupational health and safety, breaches of freedom of association provisions, unlawful industrial activity, or any other form of unlawfulness. It will be the responsibility of the ABCC either itself to address this unlawfulness, or where there is another State or Federal body more suited to its investigation, to refer the matter to that body but with the obligation to monitor and ensure any complaint is properly addressed. This body will remove any reason that any participant in the industry has to engage in unlawful or inappropriate conduct. It will also ensure that unlawful conduct comes to the attention of an entity established to ensure the law is adhered to."

3.0 The Case for Reform has Undoubtedly been Established

The Australian construction industry has consistently demonstrated its capacity to build world-class infrastructure and to attain and maintain productivity levels to match the best in the world. However, in some sectors and in some parts of Australia the industry has been brought into disrepute by unsatisfactory and inappropriate industrial practices that have created a culture, which has the potential to hold back growth and investment.

Over 100 types of unlawful and inappropriate practices were identified by the Royal Commission. Further, Commissioner Cole made findings about 392 separate incidents of unlawful conduct committed by individuals, unions and employers.

The prime reason for the occurrence of unlawful and inappropriate behaviour in the industry, was described by Commissioner Cole in the following way:

> *"The reason why unlawfulness, in all its forms, and inappropriate conduct and practices occur, is because of the clash between the short-term project profitability focus of the providers of capital, clients, head contractors and subcontractors on the one hand, and the long term aspirations of the union movement, especially the CFMEU, to dominate, control and regulate the industry for its benefit, and what it perceives to be the benefit of its members, on the other hand".*[2]

[2] Final Report, Volume 1, p.11

Commissioner Cole found that there was 'an urgent need for structural and cultural reform'[3]. It is essential that reform be implemented without delay.

While it can be expected that different parties will have different views about the approach which should be taken to reform, it is untenable for any party to argue that reform is not needed. The case for reform has undeniably been established in the 7000 pages of the Royal Commission's Final Report.

[3] Final Report, Volume 1, p.6.

4.0 The Provisions of the *Building and Construction Industry Improvement Bill 2003*

4.1 Chapter 1 – Preliminary

4.1.1 Overview

As a general principle, Ai Group would prefer to have consistent workplace relations legislation that is applicable to all Australian employers and employees, rather than sector-specific legislation.

However, on balance, we support the enactment of industry-specific legislation to deliver a reform package for the building and construction industry for the following reasons:

- Unlike other industries, the building and construction industry has been the subject of a Royal Commission which has identified widespread inappropriate and unlawful behaviour that must be addressed without delay;
- Industry-specific legislation enables the problems which the Royal Commission has identified to be addressed without creating widespread unintended consequences in other industries;
- An industry-specific approach to workplace relations has been worthwhile in other industries during periods in their history when significant problems arose (eg. Specific legislative frameworks and tribunals were established in the coal and airline industries under federal legislation. In addition, a Coal Industry Tribunal is currently in operation under State Law in Western Australia).

- Over recent years, several worthwhile workplace relations legislative reform proposals that were particularly important to the construction industry have failed to pass through the Senate, in part due to concerns expressed by Opposition parties about the impact of such proposals on other industries. For example, in a Senate Committee Report[4] in June 2000 the Australian Democrats cited the impact on the higher education sector of the proposed *Workplace Relations Amendment Bill 2000* which would have given the AIRC enhanced powers to deal with unlawful industrial action in pursuit of pattern bargaining. Ai Group pressed the Federal Government to introduce the Bill, and the Opposition parties to support it, due to the problems that were (and still are) being caused by pattern bargaining in the construction and manufacturing industries.

Ai Group proposes that there be a review of the industry-specific legislation after five years to ascertain whether there is an ongoing need to retain it.

Ai Group's support for industry-specific legislation is contingent upon an appropriate definition of the building and construction industry being incorporated within the legislation, for the purposes of defining the coverage of the legislation. Ai Group does not support the approach taken in the Bill, which defines the building and construction industry in a very broad way. The Bill's definitions would lead to the following significant risks:

[4] Report of the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee Inquiry into the Workplace Relations Amendment Bill 2000, p.61

- ***The risk that construction industry terms and conditions (eg. construction industry trust funds and the 36 hour week) may "drift" into non-construction sectors***

  This is a significant risk. Ai Group is constantly faced with claims by unions such as the CFMEU, the AMWU and the CEPU to extend the scope of construction industry portable long service schemes and construction industry severance funds to areas outside of the commonly accepted boundaries of the building and construction industry. Parts of the manufacturing, contracting, labour hire and services sectors are the focus of these union claims.

  Construction unions regularly attempt to force companies in the **manufacturing sector** which manufacture products which are later installed in, or become part of, buildings and other structures, to apply construction industry wages and conditions to their manufacturing employees. There are a very large number of companies which manufacture such products. For example, manufacturers of: aluminium windows; metal shelving; metal brackets and fittings; bolts, nails and other fasteners; structural steel; air-conditioning ducting; guttering; pipes and tubing; cables and wiring; doors; timber, metal, glass, gyprock and other building materials and products; cement; telecommunications systems; alarm systems; refrigeration systems; computer systems; etc. These companies are manufacturers, not constructors, even though some companies have installation crews. The *Metal, Engineering and Associated Industries Award 1998* covers the manufacture of a very large number of products which are often installed in buildings and other structures.

In addition, construction unions regularly attempt to force companies which operate in both the construction and **services sector** to apply construction industry terms and conditions to the employees in their service divisions. This situation is especially prevalent in the lift, fire protection, air-conditioning, electrical contracting and contract maintenance sectors.

Ai Group and its members have devoted substantial resources over the years to ensuring that unions do not succeed with their claims to dissolve the dividing line between the construction and manufacturing sector, and the construction and services sector.

- ***The risk of building costs increasing significantly, due to added input costs***

  If the proposed legislation had the effect of assisting the unions with their claims to extend construction industry terms and conditions into other sectors, as described above, the cost of a very large number of products which are ultimately installed in or become part of buildings and other structures would increase significantly. This, in turn, would increase the overall cost of building.

- ***The risk of claims by the CFMEU and other construction unions to increase their coverage in line with any new broader definition of the building and construction industry***

  This is another significant risk. Over recent years, the CFMEU has aggressively sought to extend its coverage. The long-running proceedings in the Australian Industrial Relations Commission (AIRC), Federal Court and High Court relating to the CFMEU's attempts to expand its coverage in the civil engineering sector at the expense of the Australian Workers Union (AWU), is one example of this.

The approach taken in the Bill to defining the building and construction industry extends far beyond the definition which Commissioner Cole used during the Royal Commission and, consequently, incorporates many sectors which were not investigated by the Royal Commission[5]. Such an approach is not appropriate. The very expansive definitions in the Bill would have substantial impact on the manufacturing industry and various other non-construction sectors.

4.1.2 Definitions which have the effect of determining the coverage of the *Building and Construction Industry Improvement Bill*

The definition of *"building work"* (s.5) is the principal definition which determines the coverage of the Bill. However, various other definitions operate to expand the coverage of the Bill beyond activities which fall within the definition of *"building work".* The definitions of *"building agreement"*, *"building award"*, *"building certified agreement" and "building industrial dispute"* are examples of this. These definitions incorporate agreements, awards and disputes which apply to *"building work"* even if such work is a relatively insignificant part of the overall work covered by the agreement, award or dispute.

In addition to various activities which are clearly part of the building and construction industry, *"building work"* is defined to include numerous activities which are not generally regarded as falling within the industry, including but by no means limited to:

- The repair and maintenance of buildings and other structures (eg. The cleaning of buildings and the repair and maintenance of air-conditioning and refrigeration systems);

[5] The meaning which Commissioner Cole gave to the term "Building and Construction" is set out on page 4 of Volume 2 of the Final Report

- The repair and maintenance of railways (which conceivably could apply to the maintenance of rolling stock);
- The installation of replacement fittings in buildings and other structures (eg. The installation of a replacement telecommunications or security system in an existing building); and
- The prefabrication of components to form part of any building, structure of works (eg. The manufacture of doors and aluminium windows in a factory).

The definition of *"building work"* appears to have been based upon the definition of *"construction work"* in the NSW *Building and Construction Industry Security of Payment Act 1999* (although some significant modifications have been made). While the definition is appropriate for security of payment legislation, it is inappropriate for workplace relations legislation. With security of payment legislation, it is important to protect the parties who are part of the contractual chain (eg. manufacturers of products which are delivered to a building site). Workplace relations is an entirely different issue.

The coverage of the legislation should be limited to those activities which are typically recognised within Australia's workplace relations system as being part of the building and construction industry (eg. those activities which are covered by the scope clauses of the major construction industry awards). These are the activities which were the subject of the Royal Commission's investigations.

The major construction industry awards very carefully define the boundaries between construction work and non-construction work. These award definitions have been carefully negotiated by employer and union parties over the years. Clear definitions are extremely important for the many employers who do not operate in the construction sector and have no desire to apply construction industry terms and conditions to their employees.

In 1989, following many years of disputation over the issue, Ai Group and the metal unions negotiated a metal and engineering on-site construction industry award. Ai Group took great care in negotiating the scope clause of the award to ensure that it did not apply to companies in the metal and engineering industry which were not significantly involved in on-site construction work. If such care had not been taken, Ai Group would have exposed its members in the manufacturing and other sectors to claims by unions to apply construction industry terms and conditions.

The major construction industry awards include:

- The *National Building and Construction Industry Award 2000*;
- The *National Metal and Engineering On-site Construction Industry Award 2000*;
- The *AWU Construction and Maintenance Award 2000*; and
- The major federal plumbing industry awards (eg. The *Plumbing Industry (New South Wales Award) 1999*).

Construction industry awards generally only cover work carried out **at a construction site**. For example, the *National Metal and Engineering On-site Construction Industry Award 2000* covers construction, fabrication, erection and installation work *"carried out at a construction site"* (sub-clause 4.1 of the Award). In contrast, the bill covers *"any operation that is part of, or is preparatory to, or is for rendering complete"* work that is covered by other aspects of the definition of *"building work"*, including but not limited to the *"prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site".*

With regard to installation, the Bill's coverage is not limited to the installation of products in buildings and structures which are under construction – the Bill also covers products being installed in existing buildings and structures.

Construction industry awards do not cover most forms of maintenance work. The *National Metal and Engineering On-site Construction Industry Award 2000* only covers maintenance work which is carried *out "on site by the employees of contractors or subcontractors in connection with contracts for on-site construction work"* (paragraph 4.1.2 of the Award). In contrast, the Bill covers the *"maintenance…of buildings, structures or works".* This would appear to include activities such as cleaning and day-to-day repairs which are clearly not construction-related. Once again, this is not appropriate.

The following table compares various definitions in the Bill with draft definitions developed by Ai Group with the assistance of its solicitors, Cutler Hughes and Harris Lawyers.

It is important to note that Ai Group and Cutler Hughes and Harris have not yet had the opportunity to thoroughly analyse all of the implications associated with the original and redrafted definitions and consultation is continuing with different sectors of industry. With this qualification, Ai Group believes that the redrafted definitions are far more appropriate for the Bill than the existing definitions.

Definitions in the *Building and Construction Industry Improvement Bill*	**Comments**	**Proposed definitions**
Definition of *"building work"*		**Definition of *"building work"***
(1) Subject to subsections (2), (3) and (4), "building work" means any of the following activities:		*(1) Subject to subsections (2), (3) and (4), "building work" means any of the following activities:*
(a) the construction, alteration, extension, restoration, repair, maintenance, demolition or 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;	Repair and maintenance work should not be included in the definition of *"building work",* as such work is generally part of the manufacturing industry, not the construction industry. In addition, the term *"alteration"* is too vague to be used the definition. Forms of *"alteration"* that are appropriately covered by the Act are covered by other terms in the definition, eg. *"construction"* , *"extension"* and *"restoration*". This part of the definition should only cover work carried out **on** a construction site.	*(a) the construction, **extension, restoration, demolition** or dismantling of buildings, structures or works that form, or are to form, part of land, **at the site where such buildings, structures or works are to be located,** whether or not the buildings, structures or works are permanent;*

Definitions in the *Building and Construction Industry Improvement Bill*	Comments	Proposed definitions
(b) the construction, alteration, extension, restoration, repair, maintenance, demolition or dismantling of railways or docks;	Ai Group is concerned that the term *"railway"* could be interpreted to include the maintenance of rolling stock, which is clearly part of the manufacturing industry, not the construction industry. In addition, repair and maintenance activities relating to railway equipment and docks is not generally regarded as being part of the construction industry. The construction of railway lines, ports, roads, tunnels, bridges and so on, would appear to be clearly covered by paragraph (a). Therefore, the wording in (b) of the original definition may not be necessary	

Definitions in the *Building and Construction Industry Improvement Bill*	**Comments**	**Proposed definitions**
(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems.	Only installation work carried out on a construction site should be included in the definition of *"building work".* Installation work relating to existing buildings and structures should not be included. Further, the activities in paragraph (e) of the redrafted definition should be excluded.	***(b) the installation of fittings forming part of buildings, structures or works which are being constructed, extended, restored, demolished or dismantled,*** *including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems.*

Definitions in the *Building and Construction Industry Improvement Bill*	**Comments**	**Proposed definitions**
(d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c), for example: *(i) site clearance, earth-moving, excavation, tunnelling and boring;* *(ii) the laying of foundations;* *(iii) the erection, maintenance or dismantling of scaffolding;* *(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site;* *(v) site restoration, landscaping and the provision of roadways and other access works;*	This part of the definition is far too broad. Large segments of the manufacturing industry would be covered by paragraph (iv). It is inappropriate to define such sectors as being part of the construction industry. The definition should only cover work carried out **on** a construction site, except for the circumstances set out in (d) of the redrafted.	***(c) The following work when carried out at sites where buildings, structures or works are being constructed, extended, restored, demolished or dismantled:*** *(i) site clearance, earth-moving, excavation, tunnelling and boring;* *(ii) the laying of foundations;* *(iii) the erection, maintenance or dismantling of scaffolding;* *(iv) site restoration, landscaping and the provision of roadways and other access works;*

Definitions in the *Building and Construction Industry Improvement Bill*	Comments	Proposed definitions
	This part of the redrafted definition covers facilities set up by building contractors to construct or prefabricate major and substantial parts of the building or structure which is under construction (eg. pre-castings). However, on-going manufacturing facilities should not be covered.	***(d) The construction or prefabrication of major and substantial parts of buildings, structures and works carried out:*** • ***at the site where such buildings, structures or works are located or are to be located; or*** • ***off-site in a temporary facility or yard established for the purposes of carrying out such construction or prefabrication work for the project.***

Definitions in the *Building and Construction Industry Improvement Bill*	**Comments**	**Proposed definitions**
but does not include any of the following: *(e) the drilling for, or extraction of, oil or natural gas;* *(f) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;* *(g) any work that is part of a project for:* *(i) the construction, repair, restoration or maintenance of a single-dwelling house; or* *(ii) the construction, repair, restoration or maintenance of any building, structure or work associated with a single dwelling house; or*	This part of the redrafted definition distinguishes between equipment and machinery which is located in a building or structure (but are often attached to it), but do not form part of the building or structure. For example, an air-conditioning unit typically forms part of a building but a lathe, while installed in a building, is not part of the building.	*but does not include any of the following:* ***(e) The installation, repair or maintenance of equipment or machinery in:*** • ***buildings, structures or works which are not being constructed, extended, restored, demolished or dismantled; or*** • ***which do not form part of the building, structure or works, for example, power generation equipment, electricity supply equipment, and industrial machinery.*** *(f) the drilling for, or extraction of, oil or natural gas;*

Definitions in the *Building and Construction Industry Improvement Bill*	Comments	Proposed definitions
(iii) the alteration or extension of a single-dwelling house, if it remains a single-dwelling house after the alteration or extension.		*(g) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;* *(h) any work that is part of a project for:* *(i) the construction, repair, restoration or maintenance of a single-dwelling house; or* *(ii) the construction, repair, restoration or maintenance of any building, structure or work associated with a single dwelling house; or* *(iii) the alteration or extension of a single-dwelling house, if it remains a single-dwelling house after the alteration or extension.*

Definitions in the *Building and Construction Industry Improvement Bill*	**Comments**	**Proposed definitions**
(2) Paragraph (1)(g) does not apply if the project is part of a multi-dwelling development that consists of, or includes, the construction of at least 5 single-dwelling houses. *(3) Subject to subsection (4), "building work" includes any activity that is prescribed by the regulations for the purposes of this subsection.* *(4) "Building work" does not include any activity which is prescribed by the regulations for the purposes of this subsection.* *(5) In this section:* *"land" includes land beneath water.*		*(2) **Paragraph (1)(h)** does not apply if the project is part of a multi-dwelling development that consists of, or includes, the construction of at least 5 single-dwelling houses.* *(3) Subject to subsection (4), "building work" includes any activity that is prescribed by the regulations for the purposes of this subsection.* *(4) "Building work" does not include any activity which is prescribed by the regulations for the purposes of this subsection.* *(5) In this section:* *"land" includes land beneath water.*

Definitions in the *Building and Construction Industry Improvement Bill*	**Comments**	**Proposed definitions**
"Building agreement" *means an agreement that applies to building work (whether or not it also applies to other work).* ***"Building award"*** *means an award that applies to building work (whether or not it also applies to other work).* ***"Building certified agreement"*** *means a certified agreement that applies to building work (whether or not it also applies to other work).* ***"Building industrial dispute"*** *means an agreement that applies to building work (whether or not it also applies to other work).*	The definitions of *"building agreement", "building award", "building certified agreement"* and *"building industrial dispute"* incorporate agreements, awards and disputes which apply to *"building work"* even if such work is a relatively insignificant part of the overall coverage of the agreement, award or dispute. This is not appropriate.	***"Building agreement"*** *means an agreement that* ***primarily*** *applies to building work.* ***"Building award"*** *means an award that* ***primarily*** *applies to building work.* ***"Building certified agreement"*** *means a certified agreement that* ***primarily*** *applies to building work.* ***"Building industrial dispute"*** *means an agreement that* ***primarily*** *applies to building work*

4.1.3 Definition of *"Office"*, *"Objectionable Provision" and "Pattern Bargaining"*

Ai Group supports the definition of *"office"* in s.6 of the *Building and Construction Industry Improvement Bill* and the associated definition of *"officer"* in s.4 of the Bill. These definitions are consistent with the general definitions of *"office"* and *"officer"* in s.4 of the *Workplace Relations Act*. It is noted that various sections of the Bill and the *Workplace Relations Act* define *"officer"* in a broader way, to include employees, delegates and other representatives of registered organisations, in addition to the office-bearers recognised within the general definition. This issue is dealt with in Chapter 13.

The definition of *"objectionable provision"* in s.7 and *"pattern bargaining"* in s.8 of the Bill are dealt with in detail in section 4.5 of this submission.

4.2 Chapter 2 - Australian Building and Construction Commissioner

In its submissions to the Royal Commission, Ai Group argued strongly 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.

Under the provisions of the Bill, the Australian Building and Construction Commissioner ("*the ABC Commissioner*") has all of the functions proposed by Ai Group in its submissions together with various additional powers which were recommended by the Royal Commission. Ai Group supports the appointment of an ABC Commissioner, as proposed in the Bill, subject to an appropriate governance regime being established which should include:

- A Charter;
- An Advisory Board, which includes representatives of key construction industry representative bodies such as Ai Group and the Australian Constructors Association (NB. The Australian Taxation Office (ATO) and the Australian Competition and Consumer Commission (ACCC) have established advisory bodies containing industry and other representatives);
- A media protocol; and
- As proposed by Ai Group in its submissions, and as recommended by the Royal Commission[6], the ABC Commissioner should be subject to the prudential oversight of an Ombudsman.

[6] Recommendation 197

The Charter of the proposed ABC Commissioner is set out in s.12 of the Bill. However, the Bill does not appear to deal with the last three elements above.

The office of the ABC Commissioner will require substantial funding if it is to perform the role recommended by the Royal Commission. It is vital that adequate funding be provided. If the funding is inadequate, employers may be exposed to retaliatory action by unions in circumstances where they are simply complying with legal obligations to provide information to the ABC Commissioner.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
An office of the Australian Building and Construction Commissioner ("*the ABC Commissioner*") will be established. The ABC Commissioner will be assisted by a number of Deputy ABC Commissioners as are appointed from time to time. [s.11]	**Supported, subject to an appropriate governance regime being established**	The appointment of an ABC Commissioner would be beneficial 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. Such appointment would address the significant problem of employers being reluctant to enforce their legal rights due to retaliation and victimisation by construction industry unions. Ai Group supports the appointment of the proposed ABC Commissioner, subject to an appropriate governance regime being established which should include: • A Charter;

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		• An Advisory Board, which includes representatives of key construction industry representative bodies such as Ai Group and the Australian Constructors Association (NB. The Australian Taxation Office (ATO) and the Australian Competition and Consumer Commission (ACCC) have established advisory bodies containing industry and other representatives); • A media protocol; and • As proposed by Ai Group in its submissions, and as recommended by the Royal Commission[7], the ABCC should be subject to the prudential oversight of an Ombudsman. The Charter of the proposed ABC Commissioner is set out in s.12 of the Bill. However, the Bill does not appear to deal with the last three elements above.

[7] Recommendation 197

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The functions of the ABC Commissioner will include: • Monitoring and promoting appropriate standards of conduct by building industry participants, including by: o Monitoring and promoting compliance with the *Building and Construction Industry Improvement Act* and the *Workplace Relations Act*; o Monitoring and promoting compliance with the Building Code; and o Referring matters to other relevant agencies and bodies; • Investigating suspected contraventions, by building industry participants, of: o The *Building and Construction Industry Improvement Act*, the *Workplace Relations Act*, awards, certified agreements, AWAs or orders of the AIRC; and o The Building Code;	**Supported with modifications**	The functions of the ABC Commissioner, as set out in the Bill, are appropriate, with the exception that Ai Group does not support the ABC Commissioner having the functions of: • Monitoring and promoting compliance with the Building Code; and • Investigating suspected contraventions by building industry participants of the Building Code; unless the Building Code is given effect as a law or regulation of the Commonwealth. (NB. This issue is dealt with in detail in section 4.3 of this submission). The educative functions of the ABC Commissioner are very important – equally important to his or her compliance and enforcement functions.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
• Providing assistance and advice to building industry participants regarding their rights under the *Building and Construction Industry Improvement Act* and the *Workplace Relations Act*; • Providing representation to a building industry participant who is, or might become, a party to proceedings under the *Building and Construction Industry Improvement Act* or the *Workplace Relations Act*, if the ABC Commissioner considers that providing the representation would promote the enforcement of the Acts; • Disseminating information about relevant matters; and • Other functions as conferred by legislation or regulation. [s.12].		

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The Minister may, by notice published in the *Gazette*, give directions specifying the manner in which the ABC Commissioner must exercise or perform his or her powers. The ABC Commissioner must comply with the directions. A direction of the Minister can be disallowed by the Senate. [s.13].	**Supported**	The proposal to subject Ministerial directions issued under this section of the Bill to Parliamentary scrutiny is appropriate.
The office of the ABC Commissioner will be subject to various reporting and administrative arrangements. [ss.14, 15 and 16].	**Supported**	Ai Group supports these provisions.

4.3 Chapter 3 – The Building Code

Ai Group supports the right of the Commonwealth as a client to clearly articulate the standards expected of its service providers and to promote reform in the building and construction industry via its role as a client. To date, the centrepiece of the Federal Government's strategy in this regard has been the *National Code of Practice for the Construction Industry* and the supporting *Implementation Guidelines*.

'Codes of Practice are, in part, an aspect of self-regulation of an industry. Unless adopted by legislation, or incorporated by contract, they have no mandatory or binding effect'[8].

The first Building and Construction Industry Code was introduced by the New South Wales Government in 1992, following the Gyles Royal Commission. Its purpose was to ensure that the construction industry operated within the law and to utilise the government's substantial purchasing power to stimulate reform within the industry[9]. Since this time, a National Code has been released, together with the release of separate Codes for all States and Territories (with the exception of the ACT, where the National Code applies)[10].

The National Code of Practice for the Construction Industry was jointly developed by the Commonwealth, States and Territories. It was introduced in 1997. The Commonwealth issued implementation guidelines in 1998 to accompany the Code. Unlike the provisions of the Code, these guidelines were not explicitly agreed upon by the States and Territories[11].

[8] Royal Commission Discussion Paper 8, *Codes of Practice for the Building and Construction Industry*, p.8.
[9] Discussion Paper 8, see Note 8, p.9.
[10] Discussion Paper 8, see Note 8 p.10,11.
[11] Discussion Paper 8, see Note 8, p.10.

The Royal Commission's Final Report recommended that the role of the *National Code of Practice for the Construction Industry* and the associated *Implementation Guidelines* be extended far beyond a role as a client document. In view of the broader regulatory role recommended by the Royal Commission, Ai Group proposed in its July 2003 submission that such instruments be replaced by a law or regulation of the Commonwealth. Ai Group argued that this would ensure an appropriate degree of Parliamentary and judicial scrutiny in respect of any amendments made to the provisions of the Code or amended interpretations of such provisions. We argued that our proposed approach would protect the rights of employers and other parties in the industry, including providing rights of appeal.

The provisions of the draft *Building and Construction Industry Improvement Bill,* relating to the proposed *"Building Code",* do not address the concerns set out in Ai Group's July 2003 submission. Indeed, by using the Corporations Power under the Constitution, the Bill extends the reach of the Code beyond that recommended by the Royal Commission. The Code's role extends beyond standard-setting for contractors engaged on projects funded by the Commonwealth, to the regulation of all incorporated building contractors. The *Building Code* would regulate significant sections of the construction industry, using an instrument that would not be subjected to Parliamentary or judicial scrutiny. It is unclear in the Bill whether the *"Building Code"* is to be based on the current *National Code of Practice for the Construction Industry* or is to be an entirely different document.

The Bill provides the Minister with the power to issue, in one or more documents, a code of practice to be called the *"Building Code".* All incorporated building contractors would be required to comply with the Code. Other building industry participants would need to comply with the Code if the work is to be carried out in a Territory or Commonwealth place[12].

[12] Section 52(i) of the Constitution empowers the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to the seat of Government of the Commonwealth and all place acquired by the Commonwealth for public purposes.

There are virtually no constraints placed upon the Minister, under the terms of the Bill, with regard to the content of the Code. Further, the exercise of Section 241 – Delegation by Minister, of the Bill allows the Minister to delegate the power to issue or amend the *Building Code* to the ABC Commissioner, a Deputy ABC Commissioner, the Federal Safety Commissioner and various other persons.

There are no protections within the Bill to ensure that the content of the *Building Code* remains appropriate over time. For example, different Governments or Ministers could have very different views about what provisions should be incorporated within the Code.

Ai Group restates the position set out in its July 2003 submission. That is, given the broad regulatory role proposed for the *Building Code,* the Code should be given effect as a regulation of the Commonwealth pursuant to the *Building and Construction Industry Improvement Bill*. In order to protect the rights of building contractors and other building industry participants, there must be an appropriate degree of Parliamentary and judicial scrutiny of the Code and any amendments made to it.

Within the framework proposed by Ai Group, we support the requirement that the ABC Commissioner report to the Minister on the extent to which the *Building Code* is being complied with and that this report be tabled in the Parliament.

Ai Group does not support the proposal, in its present form, that the ABC Commissioner be able to publish instances of non-compliance with the Code, given that the Bill does not provide adequate protections to prevent injustice. In addition, Ai Group cannot support the proposal to impose an obligation on building industry participants to report to the ABC Commissioner on the extent to which they have complied with the Code, when we are unaware of the provisions of the proposed *Building Code* and, consequently, we are unaware of the obligations which would be imposed on building industry participants.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The Bill provides the Minister with the power to issue, in one or more documents, a code of practice to be called the "*Building Code*". All incorporated building contractors are required to comply with the Code and other building participants must comply with the Code if the work is to be carried out in a Territory or Commonwealth place[13]. [s.26].	**Not supported in its current form**	Ai Group supports the right of the Commonwealth as a client to clearly articulate the standards expected of its service providers. In addition, Ai Group has been supportive of the Commonwealth promoting reform in the building and construction industry via its role as a client. Indeed, this follows the practice of a number of States which have pursued a similar strategy. To date, the centrepiece of the Federal Government's strategy in this regard has been the *National Code of Practice for the Construction Industry* and the supporting *Implementation Guidelines*. The Royal Commission's Final Report recommended that the role of the *National Code of Practice for the Construction Industry* and the associated *Implementation Guidelines* be extended far beyond a role as a client guidance document.

[13] See note 12 above.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		In view of the broader regulatory role recommended by the Royal Commission, Ai Group proposed in its July 2003 submission that such instruments be replaced by a law or regulation of the Commonwealth. Ai Group argued that this would ensure an appropriate degree of Parliamentary and judicial scrutiny in respect of any amendments made to the provisions of the Code or amended interpretations of such provisions. We argued that our proposed approach would protect the rights of employers and other parties in the industry, including providing rights of appeal. The provisions of the draft *Building and Construction Industry Improvement Bill,* relating to the proposed *Building Code*, do not address the concerns set out in Ai Group's July 2003 submission.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Indeed, by using the Corporations Power under the Constitution, the Bill extends the reach of the Code beyond that recommended by the Royal Commission. The Code's role extends beyond standard-setting for contractors engaged on projects funded by the Commonwealth, to the regulation of all incorporated building contractors. The *Building Code* would regulate significant sections of the construction industry, using an instrument that would not be subjected to Parliamentary or judicial scrutiny. There are virtually no constraints placed upon the Minister, under the terms of the Bill, with regard to the content of the Code. Further, the exercise of Section 241 – Delegation by Minister, of the Bill allows the Minister to delegate the power to issue or amend the *Building Code* to the ABC Commissioner, a Deputy ABC Commissioner, the Federal Safety Commissioner and various other persons.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		There are no protections within the Bill to ensure that the content of the *Building Code* remains appropriate over time. For example, different Governments or Ministers could have very different views about what provisions should be incorporated within the Code. Ai Group restates the position set out in its July 2003 submission. That is, given the broad regulatory role proposed for the *Building Code*, the Code should be given effect as a regulation of the Commonwealth pursuant to the *Building and Construction Industry Improvement Bill*. In order to protect the rights of building contractors and other building industry participants, there must be an appropriate degree of Parliamentary and judicial scrutiny of the Code, and any amendments made to it.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The ABC Commissioner must provide the Minister with a written report on the extent to which the *Building Code* is being complied with (at least annually) and the Minister must table the report in Parliament. [s.27].	**Supported, within the framework proposed by Ai Group**	Within the framework proposed by Ai Group (ie. the incorporation of the Code within a regulation), we support this provision.
The ABC Commissioner may publicise details of non-compliance with the *Building Code* if considered to be in the public interest. [s.28].	**Not supported in its present form**	Ai Group does not support this provision, in its present form, given that the Bill does not provide adequate protections to prevent injustice.
The Federal Safety Commissioner must provide the Minister with a written report on the extent to which the *Building Code* is being complied with (at least annually) and the Minister must table the report in Parliament. [s.29].	**Not supported**	Ai Group does not support the Federal Safety Commissioner having a compliance and enforcement role regarding the *Building Code*. (This issue is dealt with in s.4.4 of this submission).

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The ABC Commissioner may direct persons to provide it with a written report containing specified information on its compliance with the *Building Code* and the person must comply. (Maximum penalty $11,000 for a body corporate and $2,200 for an individual). [s.30 and s.222].	**Ai Group cannot provide its position on this proposal until the details of the specific obligations to be imposed are known**	Ai Group cannot support the proposal to impose an obligation on building industry participants to report to the ABC Commissioner on the extent to which they have complied with the Code, when we are unaware of the provisions of the proposed *Building Code* and, consequently, we are unaware of the obligations which would be imposed on building industry participants.

4.4 Chapter 4 - Occupational Health and Safety (OHS)

The Royal Commission recommended that a new paradigm for occupational health and safety be fostered in the building and construction industry. Ai Group strongly supports such recommendation. The safe performance of work should be a prerequisite to the completion of work on time and within budget.

Whilst the incidence of injuries and fatalities in the construction industry remains unacceptably high, the Royal Commission acknowledged that the trend is one of improvement[14].

At the present time, OHS is almost entirely regulated through State and Territory laws. Employers in the building and construction industry are required to comply with onerous State and Territory OHS legislation, regulations, codes of practice and Australian Standards. Very substantial penalties apply where the requirements are breached.

Ai Group agrees with the following assessment of Commissioner Cole of the current state of OHS laws and regulations in Australia:

> *"There is at present a fragmented, disjointed and uncoordinated system of occupational health and safety law and regulation in Australia which, when applied to a national industry such as the building and construction industry, is inequitable, wasteful and inefficient. Workers in the industry are entitled to a regime of the highest possible standard regardless of where they are working in Australia. In view of these considerations, there could be no more salutary reform to occupational health and safety law and regulation than a single national scheme comprehensively regulating*

[14] There has been a significant improvement in safety outcomes over recent years, in the order of a 30% decrease in the incidence rate since 1994-95. (Royal Commission Discussion Paper 6 – *Workplace Health and Safety in the Building and Construction Industry*, p.7)

occupational health and safety generally throughout Australia. There is strong support for this in the industry. However, the long failure of attempts to achieve national uniformity, and then national consistency, in occupational health and safety regulation indicate that there is no realistic prospect that the Commonwealth, States and Territories will cooperate to bring about a single national system regulating occupational health and safety generally. It would be wrong to establish a national system regulating only the building and construction industry. However, this does not mean that nothing can be done to achieve at least some improvement in the regulation of occupational health and safety in the industry[15]*"*

It is essential that the Commonwealth, States and Territories continue to strive to achieve consistency amongst OHS laws. The Productivity Commission is currently investigating the importance of this issue in its *Inquiry into National Frameworks for Workers' Compensation and Occupational Health and Safety*. A Final Report in this inquiry is expected to be released in March 2004.

It is vital that any reforms implemented to improve occupational health and safety in the construction industry do not simply result in the imposition of another layer of regulation which would lead to further confusion about which federal and state laws, regulations, codes and standards apply. Rather than contributing to better OHS performance, the creation of further complexity and confusion could compromise the safety of employees because employers would be unlikely to understand what is required of them. Adding complexity to the OHS system would be particularly unfair on small businesses which do not employ specialist OHS staff. A large percentage of employees in the building and construction industry are employed by small businesses[16].

[15] Final Report, Volume 6, p.29.
[16] 99 percent of the enterprises in the building and construction industry employ less than 20 employees. Businesses with less than five employees represent 94 percent of enterprises and employ over two thirds of the employees in the industry. (Final Report, Volume 3, p.59)

In its submissions to the Royal Commission, Ai Group argued for increased client activism in order to achieve higher standards of OHS in the building and construction industry. This proposal was adopted by Commissioner Cole who recommended that there be increased activism by the Commonwealth, as a client of the industry and as an agent to drive OHS improvement. However, Ai Group is concerned that the manner in which the Commissioner's recommendations have been translated into the *Building and Construction Industry Improvement Bill* may exacerbate the confusion and complexity described above. One area of concern relates to the provisions of the Bill which pertain to the proposed *"Building Code".*

The Bill gives the Minister for Employment and Workplace Relations the power to issue a *"Building Code".* All incorporated building contractors would be required to comply with the Code. Other building industry participants would need to comply with the Code if the work is to be carried out in a Territory or Commonwealth place[17].

There are virtually no constraints placed upon the Minister, under the terms of the Bill, with regard to the content of the Code. The Bill allows the Minister (or his delegate) to draft, issue, then require building contractors to comply with an, as yet, unknown *Building Code.* In contrast, standards established by States and Territories have been approved by the relevant State or Territory Parliament (Acts), or have been reviewed by the Parliament as subordinate legislation (Regulations) or have evidentiary status under the enabling legislation (Codes of Practice).

The *Building Code* would regulate significant sections of the construction industry, using an instrument that would not be subjected to Parliamentary or judicial scrutiny. The fact that the OHS requirements of the Code would be shielded from Parliamentary scrutiny

[17] Section 52(i) of the Constitution empowers the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to the seat of Government of the Commonwealth and all place acquired by the Commonwealth for public purposes.

contrasts with the provisions of the Bill which deal with the proposed accreditation scheme. Such provisions utilise a regulatory power (refer to s.50).

There are no protections within the Bill to ensure that the content of the *Building Code* remains appropriate over time. For example, different Governments or Ministers could have very different views about what provisions should be incorporated within the Code.

The incorporation of health and safety requirements within the *Building Code* (s.26(2)) and the application of the *Building Code* to all incorporated building contractors, has the potential to establish competing occupational health and safety standards and, accordingly, to compromise the OHS of employees because of confusion regarding which of the competing obligations need to be complied with by employers.

The Bill creates the office of the Federal Safety Commissioner and sets out the functions of the Commissioner. Such functions include, amongst others:

- The promotion of OHS in the building and construction industry;
- Monitoring and promoting compliance with the *Building Code*, insofar as the Code deals with OHS; and
- Managing an OHS accreditation scheme.

In lieu of the roles prescribed for the Federal Safety Commissioner in the Bill, Ai Group proposes the following roles:

- A role in promoting OHS in the building and construction industry; and
- A role in managing the proposed OHS accreditation scheme.

It is not appropriate that the Federal Safety Commissioner have a role in monitoring and promoting "compliance"[18] with the *Building Code,* nor is it appropriate that the *Building Code* contain detailed provisions relating to OHS. At the present time, OHS is almost entirely regulated through State and Territory laws. Comprehensive monitoring and compliance mechanisms are already in place under such legislation.

The office of the Federal Safety Commissioner should be subject to an appropriate governance regime which should include:

- An Advisory Board, which includes representatives of key construction industry representative bodies such as Ai Group and the Australian Constructors' Association (NB. The Australian Taxation Office (ATO) and the Australian Competition and Consumer Commission (ACCC) have established advisory bodies containing industry and other representatives); and
- The prudential oversight of an Ombudsman.

[18] "Compliance" suggests a system to prosecute or in other ways take punitive action against those who fail to comply.

The Federal Safety Commissioner's function of *"promoting occupational health and safety"* (s.32(a)) should include the establishment of well-resourced educative and advisory services.

With regard to the proposed federal OHS accreditation scheme, various State and Territory Governments already have OHS qualification schemes in place and most significant employers in the building and construction industry are accredited under such schemes. It is important that the Commonwealth, States and Territories work together to ensure that a high level of uniformity and consistency occurs in the development and implementation of OHS qualification schemes, and that unnecessary duplication does not occur. The Australian Procurement and Construction Council (APCC) would be an appropriate organisation to consult in the development of a federal accreditation scheme as the APCC represents each of the State and Territory departments which are already operating OHS accreditation schemes. Significant industry associations should also be involved in the development of the accreditation scheme.

Contractors and subcontractors would have a significant incentive to achieve a superior OHS performance record if clients (including the Commonwealth) rated OHS performance highly when selecting their service providers. It is important that OHS performance become a transparent element of the Commonwealth tendering process.

Currently, in the building and construction industry, OHS is often misused by unions as an industrial weapon against employers. It is essential that this highly inappropriate and damaging tactic be addressed. Bogus safety disputes cost the industry dearly and are constantly cited as one of the most significant industrial relations problems in the industry. The misuse of OHS by unions as an industrial weapon fosters an attitude of cynicism amongst employers towards safety concerns raised by union officials and delegates. This, in turn, negatively impacts upon OHS in the industry.

As stated by Commissioner Cole in his Final report:

> *"It was put to me, and I agree, that 'mutual trust and cooperation is compromised by a perception by the employer that union officials sometimes have a vested interest in finding safety breaches. This practice is potentially harmful to employees as it merely serves to devalue OH and S'. Safety is simply too important a matter to be degraded by this process. Time and time again I received compelling evidence of alleged safety issues being raised in circumstances where there was no genuine safety issue to be resolved or where the alleged safety issue was able to be resolved by the entering into of an EBA, the payment of increased rates or site allowances or membership of a union".*[19]

The Bill implements the essential reform of outlawing the misuse of OHS, but the rights of employees to refuse to perform duties which are genuinely unsafe are protected.

[19] Final Report, Volume 6, p.107

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
An office of the Federal Safety Commissioner will be established. [s.31]	**Supported**	A Federal Safety Commissioner, with appropriate functions, would be beneficial to assist building industry participants to achieve higher standards of OHS.
The functions of the Federal Safety Commissioner will include, amongst others: • The promotion of OHS in the building and construction industry; • Monitoring and promoting compliance with the *Building Code*, insofar as the Code deals with OHS; and • Managing an OHS accreditation scheme. [s.32].	**Supported with modifications**	It is essential that any reforms implemented to improve occupational health and safety in the construction industry do not simply result in the imposition of another layer of regulation which would lead to further confusion about which federal and state laws, regulations, codes and standards apply. Rather than contributing to better OHS performance, the creation of further complexity and confusion could compromise the safety of employees because employers would be unlikely to understand what is required of them.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Adding complexity to the OHS system would be particularly unfair on small businesses which do not employ specialist OHS staff. A large percentage of employees in the building and construction industry are employed by small businesses[20]. One area of concern relates to the provisions of the Bill which pertain to the proposed *"Building Code".* The Bill gives the Minister for Employment and Workplace Relations the power to issue a *"Building Code".* All incorporated building contractors would be required to comply with the Code. Other building industry participants would need to comply with the Code if the work is to be carried out in a Territory or Commonwealth place[21].

[20] 99 percent of the enterprises in the building and construction industry employ less than 20 employees. Businesses with less than five employees represent 94 percent of enterprises and employ over two thirds of the employees in the industry. (Final Report, Volume 3, p.59)
[21] See Note 17 above

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		There are virtually no constraints placed upon the Minister, under the terms of the Bill, with regard to the content of the Code. The Bill allows the Minister (or his delegate) to draft, issue, then require building contractors to comply with an, as yet, unknown *Building Code.* In contrast, standards established by States and Territories have been approved by the relevant State or Territory Parliament (Acts), or have been reviewed by the Parliament as subordinate legislation (Regulations) or have evidentiary status under the enabling legislation (Codes of Practice). The *Building Code* would regulate significant sections of the construction industry, using an instrument that would not be subjected to Parliamentary or judicial scrutiny.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		The fact that the OHS requirements of the Code would be shielded from Parliamentary scrutiny contrasts with the provisions of the Bill which deal with the proposed accreditation scheme. Such provisions utilise a regulatory power (refer to s.50). There are no protections within the Bill to ensure that the content of the *Building Code* remains appropriate over time. For example, different Governments or Ministers could have very different views about what provisions should be incorporated within the Code. The incorporation of OHS requirements within the *Building Code* (s.26(2)) and the application of the *Building Code* to all incorporated building contractors, has the potential to establish competing occupational health and safety standards and, accordingly, to compromise the OHS of employees because of confusion regarding which of the competing obligations need to be complied with by employers.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		In lieu of the roles prescribed for the Federal Safety Commissioner in the Bill, Ai Group proposes the following roles: • A role in promoting OHS in the building and construction industry; and • A role in managing the proposed OHS accreditation scheme. It is not appropriate that the Federal Safety Commissioner have a role in monitoring and promoting "compliance" with the *Building Code,* nor is it appropriate that the *Building Code* contain detailed provisions relating to OHS. At the present time, OHS is almost entirely regulated through State and Territory laws. Comprehensive monitoring and compliance mechanisms are already in place under such legislation.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		The office of the Federal Safety Commissioner should be subject to an appropriate governance regime which should include: • An Advisory Board, which includes representatives of key construction industry representative bodies such as Ai Group and the Australian Constructors' Association (NB. The Australian Taxation Office (ATO) and the Australian Competition and Consumer Commission (ACCC) have established advisory bodies containing industry and other representatives); and • The prudential oversight of an Ombudsman. The Federal Safety Commissioner's function of *"promoting occupational health and safety"* (s.32(a)) should include the establishment of well-resourced educative and advisory services.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The office of the Federal Safety Commissioner will be subject to various reporting and administrative arrangements. [ss.33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45].	**Supported**	Ai Group supports these provisions.
"Building OHS action" is defined, in general, as: • "a failure by an employee to attend for building work; or • a failure or refusal to perform any building work at all by an employee who attends for building work; where • the failure or refusal is based on a reasonable concern by the employee about an imminent risk to his/her health or safety arising from conditions at the workplace". [s.46].	**Supported**	The definition of *"building OHS action"* is consistent with the exclusion for genuine safety-related stoppages set out in the definition of "industrial action" in s.4 of the *Workplace Relations Act*.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
It is unlawful for an employer to pay an employee for any period of *"building OHS action"* which occurs **prior** to the relevant OHS authority being notified unless the employee has followed the relevant dispute resolution procedure. [s.47(2)]. It is unlawful for an employer to pay an employee for any period of *"building OHS action"* in circumstances where the action occurs **after** the relevant OHS authority has been notified unless: • a prohibition notice has been issued under the relevant OHS law and the employee has complied with the relevant disputes procedure before the prohibition notice was issued; or • the action ceased before the relevant authority began its inspection and the employee has complied with the relevant disputes procedure at all times. [s.47(5)]	**Supported**	Currently, in the building and construction industry, OHS is often misused by unions as an industrial weapon against employers. It is essential that this highly inappropriate and damaging tactic be addressed. Bogus safety disputes cost the industry dearly and are constantly cited as one of the most significant industrial relations problems in the industry. The misuse of OHS by unions as an industrial weapon fosters an attitude of cynicism amongst employers towards safety concerns raised by union officials and delegates. This, in turn, negatively impacts upon OHS in the industry. The provisions of the Bill are fair and reasonable. The misuse of OHS is outlawed but the rights of employees to refuse to perform duties which are genuinely unsafe are protected.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
It is unlawful for an employee to accept payment for any period of *"building OHS action"* in the above circumstances. [s.47(4) &(6)]. The maximum penalty for the above offences is $110,000 for a body corporate and $22,000 for an individual. [s.47(3), (4), (6) & (7) and s.222]. If: • an employee engages, or threatens to engage, in *"building OHS action";* or • an employer makes a payment to an employee in respect of a period during which the employee engaged in *"building OHS action";* then the employer must notify the ABC Commissioner in writing within 72 hours. (Maximum penalty $11,000 for a body corporate and $2,200 for an individual). [ss.48, 49 & 222].		Importantly, the Bill does not require payment for all periods of *"building OHS action",* even if employees have followed the relevant disputes procedure. Rather, the Bill prevents payment in certain circumstances. The issue of whether an employee is entitled to payment on a particular occasion will depend upon the circumstances and the provisions of the relevant award. Contrary to union arguments, the restrictions imposed on the right of entry of union officials under Chapter 9 of the Bill will not adversely affect safety, but rather will enhance it (given the attitude of cynicism described above). Employees, union delegates and union officials have the right to immediately notify the relevant OHS authority if they have concerns about safety.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
An accreditation scheme may be established by regulation for persons who wish to contract with the Commonwealth or its authorities. The Federal Safety Commissioner will be the accrediting authority. The Commonwealth and its authorities will not be permitted to enter into a building contract with a person or persons that are not accredited at the time the contract is entered into, except for contracts prescribed in the regulations. [s.50].	**Supported**	With regard to the proposed federal OHS accreditation scheme, various State and Territory Governments already have OHS qualification schemes in place and most significant employers in the building and construction industry are accredited under such schemes. It is important that the Commonwealth, States and Territories work together to ensure that a high level of uniformity and consistency applies in the development and implementation of OHS qualification schemes, and that unnecessary duplication does not occur. The proposed federal OHS accreditation scheme should be developed in consultation with industry. It is important that OHS performance become a transparent element of the Commonwealth tendering process.

4.5 Chapter 5 – Awards, Certified Agreements and Other Provisions About Employment Conditions

4.5.1 Part 1 – Awards

The Bill proposes that the number of allowable matters in *"building awards"* be reduced.

The term *"building award"* is defined in s.4 of the Bill as *"an award that applies to building work (whether or not it also applies to other work)".* As set out in section 4.1 of this submission, the definition of *"building work"* is very broad and would encompass large segments of the manufacturing industry and other industries. In addition to construction industry awards, various awards in the manufacturing and other sectors, such as the *Metal, Engineering and Associated Industries Award 1998,* would clearly be encompassed within the definition of a *"building award".*

Given the risks set out in section 4.1 of this submission, it is important that the Bill define the building and construction industry in clear terms and that such definition be consistent with the common understanding of where the boundaries of the construction industry lie. Consistent with this approach, only genuine construction industry awards should fall within the definition of a *"building award".* Awards such as the following should be included:

- The *National Building and Construction Industry Award 2000*;
- The *National Metal and Engineering On-site Construction Industry Award 2000*;
- The *AWU Construction and Maintenance Award 2000*; and

- The major federal plumbing industry awards (eg. The *Plumbing Industry (New South Wales Award) 1999*).

The *Metal, Engineering and Associated Industries Award 1998* and other major manufacturing industry awards should not be included within the definition.

Ai Group supports the continuing evolution away from a "one-size-fits all" approach to the regulation of wages and conditions in the construction industry (and other industries) and an increased focus on the setting of wages and conditions at the enterprise level. That said, in Ai Group's experience, the provisions of enterprise agreements are a much greater barrier to the implementation of flexible work practices in the construction industry than the provisions of awards.

Ai Group's position on the specific proposals in the Bill are set out in the table below. Whilst we do not oppose many of the proposed changes to the "allowable matters" and the resultant further simplification of the content of construction industry awards, we note that most of the Bill's proposals in this area were not recommended by the Royal Commission.

Ai Group strongly opposes the provision in the Bill which would specifically give the AIRC the power to set a maximum number of overtime hours. A Full Bench of the AIRC recently rejected the concept of imposing a cap on hours in the *Reasonable Hours Test Case*. The clause which arose from such test case appropriately deals with the issue of employees being directed to work excessive hours.

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Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The "allowable matters" under s.89A of the *Workplace Relations Act* will be amended for *"building awards",* via the *Building and Construction Industry Improvement Bill*, as set out in the sections below.		
Skill-based career paths will be removed as an allowable matter for *"building awards".* [s.51(2)(a)].	**Not supported**	While Ai Group is far from satisfied with aspects of the skill-based classification structures in construction awards, we do not agree that this matter would be more appropriately dealt with at the enterprise level. Skill-based classifications in awards, when appropriately structured, are able to assist in elevating skill levels and addressing skill shortages in an industry through linkages with national competencies and industry training packages.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
"Building awards" will no longer be able to prescribe the times within which ordinary hours of work can be performed. [s.51(2)(b) and (4)(d)].	**Supported**	Ai Group does not object to the award restrictions which limit ordinary work to certain times of the day or week being removed from construction industry awards. Such restrictions, in effect, require employers to pay overtime rates when they require work to be performed outside of the times set out in awards. However, it is appropriate that the AIRC retain the power to prescribe penalties / loadings for ordinary time worked on nights, weekends and public holidays, together with the right to prescribe overtime penalties for time worked in excess of ordinary hours. As Ai Group interprets s.51(2)(b) and (4)(d), such AIRC powers would not be disturbed.
Relatively minor modifications will be made to the allowable matters dealing with bonuses, leave and outworkers, for *"building awards".* [s.51(2)(d), (f), (g), (s) and (t)].	**Supported**	Ai Group does not object to these relatively minor modifications.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The public holiday provisions of *"building awards"* will be limited to provisions dealing with: • Public holidays which are declared by States or Territories; and • Payments for time worked on a public holiday. [s.51(2)(i)].	**Supported with modifications**	The Bill appears to prevent the following common provisions remaining in *"building awards":* • Provisions which allow other days to be substituted for prescribed days by agreement between an employer and its employees; • Provisions which allow other days to be substituted for prescribed days on Christmas Day, Boxing Day, New Year's Day and Australia Day; • The ability for awards to provide for an 11th public holiday in NSW. In many industries this day is commonly taken on the Tuesday immediately following Easter. The day is not a declared public holiday but is equivalent to Melbourne Cup Day in Victoria and Show Day in Brisbane. Unnecessary disputation and inequity would most likely occur if the above provisions were removed from awards.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
"Building awards" will only be able to prescribe *"monetary allowances"*, not allowances in general. [s.51(2)(j)].	**Not supported**	Many awards give employers the option of either providing certain benefits (eg. Tools) or paying an allowance in lieu of the provision of such benefits. Employers would lose significant flexibility if *"building awards"* were varied to require that monetary allowances be paid in all circumstances.
"Building awards" will be able to prescribe a maximum number of hours per week that an employee can be required to work overtime. [s.51(2)(k)].	**Not supported**	Ai Group strongly opposes this provision. A Full Bench of the AIRC recently rejected the concept of imposing a cap on hours in the *Reasonable Hours Test Cas*e. The clause which arose from such test case appropriately deals with the issue of employees being directed to work excessive hours.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
"Building awards" will no longer be able to deal with notice of termination of employment. [s.89A(n) of the *Workplace Relations Act*].	**Not supported**	The rationale for removing notice of termination as an allowable matter in *"building awards",* appears to be that this issue is dealt with in s.170CM of the *Workplace Relations Act* and, therefore, that it is unnecessary for the issue to be dealt with in awards. Unlike the award test case clause, s.170CM of the Act does not require an employee to give his or her employer notice upon resignation. Therefore, to remove notice of termination as an allowable matter would significantly disadvantage employers.
In *"building awards",* the allowable matter of *"redundancy pay"* will be replaced with the allowable matter of *"payments in relation to a termination that is: (i) on the initiative of the employer; and (ii) on the grounds of operational requirements".* [s.51(2)(n)].	**Supported**	Ai Group does not object to this change, although it would appear to have little practical consequence.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
"*Jury service"* will be removed as an allowable matter for *"building awards".* [s.89A(2)(q)].	**Not supported**	Award clauses dealing with jury service impose obligations on both employers and employees. The removal of jury service as an allowable matter would remove various employee obligations to their employer. State laws generally require employers to pay employees for jury service.
Various specific matters will be deemed to be "not allowable" for *"building awards",* including: (a) Transfers between locations; (b) Training and education (except in relation to leave and allowances for trainees and apprentices); (c) Recording of the hours employees work, or the times of their arrival and departure from work; (d) The times of day when work counts as ordinary time or overtime, or when rostered days off (RDOs) may be taken;	**Not supported without modifications**	The items in paragraphs (h), (i) and (j), with minor modification, are existing provisions of the *Workplace Relations Act.* Ai Group is particularly concerned about the removal of the following items as allowable matters".

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
(e) Payments of accident make-up pay by employers; (f) Rights of an organisation to participate in, or represent, the employer or employee in the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice; (g) Transfers from one type of employment to another type of employment (h) The number or proportion of employees that an employer may employ in a particular type of employment or in a particular classification; (i) Prohibitions (directly or indirectly) on an employer employing employees in a particular type of employment or in a particular classification; (j) The maximum or minimum number of hours of work for regular part-time employees. [s.51(2)]		**(e) Accident make-up pay** Accident make-up pay is a settled provision in many awards and has been for many years. Ai Group is concerned that if it is removed from *"building awards"*, unnecessary disputation will occur and this issue will become the subject of widespread enterprise bargaining claims which could result in costs to employers which are greater than those currently being incurred via awards. **(f) Transfers from one type of employment to another type of employment** Many awards give employers significant rights to transfer employees from day work to shift work and vice versa. Such rights are important for efficiency purposes and should not be removed from awards.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The power of the AIRC to specify a particular superannuation fund or scheme in an award will be removed. [s.51(5)].	**Not supported**	Most awards refer to industry superannuation funds which are typically jointly overseen by unions and employer associations for no monetary benefit to such organisations. The performance of industry superannuation funds compares very favourably with other superannuation schemes and the administration costs are typically far lower than other schemes. The AIRC's power to insert references to industry superannuation funds in awards should not be removed.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The power of the AIRC to insert provisions in an award which are *"incidental"* to an allowable matter and *"necessary for the effective operation of the award"* will be modified. In respect of *"building awards",* the AIRC will only have the power to insert: • Provisions which are *"incidental"* to an allowable matter and *"essential for the purpose of making a provision operate in a practical way";* • *"Machinery provisions"* such as definitions, titles, etc. [s.51(7) and (8)].	**Supported**	Ai Group has no objection to this change.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The AIRC is to have the power to include a statutory freedom of association statement in documentation which is filed with an award. [s.51(14)].	**Supported with modifications**	With regard to the proposed Freedom of Association Statement in Schedule 2 of the Act, the "Note" under paragraph (3) should be omitted. It is appropriate that the Statement not be an legally enforceable provision of an award or certified agreement, as proposed in the Bill. However, the wording of the "Note" under paragraph (3) may lead to an employer or employee believing that the freedom of association provisions of the Bill are not legally enforceable. It is particularly important to avoid any uncertainty in this area because the maximum penalty for non-compliance with the freedom of association provisions of the Bill is $110,000 for a body corporate and $22,000 for an individual.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
The AIRC will be required to have regard to the desirability of minimising the number and complexity of allowances. [s.52].	**Supported**	The Royal Commission held that the allowance provisions of most construction awards are far too complicated[22]. The Bill deals with this problem in an appropriate way. The Bill gives direction to the AIRC but continues to give the AIRC the flexibility which it needs to determine what allowances are appropriate.

[22] Final Report, Volume 1, p.102.

4.5.2 Parts 2 and 3 – Certified Agreements and Other Provisions about Employment Conditions

In Volume 5 of Commissioner Cole's Final Report, the approaches to bargaining that are common in the building and construction industry are analysed.

The Royal Commission found that *"pattern bargaining and, to a lesser extent, project agreements have displaced or nullified the scope for genuine enterprise level bargaining about wages and conditions"*[23].

Commissioner Cole identified the following reasons for his rejection of the contentions of those who argue that pattern bargaining is justified in the building and construction industry:

- Pattern bargaining is, by its nature, imposed in a compulsory manner without the involvement of the employer or employees in the employment relationship;
- It denies employers the capacity for flexibility, innovation and competitiveness in respect of a major aspect of project cost;
- It denies employees the capacity to reach agreement with their employer regarding their own employment conditions – including leave arrangements, participation in bonus schemes, flexible working hours and other mutually acceptable arrangements;
- It assumes that all businesses and their employees operate in the same fashion, have the same objectives, adopt common approaches to working arrangements and are content with uniformity;

[23] Volume 5, p.15.

- It assumes that third parties such as unions, head contractors or employer associations understand better than either the employer or the employees what the business model of the enterprise is and what the wishes and desires of the employees are;
- It assumes that employees are not capable of negotiating satisfactorily on their own behalf; and
- In areas other than major centres, where pattern bargaining does not occur, there is nothing to suggest that the industry operates inefficiently or that the working conditions are not satisfactory for the employer or the employees.[24]

Ai Group strongly supports the Royal Commission's view that pattern bargaining in the construction industry is highly damaging and must be addressed. However, whilst supporting the thrust behind the proposed reforms set out in the Bill, Ai Group cannot support the provisions as they are currently drafted. The definition of *"pattern bargaining"* in the Bill fails to deal with several of the most damaging aspects of union behaviour which constitute pattern bargaining, whilst outlawing many legitimate forms of bargaining and other conduct. Indeed, the important decision of Justice Munro of the AIRC concerning pattern bargaining[25], which is referred to in a Note in s.170MW(2) of the *Workplace Relations Act*, would appear to be adversely disturbed by the provisions of the Bill.

Ai Group's views on the Bill's approach to addressing pattern bargaining and various other matters, are set out in the following table.

[24] Volume 5, p.53

[25] *Australian Industry Group v AFMEPKIU*, Print T1982. A Note was inserted into s.170MW(2) of the *Workplace Relations Act* in February 2003 via the *Workplace Relations Amendment (Genuine Bargaining) Act 2002,* referring to the relevance of the decision in considering whether or not a negotiating party is genuinely trying to reach agreement with another negotiating party.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The Bill contains various provisions, which are set out in other parts of this table, which will have the effect of totally outlawing *"pattern bargaining"* in the building and construction industry.	**The total outlawing of pattern bargaining *(as opposed to simply outlawing industrial action in pursuit of pattern bargaining)* is conditionally supported.**	Ai Group strongly supports a prohibition on industrial action being taken in pursuit of pattern bargaining. In its submissions to the Royal Commission, Ai Group argued that the *Workplace Relations Act* should be amended to "make it abundantly clear that protected action is not available in support of any form of multiple employer or pattern bargaining"[26]. Such an amendment would minimise coercion of employers by unions to sign pattern agreements against their will. In response to Ai Group's proposal, Commissioner Cole said: *"I agree that these reforms would be necessary if pattern bargaining is to continue. However, if my recommendation that engaging in pattern bargaining be prohibited in the building and construction industry is adopted, there will be no requirement for reforms as suggested above"*[27].

[26] Volume 5, p.30
[27] Volume 5, p.73

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Prohibiting pattern bargaining which is freely entered into by parties would be a very significant step because the vast majority of current enterprise agreements in the industry are pattern agreements. Having carefully considered the implications of pattern bargaining being outlawed completely, Ai Group believes that such a legislative change would be feasible and worthwhile so long as the legislative provisions which outlaw pattern bargaining (eg. the definitions used) are appropriately drafted. The provisions of the Bill, as currently drafted, are not appropriate. In addition, it is important that the legislation contain a mechanism to enable the certification of genuine project agreements for major projects.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		If such a mechanism was established there would no longer be a need for the use of common enterprise agreements (which could be regarded as pattern agreements) to manage the significant risks associated with the construction of major projects. The use of project agreements on major projects is a legitimate risk-management practice adopted by stakeholders in the building and construction industry and such practice can be clearly differentiated from damaging industry-wide pattern bargaining approaches and damaging industry agreements such as the *Victorian Building Industry Agreement*. Major projects can be viewed as enterprises that bring together parties with the relevant skills and expertise in pursuit of a common goal.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Commissioner Cole did not recommend that project agreements be outlawed completely but expressed support for some forms of project agreement. This can be contrasted with his views on industry-wide pattern bargaining which he regarded as highly inappropriate and damaging. The *National Code of Practice for the Construction Industry* recognises that project agreements are often appropriate for major projects (see page 8 of the Code). The potential for project agreements to improve time and/or cost performance is recognized in the *Implementation Guidelines* (see page 11 of the Guidelines). The ability to implement effective risk management strategies is a vital factor that underpins decisions by investors to fund major projects.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
"Pattern bargaining" means a course of conduct or bargaining, or the making of common claims, by a person that: • Involves seeking common wages or other conditions of employment (other than in an award or State award); and • Extends beyond a single business. [s.8(1)].	**Supported, with modifications**	The Bill's definition as currently drafted, is inappropriate because it could restrain registered organisations such as Ai Group (together with a wide range of other parties) from carrying out many of their central functions. An important function of virtually all registered organisations (together with many law firms, consultants and a wide range of other parties) is to give advice to employers and/or employees regarding the content of enterprise agreements. For example, following the Court's *Emwest*[28] decision, Ai Group procured legal advice regarding the appropriate form of wording for No Extra Claims Clauses in certified agreements that would overcome the adverse effects of the decision, and circulated this advice to its member companies.

[28] *Emwest , Ai Group v AFMEPKIU* [2003] FCAFC 183

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		In addition, following the Federal Court's *Amcor* decision, Ai Group sought legal advice regarding what form of wording would be appropriate for transmission of business clauses in certified agreements, and circulated this advice to members. Ai Group regularly gives advice to its member companies about union claims. For example, during the manufacturing unions *Campaign 2003*, Ai Group urged its members to reject union claims for a 36 hour week and the payment of monies into the unions' National Entitlement Security Trust (NEST). S.8(1) of the Bill could be interpreted as outlawing the giving of advice to more than one company in similar terms, if such advice was seen as *"a course of conduct"* that involves *"seeking common wages or other common conditions of employment".* Such a result would be inappropriate, unfair and unworkable.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		In addition, s.8(a) of the Bill could be interpreted as outlawing numerous publications dealing with enterprise bargaining, including various publications of the Office of the Employment Advocate which give advice regarding the content of clauses in Australian Workplace Agreements. The prohibition on *"pattern bargaining"* under the Bill should be directed at conduct which occurs during the negotiation of certified agreements under the *Workplace Relations Act*. The prohibition should not extend to the extremely broad concepts captured by the provisions as currently drafted. In addition, it is essential that the acts of giving advice about enterprise agreement provisions, and accepting such advice, not fall within the definition of *"pattern bargaining".*

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Ai Group proposes that s.8(a) of the Bill be reworded as follows: *"Pattern bargaining" means a course of conduct by a negotiating party during the negotiation of agreements under Part VIB of the Workplace Relations Act, that:* • *Involves seeking common wages or other conditions of employment; and* • *Extends beyond a single business.* In addition to the above amendment, s.8 needs to be amended to exempt the acts of giving and accepting advice about enterprise agreement provisions, as set out above.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Conduct by a person is not *"pattern bargaining"* to the extent to which the person *is "genuinely trying to reach agreement"* on the matters that are the subject of the conduct. [s.8(2)]. *"Genuinely trying to reach agreement"* has the same meaning as in s.170MW of the *Workplace Relations Act*, as affected by s.62 of the Bill. [s.8(5)]. *"Single business"* has the same meaning as in Part VIB of the *Workplace Relations Act*. [s.8(5) of the Bill and s.170LB of the *Workplace Relations Act*].	**Supported, subject to s.62 of the Bill being substantially modified.**	Ai Group supports the approach of defining *"pattern bargaining"* with reference to whether or not a party is *"genuinely trying to reach agreement".* However, as set out later in this table, the provisions of s.62 are highly inadequate as indicators of whether or not a union party is *"pattern bargaining".* In addition, the relationship between s.62 of the Bill; and s.170MW(2) of the *Workplace Relations Act* needs to be clearer.
A party to a proposed agreement in relation to a single business, or part, does not engage in *"pattern bargaining"* merely because the party is seeking the inclusion in the proposed agreement of terms and conditions which give effect to a Full Bench decision establishing national standards. [s.8(3)].	**Supported**	This is an appropriate exclusion from the definition of pattern bargaining.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Conduct by a person (the first person) is not *"pattern bargaining"* if: • The conduct occurs in relation to a proposed agreement between the first person and a second person under which the second person would carry out building work or arrange for building work to be carried out; and • The conduct is engaged in solely for the purpose of encouraging the second person to have particular *"eligible conditions"* in an agreement that covers employees of the second person. [s.8(4)]. *"Eligible condition"* means a condition relating to: • The times of day when work is to be performed; • Inclement weather procedures; or • Any other matter prescribed by the regulations for the purposes of this definition. [s.4]	**Not supported in its present form**	This provision is unduly restrictive. For example, it would appear to severely restrict the content of project agreements which are certified under s.170LC of the *Workplace Relations Act* or are registered under State legislation. The provision would also severely restrict the ability of head contractors to manage projects efficiently. Whilst Ai Group accepts that it is inappropriate (and unlawful under s.170NC of the *Workplace Relations Act)* for clients and head contractors to coerce subcontractors to have a particular form of agreement, it is inappropriate and unworkable to prevent clients and head contractors giving advice to subcontractors on the content of their agreements, other than advice about the inclusion of *"eligible conditions"* as defined. The Bill, as drafted, appears to impose such restrictions.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		In addition, in his Final Report, Commissioner Cole endorsed the practice of head contractors discriminating against sub-contractors at the point of awarding contracts, if a sub-contractor does not have a workplace agreement with sufficiently flexible terms to enable the head contractor to efficiently manage the site. One example given by Commission Cole of where discrimination would be desirable was where a sub-contractor's agreement did not allow work to be carried out on particular days upon which the head contractor required work to be performed.[29] Discriminating in such circumstances would appear to be inconsistent with the Bill. Section 8 of the Bill only allows a head contractor to encourage sub-contractors to have provisions in agreements relating to the *"times of day"* when work is able to be performed - not the *"days of the week*".

[29] Volume 5, p.123

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Of course, hours of work are only one of a large number of issues which impact upon a head contractor's ability to effectively manage a site. A head contractor may wish to give preference when awarding a contract (all others aspects being equal) to a sub-contractor whose enterprise agreement enables casuals to be employed to cope with work fluctuations, or permits staff to carry out a wide range of different tasks, etc. It is appropriate that head contractors retain their right to select sub-contractors with agreements that contain provisions which are suited to the needs of the project.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
In the application of s.170MW of the *Workplace Relations Act* in relation to a proposed building agreement, the following conduct of a negotiating party is to be regarded as indicating that the party is *"genuinely trying to reach an agreement":* (a) Agreeing to meet face to face at reasonable times proposed by another negotiating party; (b) Attending meetings that the first party has agreed to attend; (c) Complying with negotiating procedures agreed to by the first party; (d) Disclosing relevant information, as appropriate, taking into account the employer's need to protect the employer's commercial interests; (e) Disclosing in writing any direct or indirect financial benefit that has been, or is to be, provided, in relation to the proposed agreement, to the first party by a third party, for example any commission or other income that may be derived by the first party arising from a term proposed for the agreement;	**Supported, but only with substantial modifications**	As a set of indicators of whether an individual negotiating party is *"genuinely trying to reach agreement"* with another individual negotiating party, the provisions of s.62 are uncontroversial and consistent with various decisions of the AIRC and Federal Court. However, as a set of indicators of whether or not a party is *"genuinely trying to reach agreement"* **in a pattern bargaining context**, the indicators are highly inappropriate and miss the point. As set out in a legal opinion obtained from Cutler Hughes and Harris Lawyers regarding the interrelationship between the definition of *"pattern bargaining"* in s.8 of the Bill and the indicators of *"genuinely trying to reach agreement"* in s.62 of the Bill:

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
(f) Stating a position on matters at issue, and explaining that position; (g) Considering and responding to proposals made by another negotiating party; (h) Adhering to commitments given to another negotiating party or parties in respect of: (i) Meetings; and (ii) Responses to matters raised during bargaining; (i) Dedicating sufficient resources and personnel to the bargaining process; (j) Not capriciously adding or withdrawing items for bargaining; (k) Not refusing or failing to meet with one or more of the other negotiating parties; (l) In or in connection with the bargaining process, not refusing or failing to meet with a person who is entitled to represent an employee or with a person who is a representative chosen by a negotiating party to represent it in the bargaining process. [s.62].		*"The Bill appears to treat the advocating of particular common standards, coupled with the refusal to engage in technical acts of bargaining at the workplace level, as being the evil of pattern bargaining. This is not a correct assumption".* Consider the very realistic example of the CFMEU endeavouring to impose its building industry pattern agreement on an employer. The union could readily comply with all of the elements in s.62 without demonstrating any preparedness to negotiate any change in any term of the pattern agreement. Given that the union was complying with s.62, it could argue that it is not *"pattern bargaining",* as defined in s.8(a) of the Bill. It could also be argued that s.170MW(2) of the *Workplace Relations Act*, is largely overridden by s.62 of the Bill.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		The concept of *"genuinely trying to reach agreement"* in a pattern bargaining context was dealt with by Justice Munro in *Australian Industry Group v AFMEPKIU*[30]*.* This decision is referred to in a Note which was inserted into s.170MW(2) of the Act in February 2003 via the *Workplace Relations Amendment (Genuine Bargaining) Bill 2002.* The case involved an attempt by various manufacturing unions to impose a pattern agreement on employers throughout the manufacturing industry during a campaign that the unions called *"Campaign 2000".*

[30] Print T1982

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Identical bargaining notices were served on approximately 1500 employers. All of these employers received identical notices of a state-wide stoppage (which supposedly related to the negotiation of their enterprise agreements). In response, Ai Group made application to the Commission to suspend or terminate bargaining periods on behalf of a large number of employers, on the basis that the unions were not *"genuinely trying to reach agreement"* **at the enterprise level.** In deciding to terminate the bargaining periods relating to the applicant companies, Justice Munro held that: • A negotiating party's conduct must evidence *"a genuine try to reach an agreement with the opposing negotiating party to whom the industrial action or bargaining period is specific";*

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		• If a negotiating party is *"trying to reach agreement with all, or an entire class of negotiating parties in an industry - all or none"* then the negotiating party is *"not genuinely trying to reach agreement with <u>any</u> negotiating party in the industry or class".* However, in a particular case the issue is dependent upon matters of fact and degree; • *"The more the negotiation conduct can be characterised as evidencing a refusal to allow agreement other than on an all or nothing basis, the greater the likelihood that it should be found to fail the genuinely fail to reach agreement with the other negotiator test".* The tests in Justice Munro's decision were endorsed by a Full Bench of the AIRC in March 2003 in *MEAA v APN (PR928033).*

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		It is essential that the indicators of *"genuinely trying to reach agreement"* in s.62 be modified to deal with pattern bargaining conduct. Accordingly, Ai Group proposes that the following items be added to s.62: *(m) Negotiating in a manner consistent with wages and conditions of employment being determined as far as possible by agreement between the employer and its employees at the workplace or enterprise level;* *(n) Not engaging in industrial action which is part of a campaign of industrial action extending beyond a single business; and* *(o) Demonstrating a preparedness to negotiate an agreement which takes into account the individual circumstances of the other party or parties involved in the negotiations.*

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		In addition, amendments need to be made to better clarify the relationship between s.170MW of the *Workplace Relations Act* and s.62 of the Bill. Ai Group proposes that the existing provisions of s.62 (with the additions as set out above) become s.62(2) and that a new paragraph (1) be inserted as follows: *"62(1) Nothing in this section is to be deemed to limit the operation of section 170MW of the Workplace Relations Act in relation to a proposed building agreement."* Further, it is important to ensure that s.62 is not able to be interpreted as requiring a party to bargain for an enterprise agreement, regardless of whether or not such party wishes to. Many employers and their employees are content to comply with relevant awards and to implement informal over-award arrangements, rather than entering into a formal enterprise agreement.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		The *Workplace Relations Act* recognises the validity of this informal bargaining approach in s.3(c). Forcing parties to bargain against their will would disturb the AIRC's longstanding *Asahi* principle (established by a five member Full Bench in the 1995 *Asahi* case, *Print L9800*). The Asahi principle was reconfirmed by the AIRC in the *Sensis* case. *(PR930269, Smith C, 10 April 2003).*
The AIRC will not be able to certify a building agreement unless it is satisfied that the agreement did not result from *"pattern bargaining".* [s.56].	**Not supported**	The emphasis should be on addressing unacceptable conduct which occurs during the bargaining process, not unduly complicating the certification process once agreement has been reached. This provision of the Bill would most likely cause great difficulties for the AIRC in identifying agreements which had resulted from pattern bargaining, given that many agreements contain relatively similar provisions.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
If, on application by the ABC Commissioner or any other person, the Federal Court is satisfied that a person or industrial association is engaging, has engaged or is proposing to engage in *"pattern bargaining"* in respect of *"building employees*", then the Court may grant an injunction in such terms as the Court considers appropriate. [s.67(1)]. If the Court considers it desirable to do so, the Court may grant an interim injunction pending determination of an application for an injunction. [s.67(2)]. The Court cannot grant an injunction unless: (a) The defendant is a registered organisation or constitutional corporation; or (b) The conduct concerned is, was, or would be:	**Supported, subject to the modifications set out above being made to the definition of *"pattern bargaining"* and modifications being made to this section.**	The ability to apply for an injunction to restrain *"pattern bargaining"* would be worthwhile. However, consistent with Ai Group's view that *"pattern bargaining"* should be defined with reference only to conduct which occurs during the negotiation of agreements under Part VIB of the *Workplace Relations Act*, paragraph 67(3) should be deleted, and paragraphs (4) and (5) renumbered accordingly.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
(i) Conduct that adversely affects a constitutional corporation in its capacity as a *"building industry participant";* or (ii) Conduct carried out with intent to adversely affect a constitutional corporation in its capacity as a building industry participant; or (iii) Conduct occurring in connection with the negotiation of an agreement under Division 2 of Part VIB of the *Workplace Relations Act*; or (iv) Conduct occurring in relation to an industrial dispute that the parties are seeking to resolve by an agreement under Division 3 of Part VIB of the *Workplace Relations Act*; or (v) Conduct occurring in a Territory or Commonwealth place; or (c) Some or all of the employees referred to in subsection (1) are employees, or prospective employees, of a constitutional corporation.		

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
In addition to amending the pattern bargaining provisions of the Bill, as set out above, Ai Group proposes that a new provision be inserted into the Bill (say in Chapter 6, Part 3) which specifies that industrial action is not protected if the party is "pattern bargaining". The provision could be worded as follows: ***"Action involving pattern bargaining*** *Building industrial action is not protected action for the purposes of the Workplace Relations Act if the action is engaged in as part of course of conduct that involves seeking common wages or other common conditions of employment extending beyond the single business which is the subject of the building industrial action".*		

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Agreements entered into with the intention of securing standard employment conditions for *"building employees"* in respect of *"building work"* that they carry out at a particular building site or sites (ie. Project agreements), will not be enforceable, unless the agreement is certified. [s.68].	**Supported with modifications**	Ai Group does not agree that the existing mechanism in the *Workplace Relations Act* (ie. s.170LC) provides a suitable mechanism for the certification of project agreements. S.170LC agreements are of little use in the construction context because all of the organisations to be bound by the agreement need to be identified at the time when the agreement is certified. All such organisations need to sign the agreement and their employees need to vote in favour of the agreement. It is impossible to identify all employers that will work on a major project at the commencement of the project. The Bill should establish a genuine mechanism for the certification of project agreements for major projects, subject to stringent controls.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Project agreements should be able to be certified if they meet the following criteria: • The agreement applies to a major project - to be defined. (Note: The definition of a "major project" needs to be carefully drafted to ensure that such agreements are only available in exceptional and appropriate circumstances. Factors that may be relevant in determining whether such exceptional circumstances exist include: the location of the project (eg. remote area); the size of the project; the complexity of the project; and whether any special demarcation problems exist; • It is reached between: (1) an employer or group of employers and a union or unions; or (2) an employer or group of employers and a group of employees; • It is certified by a Presidential Member or a Full Bench of the AIRC;

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		• The Presidential Member or Full Bench is satisfied that it is in the public interest to certify the agreement, having regard to: o Whether the matters dealt with by the agreement could be more appropriately dealt with by agreements at the enterprise level; o Whether the agreement contains provisions which are likely to lead to productivity and efficiency improvements on the project and a consequent reduction in the period of construction and/or a lower construction cost; o Whether the client supports the project agreement; and o Any other matters that the Commission considers relevant.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		• The Presidential Member or Full Bench is satisfied that, in addition to the involvement of the specific parties to the agreement, the negotiation process has, to the extent that is practicable, taken into account the views and interests of the subcontractors who will subsequently become bound by the agreement. This could be achieved via the involvement in the negotiations of an agent (eg. an employer association or other body or person) appointed by a representative group of sub-contractors. Upon certification, the project agreement should become binding on all Constitutional Corporations that work on the project. This could be achieved through reliance on the Corporations Power under the Australian Constitution. (Note: The overwhelming majority of employers that perform work on major projects are corporations).

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		The integrity of individual enterprise agreements should be maintained. Project agreements should supplement and co-exist with enterprise agreements. Consistent with the existing multiple-business agreement provisions of the *Workplace Relations Act* (s.170LC), protected industrial action should not be available during the negotiation of project agreements. It is a fundamental tenet of the Act that protected action applies exclusively for enterprise bargaining – not bargaining across more than one employer. Further, industrial action taken by employees working on a project and covered by a certified project agreement should not be protected regardless of whether an enterprise agreement also applicable to such employees expires during the life of the project. This proposal is consistent with s.79 of the Bill

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
		If Ai Group's proposals, as outlined above, are accepted and incorporated within the legislation then Ai Group supports the proposal in the Bill that unregistered project agreements become unenforceable. However, in addition to project agreements certified within the federal system, s.68 of the Bill should not apply to project agreements registered or approved under State legislation.
Before certifying a *"building agreement",* the AIRC will be required to hold a hearing. At least seven days before the hearing, the Industrial Registrar will be required to give the ABC Commissioner a copy of all documents lodged with the AIRC in relation to the certification. [s.53].	**Supported**	Such a process would be worthwhile to enable the ABC Commissioner to monitor agreement-making in the industry.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The AIRC will not be able to certify a *"building agreement"* that includes matters which do not pertain to the employment relationship between the employer and employees. [s.54]	**Supported**	The proposed provision is consistent with s.170LI of the *Workplace Relations Act*.
The AIRC will not be able to certify a *"building agreement"* if the nominal expiry date specified in the agreement is a date other than the third anniversary of the *"starting date"* of the agreement. (ie. The date of approval by employees). This does not apply if: • The specified starting date is earlier than the third anniversary; and • The AIRC is satisfied that the earlier date is justified by special circumstances. The AIRC will not be able to certify a *"building agreement"* which imposes obligations on an employer to make payments in respect of any period before the starting date of the agreement, unless the employer unreasonably delayed the making of the agreement. [s.55].	**Not supported**	The apparent intent of this provision is to spread the expiry dates of certified agreements in the industry. However, Ai Group is concerned that the provision will have the opposite effect and operate to ensure the ongoing close alignment of expiry dates. If s.62 of the Bill is amended in the manner proposed by Ai Group this provision will not be necessary as the refusal by a union to enter into agreements which do not have a common expiry date would constitute *"not genuinely trying to reach agreement"*.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		The AIRC should have the discretion to certify agreements with a longer term than three years (but no more than five years) if it is satisfied that special circumstances exist. For major projects, a four or five year construction period is not uncommon. Most employers working on a construction project would prefer that their certified agreements not expire during the life of the project.
The AIRC will not be able to certify a building agreement if it contains *"objectionable provisions".* [s.7 and s.57].	**Supported**	It is important that certified agreements not be permitted to contain provisions which breach freedom of association laws or provisions relating to the payment of bargaining agent's fees.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The AIRC will not be able to certify a building agreement unless it contains a statutory freedom of association statement. [s.58].	**Supported with modifications**	With regard to the proposed Freedom of Association Statement in Schedule 2 of the Act, the "Note" under paragraph (3) should be omitted. It is appropriate that the Statement not be an legally enforceable provision of an award or certified agreement, as proposed in the Bill. However, the wording of the "Note" under paragraph (3) may lead to an employer or employee believing that the freedom of association provisions of the Bill are not legally enforceable. It is particularly important to avoid any uncertainty in this area because the maximum penalty for non-compliance with the freedom of association provisions of the Bill is $110,000 for a body corporate and $22,000 for an individual.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The AIRC will not be able to certify a building agreement unless a bargaining period has been established. [s.59]	**Not supported**	In circumstances where an agreement is reached amicably without resort to industrial action, it is unnecessary for a bargaining period to be established. This provision would impede the certification of agreements reached in such amicable circumstances. Further, it is rare for bargaining periods to be established where agreements are reached directly between employers and employees under s.170LK of the *Workplace Relations Act.*
The AIRC will be required to consider the terms of all documents which are referred to in a certified agreement, when certifying the agreement. [s.60]	**Supported**	This is appropriate. It would avoid extraneous documents, which are cross-referenced in certified agreements, being used to circumvent the intentions of the Act.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Before an employer makes a building agreement with a union or unions, the employer will be required to take reasonable steps to ensure that all affected employees have an opportunity to make representations to the employer about the proposed agreement. A bargaining notice initiated by a union or employer will have no effect unless, in the period of 21 days before the notice date, all affected employees were given an opportunity to vote on a proposal that the notice be given and a majority of those who cast a valid vote support the proposal.	**Supported with modifications**	This proposal is appropriate for bargaining notices initiated by unions. It would address the damaging union pattern bargaining tactic of serving identical bargaining notices on thousands of employers at the same time. However, the proposal is unworkable and unfair in respect of bargaining notices initiated by employers. The main reason employers initiate bargaining periods is when they are considering locking-out employees. It is, of course, highly unlikely that employees would vote in favour of giving their employer a right to lock them out.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Employees acting on their own behalf in the negotiation of a certified agreement will be entitled to appoint an agent to initiate a bargaining period or give notice of protected action on their behalf. The identity of appointed agents is not to be disclosed by any person. Persons who disclose the identity of an agent are subject to 12 months imprisonment. [s.65 and 66].	**Supported with modification**	As set out above, Ai Group does not see merit in creating a new legislative requirement that bargaining periods be established in all circumstances where a certified agreement is to be negotiated. Without such a legislative requirement, sections 65 and 66 of the Bill are far less relevant. The proposed penalty for disclosing the identity of an agent is excessive. Also, the penalty should only apply to Registry officials or authorised ballot agents in a consistent manner to the approach adopted in s.170WHB of the *Workplace Relations Act* re. the disclosure of confidential information about AWAs.
"Objectionable provisions" in building certified agreements and building awards will be void and will be removed by the AIRC on application by the ABC Commissioner or a party which is bound or covered by a building award or certified agreement. [ss. 69 and 70].	**Supported**	It is important that any award or certified agreement provisions which breach freedom of association laws or provisions relating to the payment of bargaining agent's fees be removed.

4.6 Chapter 6 – Industrial Action etc.

Industrial disputes in the building and construction industry can be extremely costly. A one-day stoppage on a major project can cost hundreds of thousands of dollars. In addition to the more obvious direct costs of the industrial action, there are numerous hidden costs that arise due to delays in completion resulting from industrial action. These costs include:

- Liquidated damages – up to $50,000 per day is typical;
- Damage to the contractor's reputation which may result in the loss of future business.
- Program acceleration expenses, eg. extra overtime;
- Daily costs of hire for rental equipment, such as cranes, mobile plant, sheds, offices and other equipment; and
- The effects of inflated sub-contractor tender prices, which tend to occur on trouble-prone projects.

One area of great concern to contractors is the additional stresses that arise due to accelerated *"catch-up"* programs, which are often implemented when delays have been caused by industrial disputes. Such programs can have a negative effect on safety performance and quality and result in significant overtime penalty costs.

In addition, often industrial action taken in the building and construction industry creates significant hardship for third parties (both employers and employees) due the inter-related nature of the activities carried out by sub-contractors. Given the uniqueness of the industry, it is appropriate that the industry be treated differently under the laws relating to the taking of industrial action and the remedies available when unlawful industrial action is taken.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
"Unlawful industrial action" will be prohibited. The maximum penalty for engaging in unlawful industrial action will be $110,000 for a body corporate and $22,000 for an individual. [ss.71, 72 and 73]	**Supported**	The definitions in the Bill are appropriate. The proposed maximum penalty for unlawful industrial action is appropriate, given the very costly nature of industrial action taken in the building and construction industry. A one-day stoppage on a major project can cost hundreds of thousands of dollars. In addition to the more obvious direct costs of the industrial action, there are numerous hidden costs that arise due to delays in completion resulting from industrial action. These costs include: • Liquidated damages – up to $50,000 per day is typical; • Damage to the contractor's reputation which may result in the loss of future business; • Program acceleration expenses, eg. extra overtime;

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		• Daily costs of hire for rental equipment, such as cranes, mobile plant, sheds, offices and other equipment; and • The effects of inflated sub-contractor tender prices, which tend to occur on trouble-prone projects.
Courts of competent jurisdiction will be empowered to grant injunctions to restrain threatened, impending or probable unlawful industrial action, on application by the ABC Commissioner or another person. [s.74].	**Supported**	Industrial action in the building and construction industry is often extremely costly and impacts upon a large number of third parties – employers and employees. It is essential that parties are able to pursue an injunction when unlawful industrial action is being threatened or taken.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Within 14 days after industrial action by employees of an employer comes to an end, the employer will be required to give written notice to the ABC Commissioner in a prescribed form. The ABC Commissioner will have the power to require an employer to provide further information about any damage suffered. The maximum penalty for breaching this provision will be $11,000 for a body corporate and $2,200 for an individual. [s.75]	**Supported**	The proposed process would reinforce the rule of law and act as a significant deterrent to unlawful industrial action.
An ABC Inspector may assess the maximum amount that could be ordered to be paid to a person as compensation for damage suffered through unlawful industrial action and specify the amount in a certificate. The certificate is prima facie evidence in court proceedings. [s.76].	**Supported**	This process should significantly reduce the costs involved in pursuing damages where unlawful industrial action has occurred.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
The following forms of industrial action are not protected: • Action taken in pursuit of claims which do not pertain to the employment relationship; [s.77] • Action taken in concert with unprotected persons; [s.78] • Action taken before the nominal expiry date of an agreement. [s.79]	**Supported**	These three exclusions are all very important. The provisions of the *Workplace Relations Act* relating to these three areas have been the subject of conflicting decisions of the Commission and Courts. The decisions of the Federal Court in the *Electrolux*[31] and *Emwest*[32] cases, which relate to two of these areas, threaten the integrity of Australia's enterprise bargaining system. The provisions of the Bill are clearer than the corresponding provisions of the *Workplace Relations Act.*

[31] [2002] FCAFC 199
[32] [2003] FCAFC 183

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
A limit of 14 days will be imposed on protected industrial action at which time a compulsory 21 day cooling off period will apply. Any further protected action will only be permitted with leave of the AIRC. [s.80].	**Supported**	Industrial action in the building and construction industry is often highly damaging. Typically a large number of third parties are affected – employers and employees. The proposed provisions strike an appropriate balance between enabling negotiating parties to pursue their industrial rights and protecting the public interest. The limit applies equally to industrial action taken by employers and employees / unions.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Negotiations must precede building industrial action. If the AIRC makes an order in relation to negotiations, industrial action will not be protected unless the order has been complied with. [s.82].	**Supported but a minor amendment would be worthwhile to improve clarity.**	To avoid disputes over interpretation, it would be worthwhile to refer to both "orders" and "directions" of the AIRC in s.82. (Note: s.170MW(6) of the *Workplace Relations Act* refers to both terms).
Organising industrial action is not protected action if the industrial action is not protected. [s.83].	**Supported**	This provision addresses the argument which has been pursued by unions (unsuccessfully) in various cases, that the act of "organising" industrial action is not industrial action and therefore cannot be the subject of an AIRC or Court order.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Industrial action will not be protected unless authorised by a secret ballot, conducted in accordance with a process set out in the Bill. Such process provides for: • Applications to be made to the AIRC by employees or a union, authorising a protected action ballot; • A requirement that the AIRC act quickly when an application for a ballot is made; • The appointment of an authorised ballot agent by the AIRC; • Directions to be issued by the AIRC regarding the conduct of the ballot; • Ballots to only be granted if the applicant has genuinely tried to reach agreement with the employer; • The roll of voters to be compiled before a ballot is held; • The requirement that all parties comply with orders and directions of the AIRC relating to ballots; • Ballot papers to be in a prescribed form; • A written report to be given by the ballot agent to the Industrial Registrar, after the end of the voting. [ss.81, 84–112].	**Supported with modification**	The proposed process is fair and democratic. However, the proposed penalty for disclosing the identity of the persons referred to in ss.119 and 120 is excessive. Also, the penalty should only apply to Registry officials or authorised ballot agents in a consistent manner to the approach adopted in s.170WHB of the *Workplace Relations Act* re. the disclosure of confidential information about AWAs.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
The Commonwealth will pay 80% of the reasonable cost of holding the ballot. The remainder will be met by the applicant/s. [ss.117 and 118]. Industrial action will only be protected if more than 50% of the votes validly cast support the action. [s.113]. In addition: • Immunity will apply where a person acts in good faith on the ballot results; [s.122] • Ballot orders and ballots will only be able to be challenged in limited circumstances; [ss.122 and 123] • Various administrative and other provisions will apply. [s.124-132].		

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The AIRC will have the power to order that industrial action stop or not occur, upon application by the ABC Commissioner or various other parties involved in the matter. The AIRC will be required, as far as practicable, to hear and determine an application for an order within 48 hours. If it is unable to determine the application within 48 hours, an interim order will be able to be granted. The Federal Court will be able to grant an injunction, if an AIRC order is not complied with, upon application by the ABC Commissioner or various other parties involved in the matter. [s.133].	**Supported**	Given the enormous losses which can result from unprotected industrial action in the building and construction sector, employers need access to quick and effective mechanisms to bring unlawful industrial action to an end. The issuing of orders by the Commission to stop or prevent industrial action is discretionary and instances have occurred of delays in having applications heard, delays in decisions being issued and a failure on the part of some unions to comply with orders which are issued. The Bill addresses these issues.
Employers will be required to notify the ABC Commissioner within 72 hours of any industrial action or threats of industrial action. (Maximum penalty: $11,000 for a body corporate and $2,200 for an individual). [s.134]	**Supported with modification**	The proposed process would reinforce the rule of law and act as a significant deterrent to unlawful industrial action. However, notification should only be required where actual industrial has occurred.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Payments for periods of industrial action will be unlawful. (Maximum penalty: $110,000 for a body corporate and $22,000 for an individual). [s.135]. Employers will be required to notify the ABC Commissioner in writing of any claims for the payment of strike pay within 72 hours of such claim being made. (Maximum penalty: $110,000 for a body corporate and $22,000 for an individual). [s.136].	**Supported, with modification**	While it is appropriate that a high maximum penalty apply to the offence of paying strike pay, a much lower penalty should apply for failing to give the ABC Commissioner notification of any claims within what is a very short timeframe. Ai Group proposes that the offence in s.136 attract a Grade B civil penalty.
If an employee or employer party gives a notice under s.170MO of the Act, then no further section 170MO notice will be able to be given in respect of that proposed agreement.	**Supported**	This provision aligns with the process set out in s.80 of the Bill re. cooling-off periods.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
s.166A of the *Workplace Relations Act* will not apply to building industry unions, in relation to building industrial disputes.	**Supported**	Given the massive costs often associated with industrial action in the building and construction industry, parties should have immediate access to relevant courts to pursue injunctions and damages when unlawful action is taken.
The Federal Court will be prevented from restraining parties from pursuing actions under State laws in relation to building industrial action.	**Supported**	Interim injunctions have been issued on several occasions by the Federal Court which have restrained employers from pursuing their common law rights in State courts[33]. It is unreasonable for employers who are sustaining, or have sustained, loss or damage from unlawful industrial action to be subjected to anti-suit injunctions in the Federal Court.

[33] For example, see *AWU v Yallourn Energy* [2000] FCA 65, and *CFMEU v Multiplex Constructions* [2000] FCA 101.

4.7 Chapter 7 – Freedom of Association

Freedom of choice is a fundamental tenet of our democracy. All employers and employees should be free to decide whether or not they wish to belong to a union or employer association.

The Bill reinforces these freedoms in the building and construction industry. Ai Group support's the provisions of Chapter Seven of the Bill.

4.8 Chapter 8 – Discrimination, Coercion and Unfair Contracts

One of the most significant workplace relations problems in the construction industry relates to the coercion of employers to employ specific persons nominated by unions. The coercion typically takes the form of the relevant union refusing to sign an industrial agreement with the head contractor or major subcontractor on a project, and refusing to allow work to commence, until agreement has been reached that the employer will hire specific persons nominated by the union (and agreement reached on the assignment of key roles, such as that of OHS representatives, to such persons).

Many of the individuals nominated are highly militant and have a history of contributing to poor workplace relations on previous construction projects. It is essential that employers have the ability to employ the most appropriately qualified person for each job. Employers carry the risk for OHS on a project and must be able to employ the persons who are best qualified to assist in achieving a high level of OHS performance – not the persons forced upon them by unions for industrial purposes.

The anti-coercion provisions of the Bill adopt proposals that Ai Group argued strongly for in its submissions to the Royal Commission and which were recommended by Commissioner Cole in his Final Report.

Ai Group has concerns about only two aspects of the Bill in this Chapter. The first of these concerns relates to the section of the Bill which extends the concept of "discrimination" far beyond coercion and which would most likely inhibit head contractors in efficiently managing construction projects. The second concern pertains to provisions of the Bill which could be interpreted as requiring that employers offer unlimited freedom of choice to employees regarding superannuation funds.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
A person must not coerce another person to: • Employ or not employ a person; • Engage or not engage a building contractor; • Allocate or not allocate particular responsibilities to a person; • Designate or not designate a person as having particular duties. A person must not coerce another person to make, vary, terminate or extend a certified agreement. [s.170].	**Supported**	One of the most significant workplace relations problems in the construction industry relates to the coercion of employers to employ specific persons nominated by unions. The coercion typically takes the form of the relevant union refusing to sign an industrial agreement with the head contractor or major subcontractor on a project, and refusing to allow work to commence, until agreement has been reached that the employer will hire specific persons nominated by the union (and agreement reached on the assignment of key roles, such as that of OHS representatives, to such persons). Many of the individuals nominated are highly militant and have a history of contributing to poor workplace relations on previous construction projects.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		It is essential that employers have the ability to employ the most appropriately qualified person for each job. Employers carry the risk for OHS on a project and must be able to employ the persons who are best qualified to assist in achieving a high level of OHS performance – not the persons forced upon them by unions for industrial purposes. This section of the Bill adopts proposals that Ai Group argued strongly for in its submissions to the Royal Commission and which were recommended by Commissioner Cole in his Final Report.
A person must not coerce another person to make, vary, terminate or extend a certified agreement. (Maximum penalty: $110,000 for a body corporate and $22,000 for an individual). [s.171].	**Supported**	This provision is very similar to s.170NC of the *Workplace Relations Act*.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
A person must not discriminate against a second person on the ground that such person's building employees are covered (or are proposed to be covered) by a particular form of industrial instrument or an instrument that contains particular kinds of provisions. The following is excluded: • Protected action; • Conduct which occurs in relation to a proposed agreement under which the second person would carry out or arrange building work for the first person - where the conduct is engaged in for the purpose of encouraging the second person to have conditions dealing with the following matters in an industrial instrument: o The times of day when work is to be performed; o Inclement weather procedures; or o Any other matter prescribed by the regulations. (Maximum penalty: $110,000 for a body corporate and $22,000 for an individual). [s.172]	**Not supported**	Ai Group supports a legislative prohibition on **coercion** to enter into a particular form of enterprise agreement. Such a prohibition is covered by ss.170 and 171 of the Bill and s.170NC of the *Workplace Relations Act.* As identified by the Royal Commission, the present state of the law defines coercion as *"an application of pressure which has the practical effect of negating choice, by conduct which is unlawful, illegitimate or unconscionable. Conduct which merely influences, persuades or induces, or which amounts to an incentive to do something is not coercion"*[34]. Ai Group is concerned about the potential breadth of the term *"discrimination"* and the very narrow exclusions.

[34] Volume 5, p.90.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		In the Final Report, Commissioner Cole endorsed the practice of head contractors discriminating against sub-contractors at the point of awarding contracts, if a sub-contractor does not have a workplace agreement with sufficiently flexible terms to enable the head contractor to efficiently manage the site. One example given by Commission Cole of where discrimination would be desirable was where a sub-contractor's agreement did not allow work to be carried out on particular days upon which the head contractor required work to be performed. Discriminating in such circumstances would appear to be inconsistent with the Bill. [35] Section 172 of the Bill only allows a head contractor to discriminate against a contractor when awarding on contract on the basis of the *"times of day"* when work is able to be performed - not *"days of the week*".

[35] Volume 5, p.123

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Of course, hours of work are only one of a large number of issues which impact upon a head contractor's ability to effectively manage a site. A head contractor may wish to give preference when awarding a contract (all others aspects being equal) to a sub-contractor whose enterprise agreement enables casuals to be employed to cope with work fluctuations, or permits staff to carry out a wide range of different tasks, etc. It is appropriate that head contractors retain their right to select sub-contractors with agreements that contain provisions which are suited to the needs of the project. Ai Group submits that the legislative prohibition should not extend beyond the concept of **coercion.**

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
A person must not coerce another person to use a particular superannuation fund. Protected action is excluded. (Maximum penalty: $110,000 for a body corporate and $22,000 for an individual). [s.173]	**This provision is not supported in its present form as it could be interpreted as requiring that employers offer unlimited freedom of choice to employees regarding superannuation funds.**	An employer needs to retain the right to make superannuation contributions to relevant fund/s on behalf of its employees. It would be extremely onerous and costly for an employer to be required to make superannuation contributions to an unlimited number of different superannuation funds. Standard award and legislative provisions enable an employer to make contributions to one fund for all of its employees. Legislation to give employees **limited** freedom of choice is still before Parliament. The provisions of the Bill appear to be inconsistent with the stated policies of all of the major political parties in Australia, regarding superannuation freedom of choice.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Sections 127A, 127B and 127C of the *Workplace Relations Act* will apply, except that applicants will also be able to pursue claims in the Federal Magistrates Court. [s.174].	**Supported**	Sections 127A, 127B and 127C of the Act have been in the *Workplace Relations Act* for many years and are operating effectively.

4.9 Chapter 9 – Union Right of Entry

Unions have an important representative role to play which is recognised within the *Workplace Relations Act*. It is an object of the Act that registered employee and employer bodies be able to operate effectively (s.3(g)).

Accordingly, an appropriate balance needs to be struck between protecting employers from the misuse by unions of right of entry and inspection powers (which the Royal Commission held to be highly prevalent in the industry) and retaining an entry and inspection regime which enables unions to represent their members effectively.

Another important issue relates to the interaction between Federal and State laws. Typically, union officials have entry powers under Federal workplace relations laws, State workplace relations laws and State OHS laws. Limiting a union official's rights of entry and inspection under Federal workplace relations laws will be of little consequence if such official retains very broad entry and inspection rights under State laws.

The provisions of the Bill strike an appropriate balance.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Union officials will be able to apply to the Industrial Registrar for an entry permit. The Industrial Registrar will not be able to issue a permit to the official unless the Industrial Registrar is satisfied that the official is a fit and proper person to hold the permit. A list of factors to be taken into account by the Registrar are set out in the Bill and include: whether the official has received appropriate training and whether the official has been convicted of various offences. [ss.177-179].	**Supported**	These provisions are reasonable. The Industrial Registrar retains the discretion to decide whether it is appropriate to issue a permit to an official.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
Entry permits will expire after three years or when a person ceases to be an official of the union. The ABC Commissioner, or a person prescribed by the regulations, will be able to apply to the Industrial Registrar to have an entry permit suspended or revoked. The following minimum suspension periods will apply, but only in certain circumstances: • First offence – 3 months; • Second offence – 12 months; • If there have been more than two previous offences – 5 years. [ss.180 and 181]	**Supported with modification**	While it may be appropriate for guidelines to be set out to guide Registrars in the exercise of their powers to suspend or revoke permits, Registrars should retain their discretion to look at all of the circumstances of a particular case in making a decision about a period of suspension.
The AIRC will have the power to make whatever orders it considers appropriate to restrict the entry rights of a union or its officials, on its own motion or upon application by the ABC Commissioner. [s.182].	**Supported**	It is appropriate that the AIRC have this discretion.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
If a permit holder suspects that a breach has occurred of: • The *Building and Construction Industry Improvement Act* or *Workplace Relations Act*; • A federal award, certified agreement or order of the AIRC that is binding on the relevant union; or • A State industrial law or a State industrial instrument that is binding on the relevant union; the official will be able to enter during working hours to investigate the suspected breach, if the breach affects one or more members of the permit holder's union. In investigating the suspected breach the official will be entitled to inspect relevant work and records, and interview relevant persons. Employers will not be required to provide records relating to persons that are not a member of the official's union. However, an application will be able to be made to the AIRC for access to non-member records if such access is necessary for investigating the breach. [ss.185 and 186].	**Supported**	These provisions are reasonable and appropriate.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The right of entry under s.185 will be conditional upon: • At least 24 hours (but not more than 14 days) notice being given to the employer; • The official providing a copy of the entry notice to the ABC Commissioner at least 24 hours (but not more than 14 days) before entry; • The entry notice setting out particulars of the suspected breach; • The official entering on the day specified in the notice. The official may apply for an exemption from the requirement to provide entry notice in certain circumstances. Various limitations will apply to the right of entry. [ss.187-191, 193]	**Supported**	These provisions are reasonable and appropriate.
Persons who are authorised to enter premises under federal laws will be excluded from having entry rights under State laws (other than an OHS law). [ss.192 and 201].	**Supported**	These provisions are important to avoid State laws being used to nullify the operation of the federal provisions.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
A permit holder may enter premises for the purposes of holding discussions with relevant persons who are members or eligible to be members of the official's union, provided that: • The union is a party to the award or certified agreement that applies to the employees; • The official enters and holds the discussions during working hours. [ss.194 and 195].	**Supported**	These provisions are reasonable and appropriate.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The right of entry under s.194 will be conditional upon: • At least 24 hours (but not more than 14 days) notice being given to the employer; • The official providing a copy of the entry notice to the ABC Commissioner at least 24 hours (but not more than 14 days) before entry; • The official entering on the day specified in the notice. Entry will not be authorised if the conduct is for the purposes of recruitment and a permit holder for the union has entered the premises in the preceding six months for that purpose. Various limitations will apply to the right of entry. Various other miscellaneous matters are dealt with. [ss.196-200 and 202-205].	**Supported**	These provisions are reasonable and appropriate.

4.10 Chapter 10 – Accountability of Organisations

Representative bodies, by definition, are established to represent their members and should be accountable to their members.

Commissioner Cole found that clients and contractors often seek to secure peace by paying money to or at the direction of unions - typically after a union representative threatens to organise industrial action. Clients and head contactors cannot afford delays to their projects because liquidated damages of up to $50,000 per day are typical when a project is not completed on time. The Royal Commission found that such circumstances have contributed to a culture where there is a tendency to seek *"short-term, quick-fix solutions which are justified on the basis of commercial reality or pragmatism"*[36].

The Bill addresses these issues.

[36] Volume 9, p.221.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
Registered organisations will not be permitted to deduct more than 12 months' membership fees from money held on behalf of a member and will only be able to make a deduction if the member gives written consent. (Maximum penalty: $110,000 for a body corporate and $22,000 for an individual) [s.206].	**Supported**	Such requirements are appropriate. The Royal Commission found that in some cases money paid to a union for the purposes of resolving allegations of under-payment or non-payment of entitlements was retained by the union rather than being disbursed to the affected employees[37].
At the end of each financial year, registered organisations will be required to lodge with the Industrial Registrar and the ABC Commissioner, a statement showing various particulars in relation to each donation exceeding $500 received by the organisation during that financial year. [ss.206 and 207]. Clients, head contractors and subcontractors will be required to notify the ABC Commissioner of any request or demand made by a registered organisation for a donation exceeding $500. [s.208].	**Supported**	Such reporting requirements are appropriate, given the Royal Commission's findings.

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Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The Industrial Registrar will be required to issue additional guidelines setting out the manner in which registered organisations must disclose commissions or benefits received directly or indirectly by: • The organisation; or • An officer, employee or member of the organisation. The Industrial Registrar will be required to report on such commissions or benefits to the Minister and the ABC Commissioner annually. [s.209].	**Supported, subject to clarification**	Ai Group strongly supports the full disclosure of commissions and other payments that may be received by registered organisations relating to claims which an organization is pursuing during enterprise bargaining. The need for such disclosure is highlighted by the huge sums that are being paid each year to the CEPU by an income protection insurance provider, as uncovered by the Royal Commission. It is highly inappropriate that employers faced with claims to pay for such insurance (and employees being urged by their union to pursue such claims) are not aware of these commissions. This issue is addressed in s.62(e) of the Bill. Clarity as to the meaning of the term *"benefit"* in s.209 is important. For example, many registered organisations have a large number of staff and a requirement to report on the specific salary and benefits of all staff members would be extremely administratively burdensome and unnecessary.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The Bill prescribes a process for the deregistration of registered organisations which fail to satisfy and fully comply with orders issued for the payment of damages following unlawful industrial action. The Bill enables the ABC Commissioner to apply to the Industrial Registrar for the issuing of a certificate deregistering an organisation if a payment order has not been complied with. The Industrial Registrar will be required to immediately issue a deregistration certificate if non-compliance has occurred, except in circumstances where an appeal has been lodged but has not yet been determined. [s.210].	**Supported**	The cancellation of the registration of a union or employer association is a very serious and significant step. The appeal process ensures that the AIRC and relevant courts retain the discretion to decide whether cancellation is warranted in all the circumstances.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
If: • A registered organisation; • A substantial number of the members of a registered organisation; or • A section or class of members of a registered organisation fail to comply with an injunction issued under the Act, then this constitutes a ground for the ABC Commissioner applying to the Federal Court for an order cancelling the registration of the organisation. [s.211].	**Supported**	This provision is consistent with s.28(1) of Schedule 1B of the *Workplace Relations Act*. Automatic deregistration is not provided for. The Federal Court would be required to take into account all of the circumstances.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
If a person is found to have: • Contravened a civil penalty provision in the Bill or the *Workplace Relations Act*; or • Has been disqualified from holding office in a registered organisation under a State industrial law then this constitutes a ground for the ABC Commissioner applying to the Federal Court for an order disqualifying the person from holding office in a registered organisation for a specified period. The Federal Court will be required to have regard to the nature and circumstances of the person's involvement in the contravention, the general character of the person and the fitness of the person to be involved in the management of the organisation as well as any other matters the Court thinks relevant. [s.212].	**Supported**	These provisions of the Bill are largely consistent with the provisions of Schedule 1B of the *Workplace Relations Act*. Automatic disqualification is not provided for. The Federal Court would be required to take into account all of the circumstances. The removal of a union or employer association official from office is a serious step.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The Bill provides the Federal Court with powers to address circumstances where: • A court has made an order for the payment of damages following unlawful industrial action by a registered organisation; • Such order has not been complied with; and • The organisation has entered into a transaction with: o The intent to defeat one or more creditors of the organisation; or o With reckless disregard of the interests of one or more creditors of the organisation. In such circumstances, the Federal Court will be able to order certain persons who were beneficiaries of the transaction to satisfy the debt. [s.213].	**Supported**	The assets of a registered organisation should not be able to be 'quarantined' so as to avoid creditors, including those to whom the organisation has caused recoverable loss.

4.11 Chapter 11 – Demarcation Orders

Demarcation disputes occur much less frequently nowadays than has historically been the case. However, some problems still arise from time to time.

Sections 214 to 220 of the Bill provide the AIRC with the ability to make orders in relation to demarcation disputes that relate to building employees. Applications would be able to be made by the Minister, the ABC Commissioner or a person adversely affected by a demarcation dispute.

Ai Group supports the provisions of Chapter 11 of the Bill. The provisions are practical and balanced.

4.12 Chapter 12 – Enforcement

The reasons why it is essential that workplace relations laws, such as the proposed *Building and Construction Industry Improvement Act,* contain effective compliance and enforcement mechanisms are obvious. Such reasons were succinctly set out in the following extract from a May 2000 decision of Merkel J of the Federal Court in finding that three officials of the AMWU, the CEPU and the AWU had wilfully breached a Federal Court order:

> *"Plainly, the protection of legal rights is severely undermined if parties to a dispute act on the basis that they can apply for court orders to protect their rights, but ignore court orders which protect the rights of other parties to the dispute, simply because compliance with such orders is seen to be adverse to their interests or objectives, or that of their members.*
>
> *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.*
>
> *If the individual respondents believed that the orders of Whitlam J were wrongly made, then it was open to them to appeal, or apply for leave to appeal, against those orders. Instead, they breached them. The fact that the breaches are by union leaders holding important offices in a federation of national trade unions makes them more, rather than less serious...*

If such breaches are treated as no more than "technical" breaches, then the carefully prescribed processes provided for under the Act, available to, or to be observed by, unions, employees, employers and employer organisations alike, will quickly erode. Also, if aspects of the statutory scheme or of the orders made by Whitlam J were seen to be contentious, the political and legal processes of our democratic society provide remedies other than those chosen by the individual respondents"[38]

Accordingly, Ai Group supports strong compliance and enforcement powers in respect legislation, awards, agreements, and orders of the AIRC and Courts.

However, for the reasons set out in section 4.3, Ai Group does not support the approach adopted within the Bill regarding compliance and enforcement relating to the proposed Building Code – a document which is not subject to Parliamentary or judicial scrutiny.

[38] *Australian Industry Group v AFMEPKIU* [2000] FCA 629, 12 May 2000, Merkel J, p.18.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
If the ABC Commissioner believes on reasonable grounds that a person has information, documents or evidence, the ABC Commissioner may, by giving at least 14 days notice in writing, require the person to: • Give the information within a specific time; • Produce the documents within a specified time; or • To attend to be interviewed (with legal representation if the person wishes). The information can be required to be provided on oath. Penalty for non-compliance: Imprisonment for six months. [ss.225-229].	**Supported**	These provisions are appropriate.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The ABC Commissioner may appoint persons as Australian Building and Construction Inspectors ("ABC Inspectors"). ABC Inspectors will be issued with an identity card and will have the power to enter premises during working hours and exercise powers to ascertain whether: • A designated building law has been complied with; and • The *Building Code* has been, or is being, complied with. ABC Inspectors will have the power to inspect work, take samples, interview persons and inspect documents and copy documents. Maximum penalty for refusing or obstructing entry: $110,000 for a body corporate and $22,000 for an individual. [ss.230-232].	**Supported with modification**	The powers of ABC Inspectors are appropriate, with the exception that it is only appropriate for ABC Inspectors to have compliance powers relating to the *Building Code* if the Code is given effect as a regulation under the Bill. (This issue is dealt with in detail in section 4.3 of this submission).

Provisions of the *Building and Construction Industry Improvement Bill 2003*	**Ai Group's Position**	**Basis of Ai Group's Position**
The Federal Safety Commissioner may appoint persons as Federal Safety Officers. Federal Safety Officers will be issued with an identity card and will have the power to enter premises during working hours and exercise powers to ascertain whether: • The *Building Code* has been, or is being, complied with; and • Applicants and accredited persons are complying with the OHS accreditation scheme. Federal Safety Officers will have the power to inspect work, take samples, interview persons and inspect documents and copy documents. Maximum penalty for refusing or obstructing entry: $110,000 for a body corporate and $22,000 for an individual. [ss.230-232].	**Supported if substantial modifications are made. The role of Federal Safety Officers should primarily be to educate.**	The role of Federal Safety Officers should primarily be to educate employers and employees. With regard to the issue of compliance - employers are required to comply with onerous State OHS legislation, regulations, codes of practice and standards, which differ from State to State. Extensive compliance and enforcements mechanisms are in place in every State, including OHS inspectors with extensive powers. Very substantial penalties apply where the legislative requirements are breached. It is essential that the Commonwealth, States and Territories continue to strive to achieve consistency amongst OHS laws. It is also vital that any reforms implemented to improve OHS in the construction industry do not simply result in the imposition of another layer of regulation which would lead to further confusion about which of the various laws, regulations, codes and standards apply.

Provisions of the *Building and Construction Industry Improvement Bill 2003*	Ai Group's Position	Basis of Ai Group's Position
		Rather than contributing to better OHS performance, the creation of further complexity and confusion could compromise the safety of employees because employers would be unlikely to understand what is required of them. It is not appropriate that that the *Building Code* contain detailed provisions relating to OHS, nor is it appropriate that the Federal Safety Commissioner or Federal Safety Inspectors have a role in monitoring and promoting "compliance" with the *Building Code* - a document that is not subject to any Parliamentary or judicial scrutiny. (These issues are covered in detail in sections 4.3 and 4.4 of this submission). With regard to the role of the Federal Safety Commissioner in managing the proposed OHS accreditation scheme, the powers in this section are unnecessary. Parties which do not cooperate, risk losing their accreditation.

4.13 Chapter 13 – Miscellaneous

Chapter 13 deals with various miscellaneous matters. Ai Group seeks amendments to only two sections in this Chapter, as set out below.

Section 238 – Enforcement of Building Awards, Agreements and Others

Under section 238 of the Bill, the penalties for breaching awards and certified agreements would increase more than 10-fold. For example:

- *Breach of award or AIRC Order*

  The penalties would increase from $5,000 (body corporate) and $1,000 (individuals), to $55,000 and $11,000 respectively.

- *Breaches of certified agreements which continue for more than one day*

  The penalties for the first day of the breach would increase from $10,000 (body corporate) and $2,000 (individuals), to $110,000 and $22,000 respectively. In addition, the penalties for each day that the breach continued would increase from $5,000 (body corporate) and $1,000 (individuals), to $55,000 and $11,000 respectively.

- *Breaches of certified agreements which do not continue for more than one day*

  The penalties would increase from $5,000 (body corporate) and $1,000 (individuals), to $55,000 and $11,000 respectively.

Such penalties are excessive.

It would be unfair for employers in the construction industry (most of which are small businesses without specialised workplace relations staff) to be exposed to such substantial penalties for what may be an inadvertent breach of an award or certified agreement provision. There are some 2200 federal awards and 2000 State awards, most of which are lengthy and complex. There are a large number of construction industry awards that are particularly complex.

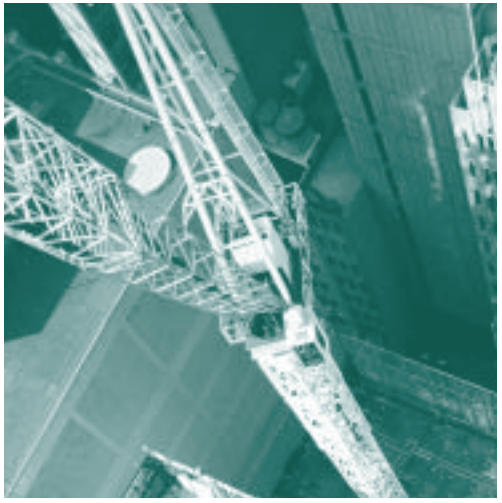
Ai Group proposes that the existing penalties be doubled.

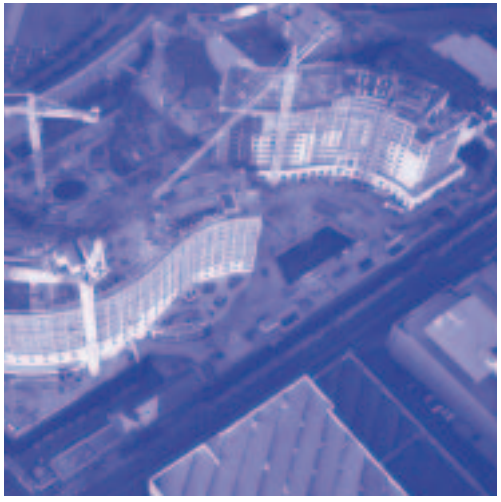
Section 242 – Building Association Responsible for Conduct of its Members

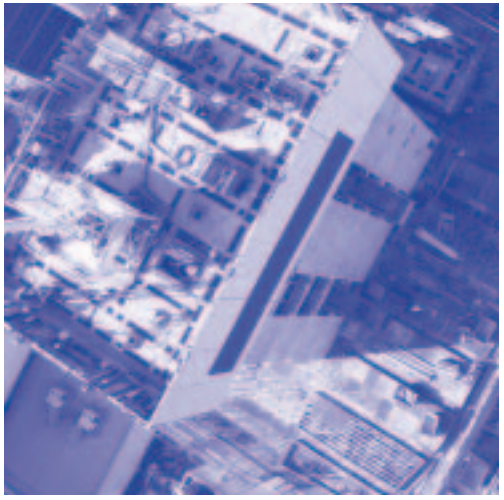
Under s.242 of the Bill, registered organisations would be liable for the conduct of an *"officer"* of the association (defined much more broadly than under s.4 of the *Workplace Relations Act*, to include a delegate or other representative of the association, or an employee of the association), amongst other persons.

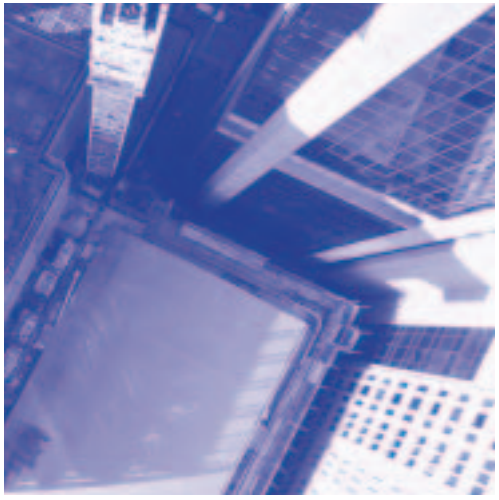
As the Bill is currently drafted, such responsibility would apply even if the association has taken reasonable steps to prevent the action. Such an approach is inappropriate and unfair on registered organisations such as Ai Group.

Paragraph 242(2) should be amended to include reference to the persons referred to in (1)(b) of the Bill – not just those referred to in (1)(c) and (d). This will have the effect of preventing conduct by an *"officer"* of a registered organisation being deemed to be conduct of the organisation, where the organisation has taken reasonable steps to prevent the action.









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