Royal Commission into the Building and Construction Industry

The Australian Industry Group's position on the final report

JULY 2003

AUSTRALIAN INDUSTRY GROUP

ROYAL COMMISSION INTO THE BUILDING AND CONSTRUCTION INDUSTRY

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Foreword

The Australian Industry Group (Ai Group) has been a major supporter of the work of the Royal Commission. Whilst we support the bulk of Commissioner Cole's Final Report we have none-the-less looked carefully and critically at the Commissioner's recommendations in order to develop a constructive response, which we hope, can deliver sustained reform.

As the representative organisation for most of the major construction companies through the Australian Constructors Association and through our broad construction membership, Ai Group is uniquely placed to provide informed advice on the Report.

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. This led to the need to find solutions and the Royal Commission has sought to deliver answers that will in turn lead to the necessary reform of the industry.

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.

After an exhaustive process of consultation with member companies to formulate our response to the Royal Commission, we have completed a detailed analysis of each of Commissioner Cole's recommendations and their implications for the industry. Our analysis has focussed on a number of key reform issues.

Ai Group has endeavoured to articulate clearly its members' concerns and to map alternative 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 in Australia's building and construction industry.

R N Herbert, Chief Executive

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1.0 Executive Summary

After the Royal Commission released its Final Report in March 2003, Ai Group embarked upon an extensive consultation process with its member companies in the construction industry. This paper is the outcome of that process.

Amongst the Royal Commission's 212 recommendations, those dealing with the following areas were the subject of the most vigorous debate, and required the most thorough consideration:

- Whether industry-specific legislation should be enacted;
- The powers of the proposed Australian Building and Construction Commission (ABCC);
- The recommended total outlawing of pattern bargaining - rather than just outlawing protected action in pursuit of pattern bargaining;
- The recommendations relating to project agreements;
- The Commission's proposal to prohibit "all forms of discrimination" against contractors on the basis that a contractor does not have a particular form of agreement – rather than simply the prohibition of "coercion" as currently applies;
- The role that the National Code of Practice for the Construction Industry and Implementation Guidelines should play in regulating workplace relations in the industry.

On the above issues, Ai Group's broad position is that:

- Industry-specific legislation should be enacted, but the legislation should be reviewed after five years to ascertain whether there is an ongoing need for it.

- The recommended powers of the ABCC are appropriate (with a few exceptions which are set out in this submission), subject to an appropriate governance regime being established for the body.

- Pattern bargaining should have no place within the industry and, in particular, protected action in pursuit of pattern bargaining should be outlawed.

- A new mechanism should be established for the certification of project agreements which provides that:

    - Such agreements are confined to and only lawful for major projects (to be defined);
    - In addition to the involvement of the specific parties to the project agreement, the negotiation process takes into account the views and interests of the subcontractors who will subsequently become bound by the project agreement;
    - The integrity of individual enterprise agreements should be maintained. Project agreements should supplement and co-exist with enterprise agreements; and
    - Upon certification, project agreements should become binding on all Constitutional Corporations, which 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).

- Consistent with the existing multiple-business agreement provisions of the *Workplace Relations Act*, 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 an industry, a sector, a geographic area or more than one employer. Further, consistent with s.170MN of the *Workplace Relations Act*, industrial action should not be protected where it is taken by employees working on a

project and bound by a certified project agreement, despite the fact that enterprise agreements applicable to such employees may expire during the period of the project.

- The Royal Commission has 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 recommended broader regulatory role, such instruments should be replaced by a law or regulation of the Commonwealth (eg. the issues could be dealt with in the proposed *Building and Construction Industry Improvement Act* or in regulations made under that Act). This process would ensure an appropriate degree of Parliamentary and judicial scrutiny in respect of any amendments made to the provisions or interpretations of such provisions. It would protect the legal and appeal rights of employers and other parties in the industry.

- The Royal Commission has recommended that a new paradigm for occupational health and safety be fostered in the building and construction industry. Ai Group strongly supports this recommendation and the supporting measures proposed. Work being performed safely should be a prerequisite to its completion on time and within budget. However, while it is an issue for all participants in the industry and a process of consultation is to be encouraged, there should be no scope for occupational health and safety issues being misused in a coercive way in an industrial relations context.

In preparing this response, the 212 recommendations made by the Royal Commission were analysed. Ai Group supports the vast majority of the recommendations. Some, however, require further analysis before implementation while others do not carry sufficient support from member companies to be implemented. Ai Group's position on the recommendations is fully documented in this response.

2.0 Introduction

2.1 Overview

On 26 March and 27 March 2003, the Minister for Employment and Workplace Relations, the Hon Tony Abbott MP, released the Final Report of the Royal Commission into the Building and Construction Industry.

The inquiry process was exhaustive and the Final Report and Recommendations are 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].

The Report is in 23 volumes and covers numerous important and relevant issues. 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."

2.2 Ai Group's Involvement in the Building and Construction Industry

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.

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.

Our members have significant involvement in engineering, building and civil construction.

2.3 Ai Group's Involvement in the Royal Commission

Ai Group strongly supported the work of the Royal Commission during its deliberations. 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.

2.4 Consultation in the Development of Ai Group's Position

In developing the position set out in this paper, Ai Group has consulted widely with employers in the construction industry. This consultation process 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 a Board Meeting on 2 May and at a Special Meeting held on 20 June 2003 to consider Ai Group's 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.

3.0 Recommendations Regarding the Conduct of the Royal Commission

Volume 2 of the Report sets out the processes and procedures that the Royal Commission used during the course of its inquiries. During the Royal Commission it became apparent that the *Royal Commissions Act 1902* was deficient in various respects. It is important that such deficiencies be addressed.

Recommendation/s	**Ai Group's Position**	**Basis of Ai Group's Position**
That the *Royal Commissions Act 1902* be amended in 11 areas to increase the powers of Royal Commissions to require information to be provided, to investigate breaches of the Act and to deal with various other matters. It is also recommended that the penalties be increased for non-compliance with the *Royal Commission Act* and for contempt of a Royal Commission. [Rec. 1].	**Supported**	The reasons why such amendments are warranted are set out in detail in Chapter 2 of the Final Report.

4.0 Industry-specific Legislation

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. Given our general view, Ai Group has given careful consideration to the Royal Commission's recommendation that separate legislation be enacted for the building and construction industry and we have carefully considered the potential risks of this approach.

One such risk relates to the problem of adequately defining the "building and construction industry" for the purposes of coverage of the legislation. If the industry is defined in a narrow way some sectors which share many of the problems which exist in the construction industry (such as the mechanical and electrical contracting sectors) may be excluded. However, if the industry is defined in a broad way, the inclusion of various sectors in the definition may increase the risks of construction industry terms and conditions (eg. construction industry trust funds and the 36 hour week) flowing on to such sectors.

On balance, after weighing up the risks and benefits, Ai Group supports the recommendation that industry-specific legislation be enacted to deliver a reform package for the building and construction industry. The reasons why industry-specific legislation is appropriate include:

- Unlike other industries, the building and construction industry has been the subject of a Royal Commission which has identified widespread unlawful and inappropriate 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).

It is also relevant that 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[2] 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 sector-specific legislation after five years to ascertain whether there is an ongoing need to retain it.

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

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That a statute of special application to the building and construction industry be enacted, provisionally called the *Building and Construction Industry Improvement Act*. The Act would prevail to the extent of any inconsistency over the *Workplace Relations Act*. [Rec. 177]. [The following Recommendations relate to the *Building and Construction Industry Improvement* Act: 2-16, 37-39, 55-57, 59, 60, 64, 68, 69, 71-99, 144-149, 154, 161, 162, 165, 171, 174, 175, 177-187, 189, 190, 192, 193 &196-212]	**Supported**	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. Ai Group has given careful consideration to the Royal Commission's recommendation that separate legislation be enacted for the building and construction industry to deliver the reform package and has decided that, on balance, the benefits outweigh the risks. Ai Group proposes that there be a review of the sector-specific legislation after five years to ascertain whether there is an ongoing need to retain it.
That the *Building and Construction Improvement Act* defines the "building and construction industry" [Rec. 186].	**The concept of a definition is supported**	The drafting of the definition will be very important and requires careful consideration. If the industry is defined in a narrow way some sectors which share many of the problems which exist in the construction industry (such as the mechanical and electrical contracting sectors) may be excluded. However, if the industry is defined in a broad way, the inclusion of various sectors in the definition may increase the risks of construction industry terms and conditions (eg. construction industry trust funds and the 36 hour week) flowing on to such sectors.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That there be *"significant monetary penalties for breaching the Building and Construction Improvement Act"*[3]	**The level of penalty needs to be appropriate for each offence**	Specific offences should be set out in the Act, rather than any breach, regardless of how trivial, attracting a penalty. A $100,000 maximum penalty is appropriate for unlawful industrial action but is inappropriate for breaches of awards as set out in Rec. 165. 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. 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 a penalty of $100,000 (per breach) for what may be an inadvertent breach of an award provision. This represents a twenty-fold increase in the current maximum penalty. The W*orkplace Relations Act* currently contains a lower maximum penalty for breaches of awards than breaches of certified agreements and orders of the AIRC. Such differentiation should remain and the level of penalty needs to be appropriate for the offence.

[3] Volume 11, p.77

5.0 Australian Building and Construction Commission (ABCC)

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. Taskforces that operated in the industry in New South Wales and Western Australia were successful in improving compliance with the law and improving workplace relations in the industry. Such taskforces addressed the significant problem of employers being reluctant to enforce their legal rights due to retaliation and victimisation by construction industry unions.

The Australian Building and Construction Commission (ABCC), as recommended by the Royal Commission, has all of the powers and functions proposed by Ai Group in its submissions, together with various additional powers. We support the establishment of the ABCC and the proposed powers (with a few exceptions which are set out in this submission), subject to an appropriate governance regime being established for the body 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;
- A media protocol;
- As proposed by Ai Group in its submissions, and as recommended by the Royal Commission, the ABCC should be subject to the prudential oversight of an Ombudsman.

The ABCC 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 ABCC.

Recommendation/s	**Ai Group's Position**	**Basis of Ai Group's Position**
That a statutory authority, provisionally called the Australian Building and Construction Commission (ABCC), be established to enforce the *Building and Construction Industry Improvement Act*, the *Workplace Relations Act* and other laws applicable to the building and construction industry. [Rec. 178 & 179]. That the ABCC have responsibility for the investigation of all forms of unlawful and inappropriate conduct which occur in the building and construction industry unless there is an agency better equipped by way of legislative power, experience, resources and expertise. [Rec. 180, 189 & 193]. That the ABCC be constituted by a chairman and a small number of other statutory office holders, appointed for a fixed but renewable term. That the ABCC employ lawyers, investigators, analysts and other staff but only the chairman and members be empowered to exercise coercive powers. [Rec. 183].	**Supported**	Bodies with similar roles that operated in the industry in New South Wales and Western Australia were successful in improving compliance with the law and improving workplace relations. The ABCC would address the significant problem of employers being reluctant to enforce their legal rights due to retaliation and victimisation by construction industry unions. The proposed responsibilities and powers of the ABCC are appropriate (with a few exceptions which are set out in this submission), subject to an appropriate governance regime being established for the body. The ABCC 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 ABCC.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the ABCC report annually to the responsible Minister (the report to be tabled in Parliament) and be subject to the jurisdiction of the Commonwealth Ombudsman. [Rec. 196 & 197].	**Supported**	This is consistent with Ai Group's submissions to the Royal Commission.
That the *Building and Construction Improvement Act* contain secondary boycott provisions mirroring ss45D–45E of the *Trade Practices Act 1974 (C'wth),* but limited in operation to the building and construction industry. [Rec. 181]. That the ABCC share jurisdiction with the Australian Competition and Consumer Commission (ACCC) in investigating and taking legal action concerning secondary boycotts in the building and construction industry. [Rec. 182].	**Supported**	This approach should enable parties who are affected by a secondary boycott to obtain faster relief.
That the ABCC have attached to it Australian Federal Police and DPP officers. That the Commonwealth encourage the States to second State police officers to the ABCC. [Rec. 188 & 194].	**Supported**	Such interaction with the police is appropriate in respect of criminal matters.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the ABCC have powers to: • Obtain information, documents and evidence. [Rec. 184, 185 & 192]. • Seek interim, interlocutory and permanent injunctions. [Rec. 39, 185, 187 & 202]. • Bring proceedings to enforce judgments where a party has not complied with an injunction or order or has failed to pay a penalty. [Rec. 39, 185, 187, 193 & 203]. • Commence and prosecute applications in courts for the imposition of penalties for any breaches of the *Building and Construction Industry Improvement Act* and the *Workplace Relations Act 1996 (C'wth)* arising in the building and construction industry. [Rec. 185]. • Intervene in any AIRC proceedings arising in the building and construction industry. [Rec. 4 & 185]. • Commence and prosecute applications in courts for the cancellation of registration of a registered organisation, or the exclusion of persons from eligibility to hold office in a registered organisation. [Rec. 185 & 212].	**Supported in principle**	Such powers are appropriate. However, the Government should consult with industry when drafting legislation to give effect to such powers.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
• Apply for orders in relation to demarcation disputes, including orders for the imposition of a civil penalty. [Rec. 58]. • Receive and investigate complaints concerning abuses of privileges by permit holders, and to make application to a Registrar to suspend or revoke a permit, or to have conditions attached to a permit. [Rec. 70]. • Refer matters to specialist agencies and tribunals and to establish administrative arrangements with other agencies. [Rec. 185, 192 & 195]. • Monitor the operation of the *Building and Construction Industry Improvement Act* and the *Workplace Relations Act 1996* and recommend amendments to the Minister. [Rec. 185].		
That the ABCC have the responsibility to monitor the National Code of Practice for the Construction Industry and the Commonwealth Implementation Guidelines. [Rec. 47, 49, 50, 54 & 190].	**Not supported in its present form**	This power is supported only if the National Code and Implementation Guidelines are replaced by a law or regulation of the Commonwealth. For example, the issues could be dealt with in the proposed *Building and Construction Industry Improvement Act* or in regulations made under that Act. (This issue is dealt with in more detail in Section 9.0 of this submission).

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the ABCC have various educative and advisory functions including: • Holding discussions with industry participants [Rec. 191]; • Conducting information sessions [Rec. 191]; • Distributing relevant literature [Rec. 191]; • Provide legal advice to aggrieved persons concerning their right to bring legal action [Rec. 193]; and • Encouraging and monitoring strategies to increase the representation of women in the building and construction industry. [Rec. 143].	**Supported**	Such educative role is very important – equally important to the ABCC's compliance and enforcement roles.
That: • The ABCC be notified within 24 hours of threatened or actual industrial action, such notification to be made by the affected person; and	**Supported in principle**	The proposed process would reinforce the rule of law and act as a significant deterrent to unlawful industrial action. However, the level of maximum penalty for non-compliance needs to be appropriate for the offence. Often it is arguable whether industrial action taken during enterprise agreement negotiations is protected or not (for example, the notices given by unions under s.170MO of the Act regarding planned industrial action often lack the requisite degree of specificity or contain various technical deficiencies), therefore, inadvertent breaches of these notification provisions could occur.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
• Within 14 days of unlawful industrial action occurring, any person who has suffered loss must lodge with the ABCC a statement of the quantum of loss or damage incurred or likely to be incurred as a result of the action, with supporting documentation. [Rec. 208].		
That: • A panel of expert assessors be established with appropriate experience and powers to assess the victim's loss quickly, justly and cheaply. • If an assessor accepts the accuracy of the victim's assessment, he or she would certify to that effect. If the assessor does not agree then he or she would determine an alternative figure. An assessor's loss certificate would be prima facie evidence of the quantum of the loss in any proceedings where it has been determined that the statutory proscription has been breached. [Rec. 209].	**Supported**	This process should significantly reduce the costs involved in pursuing damages where unlawful industrial action has occurred.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Industry Improvement Act* impose an obligation on employers to notify the ABCC within 24 hours of the substance of any demand or claim to make a payment to an employee in relation to a period during which the employee engaged or engages in industrial action. That failure to notify the ABCC attract a $100,000 maximum penalty. [Rec. 144 and 149].	**Supported in principle but the level of the maximum penalty needs to be appropriate for the offence**	Such a provision would deter unlawful union claims for strike pay. However, the maximum penalty for not reporting within the required 24 hour period needs to be appropriate.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Industry Improvement Act* require registered organisations, as soon as practicable after the end of each financial year, to lodge with the Industrial Registrar and the ABCC a statement showing the following particulars in relation to each donation exceeding $500 received by the organisation during that financial year: • The amount of the donation; • The purpose for which the donation was made; and • The name and address of the person who made the donation. [Rec. 145 and 146]. That the *Building and Construction Industry Improvement Act* require clients, head contractors and subcontractors to notify promptly the ABCC of any request or demand that a donation exceeding $500 be made to, or at the direction of, a registered organisation or an official, employee, delegate or member of a registered organisation. [Rec. 147]. That a $100,000 maximum penalty apply for breaching these requirements. [Rec. 149].	**Supported in principle but the level of the maximum penalty needs to be appropriate for the offence**	Such reporting requirements are appropriate. However, the level of the maximum penalty needs to be appropriate for the offence.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That employers be required to notify the ABCC of payments made to employees for periods of industrial action in respect of what is claimed to be a matter of occupational health and safety (OHS), except where: • The employee has complied with the relevant dispute resolution procedure or the employer has failed to comply with such procedure; and • At the time when the demand is made the work was the subject of a prohibition notice issued by an OHS authority. [Rec. 35].	**Supported in principle**	Such a reporting requirement will assist in preventing unions from using occupational health and safety as an industrial weapon against employers. However, the level of the maximum penalty needs to be appropriate for the offence.
That where a person in the building and construction industry obtains an order to stop or prevent industrial action under s.127 of the *Workplace Relations Act* from the Federal Court, such person must notify the ABCC of the order and its terms within 24 hours. That the ABCC be empowered to apply to the Federal Court for an order varying an injunction issued under s.127 or for an order that a person be charged with contempt of court for breaching a s.127 order made by the Federal Court. [Rec. 39].	**Supported in principle**	The recommended ABCC powers and notification requirements are appropriate. Significantly, the ABCC is only required to be notified of s.127 orders which are enforced by the Federal Court – not s.127 orders issued by the Australian Industrial Relations Commission.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That parties bound by the National Code be required to report breaches of the National Code, as well as breaches of the Implementation Guidelines, to the ABCC. [Rec. 49].	**Not supported in its current form**	The Code and Implementation Guidelines deal with an array of matters – from broad principles to specific requirements. It would be impractical and excessively onerous for parties to be required to report all breaches of the Code and Implementation Guidelines to the ABCC. If the Code and Implementation Guidelines are replaced with a law of regulation of the Commonwealth, then Ai Group would support a requirement to notify serious breaches of significant (and defined) provisions to the ABCC.
That Permit holders be required to provide a copy of entry and inspection notices to the ABCC not less than 24 hours before the time and date specified in the notice. [Rec. 66, 67 and 68]. That any principal, contractor, subcontractor, consultant or employee who is aware of a union official having entered a site otherwise than in strict compliance with the procedures governing entry and inspection under the *Workplace Relations Act 1996 (C'wth*), the *Building and Construction Industry Improvement Act* or under relevant State legislation must refer the matter to the ABCC for consideration. [Rec. 54]	**Supported with modification**	Given the Royal Commission's finding that union entry and inspection rights are often misused in the building and construction industry, it is appropriate that unions provide copies of entry and inspection notices to the ABCC. However, it would be extremely onerous for employers and employees to be required to report all breaches of right of entry procedures to the ABCC, regardless of how trivial the breach may be. Further, the level of the maximum penalty needs to be appropriate for the offence.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the ABCC play a leading role in the development of a privacy code in consultation with all key industry participants. That consideration be given to the ABCC handling privacy complaints made under the proposed code. [Rec. 36].	**Supported in Principle**	If a privacy code is to be developed, Ai Group strongly supports the recommendation that it be developed in consultation with industry.
That the Commonwealth through the ABCC and the Department of Employment and Workplace Relations (DEWR), provide a service in connection with the enforcement and recovery of unpaid entitlements for employees and labour-only subcontractors in the building and construction industry whose annual earned income does not exceed $50,000. [Rec. 155, 156, 157, 158, 159 and 160].	**Such an ABCC role would involve unnecessary cost and duplication, given the services provided by the DEWR**	The DEWR currently provides an effective enforcement and recovery service regarding employee entitlements. In view of this it would appear to be unnecessary to establish such a service within the ABCC.
That the ABCC be authorised to monitor projects where development funds are provided by building and construction industry superannuation, long service leave, redundancy or other industry funds to ensure that conditions are not attached to such loans or equity interests which infringe provisions of the *Building and Construction Industry Improvement Act* or the *Workplace Relations Act 1996 (C'wth*). [Rec. 176].	**Supported**	Such a monitoring role is appropriate.

6.0 Pattern Bargaining

In Volume 5 of the 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"[4].

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;
- 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;

[4] Volume 5, p.15.

- 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.[5]

Ai Group strongly supports the Royal Commission's view that pattern bargaining in the construction industry is highly damaging and must be addressed. To address the problems, the Royal Commission has made a series of recommendations. The Commissioner's recommendations and Ai Group's position on them are set out in the following table.

Recommendation/s	**Ai Group's Position**	**Basis of Ai Group's Position**
To define "pattern bargaining" broadly along the lines adopted in the *Workplace Relations Amendment Bill 2000*. [Rec. 2].	**Supported**	The definition of "pattern bargaining" will require very careful consideration.
To: • Prohibit pattern bargaining; • Enable the Federal Court, on application by an interested party or the ABCC, to grant an injunction restraining parties from engaging in pattern bargaining; and • Provide that it is a ground for deregistration of any union or employer association that the organisation has failed to comply with such an injunction. [Rec. 2].	**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"[6]. Such an amendment would minimise coercion of employers by unions to sign pattern agreements against their will.

5 Volume 5, p.53
6 Volume 5, p.30

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
		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"*[7]. 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 the Royal Commission's recommendation that pattern bargaining be outlawed completely (including removing the power for the AIRC to certify pattern agreements), Ai Group believes that such a legislative change would be feasible and worthwhile so long as a mechanism is created to enable the certification of genuine project agreements for major projects. 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.

[7] Volume 5, p.73

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
		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. Indeed, as set out in section 7.0 below, Commissioner Cole did not recommend that certified project agreements be outlawed completely but expressed support for some forms of project agreement. This can be contrasted with his views on pattern bargaining which he regarded as highly inappropriate and damaging. The National Code of Practice for the Construction Industry recognizes 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).

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
		The ability to implement effective risk management strategies is a vital factor that underpins decisions by investors to fund major projects. Ai Group's views on project agreements are set out in more detail in section 7.0 below.
That the nominal expiry date of any agreement be determined by reference to the expiry date of a fixed period (say three to five years) after the date on which the agreement is entered into (not the date of certification) – which would over time lead to the spreading of expiry dates for certified agreements in the industry. [Rec. 3].	**Supported with modification**	Ai Group supports the thrust of this practical recommendation that is designed to spread the expiry dates of certified agreements in the industry. However, Ai Group is concerned that if all agreements in the industry are to have a similar term, determined with reference to the date that agreement is reached between the parties, then: • Unions may delay signing agreements (perhaps for many months) until they are able to sign a very large batch of agreements at the same time thereby creating a common expiry date; and • Employers would lose their flexibility to enter into certified agreements with expiry dates which meet the specific needs of their enterprise. To address the above problems, Ai Group proposes that an alternative approach be adopted to that recommended, which would achieve the same objective. Our proposed approach is:

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
		• As recommended by the Royal Commission and except as provided for below, all certified agreements in the industry should have a consistent term, say, three years from the date of certification. • The AIRC should have the discretion to certify agreements with a different term if satisfied that such alternative term is consistent with the needs of the particular enterprise. Provided that the maximum term for certified agreements should be five years. • In scheduling hearings for certified agreements, the AIRC should be required to have regard to the desirability of having a diverse range of expiry dates in the industry (ie. The AIRC should be discouraged from listing dozens of agreements for certification on the same day, thereby creating dozens of agreements with common expiry dates).
To prevent the Australian Industrial Relations Commission (AIRC) certifying agreements which are pattern agreements. To require the AIRC to inform the ABCC of applications to certify agreements in the building and construction industry and enable the ABCC to intervene in certification proceedings. [Rec. 4].	**Conditionally supported**	See comments above regarding Rec. 2.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
To require that a vote be held (by secret ballot if the enterprise employs 10 or more employees who will be covered by the agreement) no later than two months prior to the expiry of the agreement to enable the employees to decide whether or not they wish to be represented by a union or other agent in the upcoming enterprise agreement negotiations. [Rec. 5].	**Conditionally supported**	Under the *Workplace Relations Act*, registered organisations have an important role to play in representing their members (eg. See s.3(f) and (g)). However, the proposed process set out in Rec. 5 is democratic and practical and Ai Group supports it. Ai Group would not be supportive of any related legislative provision that prevents certification of an agreement if this requirement is not met. There are a very large number of small contractors in the industry who do not have specialised workplace relations resources to assist them with this proposed procedural requirement. It would be unfair for such employers to be unable to have their agreement certified for two months if this requirement was inadvertently not adhered to.
That the objective of enterprise agreement negotiations should be to reach a new agreement prior to the expiry date of any existing agreement and provide that certified agreements cannot operate retrospectively unless the employer has unreasonably delayed negotiations. [Rec. 6].	**Supported**	This would discourage unions and employers from unreasonably delaying the negotiation and/or processing of enterprise agreements.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
To provide that, if the employees choose not to be represented by a union in the enterprise agreement negotiations, and any union members wish to have representations made on their behalf by their union, that the employer be required to provide an opportunity to the union to consult with the employer prior to the finalisation of the agreement. Further, to provide a similar right to the minority of employees if the majority of employees vote for union representation. [Rec. 7].	**Supported**	The proposed approach is consistent with the existing legislative requirement under s.170LK of the *Workplace Relations Act* relating to agreements entered into directly between employers and employees.
To establish a set of "genuine" bargaining principles. [Rec. 8].	**The concept of genuine bargaining is adequately catered for in the existing legislation**	In Ai Group's view, it is unnecessary for a set of "genuine" bargaining principles to be enshrined within the Act. A significant number of decisions of the AIRC and the Federal Court have held that the concept of *"genuinely trying to reach agreement"*, as set out in s.70MP and s170MW of the Workplace Relations Act includes the concept of *"bargaining in good faith"*. (For example, see *AMIEU v G & K O'Connor Pty Ltd (1999) FCA 310, 22 March 1999).* Further, Ai Group has significant concerns about (b)(xiii) in the recommended set of principles. This provision could be interpreted as prohibiting a party that has entered into negotiations with a union from entering into a s.170LK agreement or AWAs if agreement is not reached with the union.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
		Also, the set of principles, as drafted, could be interpreted as requiring all parties to bargain for an enterprise agreement, regardless of whether or not they wish to. Many employers and their employees are happy to comply with relevant awards and to implement informal over-award arrangements rather than entering into a formal enterprise agreement. The *Workplace Relations Act* recognises the validity of this informal bargaining approach in s.3(c). A requirement to bargain would disturb the AIRC's longstanding *Asahi* principle (established by a five member Full Bench in the 1995 *Asahi* case, Print L9800). This principle prevents parties being forced to bargain for an enterprise agreement against their will. The Asahi principle was recently reconfirmed by the AIRC in its *Sensis* decision *(PR930269, Smith C, 10 April 2003)*. Of course the *Asahi* principle does not prevent a party from taking protected action to endeavour to convince another party to bargain, but it does prevent the AIRC and Courts ordering a party to bargain against their will and/or penalising them if they do not.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
To prohibit all forms of discrimination for or against a contractor on the ground that a contractor has or does not have a particular form of workplace agreement with its employees, whether or not the discriminatory conduct constitutes coercion, unless the conduct is protected action. (Penalty $100,000 for corporations and $20,000 in other cases). [Rec. 12].	**Supported with modification**	This provision would impact far more significantly on head contractors than unions because the prohibition does not apply to protected industrial action. Ai Group strongly supports a legislative prohibition on **coercion** to enter into a particular form of enterprise agreement. Such a prohibition already exists in 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"*[8]. Ai Group is concerned about the potential breadth of the term *"all forms of discriminatory conduct……whether or not the discriminatory conduct constitutes coercion"*.

[8] Volume 5, p.90.

Recommendation/s	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 a contract, if the sub-contractor does not have a workplace agreement with sufficiently flexible terms to enable the head contractor to maintain control over the site (eg. The hours of work provisions in a sub-contractors agreement may be unduly inflexible)[9]. Such endorsed form of discrimination would appear to be inconsistent with Rec. 12. Ai Group submits that the legislative prohibition should not extend beyond the concept of **coercion.**

[9] Volume 5, p.123

7.0 Project Agreements

The merits of projects agreements are analysed in Chapter 14 of Volume 5 of the Final Report.

Commissioner Cole found that while project agreements are attractive to major builders and unions, "they have a tendency to interfere with, contradict and pre-empt the process of bargaining at the enterprise level"[10]. It was accepted by Commissioner Cole that head contractors need to maintain control over building sites in order to coordinate and plan work. However, in the Royal Commissioner's view such coordinating role "should not impinge upon or impugn the employment arrangements between a subcontractor and its employees"[11].

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

- The *Workplace Relations Act* should enable genuine project agreements to be certified for "major construction projects" given the size, nature, location and complexity of such projects and the complex chain of contractual relationships involved;
- In Ai Group's experience, owners, head contractors and subcontractors all support the establishment of project agreements on major projects;
- Subcontractors generally indicate to Ai Group that project agreements provide the best environment for them but seek that project agreements be established in advance of tendering and only apply to the subcontractor's employees while they are engaged on the project;
- Project agreements have delivered many best practice outcomes for major construction projects;

10 Volume 5, p.97
11 Chapter 5, p.106

- Protected action must not be available during the negotiation of project agreements because it is a fundamental tenet of the Act that protected action apply exclusively for enterprise bargaining – not bargaining involving more than one employer.

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.

The National Code of Practice for the Construction Industry recognizes 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).

Ai Group submitted to the Royal Commission that the *Workplace Relations Act* could be amended to enable genuine project agreements to be reached and certified for major projects by, either:

- Restoring the mechanism which existed under the previous *Industrial Relations Act 1988* whereby employer associations were able to enter into project agreements which would then bind member companies while working on the relevant project; or

- Relying on the Corporations Power under the Australian Constitution to underpin a new legislative provision for project agreements to enable project agreements to be certified and become binding, as a common rule, on all Constitutional Corporations which work on the project.

Ai Group has carefully analysed and considered Commissioner Cole's findings regarding project agreements and his recommendations that:

- The only forms of project agreements which should have force and effect in the building and construction industry are those made under ss.170LC or 170LL of the *Workplace Relations Act*;
- There be a legislative requirement that parties to a project agreement apply to the AIRC within 21 days of an agreement being made;
- If no application is made to the AIRC within the 21 day period, or if the AIRC refuses to certify the agreement, the project agreement should be void, unlawful and unenforceable either directly or by incorporation into another agreement.

As can be seen from the above, Commissioner Cole did not recommend that certified project agreements be outlawed completely but expressed support for some forms of project agreement. This can be contrasted with his views on pattern bargaining which he regarded as highly inappropriate and damaging.

However, Ai Group does not agree that either s.170LC or s.170LL provide a suitable mechanism for the certification of project agreements for major projects. 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 other mechanism - S.170LL – provides even less utility because such agreements can only apply to single businesses.

We believe that the *Workplace Relations Act* needs to be amended to provide a genuine mechanism for the certification of project agreements for major projects, subject to stringent controls.

Owners, head contractors and subcontractors must be able to implement effective risk management strategies on major projects. If they are not able to do so, there is a significant risk that investors will not be prepared to commit funds to major projects, which would not be in the public interest.

Commissioner Cole expressed support for the following legislative requirements of s.170LC project agreements:

> *"scrutiny of a s.170LC agreement by a Full Bench applying a public interest test as a precondition to certification serves a useful purpose of helping ensure that the agreement is not an inappropriate one bearing in mind the competing interests which may be affected by it".*

In addition, Commissioner Cole expressed support for the fact that s.170LC project agreements require the involvement of subcontractors in the agreement-making process.

Taking into account the above issues, Ai Group proposes that the *Building and Construction Improvement Act* contain a mechanism to enable the certification of a project agreement if it meets 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 which 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 an employer or group of employers and a union or unions;

- It is certified by a Presidential Member or a Full Bench of the AIRC;

- The Presidential Member or Full Bench is satisfied that it is in the public interest to certify the agreement, having regard to:

    - Whether the matters dealt with by the agreement could be more appropriately dealt with by agreements at the enterprise level;
    - 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;
    - Whether the client supports the project agreement; and
    - Any other matters that the Commission considers relevant.

- 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).

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 an industry, a sector, a geographic area or 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 the commonly accepted interpretation of s.170MN of the Act which provides that parties covered by a certified agreement cannot take protected industrial action before the nominal expiry date of the certified agreement (regardless of whether another certified agreement which binds the parties expires). Ai Group's proposal is also entirely consistent with the provisions of the Federal Government's proposed *Workplace Relations Amendment (Improving Bargaining) Bill* which we understand will clarify the operation of s.170MN of the Act to reinforce the above interpretation. In addition, our proposal is consistent with Recommendation 37 in the Royal Commission's Final Report which recommends that s.170MN of the Act be clarified in the light of the Federal Court's *Emwest* decision to make it clear that during the currency of a certified agreement, any industrial action taken by parties to that agreement cannot constitute protected industrial action.

As identified by the Royal Commission, at the present time project agreements are not producing certainty of project costs because the periodic review of enterprise agreements (which are almost invariably pattern agreements) during the life of a long term project often results in "a project becoming the front line battleground of a general campaign for the next generation of enterprise agreements, especially if it is identified by the unions as being in a vulnerable stage of its development"[12]. Ai Group's proposal overcomes this problem because there would be no right to take protected action during the life of the certified project agreement even where the subcontractors' enterprise agreements expire during such period.

[12] Volume 5, p.109

If Ai Group's proposals, as outlined above, are accepted and incorporated within the legislation then Ai Group supports the Royal Commission's recommendation that unregistered project agreements should become void, unlawful and unenforceable either directly or by incorporation into another agreement.

Similarly, unregistered industry agreements such as the *Victorian Building Industry Agreement (VBIA)*, the *Queensland Construction Sector Statement of Intent* and the *Tasmanian Framework Agreement* should become void, unlawful and unenforceable[13]. Ai Group is not a party to these agreements. However, while we support such industry agreements being made unlawful for the future, we oppose such instruments being referred to the Australian Competition and Consumer Commission (ACCC) for investigation into whether such agreements breach the *Trade Practices Act.* (Refer to Rec. 136). The emphasis should be on creating the right environment for the future, not on exploring new legal avenues to punish union and employer parties who negotiated or agreed to be bound by such industry agreements in good faith, believing that such instruments were lawful.

Ai Group's view on the specific recommendations of the Royal Commission regarding project agreements are set out in the following table.

[13] These agreements are referred to in Volume 5 at p.10 and Volume 9 at p.120.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That: • The only forms of project agreements which should have force and effect in the building and construction industry are those made under ss.170LC or 170LL of the *Workplace Relations Act*; • There be a legislative requirement that parties to a project agreement apply to the AIRC within 21 days of an agreement being made; and • If no application is made to the AIRC within the 21 day period, or if the AIRC refuses to certify the agreement, that the project agreement should be void, unlawful and unenforceable either directly or by incorporation into another agreement. [Rec. 13]	**Supported with modification**	Ai Group does not agree that either s.170LC or s.170LL provide 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 other mechanism - S.170LL – provides even less utility because such agreements can only apply to single businesses. The *Workplace Relations Act* needs to be amended to provide a genuine mechanism for the certification of project agreements for major projects, subject to stringent controls. Ai Group proposes that the *Building and Construction Improvement Act* contain a mechanism to enable the certification of a project agreement if it meets the following criteria:

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
		• 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 an employer or group of employers and a union or unions; • It is certified by a Presidential Member or a Full Bench of the AIRC; • 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.

Recommendation/s	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). The integrity of individual enterprise agreements should be maintained. Project agreements should supplement and co-exist with enterprise agreements.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
		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 an industry, a sector, a geographic area or 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.170MN of the Act and Rec. 37. If Ai Group's proposals, as outlined above, are accepted and incorporated within the legislation then Ai Group supports the Royal Commission's recommendation that unregistered project agreements should become void, unlawful and unenforceable either directly or by incorporation into another agreement.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
		Similarly, unregistered industry agreements such as the *Victorian Building Industry Agreement (VBIA)*, the *Queensland Construction Sector Statement of Intent* and the *Tasmanian Framework Agreement* should become void, unlawful and unenforceable. Ai Group is not a party to these agreements. However, while we support such industry agreements being made unlawful for the future, we oppose such instruments being referred to the Australian Competition and Consumer Commission (ACCC) for investigation into whether such agreements breach the *Trade Practices Act.* (Refer to Rec. 136). The emphasis should be on creating the right environment for the future, not on exploring new legal avenues to punish union and employer parties who have negotiated or agreed to be bound by such industry agreements in good faith, believing that such instruments were lawful.

8.0 Industrial Action

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;
- Program acceleration expenses, eg. extra overtime;
- Daily costs of hire for rental equipment on site such as cranes, mobile plant, sheds, offices and other equipment;
- Supervision and management costs;
- Legal and other costs associated with dispute resolution;
- Loss of profit by the client;
- Loss of key personnel to other projects;
- Sub-contractors will often inflate their tender prices on trouble-prone projects;
- Payments to employees for lost time over questionable OH&S disputes;
- Damage to the contractor's reputation which may result in the loss of future business; and
- Demurrage costs when plant and equipment cannot be moved from the docks to the construction site due to the industrial action.

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.

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.

Recommendation/s	**Ai Group's Position**	**Basis of Ai Group's Position**
That the Act contain a new "statutory norm" to ensure that there is clarity and certainty regarding what industrial action is permitted and what is not. This will assist in re-establishing the rule of law in the industry. [Rec. 199 & 200].	**Supported with modification**	A "statutory norm" would be worthwhile because clarity and certainty are in the interests of all parties. However, Ai Group does not support (2)(b) and (c) of the recommended statutory norm because these proposals would extend the concept of lawful industrial action beyond industrial action which is protected or based on a reasonable concern by employees about an imminent risk to their health and safety.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That jurisdiction for actions brought in relation to the new "statutory norm" be conferred on the Federal Court, the Federal Magistrates Court, relevant State and Territory Courts. [Rec. 201]	**Supported**	The provision of access to a wider range of courts will enable employers, employees and unions to pursue actions where unlawful industrial action has been taken in a faster and more cost effective manner.
That the *Building and Construction Improvement Act* contain an injunction provision that would empower courts of competent jurisdiction to grant interim, interlocutory and final injunctions to restrain threatened or actual unlawful industrial action at the suit of the ABCC or a person suffering loss. [Rec. 202].	**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. In such an environment it is essential that parties are able to pursue an injunction when unlawful industrial action is taken or threatened.
That the maximum penalty for breaching the "statutory norm" be $100,000 and that proceedings be able to be brought by a person who suffers loss or the ABCC. [Rec. 203 & 204].	**Supported**	The proposed $100,000 penalty is appropriate. It is important that the ABCC have the power to pursue such penalties. Employers are often reluctant to pursue such penalties in their own right because of the risk of victimisation by construction unions.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That registered organisations be held responsible for the actions of their officials or employees. [Rec. 205].	**Supported**	Unions often seek to distance themselves from the actions of their officials and employees. Unions should be held presumptively responsible for the actions of officials and employees. The approach recommended by the Royal Commission includes an exemption where a registered organisation has taken "reasonable steps" to prevent the action. Such exemption is appropriate.
That, in respect of unlawful industrial action, where a registered organisation, or its officials: • Have aided, abetted, counselled or procured the contravention; • Have induced, whether by threats or promises or otherwise, the contravention; • Have been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or • Have conspired with others to effect the contravention; the registered organisation and its officials should be held responsible. [Rec. 206].	**Not supported in its current form**	Ai Group supports the concept that registered organisations are to be accountable. However, elements of this recommendation go too far in making registered organisations (unions and employer associations) responsible for the actions of others. The concept of being "in any way, directly or indirectly" involved is extremely broad. Consider the example of an employer association which gives a company advice about a lock-out (advice which may not have been comprehensive or may not have been accepted by the company involved) and subsequently the lock-out is found to be unlawful due to a procedural defect in the lock-out notice or the process followed. This recommendation would appear to expose employer associations to substantial damages claims by unions and employees in such circumstances. This is not appropriate.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
		The proposals in other recommendations (in particular Rec. 205 and 207) appear to provide adequate mechanisms to ensure that registered organisations are held accountable for their actions, including those of their officials and employees.
That where a registered organisation or a person, by unlawful industrial action, causes loss to another, the person suffering such loss should be entitled to recover the loss in an action for damages. [Rec. 207].	**Supported**	Such a provision is appropriate.
That: • The ABCC be notified within 24 hours of threatened or actual industrial action, such notification to be made by the affected person; and • Within 14 days of unlawful industrial action occurring, any person who has suffered loss must lodge with the ABCC a statement of the quantum of loss or damage incurred or likely to be incurred as a result of the action, with supporting documentation. [Rec. 208].	**Supported in principle**	The proposed process would reinforce the rule of law and act as a significant deterrent to unlawful industrial action. However, the penalty for non-compliance needs to be appropriate for the offence. Often it is arguable whether industrial action taken during enterprise agreement negotiations is protected or not (for example, the notices given by unions under s.170MO of the Act regarding planned industrial action often lack the requisite degree of specificity or contain various technical deficiencies), therefore, inadvertent breaches of these notification provisions could occur.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That: • A panel of expert assessors be established with appropriate experience and powers to assess the victim's loss quickly, justly and cheaply. • If an assessor accepts the accuracy of the victim's assessment, he or she would certify to that effect. If the assessor does not agree then he or she would determine an alternative figure. • An assessor's loss certificate would be prima facie evidence of the quantum of the loss in any proceedings where it has been determined that the statutory proscription has been breached. [Rec. 209].	**Supported**	This process should significantly reduce the costs involved in pursuing damages where unlawful industrial action has occurred.
That in proceedings brought under the *Building and Construction Improvement Act*, costs should normally follow the event. [Rec. 210].	**Supported with modification**	This is a different approach to that taken in the *Workplace Relations Act* (refer to s.347). Until the interpretations of various provisions of the new legislation are "bedded down", there is the potential for a significant amount of litigation. Such litigation may be financially crippling for employers, employer associations and unions, particularly if such organisations are exposed to the risk of paying another party's costs. We propose that costs should only follow the event in respect of a limited number of defined proceedings brought under the Act. For example, pursuing a penalty when unlawful industrial action has been taken.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That where a judgement for damages against a registered organisation is obtained but not satisfied in accordance with its terms then: • The person entitled to the benefit of the judgement or the ABCC may file with the Industrial Registrar the certificate or judgement and relevant evidence; and • On receipt of such evidence the Registrar is bound to immediately cancel the registration of the registered organisation with effect on the expiration of 14 days, unless the judgement debt is paid, set aside or stayed within that 14 day period. [Rec. 211].	**Not supported in its current form**	The cancellation of the registration of a registered organisation is a very serious and significant step. Registrars, Industrial Commissioners and Federal Court Judges need to retain the discretion to decide whether cancellation is warranted in all the circumstances.
That the *Building and Construction Improvement Act* require that officials and employees of registered organisations be fit and proper persons. That the Federal Court or any other court of competent jurisdiction have jurisdiction to disqualify the official from holding such office. [Rec. 212].	**Not supported in its present form**	The removal of a union or employer association official from office is a serious step. If this recommendation is to be adopted, any test of what constitutes a "fit and proper person" would need to be set out in sufficient detail to minimise the potential for unjust outcomes. It is inappropriate that lower Courts (eg. Magistrates Courts) have such power. The recommended provisions should be considered in the context of the provisions of Division 6 of Part IX of the *Workplace Relations Act* which prevent officials of registered organisations from holding office if they have been convicted of certain offences.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
To require that employees at an enterprise vote (by secret ballot where more there are more than 10 employees) on whether protected industrial action should be taken, before such action is taken. [Rec. 9].	**Supported**	The proposed process is fair and democratic.
To provide that industrial action which is not protected be prohibited by the *Building and Construction Industry Improvement Act*. [Rec. 10].	**Supported**	Unprotected industrial action is currently unlawful but the incorporation of the proposed provision within the *Building and Construction Industry Improvement Act* would have the effect of substantially increasing penalties for taking unlawful industrial action in the building and construction industry. The proposed $100,000 penalty is appropriate.
To impose a limit of 14 days on protected industrial action at which time a compulsory 21 day cooling off period would ensue. Any further protected action could only be taken with leave of the AIRC. [Rec. 11].	**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 provision would apply equally to industrial action taken by employers and employees / unions.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Industry Improvement Act* provide that: • Certified agreements can only contain matters that pertain to the employment relationship; • A request that an employee or employer pay a fee to a third party be deemed not to be a term relating to the employment relationship; • Industrial action is not protected if it is taken in support of an agreement that contains any claim that has been declared by the Federal Court not to pertain to the employer-employee relationship or taken in support of a claim at a time at which an application has been made to the Federal Court seeking a declaration that the particular claim does not pertain to the employer-employee relationship and that application has not been determined. That the *Building and Construction Industry Improvement Act* provide for applications to be made to the Federal Court to determine whether matters pertain to the employment relationship. [Rec. 14, 15 and 38].	**Supported**	In its *Electrolux* decision, the Full Federal Court extended union rights to take industrial action to matters which extend beyond the employment relationship – including claims for non-union members to pay bargaining fees to unions. The decision threatens the integrity of Australia's enterprise bargaining system. In May 2003, the High Court of Australia decided that it would hear an appeal by Ai Group against the *Electrolux* decision. The *Workplace Relations Act* was recently amended to outlaw bargaining agent's fee claims but the Federal Court's *Electrolux* decision has wider implications than this issue alone. If the decision stands, there is the risk that unions could organise legally protected industrial action in pursuit of a wide range of political and social causes. It is essential that protected action only be available if taken in support of a proposed agreement in which all claims pertain to the employer-employee relationship. This requirements needs to be clearly set out in relevant legislation. In addition, as recommended by the Royal Commission negotiating parties should have a mechanism to enable them to apply to the Federal Court to clarify whether a particular claim is lawful or not.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Improvement Act* contain secondary boycott provisions mirroring ss45D–45E of the *Trade Practices Act 1974 (C'wth),* but limited in operation to the building and construction industry and: • Provide that any breach of the provisions attracts a maximum penalty of $100,000; • Provide for the Federal Court to issue an injunction on application by an interested party or the ABCC; • Provide for the payment of compensation to any person who suffers loss as a result of the breach. [Rec. 16 and 181]. That the ABCC share jurisdiction with the Australian Competition and Consumer Commission (ACCC) in investigating and taking legal action concerning secondary boycotts in the building and construction industry. [Rec. 182].	**Supported**	This approach should enable parties who are affected by a secondary boycott to obtain faster relief and/or compensation for damages.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That a provision be included within the *Building and Construction Industry Improvement Act* which makers it clear that during the currency of a certified agreement, any industrial action taken by parties to the agreement in support of any claims, whether dealt with in the agreement or not, is not protected action. [Rec. 37].	**Supported**	Such a provision is essential to preserve the integrity of Australia's enterprise bargaining system. The Federal Court's *Emwest* decision (which Ai Group has appealed and is awaiting a decision upon from the Full Federal Court) exposes companies in the construction industry and other industries to protected action during the life of their enterprise agreements.
That where a person in the building and construction industry obtains an order to stop or prevent industrial action under s.127 of the *Workplace Relations Act* from the Federal Court, such person must notify the ABCC of the order and its terms within 24 hours. That the ABCC be empowered to apply to the Federal Court for an order varying an injunction issued under s.127 or for an order that a person be charged with contempt of court for breaching a s.127 order made by the Federal Court. [Rec. 39].	**Supported in principle**	The recommended ABCC powers and notification requirements are appropriate. Significantly, the ABCC is only required to be notified of s.127 orders that are enforced by the Federal Court – not s.127 orders issued by the Australian Industrial Relations Commission.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That s.166A of the *Workplace Relations Act* not apply in the building and construction industry. [Rec. 198]	**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 72 hour period under s.166A and the requirement that a certificate be obtained from the AIRC before pursuing tort action in a relevant court is not appropriate for the building and construction industry.

9.0 National Code of Practice

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 and Territories that 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 has 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 recommended broader regulatory role, such instruments should be replaced by a law or regulation of the Commonwealth (eg. the issues could be dealt with in the proposed *Building and Construction Industry Improvement Act* or in regulations made under that Act). This process would ensure an appropriate degree of Parliamentary and judicial scrutiny in respect of any amendments made to the provisions or interpretations of such provisions. It would protect the legal and appeal rights of employers and other parties in the industry.

There is already anecdotal evidence emerging that some companies' qualification to tender for particular projects has been removed following the referral of their current (and legally binding) certified agreements to Commonwealth Departmental Officers for review. Further, it appears that the interpretation now being placed on various provisions of the Code by Departmental Officers is different to past interpretations and that this has occurred without any consultation with industry representative bodies or even any notification to industry. Further, there are no evident appeal or review mechanisms in place for companies that suffer commercially as a result of such actions.

If, despite Ai Group's view, the National Code and Implementation Guidelines are to be retained then they need to be redrafted and this should occur in consultation with industry representative bodies such as Ai Group and the Australian Constructors Association. The Code and Implementation Guidelines have aged since their initial publication in 1997 and some provisions are now inconsistent with contemporary Government policy.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the National Code and the Implementation Guidelines apply to all projects to which the Commonwealth directly or indirectly provides funds for construction. [Rec. 40]. That it be a requirement that any person who contracts to work on a building site owned, operated, or funded, wholly or partly, by the Commonwealth, comply with the National Code and the Implementation Guidelines, not only in relation to that project, but generally. That is, the Commonwealth should agree only to do business with those who comply with the National Code and the Implementation Guidelines on both publicly and privately funded projects. [Rec. 41]	**Not supported in its current form**	In view of the broader regulatory role recommended for the Code and Implementation Guidelines, such instruments should be replaced by a law or regulation of the Commonwealth (eg. the issues could be dealt with in the proposed *Building and Construction Industry Improvement Act* or in regulations made under that Act). This process would ensure an appropriate degree of Parliamentary and judicial scrutiny in respect of any amendments made to the provisions or interpretations of such provisions. It would protect the legal and appeal rights of employers and other parties in the industry.
That there be a national system of prequalification. [Rec. 42].	**Supported in principle**	It is important that industry be involved in the development of any prequalification system.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That where there is a direct and quantifiable loss to the Commonwealth, contractors or subcontractors, arising from unlawful industrial action in consequence of the insistence by the Commonwealth on compliance with the National Code and the Implementation Guidelines, the loss should be recovered from whoever caused that loss to be incurred. [Rec. 44].	**This principle is supported with qualification**	This recommendation is supported in principle but companies must retain their right to decide whether or not they wish to pursue damages in each particular case. The Royal Commission has recommended that the right to recover damages be set out in detail in the *Building and Construction Industry Improvement Act*. (See section 8.0 of this submission). In view of this, it would appear to be unnecessary for this issue to be dealt with again in the Code or Implementation Guidelines.
That all Commonwealth departments and agencies have an obligation to comply with the National Code and the Implementation Guidelines in all building and construction procurement activities. [Rec. 43]. That the Department of Employment and Workplace Relations (DEWR) be the lead agency within the Commonwealth in relation to the National Code and the Implementation Guidelines and that DEWR advise agencies and other interested parties about their respective responsibilities under the National Code and the Implementation Guidelines. [Rec. 45].	**Leadership by the Commonwealth is important**	Leadership by the Commonwealth is important. However, as set out above, Ai Group proposes that the National Code and Implementation Guidelines be replaced with legislation or a regulation of the Commonwealth.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That DEWR take a lead role in sponsoring a periodic, cross-portfolio review of the Commonwealth's performance in implementing the National Code. [Rec. 48].	**Leadership by the Commonwealth is important**	Leadership by the Commonwealth is important. However, as set out above, Ai Group proposes that the National Code and Implementation Guidelines be replaced with legislation or a regulation of the Commonwealth.
That the Commonwealth review its arrangements for the oversight and monitoring of the National Code and its implementation, with a view to devising review mechanisms which seek to promote best practice. That a dialogue be maintained between the Commonwealth and industry stakeholders. [Rec. 46].	**Supported**	We strongly suggest that the responsible Minister establish an Industry Reference Group to work with the Commonwealth on these review mechanisms. Participation by well-qualified industry representatives will provide the Commonwealth with a service provider's perspective.
That the ABCC have a presence on the revitalised Code Monitoring Group and have the capacity to investigate breaches of the National Code and the Implementation Guidelines and make recommendations to the Code Monitoring Group. [Rec. 47 and 190].	**Conditionally supported**	If the Code and Implementation Guidelines are replaced with a law or regulation of the Commonwealth, then Ai Group would support such a role.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That parties bound by the National Code be required to report breaches of the National Code, as well as breaches of the Implementation Guidelines, to the ABCC. [Rec. 49].	**Not supported in its current form**	The Code and Implementation Guidelines deal with an array of matters – from broad principles to specific requirements. It would be impractical and excessively onerous for parties to be required to report all breaches of the Code and Implementation Guidelines to the ABCC. If the Code and Implementation Guidelines are replaced with a law or regulation of the Commonwealth, then Ai Group would support a requirement to notify serious breaches of significant (and defined) provisions to the ABCC.
That the ABCC and DEWR, on the recommendation of the Code Monitoring Group, be authorised to publicise non-compliance with the National Code and the Implementation Guidelines by contractors and Commonwealth departments and authorities, using the model of the *Ombudsman Act 1976 (C'wth*). [Rec. 50].	**Conditionally supported**	It is important that publication of incidences of non-compliance identify the nature of the non-compliance. Publication should only occur where a pattern of behaviour has occurred over time involving ongoing serious breaches of the Code and Implementation Guidelines. Some instances of non-compliance may be relatively trivial.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the National Code and the Implementation Guidelines be amended to ensure that they are consistent with the terms of the *Building and Construction Industry Improvement Act* once the precise terms of the new statute are known. [Rec. 51].	**Supported in principle**	Consistency is important. This is best achieved by replacing the Code and Implementation Guidelines with a law or regulation of the Commonwealth.
That the Implementation Guidelines, when dealing with the requirement to comply with applicable obligations arising from awards, certified agreements, other industrial agreements and legislative requirements, also specify an obligation to comply with orders and directions of courts and tribunals. [Rec. 52].	**Supported**	The Royal Commission has recommended that such issues be dealt with in the *Building and Construction Industry Improvement Act*. In view of this, it would appear to be unnecessary for these issues to be dealt with again in the Code or Implementation Guidelines. If such issues are to be dealt with in the Code and Implementation Guidelines, the Commonwealth needs to be flexible in recognizing legal obligations entered into by service providers before promulgation of any revised Code and Implementation Guidelines that may have the effect of rendering those service providers in breach of various provisions.
That various items be added to the list of examples given of practices inconsistent with the National Code, including: • Bargaining agent's fees;	**Supported in principle**	Bargaining agent's fees and coercion by unions to employ nominated persons should not be tolerated. However, these issues are comprehensively dealt with in other recommendations of the Royal Commission.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
• The imposition by a union of a requirement for a non-working shop steward or other person to be employed on a construction site; and • Any attempt by a union to compel any contractor, subcontractor or employer to hire an individual nominated by the union. [Rec. 53].		The Royal Commission has recommended that such issues be dealt with in the *Building and Construction Industry Improvement Act*. In view of this, it would appear to be unnecessary for these issues to be dealt with again in the Code or Implementation Guidelines.
A provision be inserted in the Implementation Guidelines in the following terms: • No union official is to seek, and no principal contractor, subcontractor, consultant or employee is to grant admission to a site where building or construction activity that is subject to the National Code is being carried on, other than in strict compliance with the procedures governing entry and inspection under the *Workplace Relations Act 1996 (C'wth*), the *Building and Construction Industry Improvement Act* or under relevant State legislation; and • Any principal, contractor, subcontractor, consultant or employee who is aware of a union official having entered such a site otherwise than in accordance with any such procedure must refer the matter to the ABCC for consideration. [Rec. 54].	**Not supported, in its current form**	It is appropriate that right of entry requirements be complied with. However, some flexibility is required. A dispute or grievance may arise in which an employer may want a union official to visit a site at short notice (eg. An industrial dispute may have arisen or an employer may wish to terminate an employee and the employee may have requested that a union official be present at the termination interview). It is unreasonable for an employer to be in breach of the Code (or of legislation or a regulation) if the employer has invited the union official to visit the site. It would be excessively onerous for employers and employees to be required to report all breaches of right of entry procedures to the ABCC, regardless of how trivial.

10.0 Entry, Inspection, Freedom of Association and Demarcation

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 has held to be highly prevalent in the industry and retaining an entry and inspection regime which enables unions to represent their members effectively.

The Royal Commission has recommended that the unions provide notice to employers before entering a site together with details about the purpose of their visit. This is appropriate. However, there will be occasions where an employer wishes a union official to enter a site at short notice (eg. when an industrial dispute has arisen or when an employee is to be terminated and the employee wishes a union official to be present at the termination interview). In such circumstances, the legislation needs to provide sufficient flexibility to avoid the employer and the union official being held to have broken the law if the employer invites the union official to enter.

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.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That entry and inspection provisions in the *Building and Construction Industry Improvement Act* contain an appropriate statement of objects. [Rec. 59].	**Supported**	This is appropriate and consistent with the approach adopted within many of the parts of the *Workplace Relations Act.*
That a Registrar not be permitted to grant a permit to a union official unless the person has undertaken appropriate training and is a fit and proper person to hold such permit. [Rec. 60 and 61].	**Supported**	It is very important that union officials be appropriately trained. The content of training programs for union officials should not be left entirely to unions to develop. Input from other parties is important to ensure that such courses are balanced.
That in appropriate cases the ABCC be entitled to apply to a Presidential Member of the Australian Industrial Relations Commission for orders that: • The right of a union to apply for permits to be issued to its officers or employees be suspended for a fixed period or revoked or made subject to appropriate conditions; and • All permits issued to officials of a union be suspended or revoked, or made subject to appropriate conditions. [Rec. 62].	**Supported**	This proposal is balanced and appropriate.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That Registrars have the power to impose conditions on the granting of permits, including conditions that the permit holder not be permitted to enter specified premises. [Rec. 63].	**Supported**	Such power is appropriately exercised by Registrars.
That entry and inspection provisions in the *Building and Construction Industry Improvement Act* be implemented to the full extent of Commonwealth Constitutional power. [Rec. 64]. That the Commonwealth seek to persuade the States to enact entry and inspection provisions for the building and construction industry that mirror those recommended for inclusion in the *Building and Construction Industry Improvement Act.* [Rec. 65].	**Supported**	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 issue of whether or not the federal right of entry laws "cover the field" was the subject of recent proceedings before a Full Bench of the AIRC in a case involving Boral. At the time of writing, the Full Bench's decision was reserved.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That Federal rights of entry be limited to persons with a permit to enter who have given no less than 24 hours notice in the prescribed form before entering premises or inspecting records. The notice would need to state: • The name and permit number of the permit holder, and the union he or she represents; • The time and date of the proposed entry or inspection; • The purpose of the proposed entry or inspection; • The breach which they suspect has occurred (without there being any obligation to identify any complainant). That any suspicion on the part of a permit holder must be reasonable. The onus is on the permit holder to establish that he or she held a reasonable suspicion. That Permit holders be required to provide a copy of the notice to the ABCC not less than 24 hours before the time and date specified in the notice for entering the premises or inspecting documents. [Rec. 66, 67 and 68].	**Supported with modification**	It is reasonable for these details to be provided to employers and reasonable for copies of notices to be sent to the ABCC. However, sufficient flexibility should be maintained to enable employers to invite a union official on to a site in appropriate circumstances without the required amount of notice. For example, a dispute or grievance may arise in which an employer may want a union official to visit a site at short notice (eg. An industrial dispute may have arisen or an employer may wish to terminate an employee and the employee may have requested that a union official be present at the termination interview). In such circumstances, the legislation needs to provide sufficient flexibility to avoid the employer and the union official being held to have broken the law if the employer invites the union official to enter.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That awards and certified agreements in the building and construction industry not be able to contain provisions dealing with right of entry and inspection. That the operation of this reform be reviewed after a period of three years. [Rec. 69].	**Supported**	It is unnecessary for awards and certified agreements to include right of entry and inspection arrangements when such matters are dealt with comprehensively under legislation.
That the ABCC be given the power to receive and investigate complaints concerning abuses of privileges by permit holders, and to make application to a Registrar to suspend or revoke a permit, or to have conditions attached to a permit. [Rec. 70].	**Supported**	This is an appropriate and important power for the ABCC.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That Registrars be required to suspend or revoke a permit if satisfied that the person to whom it was issued has, in exercising a Federal power of entry or inspection: • Intentionally hindered or obstructed any person; • Failed to provide the necessary notice in the prescribed form; • Provided a notice, or repeatedly provided notices, for vexatious or frivolous reasons or in vexatious or frivolous circumstances; • Failed to comply with a condition attaching to a permit; • Other than in cases involving an inadvertent or minor breach, failed to comply with any of the statutory obligations of a Federal permit holder; or • Otherwise acted in an improper manner. [Rec. 71 and 72].	**Supported with modification**	While it may be appropriate for guidelines to be set out in the Act 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.
That where a ground for suspension or revocation of a Federal permit is made out, the following mandatory minimum penalties apply: • For a first contravention: minimum suspension of three months; • For a second contravention: minimum suspension of 12 months; and • For a third or further contravention: minimum suspension of five years. [Rec. 73].	**Supported with modification**	While it may be appropriate for guidelines to be set out in the Act, Registrars should retain their discretion to look at all of the circumstances of a particular case in determining a period of suspension or revocation.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That a right of appeal be preserved to the AIRC, with the AIRC having the power to shorten or lengthen a mandatory suspension period, or overturn a suspension period entirely, if satisfied that the period of suspension is manifestly unreasonable. [Rec. 74].	**Supported**	Such appeal rights are appropriate.
That where a permit to enter premises or inspect documents issued to a person under a State law has been suspended or revoked, a Registrar be required, on application, similarly to suspend or revoke the person's Federal permit. That a person be prevented from applying for a Federal permit while any permit held by that person under Commonwealth or State industrial relations legislation is suspended or revoked. [Rec. 75].	**Supported**	It is important that suspension or revocation occur in such circumstances. State and Territory Governments should be encouraged to make complementary legislative amendments to ensure that where a union official's entry permit is suspended or revoked under Federal law, a similar suspension or revocation occurs under State law.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That in the *Building and Construction Industry Improvement Act*: • There be a mandatory period of suspension of at least 3 months for permit holders who fail to comply with their statutory obligations (see Rec. 73); • Other remedies, including compensation for loss and damage, and suspension or disqualification from holding an office or paid position in a registered organisation, be available where contravention of a right of entry and inspection provision is proved; and • Unions be accountable for contraventions of entry and inspection provisions by their officers and employees. The maximum penalty for contravening an entry or inspection provision attracting a civil penalty be $100,000 for a body corporate and $20,000 in other cases. [Rec. 76 and 77].	**Supported with modification**	See section above re. Rec. 73. Registrars should retain their discretion to determine an appropriate period of suspension or revocation. It is inappropriate that an employer be subject to a penalty for inviting a union official on to a site at short notice. There will be times when such attendance is clearly in the interests of the employer (eg. If a dispute arises).
That freedom of association provisions in the *Building and Construction Industry Improvement Act* include an appropriate statement of objects. [Rec. 78].	**Supported**	This is appropriate and consistent with the approach adopted within many of the parts of the *Workplace Relations Act.*

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Industry Improvement Act* contain a provision to the effect that s.267 of the *Workplace Relations Act 1996 (C'wth)* does not apply in respect of the building and construction industry. [Rec. 79].	**Supported in principle**	Conscientious objection certificates are unnecessary when freedom of association laws are in place and enforced.
That the regulation of freedom of association in the *Building and Construction Industry Improvement Act* apply as broadly as possible having regard to Constitutional limitations. Also, that the Commonwealth seek to persuade each State to enact complementary freedom of association provisions of specific application to the building and construction industry in terms which mirror those in the *Building and Construction Industry Improvement Act*. An alternative means of establishing a uniform regulatory environment would be for States to refer relevant powers to the Commonwealth. [Rec. 80 & 82].	**Supported**	Consistency between Federal and State laws should occur to the greatest extent possible. There is the potential for the proposed *Building and Construction Industry Improvement Act* to make provisions that are in stark contrast to State/Territory industrial legislation leaving employers in an uncertain position. For example, the Queensland *Industrial Relations Act 1999*, supports the inclusion of encouragement provisions within an industrial instrument.
That freedom of association provisions in the Building and Construction Industry Improvement Act have generally the same coverage as Part XA of the *Workplace Relations Act 1996 (C'wth)* with some modifications to clarify the operation of various provisions. [Rec. 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92 and 96].	**Supported**	

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the ABCC have the power to: • Make applications to the Federal Court for orders in respect of contraventions of freedom of association provisions in the *Building and Construction Industry Improvement Act;* • Investigate contraventions of those provisions; and • Provide free legal representation to a party in a proceeding concerning a contravention of those provisions. [Rec. 93].	**Supported**	Such powers are appropriate.
That the maximum civil penalty for a contravention of freedom of association provisions in the *Building and Construction Industry Improvement Act* be $100,000 in the case of a body corporate, and $20,000 in all other cases. Additional remedies be prescribed in cases where freedom of association contraventions are proved. [Rec. 94].	**Supported**	This level of maximum penalty is appropriate for such breaches.
That the *Building and Construction Industry Improvement Act* include provisions which prohibit the inclusion of clauses in awards and agreements that contravene freedom of association provisions and require all awards and agreements to include a clause which expressly states the principle of freedom of association. [Rec. 95].	**Supported**	Such an approach would be worthwhile.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That: • Industrial action not be protected if one of the reasons for the action is the existence of a demarcation dispute [Rec. 55]; • The right to apply for a s.118A order be extended to any party adversely affected by a demarcation dispute [Rec. 56]; • A person who suffers loss through the contravention of a s.118A order be entitled to pursue a penalty and compensation [Rec. 57]; and • The ABCC have standing to apply for orders in respect of demarcation disputes. [Rec. 58]	**Supported**	Demarcation disputes in the building and construction industry have the potential to cause significant damage. In view of this, the recommended measures are appropriate

11.0 Improving Occupational Health and Safety

In its submissions to the Royal Commission, Ai Group argued for increased client activism in order to achieve higher standards of occupational health and safety (OHS) in the building and construction industry. In this regard, the performance of the engineering and mining sectors contrasts with the building sector, with experienced, long-term clients demanding higher OHS performance standards and monitoring performance. The Royal Commission has recommended that there be increased activism by the Commonwealth, as a client of the industry and as an agent to drive OHS improvement. This is consistent with the position advocated by Ai Group.

Ai Group also argued in its submissions that clients needed to place more emphasis on *designing in* safety with the capability of design consultants being assessed prior to their engagement. This position has been supported and actioned in the Royal Commission's recommendations.

The principal incentive for a contractor or subcontractor should be its ability to win more work based on a superior OHS performance record. However, this will only be realised if OHS performance is an element that the client rates highly in selecting its service providers. The client's role in making superior OHS performance a core capability in the selection of service providers must continue to be promoted. This will only be achieved by making the cost of OHS performance a transparent element of the tendering process.

In its submissions to the Royal Commission, Ai Group argued that the OHS capability and performance of contractors and more importantly, subcontractors, needs to be assessed at a number of stages, including:

- Project initiation;

- Project design;
- Tender/contract specifications;
- Tender evaluation;
- Planning of work;
- On-site control/management; and
- Review (systems improvement).

The above proposal has been supported by the Royal Commission.

In addition, Ai Group, in its submissions to the Royal Commission, argued for the establishment of an independent OHS advisory body employing highly trained construction industry OHS advisors charged with providing expert OHS advice to employers and their employees, contractors and subcontractors. Evidence before the Royal Commission has demonstrated that OHS can quickly become an industrial issue when a more constructive approach to an OHS issue could have delivered a more positive outcome. In this regard, the Royal Commission has recommended the appointment of a new statutory office of Commissioner for Occupational Health and Safety. Ai Group supports this proposal, subject to an appropriate governance regime being established for the new office.

Ai Group also supported the development of a uniform national OHS framework preferably with the States surrendering their OHS regulatory powers to the Federal Government. This has been addressed in Recommendation 21. We note that previous attempts to harmonise OHS standards through Federal/State/Territory Government cooperation have proved unsuccessful or delivered sub-optimal outcomes.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth foster a new paradigm in the building and construction industry. Work must be performed safely, as well as on budget and on time. [Rec. 17].	**Supported**	This is essential.
That the National Occupational Health and Safety Commission (NOHSC) at regular intervals convene a conference for the purpose of considering occupational health and safety in the building and construction industry. The conference should be linked to the National Occupational Health and Safety Strategy 2002-2012. [Rec. 18]. That the Commonwealth refer submissions, evidence and other material tendered before the Commission that relates to occupational health and safety to the NOHSC. [Rec. 19]. That the Commonwealth take steps to ensure that: • The drawing up of uniform national standards to be applied in the industry is taken up in the National Occupational Health and Safety Strategy 2002-2012; • The Workplace Relations Ministers' Council, adopt a timetable for the completion of this work and be accountable for its completion. [Rec. 20].	**Supported**	Ai Group sees value in a national conference. However it must include the active participation of the State/Territory OHS authorities. Ai Group supports the National Occupational Health and Safety Strategy 2002-2012. The national targets allow progress to be measured and will foster national efforts for substantial, on-going improvement in Australia's OHS performance over the next decade. The five initial national priority areas for action to achieve short-term and longer-term improvements recognise that cooperation among OHS stakeholders will lead to more efficient and effective prevention efforts. NOHSC is now developing the detailed action plans for each of the 5 priorities, so that they will be in place and underway in time for the first annual report to the Workplace Relations Ministers' Council in May 2003. We await advice on how these action plans will address construction industry issues.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the annual report of the NOHSC to the Workplace Relations Ministers' Council provide additional information about OHS performance and strategies in the building and construction sector and that such report be tabled in Parliament. [Rec. 21 and 22]. That the Comparative Performance Monitoring project be continued to allow as far as possible measurements and comparisons at the project level. [Rec. 23].	**Supported**	These measures are appropriate.
That the Commonwealth investigate and report on the *Construction (Design and Management) Regulations 1994 (UK)* and its adoption in Australia. [Rec. 24]. That the Commonwealth take steps to: • Publish guidance material to measure and report on safe design performance; • Publish criteria for investment funds to use to assess the performance of building and construction industry participants in relation to safe design; and	**Supported**	In its submissions to the Royal Commission, Ai Group supported the need to engage the design professions in a programme that focused safety as a *whole of life* issue, through the construction and operation/maintenance of the asset. It is rare for the design elements of OHS law to be applied and there are currently no practical tools. Clients who are procuring an asset to take a short-term development profit may not have the same commitment to *designing-in* safety, if there is a premium attached to this initiative. Clients who are procuring an asset that they will own and operate in the medium to long-term will see the economic benefit of addressing design and safety as a threshold issue.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
• Encourage investment funds, including superannuation funds, to use the criteria developed. [Rec. 25]. That the Commonwealth ensure that designs for construction work include: • Avoidance of foreseeable risks to any person carrying out construction work; • Combating risks to the health and safety of any person carrying out construction; • Giving priority to measures which will protect all persons who may carry out construction work; and • Ensuring that the design includes information about any aspect that might affect the health or safety of any person carrying out construction work. [Rec. 27].		This is an education issue that must involve the design professions, constructors, educators and regulators. It should be based on the hierarchy of controls and must extend to include materials, construction methodology, plant and equipment manufacturers and maintainers.
That the Commonwealth amend the Commonwealth Procurement Guidelines and the Best Practice Policy Guidance issued by the Department of Finance and Administration to provide that occupational health and safety be considered as a core principle in assessing Value for Money in the procurement of any public work. [Rec. 26].	**Supported**	This was proposed by Ai Group in its submissions to the Royal Commission.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth amend the *Public Works Committee Act 1969* to ensure that the Public Works Committee shall have regard to the measures taken to ensure the occupational health and safety of building and construction workers undertaking public work within the meaning of that Act. [Rec. 28].	**Supported**	This is appropriate.
That the Commonwealth introduce a pre-tender occupational health and safety qualification scheme. [Rec. 29].	**Supported**	The Commonwealth and State/Territory Governments should work together to ensure a high level of uniformity and consistency in the development and application of OHS qualification programs. Industry should be involved in the development of the proposed qualification scheme.
That the Commonwealth where it is the client require the contractor to have responsibility to co-ordinate the safety practices of all sub-contractors. [Rec. 30].	**Supported**	This frequently occurs at the present time.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth consider the introduction of a system of tied grants whereby additional funding is made available to the States and Territories on condition that the funding is applied so as to provide additional occupational health and safety inspectors in the building and construction industry. [Rec. 31]. For projects where the value of the works exceeds $3 million, that the Commonwealth seek to enter into an agreement with the relevant State or Territory whereby, in return for an enhanced system of regular worksite health and safety inspections the Commonwealth would agree to provide funding to support the increased level of inspection. [Rec. 32].	**Supported in principle**	Such additional resources would be very beneficial but a strong emphasis should be placed on education - rather than just on inspections and prosecutions.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth establish the Office of the Commissioner for Occupational Health and Safety in the Building and Construction Industry. [Rec. 33].	**Supported**	Such Office should seek to engage industry constructively in the achievement of high standards of OHS in the building and construction industry and should have a strong focus on education. The Office should be subject to an appropriate governance regime 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; • A media protocol; • The prudential oversight of an Ombudsman.
That the National Code of Practice for the Construction Industry, and the Commonwealth Implementation Guidelines, be amended to reflect and complement the reforms proposed in Rec. 27, 29, 30, 31,32, 33 and 35. [Rec. 34].	**Consistency is important**	Consistency is important. However, as set out in section 9.0 above, Ai Group proposes that the National Code and Implementation Guidelines be replaced with legislation or a regulation of the Commonwealth.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
The Commonwealth introduce by legislation a new scheme to apply in the building and construction industry which has the following features: • Model safety dispute resolution procedures; • Prerequisites for payment in relation to work stoppages for safety matters; • Notification to the ABCC; • Payment while safety dispute resolution procedure is being followed up to time of notification of referral to the occupational health and safety authority or inspectorate. That employers be required to notify the ABCC of payments made to employees for periods of industrial action in respect of what is claimed to be a matter of occupational health and safety (OHS), except where: • The employee has complied with the relevant dispute resolution procedure or the employer has failed to comply with such procedure; and • At the time when the demand is made the work was the subject of a prohibition notice issued by an OHS authority. [Rec. 35].	**Supported with modification**	OHS is currently often misused by unions as in industrial weapon against employers. These recommendations, including the proposed reporting requirement to the ABCC, will assist in preventing unions from using occupational health and safety as an industrial weapon against employers. The proposed scheme should be developed in consultation with industry.

12.0 Inappropriate and Unlawful Coercion

Unions in the construction industry frequently coerce head contractors and subcontractors responsible for major packages of work on projects to employ specific persons who they nominate and coerce them to assign key roles (eg. occupational health and safety representative or union delegate) to such persons. Often the individuals would not be the best qualified applicants if the jobs were advertised.

Employers must retain 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 coercion typically takes the form of the union refusing to sign an industrial agreement with the head contractor or subcontractor until agreement has been reached on employing the union nominated labour.

This practice is having a significant negative impact on workplace relations in the industry because many of the individuals nominated are highly militant and have a history of contributing to poor workplace relations on previous construction projects. For example, bogus safety disputes initiated by union nominated occupational health and safety representatives are causing significant losses in the industry.

Recommendation 97 in the Final Report adopts proposals that Ai Group strongly argued in support of in its submissions to the Royal Commission.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Improvement Act* prohibit any registered organisation, or any officer or member of a registered organisation, from organising or taking, or threatening to organise or take, any action with intent to coerce a person: • Employ or engage another person or subcontractor; • Not to employ or engage another person or subcontractor; • To allocate particular duties or responsibilities to any employee or person; • Not to allocate particular duties or responsibilities to any employee or person; • To designate any employee or person as having particular duties or responsibilities; or • To designate any employee or person as not having particular duties or responsibilities. [Rec. 97].	**Supported**	These are important provisions and it is essential that they be incorporated within the legislation. As set out in our submissions to the Royal Commission, construction industry unions frequently coerce head contractors and subcontractors responsible for major packages of work on projects to employ specific persons who they nominate and coerce them to assign key roles (eg. occupational health and safety representative or union delegate) to such persons. Often the individuals would not be the best qualified applicants if the jobs were advertised. The coercion typically takes the form of the union refusing to sign an industrial agreement with the head contractor or subcontractor until agreement has been reached on employing the union nominated labour. This practice is having a significant negative impact on workplace relations in the industry.

13.0 Flexible Work Practices and Labour Hire

In Ai Group's experience, the provisions of enterprise agreements are a much greater barrier to the implementation of flexible work practices in the building and construction industry than the provisions of awards. While the industry would benefit from more flexible awards, the award simplification process has assisted in making construction industry awards somewhat more flexible. On the contrary, pattern enterprise agreements in the industry are imposing increasingly restrictive arrangements upon companies. The outlawing of pattern bargaining, as recommended by the Royal Commission, will enable companies to negotiate far more flexible enterprise agreements.

Like other industries, productivity and efficiency in the building and construction industry depends upon the flexible use of different forms of labour. It is essential that employers retain the ability to determine the most suitable forms of labour for the work that needs to be performed. The following forms of labour (amongst others) are all legitimately deployed by organisations in the building and construction industry: full-time employees, casual employees, part-time employees, fixed term employees, fixed task employees, labour hire and subcontractors.

Labour hire has been the fastest and most consistently growing form of non-standard employment in the last fifteen years. Labour hire is providing significant business gains for employers and labour hire companies are now major employers of labour.

The overwhelming majority of labour hire employees have the protection of the award safety net. This is either through federal award coverage or via common rule state awards (or in Victoria, via the minimum conditions in Schedule 1A of the *Workplace Relations Act*). Consequently, labour hire employees typically have the same level of protection as other employees in other industry sectors.

The labour hire sector has for the past 10 years been a strong supporter of self-regulation through a Code of Practice. The comprehensive voluntary code which is in operation is widely accepted throughout the labour hire industry.

Recommendation/s	**Ai Group's Position**	**Basis of Ai Group's Position**
That the *Building and Construction Industry Improvement Act* include a provision that restricts the AIRC, in determining awards applicable to the building and construction industry, to the determination of four allowances only, namely: • A general allowance, payable to all workers; (The purpose of the general allowance is to replace the current raft of special allowances and rates); • A living away from home allowance; • A meal allowance; and • A travelling allowance. [Rec. 98].	**Not supported**	While we agree with the sentiment behind this proposal and agree that construction industry awards are too complex, we do not support this proposal. Flexibility needs to be maintained for awards to provide for special allowances and rates for persons performing particular roles and tasks. For example, tradespersons are typically paid a tool allowance and semi-skilled workers are not. Without such flexibility, unions would most likely pursue applications in the AIRC for any general allowance to be set at a high level, which takes into account all of the jobs, tasks and disabilities involved in the building and construction industry.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Industry Improvement Act* include provisions that: • Prohibit the AIRC, in determining awards applicable to the industry, from prescribing the times or days on which ordinary and overtime work and RDOs must occur or be taken; • Require existing clauses having that effect to be removed by the AIRC from awards applying in the industry; and • Give the AIRC the express power, in determining awards for the building and construction industry, to set a maximum number of overtime hours a worker may perform in a week. That, in determining awards applying to the building and construction industry, the AIRC should not be prevented from prescribing: • Maximum numbers of ordinary hours of work; • Rest breaks, notice periods and variations to working hours; • Rates for work on public holidays; • The rates at which overtime should be paid; or • The number of RDOs to which workers are entitled. [Rec. 99].	**Supported with modification**	It is appropriate that award restrictions, which limit work to certain times of the day or week, be removed. Such restrictions, in effect, require employers to pay overtime rates when they require work to be performed outside of the times set out in the award. It is appropriate that the AIRC retain the power to prescribe higher rates of pay for night, weekend and public holiday work. Ai Group opposes the recommendation that the AIRC be given the power to set a maximum number of overtime hours. A Full Bench of the AIRC recently rejected the concept of 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.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth initiate, through the Workplace Relations Ministers' Council, the development of a Code of Conduct and Practice for Labour Hire in the building and construction industry. [Rec. 100].	**Ai Group is unconvinced of the need for a further Code of Practice, but is prepared to explore the merits of this proposal further**	Ai Group has a large membership in the labour hire sector. In addition, Ai Group members in various sectors (including the building and construction sector) are significant users of labour hire. Labour hire companies are bound by legislation and awards like all other employers. A voluntary Code of Practice is already in operation in the industry. We are unconvinced that a further code of practice is necessary but are prepared to consult further about this issue.

14.0 Avoidance of Taxation and Phoenix Companies

Just as Ai Group argues that trade unions and employees should observe and work within the spirit and intent of the law, it is equally important for employers to do so as well.

The Royal Commission found evidence of significant tax evasion in the building and construction industry. One area of such tax evasion concerned fraudulent phoenix company activity. In view of the Royal Commission's findings, it is appropriate that legislative and other reforms be introduced to improve compliance.

The Royal Commission's reform proposals are set out in recommendations 101 - 109 and 124 – 135. Ai Group supports the recommendations in principle and the legislation should be finalised in consultation with industry.

While unlawful and inappropriate practices should not be permitted, entrepreneurship and risk-taking should not be unduly stifled.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth: • Together with the Australian Taxation Office (ATO) consider, as a matter of priority, the utility of an amendment to the *Income Tax Assessment Act 1936 (C'wth)* in the form of s16LA of the *Payroll Tax Act 1971 (NSW)* making all the members of a group jointly and severally liable for the taxation debts of other group members. [Rec. 130]. • Encourage the States and Territories to consider the adoption of the provisions contained in s16LA of the *Pay-Roll Tax Act 1971 (NSW)* to address phoenix company activities in the building and construction industry. [Rec. 101]. • Discuss with the States and Territories appropriate methods of permitting their revenue authorities to share information relevant to the detection of payroll tax evasion in the industry. [Rec. 102]. • Encourage the States and Territories to continue efforts to harmonise between jurisdictions the key definitions of the payroll tax system, particularly the definition of wages. [Rec. 103].	**Supported in principle**	In view of the Royal Commission's findings, it is appropriate that legislative and other reforms be introduced to improve compliance. While the recommendations are supported in principle, relevant legislation should not be amended without consultation with industry.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
• Establish guidelines on the separate responsibilities of the major government agencies, particularly the Australian Securities and Investments Commission (ASIC) and the ATO, in combating fraudulent phoenix company activity in the building and construction industry. The agencies given major responsibilities should be given appropriate resources. [Rec. 104]. • Convene a working party consisting of representatives of the ATO, ASIC and State and Territory revenue authorities, together with the Privacy Commissioner, to address the issue of appropriate amendments to relevant legislation to permit the exchange of information which may assist in the detection of fraudulent phoenix company activity in the building and construction industry. [Rec. 105]. • After consultation with the ACIS, consider the need for an increase in the maximum penalties provided in the *Corporations Act 2001 (C'wth)* for offences that may be associated with fraudulent phoenix company activity. [Rec. 108].		

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
• After consultation with the ASIC, consider the need for an amendment to s206F of the *Corporations Act 2001 (C'wth)* to provide for the power of disqualification to be exercisable in appropriate circumstances after a person on one occasion has been an officer of a corporation that has been wound up and been the subject of a liquidator's report under s533(1) of the *Corporations Act 2001 (C'wth*). [Rec. 109]. • Consider providing increased funding to the ATO for additional resources to be utilised for compliance activities in the building and construction industry. [Rec. 124]. • Together with the ATO, consider, as a matter of priority, the utility of an amendment to s222AOB of the *Income Tax Assessment Act 1936 (C'wth)* to remove the right of a director of a phoenix company involved in fraudulent activity to avoid the consequences of a Director's Penalty Notice by placing the company into voluntary administration or into liquidation. [Rec. 131]. • After consultation with the ATO and the ASIC, amend relevant legislation to permit Commonwealth agencies to provide, subject to appropriate safeguards, information relevant to the detection of tax evasion in the building and construction industry to State and Territory revenue and workers compensation authorities. [Rec. 133].		

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
• Discuss with the States and Territories the steps that they might take to amend relevant State and Territory legislation to permit State and Territory revenue and workers compensation authorities to provide, subject to appropriate safeguards, the ATO with information relevant to the detection of tax evasion in the industry. [Rec. 134]. That the ASIC: • Implement without delay the measures which it has developed to check all new company officers against the National Personal Insolvency Index and to check that current directors have not been declared bankrupt. [Rec. 106]. • Ensure that its procedures identify when companies in the building and construction industry are left without a director following the bankruptcy of a serving director. [Rec. 107]. That the ATO: • Consider dedicating additional resources to audit, monitor and review compliance by the building and construction industry with the Alienation of Personal Services Income legislation. [Rec. 125].		

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
• Review the impact of the Alienation of Personal Services Income legislation for the year ended 30 June 2003. [Rec. 126]. • Implement an auditing process of Australian Business Numbers issued in the building and construction industry. [Rec. 127]. • Provide an opportunity for persons and businesses in the building and construction industry holding Australian Business Numbers, to which they are not entitled, to surrender them without penalty. [Rec. 128]. • Increase its educative activities within the building and construction industry to endeavour to ensure that industry participants, at all levels, understand their taxation obligations and the purpose of Australian Business Numbers. [Rec. 129]. • Share information relevant to the detection of tax evasion in the building and construction industry with relevant Commonwealth, State and Territory government agencies. [Rec. 132]. Establish a Building and Construction Industry Forum to examine taxation issues of significance to the industry, including phoenix company activity, and develop workable solutions to the issues and problems identified, including where necessary proposals for taxation policy changes and legislative amendments. Membership of the Building and Construction Industry Forum should include representatives of all major industry participants including unions and employer organisations. [Rec. 135].		

15.0 Security of Payment

In its first submission to the Royal Commission on the issue of security of payment, Ai Group questioned whether it was possible to achieve a uniform approach to security of payment throughout Australia for three reasons.

1. There was doubt whether the Commonwealth Government had the power to legislate on the issue, given that many of the thousands of small business operators are sole traders or in partnerships rather than corporations.
2. A number of State Governments had already implemented security of payment legislation or had signalled their intention to do so - and there were already differences in these laws and proposals.
3. A number of States had other legislation which already addressed payment issues, eg. The *Contractors Debts Act* in NSW, the *Subcontractors Charges Act* in Queensland, and the *Worker's Liens Act* in South Australia.

However, in its Discussion Paper on this issue, the Royal Commission argued that the Commonwealth's powers are very broad and could extend to *"any transaction in which at least one of the businesses is incorporated."*

In a subsequent submission, Ai Group argued that the notion of overarching Commonwealth security of payments legislation had merit and should be tested further. This is now a key recommendation of the Final Report. However, while a nationally consistent approach has merit, before any federal legislation is enacted it is essential that agreement be reached between the Commonwealth and the States on the approach to be adopted. It would be extremely onerous for employers to be forced to comply with overlapping and inconsistent State and Federal security of payment legislation.

In its submissions to the Royal Commission, Ai Group suggested that the Commonwealth could influence payment practices in the industry "*by requiring those States and Territories that benefit from federal funding to adopt certain payment practices in contracts funded or substantially funded by the Commonwealth".* The Final Report adopted this proposal as a recommendation.

Further, in its submissions, Ai Group supported the greater use of prequalification as a tool to be used by a client to assess the capabilities of potential service providers and encouraged the Commonwealth to monitor, review and improve its approach to prequalification. Again, the Royal Commission has adopted this proposal.

Recommendation/s	**Ai Group's Position**	**Basis of Ai Group's Position**
That all Governments, including the Commonwealth, continue to monitor, review and improve their approach to prequalification with a view to improving security of payments within the building and construction industry. [Rec. 112].	**Supported**	This recommendation is consistent with Ai Group's submissions to the Royal Commission.
That the Commonwealth require, as a condition of the provision of Commonwealth funding to State or Territory projects, that tenderers be required to promote good payment practices to subcontractors on those projects. [Rec. 113].	**Supported**	This is consistent with Ai Group's submissions to the Royal Commission.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth, in consultation with industry participants, commence a study to assess: • The costs of a compulsory insurance scheme to secure payments to contractors, subcontractors and suppliers in the building and construction industry; • The likely benefits from such a scheme; and • The impact upon clients and the industry of such a scheme. This should not delay the introduction of the rapid adjudication legislation which has been recommended in the proposed *Building and Construction Industry Security of Payments Act* as referred to in Rec. 116. [Rec. 114].	**Supported**	Such a study would be worthwhile.
That the Commonwealth initiate an education campaign, aimed primarily at small subcontractors, to explain the Commonwealth's security of payments arrangements and improve subcontractors' understanding of the various mechanisms, including State mechanisms, which they can use to protect their interests and their understanding of their rights and obligations under common forms of contract. [Rec. 115].	**Supported**	Such an education campaign would be worthwhile.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth enact a *Building and Construction Industry Security of Payments Act* in the form of the *Building and Construction Industry Security of Payments Bill 2003*, which is set out in Appendix 1 to the *Security of Payment* Chapter contained in Volume 8 of the Final Report. [Rec. 116].	**Supported in principle**	A nationally consistent approach has merit. However, before any federal legislation is enacted it is essential that agreement be reached between the Commonwealth and the States on the approach to be adopted. It would be extremely onerous for employers to be forced to comply with overlapping and inconsistent State and Federal security of payment legislation.
The detailed submissions made on behalf of the Civil Contractors Federation, the National Electrical and Communications Association, the Housing Industry Association Limited and Mr Graham Pearce in relation to the *Building and Construction Industry Security of Payments Bill 2003* be considered in any debate concerning the development or enactment of that Bill. [Rec. 117].	**Noted**	These detailed submissions have not yet been examined by Ai Group and therefore we have not yet formed a view on their content.

16.0 Workers' Compensation, Workers' Entitlements and Superannuation Compliance

The Royal Commission found that there was substantial evidence of non-compliance in respect of workers' compensation, workers' entitlements and superannuation obligations within the building and construction industry. In view of the Royal Commission's findings, it is appropriate that legislative and other reforms be introduced to improve compliance.

The Royal Commission's reform proposals are set out in recommendations 118 - 123 and 150 - 165. Ai Group supports most of the recommendations in principle and proposes that amending legislation be prepared in consultation with industry.

It is important that the level of maximum penalty be relevant to the particular offence. This issue is dealt with in several sections of this submission.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth propose to the States and Territories that they consider: • Legislation requiring workers compensation premiums in the building and construction industry to be paid quarterly in jurisdictions where there is currently no such provision; and • Enacting legislation modelled on s175B of the *Workers Compensation Legislation Amendment Act 2002 (NSW)*, in jurisdictions where there is no such provision, to make a principal contractor liable for workers compensation premiums not paid by a subcontractor in respect of the current project unless the subcontractor supplies the principal contractor with a statement advising that appropriate workers compensation premiums have been paid. [Rec. 150].	**Detailed consultation with industry is required**	Given the potential significant impact of these proposals on companies in the building and construction industry, detailed consultation with industry should occur in drafting amending legislation.
That the Commonwealth discuss with the States and Territories appropriate methods of permitting their workers compensation authorities to share information with revenue authorities relevant to the detection of avoidance of obligations in the building and construction industry. [Rec. 151].	**Supported in principle**	Industry should be consulted before any amended arrangements are implemented.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth consider as a matter of priority giving State and Territory workers compensation authorities access to relevant information in Business Activity Statements filed with the ATO for the purpose of detection of non-compliance with obligations in the building and construction industry, subject to safeguards against the information being used for a purpose other than for which it was provided. [Rec. 152].	**Not supported if such a proposal entails an expansion of the information contained within Business Activity Statements**	Ai Group believes that such a proposal could lead to calls by workers' compensation authorities for increased information to be provides on Business Activity Statements. The level of detail already required on such statements creates very significant compliance costs for business. Ai Group opposes any expansion of the information contained within Business Activity Statements.
That the Commonwealth encourage the States and Territories to continue working with each other and the Commonwealth to harmonise between jurisdictions the key definitions of the various workers compensation systems, particularly the definition of 'worker'. [Rec. 153]	**Supported in principle**	Industry should be consulted before any amended arrangements are implemented.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Industry Improvement Act* provide that the jurisdiction conferred on the Federal Court by s127A, s127B and s127C of the *Workplace Relations Act 1996 (C'wth)* also be conferred upon the Federal Magistrates' Court in the case of matters arising in or in connection with the building and construction industry. [Rec. 154]	**Any amendments should not occur without careful examination**	Any amendments to the unfair contracts provisions in sections 127A, 127B and 127C of the Act should not occur without careful examination. As Ai Group submitted to the Royal Commission, these provisions have been in the Act for many years and are operating effectively. In contrast, the unfair contract provisions in the New South Wales *Industrial Relations Act 1996* have proved to be highly problematic. The provisions have become a de facto unfair dismissal system for senior managers wishing to challenge the quantum of their termination payments. In several cases, multi-million dollar compensation payments have been awarded. Despite several attempts by the NSW Government to amend the legislation to address the problems, the provisions remain a significant and unreasonable burden on New South Wales employers.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth: • Through the ABCC and the Department of Employment and Workplace Relations (DEWR), provide a service in connection with the recovery of unpaid entitlements for labour-only subcontractors in the building and construction industry whose annual earned income does not exceed $50,000. [Rec. 155]. • Encourage the States and Territories, that do not already do so, to provide a service in connection with the recovery of unpaid entitlements by labour-only subcontractors in the building and construction industry whose annual earned income does not exceed $50,000. [Rec. 156].	**Supported with modification**	It would be relatively straightforward to extend the existing DEWR and State Industrial Relations Departments' inspectorate services to incorporate this new service. In view of this it is unnecessary to establish such a service within the ABCC. While we do not oppose the provision of such a service by the DEWR and State IR Departments, as we submitted to the Royal Commission we do not support the introduction of any new laws that would enable subcontractors to be declared to be employees. Such laws would be unable to pay sufficient heed to the wide variety of circumstances surrounding different working arrangements within the building and construction industry. By contrast, existing legislation is sufficiently flexible so as to allow courts and industrial tribunals to determine whether any given working arrangement meets the traditional tests associated with the existence of an employer-employee relationship. This allows the issues to be dealt with on a case-by-case basis applying the general rules (such as the "control" test) which have been developed, thereby balancing the need for certainty with the desirability of taking into account the circumstances of each individual case.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth: • Through the ABCC and the DEWR adopt a greater role in the enforcement of employee entitlements in the building and construction industry, including conducting regular random inspections of employers' time and wages records and publicising the role that they play in the industry. [Rec. 157]. • Encourage the States and Territories to adopt a greater role, through their respective departments and agencies, in the enforcement of employee entitlements in the building and construction industry, including conducting regular random inspections of employers' time and wages records and publicising the role that they play in the industry. [Rec. 158].	**Supported with modification**	It would be relatively straightforward to ensure that the existing DEWR and State Industrial Relations Departments' inspectorate services adopted this recommended approach. In view of this it is unnecessary to establish such a service within the ABCC. Any increased focus on enforcement should not be at the expense of the DEWR's and State IR Department's educative roles.
That the Commonwealth: • Take the necessary steps to ensure that the ABCC and the DEWR provide advice and where appropriate representation for all employees in the building and construction industry in respect of genuine claims for unpaid entitlements arising under Commonwealth awards, agreements or industrial instruments. [Rec. 159]; and	**Supported with modification**	This role is already being carried out by the DEWR and State IR Departments. In view of this it is unnecessary to establish such a service within the ABCC. To the extent that any changes are necessary, such changes can be readily made to the existing DEWR and State IR Department services.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
• Encourage State and Territories, where they do not already do so, to provide advice and where appropriate representation for employees in the building and construction industry in respect of genuine claims for unpaid entitlements owing under State awards, agreements industrial instruments or common law contracts. [Rec. 160].		
That the *Building and Construction Industry Improvement Act* provide that for the purposes of matters arising in or in connection with the building and construction industry the maximum amount of any claim brought under the small claims procedure contained in s179D of the *Workplace Relations Act 1996 (C'wth)* be $25,000. [Rec. 161]	**Supported with modification**	While it may be appropriate to increase the existing maximum amount, a $25,000 maximum amount is too high for a small claims procedure given that Courts during such proceedings are able to act informally and are not bound by rules of evidence. It needs to be recognized that there is a very large number of small businesses in the building and construction industry. A $25,000 adverse judgment would be financially crippling for many small businesses. We propose a $10,000 maximum amount.
That the *Building and Construction Industry Improvement Act* provide that for the purposes of proceedings brought under Part VIII of the *Workplace Relations Act 1996 (C'wth)* arising in or in connection with the building and construction industry the definition of court of competent jurisdiction in s.177A in the *Workplace Relations Act 1996 (C'wth)* include the Federal Magistrates' Court. [Rec. 162].	**Supported**	A "court of competent jurisdiction" under s.177A is currently a District, County, Local or Magistrates Court. It is appropriate that such definition also include the Federal Magistrates Court.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the ABCC monitor the availability and efficiency of mechanisms available to employees in the building and construction industry to recover unpaid entitlements and report to the Minister for Employment and Workplace Relations any changes that would improve those recovery mechanisms at the Commonwealth level, or that the Commonwealth might encourage States or Territories to make. [Rec. 163].	**Supported**	Such a monitoring role is appropriate, to the extent that such role is possible without a role in enforcing and recovering employee entitlements. (See comments on Rec. 155 to 160 above).
That the Commonwealth encourage the Workplace Relations Ministers' Council to foster the development of a uniform definition of 'employee' for employee entitlement purposes in the building and construction industry. [Rec. 164].	**Supported in principle**	Increased consistency would be worthwhile. However, any legislative changes should not occur without industry consultation.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Industry Improvement Act* provide that for the purposes of proceedings brought under s178 of the *Workplace Relations Act 1996 (C'wth)* in or in connection with the building and construction industry the maximum penalty provided for in s178(4) and s178(4A) be $100,000 in the case of body corporate and $20,000 in any other case. That the Commonwealth encourage the States to review the level of penalties in their legislation applicable to the breach of awards or agreements by employers not paying employee entitlements in the building and construction industry. [Rec. 165]	**The proposed level of maximum penalty is not supported**	A $100,000 maximum penalty is appropriate for unlawful industrial action but is inappropriate for breaches of awards or certified agreements. 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. 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 a penalty of $100,000 (per breach) for what may be an inadvertent breach of an award provision. This represents a twenty-fold increase in the current maximum penalty. The W*orkplace Relations Act* currently contains a lower maximum penalty for breaches of awards than breaches of certified agreements. Such differentiation should remain.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That registered organisations in the building and construction industry be prohibited from deducting: • From moneys held by the organisation on behalf of a person, more than one year's membership fees for that person in any 12 month period; and • Any amount in relation to a person's membership of the organisation from moneys held on that person's behalf unless they have provided prior written consent to the deduction. There should be a requirement that the consent be provided no more than 12 months before the date on which the organisation deducts the amount. In other words, fresh consent should be obtained by the organisation at least once a year. These restrictions should apply despite any authorisation to the contrary given by the person. [Rec. 110].	**Supported**	The Royal Commission found that in some cases money paid to unions for the purposes of resolving allegations of underpayment or non-payment of entitlements were retained by unions rather than being disbursed to the affected employees.
That the Commonwealth encourage State and Territory governments to amend their unclaimed moneys legislation so that unions are required to treat moneys recovered by them on behalf of workers as a result of wage claims as unclaimed moneys if they have remained unclaimed (in whole or in part) for more than two years. [Rec. 111].	**Supported**	This recommendation would provide a greater incentive to unions to locate workers who are entitled to the benefits of amounts paid to unions on their behalf.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That after 12 months operation, the ATO reviews the impact of the amendments to the Superannuation Guarantee legislation that take effect from 1 July 2003 in relation to the effect on the levels of compliance. [Rec. 118]	**Supported**	The Superannuation Guarantee legislation was recently amended to require contributions to be made at least quarterly, rather than annually, as was previously the case. The clear purpose of this amendment was to improve compliance. Such amendment should significantly increase the security of employees' superannuation entitlements. It is appropriate that a review be conducted after the new arrangements have been in place for 12 months.
That the ATO be empowered to notify an employee that it intends to pay moneys held on behalf of that employee to the fund of which that employee is a member unless the employee advises otherwise. [Rec. 119].	**Supported**	This power is appropriate.
That the Commonwealth consult with the superannuation industry to ensure that superannuation funds operating in the building and construction industry review their policies and practices so that the provision of information to third parties is consistent with any requirements of confidentiality and privacy attaching to member information. [Rec. 120].	**Supported**	Care needs to be taken to ensure that confidential member information is treated appropriately.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth consult with the superannuation industry to ensure that superannuation funds operating in the building and construction industry review their policies and practices to ensure that only lawful means are used to recover unpaid emp loyer contributions. [Rec. 121].	**Supported**	Only appropriate and lawful enforcement mechanisms should be used to recover unpaid superannuation contributions.
That the ATO ensure that persons in the building and construction industry making complaints about non-payments of superannuation contributions receive a response stating in reasonable detail the outcome of the complaint. [Rec. 122].	**Supported**	Such response should be provided by the ATO in a timely manner.
That the Commonwealth amend the secrecy or confidentiality provisions in relevant legislation to permit such responses by the ATO. [Rec. 123].	**Supported in principle**	Industry should be consulted before any legislative amendments are made.

17.0 Industry Training

The Royal Commission found that the major problems impeding training in the building and construction industry include:

- The lack of consistency amongst State and Territory training systems;
- The lack of adequate data about relevant aspects of training in the industry; and
- The obstacles that exist to increasing the number of apprenticeships and traineeships in the industry, including:

    - The small size of most organisations in the industry;
    - The project-based nature of work; and
    - The absence of apprentices employed by governments across Australia in recent years, given the trend towards the outsourcing of government building and construction projects.

Ai Group has recognised these drawbacks and has pursued training reforms for this sector and across industry generally. Skills shortages are a significant problem in industry and with the growth foreshadowed in building construction and infrastructure activity in the period immediately ahead this will intensify. Accordingly, the Royal Commission's recommendations for reforming training within the building and construction industry are supported by Ai Group.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth through the Department of Employment and Workplace Relations prepare a paper for the consideration of the ANTA Ministerial Council: • Outlining the issues raised in submissions to the Royal Commission, pertaining to impediments to the implementation of Training Packages in the building and construction industry caused by industrial relations issues and occupational licensing requirements across jurisdictions, including those impacting on apprenticeship and traineeship training; • Identifying methods of addressing these issues; and • Including a critical analysis of the option of limiting Commonwealth funding to the delivery of nationally endorsed building and construction competencies for training, where nationally endorsed competencies are available. [Rec. 137].	**Supported**	Industry input should be sought in the preparation of the paper.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth request an independent audit, preferably overseen by the Australian National Audit Office, of past funding arrangements for all building and construction industry related skill centres that have received Commonwealth funding through the Australian National Training Authority (ANTA). That this audit be undertaken within six months of the recommendation being approved. That the findings of the audit be: • Presented to the ANTA Ministerial Council through ANTA; • Made public; and • Inform the Commonwealth's future funding of building and construction skill centres under the Skills Centre Program. [Rec. 138]	**Supported**	Such independent audit is appropriate.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth, through ANTA, identify a method of determining: • An accurate measure of the value of funds provided by the Commonwealth, States, Territories and industry in the building and construction industry; and • Whether there is an appropriate balance between public sector and industry funding for training in the building and construction industry to increase productivity in the industry. This information should be published regularly. [Rec. 139].	**Supported**	The establishment of such a measure would be worthwhile.
That ANTA seeks a revised agreement from the States and Territories on consistent terminology for apprentices and trainees in the building and construction industry, following input from industry stakeholders. [Rec. 140].	**Supported**	Consistent terminology is important, as is industry consultation.
That the Commonwealth take steps to facilitate the introduction of wage structures and conditions that encourage the adoption of school-based apprenticeships and traineeships. [Rec. 141].	**Supported**	Ai Group strongly supports the expansion of school based apprenticeship arrangements. Such arrangements have an important role to play in addressing industry skill shortages.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the Commonwealth implement a policy aimed at increasing the employment of apprentices and trainees working on publicly funded building and construction projects. (This policy should be informed by existing State and Territory policies.) That compliance with the Commonwealth policy be monitored by the Commonwealth department responsible for vocational education and training with an annual report on its implementation. [Rec. 142].	**Supported**	The demonstration of leadership in this area by the Commonwealth Government would be beneficial.

18.0 Unlawful and Inappropriate Payments

The building and construction industry operates on tight deadlines and margins and clients and head contactors cannot afford delays to their projects. Liquidated damages of up to $50,000 per day are typical when a project is not completed on time.

The Royal Commission found that the time and cost pressures in the industry 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"*[14]. 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. This inappropriate behaviour needs to be addressed.

Recommendation/s	**Ai Group's Position**	**Basis of Ai Group's Position**
That the *Building and Construction Industry Improvement Act* impose an obligation on employers to notify the ABCC within 24 hours of the substance of any demand or claim to make a payment to an employee in relation to a period during which the employee engaged or engages in industrial action. That failure to notify the ABCC attract a $100,000 maximum penalty. [Rec. 144 and 149].	**Supported**	Such a provision would deter unlawful union claims for strike pay. The penalty for not reporting within the required 24 hour period should be determined as appropriate to the circumstances.

[14] Volume 9, p.221.

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That the *Building and Construction Industry Improvement Act* require registered organisations, as soon as practicable after the end of each financial year, to lodge with the Industrial Registrar and the ABCC a statement showing the following particulars in relation to each donation exceeding $500 received by the organisation during that financial year: • The amount of the donation; • The purpose for which the donation was made; and • The name and address of the person who made the donation. [Rec. 145 and 146]. That the *Building and Construction Industry Improvement Act* require clients, head contractors and subcontractors to notify promptly the ABCC of any request or demand that a donation exceeding $500 be made to, or at the direction of, a registered organisation or an official, employee, delegate or member of a registered organisation. [Rec. 147]. That a $100,000 maximum penalty apply for breaching these requirements. [Rec. 148 & 149].	**Supported in principle but the maximum penalty needs to be appropriate for the offence**	Such reporting requirements are appropriate. However, the proposed maximum penalty needs to be appropriate for the offence.

19.0 Funds

There are three main types of industry fund in operation in the building and construction industry:

- Long service leave funds;
- Redundancy funds; and
- Superannuation funds.

Such funds recognise the itinerant nature of project-based employment.

Long service leave funds for building and construction workers have been established in each State and Territory via legislation. In contrast, redundancy funds in the industry are not regulated through legislation. Each redundancy fund is governed by a Trust Deed. It is the obligation of the trustees to ensure that the terms of the trust are properly implemented. The safeguard is the Trust Deed and the appointment of competent trustees with the capability of diligently serving the trust.

In its submissions to the Royal Commission, Ai Group argued that given the increasing amount of redundancy funds under administration and the generous nature of the existing benefits, redundancy funds should be subject to more rigorous prudential requirements, such as those that apply to superannuation funds. Commissioner Cole adopted this proposal as a recommendation.

Commissioner Cole also criticised the existing practice of redundancy funds (with the exception of the Australian Construction Industry Redundancy Trust in respect of which Ai Group is represented on the Board of Trustees) of utilising amounts contributed for purposes other than providing redundancy benefits. He described the issue in the following terms:

> *"Redundancy funds were set up for the benefit of employees to ensure payment of entitlements in the event of redundancy. They should operate solely for the benefit of employees. With the exception of the Australian Construction Industry Redundancy Trust (ACIRT), they instead provide significant income streams for others. Other funds distribute surpluses for training, or to sponsors or their nominees."*[15]

Ai Group supports the principle that contributions should only be used for: providing redundancy benefits, investing, reimbursing contributors (employers), and meeting reasonable administration expenses.

Superannuation funds, including those that operate in the construction industry, are subject to extensive regulation.

[15] Volume 10, p 287

Recommendation/s	Ai Group's Position	Basis of Ai Group's Position
That legislation be enacted to prohibit employee associations from directing income or assets of that employee association to any person or body where the effect is, or might be, to put that income or those assets beyond the reach of creditors of that employee association. All assets and liabilities, income and expenses of an employee association should be required to be declared in consolidated accounts of that employee association. Registration conditions under the *Workplace Relations Act 1996 (C'wth)* and equivalent State legislation may be a suitable means of implementing this recommendation. [Rec. 166].	**Supported**	The assets of a union should not be able to be 'quarantined" so as to avoid creditors and those to whom the union has caused recoverable loss.
That the Commonwealth encourage the States and Territories to ensure that moneys held or received by long service leave funds should be used only for the purpose of paying employees' long service leave entitlements. [Rec. 167].	**Supported**	Contributions should only be used for: providing long service leave benefits, investing, reimbursing contributors (employers), and meeting reasonable administration expenses.

That: • Surpluses in redundancy funds either be credited to the employee members' accounts to be payable only in the event of redundancy or, if funds held are sufficient to meet redundancy obligations, used to reduce any contributions required; and • The distribution of surpluses in accordance with this recommendation should be a prerequisite for a redundancy fund being prescribed as a fund exempt from fringe benefits tax. [Rec. 168].	**Supported**	Surpluses should only be used for: providing redundancy benefits, investing, reimbursing contributors (employers), and meeting reasonable administration expenses. Such principles have been enshrined in the *Taxation Laws Amendment Bill (No 4) 2003* which was passed by the Commonwealth Parliament in late June 2003. This legislation enables the ATO to grant an FBT exemption to a fund if it meets the criteria set out in the legislation.
That legislation be enacted to implement a uniform system of financial reporting, external auditing, actuarial assessment and annual reporting to a prudential authority for redundancy funds. The systems presently applying for superannuation and long service leave funds should be the points of reference. Documents produced, in compliance with the legislation, should be public documents. [Rec. 169]. That compliance with those requirements be a prerequisite to a redundancy fund being prescribed as a fund exempt from fringe benefits tax. [Rec. 170]	**Supported**	As Ai Group submitted to the Royal Commission, given the increasing amount of redundancy funds under administration and the generous nature of the existing benefits, redundancy funds should be subject to more rigorous prudential requirements, such as those that apply to superannuation funds.

That the proposed obligation to genuinely bargain in the *Building and Construction Industry Improvement Act* (see Rec. 8) include the requirement that there be full disclosure, in writing, of any direct or indirect financial benefit that may by derived by any negotiating party to an industrial agreement from any term sought in the enterprise bargaining agreement, such as commissions or other income. [Rec. 171]. That: • To the extent that it is necessary, the reporting guidelines issued by the Industrial Registrar include a requirement that a reporting unit disclose all commissions and other benefits received, directly or indirectly: o By that reporting unit; and o By any officer, member or employee of that reporting unit where a commission or benefit was received in their capacity as an officer, member or employee of that reporting unit. • Disclosure shall include details of: o The source of all such commissions and benefits; and o The reason for receipt of such commissions and benefits. [Rec. 172].	**Supported with modification**	Ai Group supports the full disclosure of commissions and other payments that may be received by a negotiating party from any term sought in an enterprise agreement. The need for such disclosure is highlighted by the huge sums that are being paid each year to the Communications, Electrical and Plumbing Union (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 such commissions. Whilst we support the incorporation of the proposed disclosure requirements within the *Building and Construction Industry Improvement Act*, as set out in section 6.0 above we do not believe that it is necessary to enshrine a set of "genuine" bargaining principles within the Act. Clarity as to the meaning of the term "benefit" in Rec. 172 is important and would need to be drafted in an appropriate way.

That the Industrial Registrar: • Prepare a report as soon as possible after the end of each financial year addressing the completeness of the financial and operating reports prepared by reporting units of registered organisations with coverage in the building and construction industry; and • Provide the report to the Minister for Employment and Workplace Relations and to the ABCC. [Rec. 173].	**Not opposed but such process would appear to now be unnecessary given recently enacted legislation**	Ai Group does not oppose this recommendation. However, such a process would appear to be unnecessary given the recent enactment of the *Workplace Relations Amendment (Registration and Accountability of Organisations) Bill.*
That the *Building and Construction Industry Improvement Act* provide that the AIRC not certify any industrial agreement or instrument or make any award which restricts the choice of superannuation funds or schemes available to an employee, or requires an employer to make contributions on behalf of an employee to a particular superannuation fund or scheme. [Rec. 174].	**Not supported**	This recommendation is inconsistent with the choice of superannuation funds legislation that is currently before Parliament. 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.

That the *Building and Construction Industry Improvement Act* provide that: • A person shall not, by threat of industrial action, coercion or other form of intimidation, persuade or attempt to persuade: o An employee or prospective employee to nominate a particular superannuation fund or scheme; or o An employer to make contributions to a particular superannuation fund or scheme on behalf of an employee; and • A person contravening this provision be liable to a civil penalty. [Rec. 175].	**Supported in principle**	Coercion and intimidation are clearly inappropriate. However, an employer needs to retain the right to make superannuation contributions to the relevant fund/s on behalf of its employees. As set out above re. Rec. 174, 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.
That the ABCC be authorised to monitor projects where development funds are provided by building and construction industry superannuation, long service leave, redundancy or other industry funds to ensure that conditions are not attached to such loans or equity interests which infringe provisions of the *Building and Construction Industry Improvement Act* or the *Workplace Relations Act 1996 (C'wth*). [Rec. 176].	**Supported**	Such a monitoring role is appropriate.

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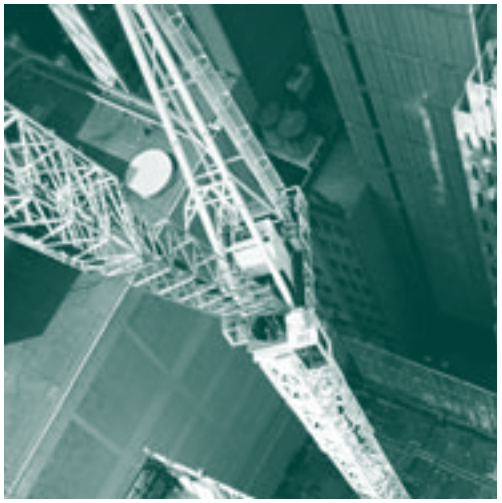

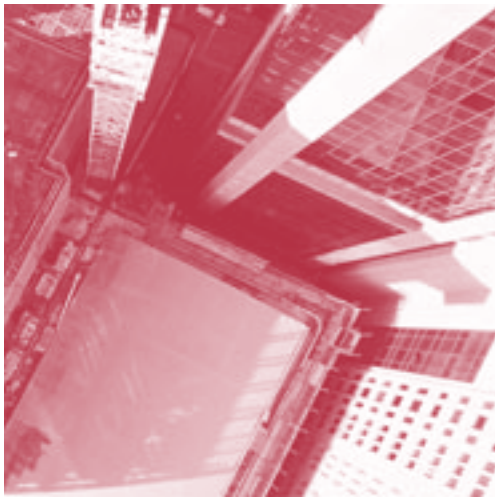

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