

**BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT AMENDMENT
(TRANSITION TO FAIR WORK) BILL 2011**

**Submission to the Senate Standing Committee on Education,
Employment and Workplace Relations**



20 January 2012

Summary of Ai Group / ACA's position

The Australian Industry Group (Ai Group) and the Australian Constructors Association (ACA) believe that the *Building and Construction Industry Improvement Act 2005* ('Act') and Office of the Australian Building and Construction Commissioner ('ABCC'), with all its current powers, must be retained if the very positive outcomes from the Royal Commission into the Building and Construction Industry are to be retained. The Act introduced important reforms to address the unlawful and inappropriate conduct that permeated the industry and which cost project owners (including Governments), employers and the Australian community vast sums.

Whilst behaviour has changed significantly since the ABCC was introduced, there are many indications that the industrial environment is deteriorating in the industry. Watering down protections for the industry and the community, at this time, would send entirely the wrong message to those who engage in unlawful or inappropriate behaviour.

The industrial laws arising from the Royal Commission treat employers and employees in the construction industry differently than those in other sectors. The different approach reflects the fact that behaviour in the construction industry was so far removed from the standards in other industries, that strong measures were required. At some point in the future the special provisions applying to employers and employees in the construction industry may be able to be removed – but not until the conduct in the industry reflects the standards of contemporary Australian society.

Following the Wilcox Review, the Government introduced the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* (“predecessor bill”) into the Parliament. This bill lapsed in the previous Parliament and has now largely been reintroduced by the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* (“Bill”). At the time, the predecessor bill was subject to an inquiry by Senate Standing Committee on Education, Employment and Workplace Relations (“Committee”), to which Ai Group and ACA made a joint submission.

Ai Group and the ACA call for the Bill to be rejected. If this is not acceptable to Parliament, some important amendments need to be made to the Bill to ensure that the reforms, that have been so vital to the industry, are not lost. These amendments include the following:

- **The provisions relating to the Independent Assessor need to be deleted**

It is not appropriate to permit the compulsory examination powers of the Fair Work Building Industry Inspectorate to be “switched off”. Justice Wilcox recommended extensive safeguards for the compulsory examination powers (which have been incorporated into the Bill) but he did not recommend that the powers be able to be “switched off”. Under the Bill, applications to the Independent Assessor to “switch off” the powers can be made before a project even commences. Before the commencement of a project it is impossible to know whether the powers will be needed. Unless the Bill is amended, unions are likely to make an application to the Independent Assessor before the start of every project.

It is our view that the Act, in its current form, includes the appropriate safeguards to prevent any misuse of the compulsory examination powers. No practical and positive outcome would be achieved if the powers were able to be switched off at any time during a project as it will always be unclear as to whether the powers will be needed in the future.

- **The three year sunset provision applicable to the compulsory examination powers should be deleted and replaced with a review after five years**

The compulsory examination powers are needed at the present time as much as ever. While the reforms introduced after the Royal Commission addressed the unlawful and inappropriate conduct that permeated the industry, industrial unrest and disputation has been steadily increasing in the industry and damaging and unproductive industrial relations practices have been creeping back onto building and construction sites across Australia.¹ In the Foreword to the Annual Report for the ABCC for the financial year ending 30 June 2011, the ABC Commissioner, Leigh Johns, identified that:

“[d]uring 2010-11, unlawful industrial disputes, the traditional ‘bread-and-butter’ work of the ABCC, continued to occur at levels that underscored the need for strong enforcement of workplace laws. The pernicious effects of unlawful industrial action are unacceptable, particularly so on projects of social and national significance like the Monash Freeway, the Melbourne Markets relocation, Gold Coast University Hospital or the Wonthaggi Desalination Plant”.

¹ The ABCC Annual Report 2010-11 reveals that investigations of unlawful industrial action occurring on building and construction sites have steadily increased since 2007-08. In that year, the ABCC investigated 199 incidents of unlawful industrial action investigated. This has increased to 223 in 2010-11. (See page 40 of the ABCC Annual Report 2010-11)

The predecessor Bill originally included a sunset provision of five years for the compulsory examination powers. The current Bill, without logical reasoning other than the simple fact that two years has passed since the predecessor Bill, includes a sunset provision of three years. Ai Group and ACA maintain their original position that the sunset provision should be deleted and replaced with a review in five years. A review after five years (say, through a Senate Committee inquiry) is appropriate, but a provision which automatically removes the powers after three years unless further legislation is passed by both Houses of Parliament is not appropriate. Prior to the powers being implemented, construction industry unions had implemented a policy of refusing to cooperate with the regulator, including refusing to allow officials or delegates to answer any questions. Unless there is a vast change in the attitudes of construction industry unions, the removal of the powers will result in the removal of the “strong cop on the beat” at the end of the sunset period. Therefore, a cautious approach is warranted.

- **The higher penalties which apply to building industry participants for breaches of industrial law should be retained**

Given the level of industrial lawlessness that was prevalent in the construction industry prior to the *Building and Construction Industry Improvement Act 2005*, and the fact that an enduring change in behaviour has not yet occurred, the existing higher penalties should continue to apply. It would be risky to reduce maximum penalties to only one third of what they currently are as proposed in the Bill.

The Director of the Fair Work Building Industry Inspectorate will be subjected to very substantial oversighting, if the Bill is passed, including the following:

- An Advisory Board will make recommendations to the Director about policies, priorities and programs and any matter that the Minister requests the Advisory Board to consider;
- The Fair Work Ombudsman is a member of the Advisory Board;
- The Commonwealth Ombudsman must monitor and review the exercise of the compulsory examination powers, including receiving a copy of all examination notices, plus receiving a report, video recording and transcript of every examination;
- A Presidential Member of the Administrative Appeals Tribunal must issue an examination notice before the Director is able to use the compulsory examination powers; and
- The Independent Assessor may determine that the compulsory examination powers do not apply to particular building projects.

It is extremely important that the construction industry regulator is able to perform its functions effectively and without undue delays. If the Bill is passed and the regulator is no longer effective, the risks associated with industrial lawlessness will again be priced into construction contracts, at great cost to project owners (including Governments) and the Australian community.

Ai Group / ACA were heavily involved in the Wilcox Review, including making a number of detailed submissions.

Ai Group represents industries with around 440,000 businesses employing around 2.4 million people. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees. Ai Group has a large membership in the construction industry including both major builders and large and small subcontractors. Ai Group has

longstanding relationships with all stakeholders in the construction industry including project owners, head contractors and subcontractors.

The ACA is a national industry association which represents Australia's major construction contractors. A list of ACA member companies is included in **Annexure A**. ACA member companies have a combined annual revenue in excess of \$50 billion and employ over 100,000 people in their Australian and international operations.

Ai Group / ACA's views on the provisions of the Bill are set out in this submission. It is not our intention to comment on all aspects of the Bill but rather to outline Ai Group / ACA's position on the most significant legislative amendments proposed. The views expressed are subject to the important qualification that at the time of drafting this submission the intended Regulations had not been publicly released, even though the Government had provided information about some of its policy intentions to the Committee on Industrial Legislation (COIL), upon which Ai Group is represented.² The Regulations will contain provisions of central importance to the operation of the legislation.



Heather Ridout
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² The Government at the time gave Ai Group permission to refer to the documents provided to COIL participants at the 15 July 2009 meeting in its submission to the Senate Standing Committee on Education, Employment and Workplace Relations regarding the predecessor bill.

Ai Group / ACA's views on specific provisions on the Bill

Ai Group / ACA's views on the provisions of the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* are set out in the following table:

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
<p>Section 2 – Object of the Act</p> <p>The existing Object of the Act is replaced with a new Object.</p> <p>[Item 2]</p>	<p>Not opposed</p>	<p>The new Object includes the necessary elements and hopefully will ensure the achievement of all of the elements referred to in the equivalent provision of the <i>Building and Construction Industry Improvement Act 2005</i> (BCII Act 2005) such as “<i>promoting respect for the rule of law</i>” and “<i>ensuring respect for the rights of building industry participants</i>” and “<i>encouraging the pursuit of high levels of employment in the building industry</i>”.</p>

<i>Provisions of the Bill</i>	<i>Ai Group / ACA's Position</i>	<i>Basis of Ai Group / ACA's Position</i>
<p>Section 4 – Definitions</p> <p>The following definitions are inserted: AAT presidential member; Advisory Board; building matter; Commonwealth Ombudsman; Director; examination; examination notice; Fair Work Building Industry Inspector; Fair Work Inspector; Fair Work Ombudsman; Independent Assessor; inspector; investigation; lawyer; nominated AAT presidential member; Office; safety net contractual entitlement; and this Act.</p> <p>[Items 3, 6, 10, 16, 19, 23, 24, 25, 26, 27, 31, 35, 36, 37, 38, 39, 43, 44]</p>	<p>Amendment needed</p>	<p>We oppose the insertion of a definition of “Independent Assessor” and all of the other provisions of the Bill relating to the Independent Assessor.</p> <p>It is not appropriate to permit the compulsory interrogation powers of the Fair Work Building Industry Inspectorate to be “switched off”. The powers are subject to numerous safeguards and are only able to be used in appropriate circumstances.</p>
<p>The following definitions would be repealed: ABC Commissioner; ABC Inspector; AIRC; bargaining representative; building enterprise agreement; civil penalty provision; collective agreement; Commissioner; Commonwealth authority; Deputy ABC Commissioner; eligible conditions; employee organisation; enterprise agreement; full-time Commissioner; Grade A civil penalty provision; Grade B civil penalty provision; industrial body; industrial instrument; industrial law; part-time Commissioner; penalty unit; protected industrial action; unlawful industrial action; and Workplace Relations Act.</p> <p>[Items 4, 5, 7, 8, 9, 11, 12, 13, 14, 17, 20, 21, 22, 28, 29, 30, 32, 33, 34, 40, 41, 42, 46, 47]</p>	<p>Amendment needed</p>	<p>We oppose the deletion of the definitions of “civil penalty provision”, “Grade A civil penalty”, “Grade B civil penalty” and “penalty unit” and the associated reduction in penalties for breaches of the Act.</p>

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
<p>The following definitions are amended: Commonwealth industrial instrument; designated building law; and transitional award.</p> <p>[Items 15, 18, 45]</p>	<p>Not opposed</p>	<p>These amendments appear to be appropriate.</p>
<p>Section 5 – Definition of <i>building work</i></p> <p>Subparagraph 5(1)(d)(iv)</p> <p>Off-site pre-fabrication of made-to-order components is removed from the definition of “building work”.</p> <p>[Item 48]</p>	<p>Not opposed</p>	<p>This amendment is consistent with Recommendation 6 (ii) of the Wilcox Review. Importantly the Explanatory Memorandum clarifies that:</p> <p><i>“It is intended that pre-fabrication of building components that takes place on auxiliary or holding sites separate from the primary construction site(s) will remain covered by the definition of building work”.</i></p> <p>It is essential that the pre-fabrication of components on-site, or in a temporary yard or other facility set up by a construction contractor to prefabricate substantial parts of a building or structure (eg. pre-castings) remain covered.</p>

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
<p>Chapter 2 – Fair Work Building Industry Inspectorate</p> <p>Part 1 – Director</p> <p>This Part deals with various matters relating to the statutory office of the Director of the Fair Work Building Industry Inspectorate.</p> <p>[Item 49, sections 9 to 22]</p> <p>Section 10 - Functions</p>	<p>Amendment needed</p>	<p>Intervention rights</p> <p>The functions of the Director do not refer to the vital function of intervention as included in Section 10 of the BCII Act 2005. This intervention function needs to be referred to in Section 10 and is discussed in more detail later in this submission.</p> <p>Independent Assessor</p> <p>Sub-section 10(h) and all other provisions of the Bill relating to the Independent Assessor should be deleted. It is not appropriate to permit the compulsory interrogation powers of the Fair Work Building Industry Inspectorate to be “switched off”. The powers are subject to numerous safeguards and are only able to be used in appropriate circumstances. This issue is discussed in detail in a later section of this submission.</p>

<i>Provisions of the Bill</i>	<i>Ai Group / ACA's Position</i>	<i>Basis of Ai Group / ACA's Position</i>
Section 11 – Minister's directions	Not Opposed	<p>It is essential that the independence of the Director is not compromised. Accordingly, Sub-section 11(2), which prevents directions about a particular case, is very important.</p> <p>Sub-section (4) is also important. This provision facilitates oversight by Parliament and enables disallowance under s.42 of the <i>Legislative Instruments Act 2003</i> in appropriate circumstances.</p>
Part 2 – Fair Work Building Industry Inspectorate Advisory Board <i>[Item 49, sections 23 to 26H]</i>	Not Opposed	<p>It is very important that the Advisory Board only have the power to make recommendations to the Director of the Fair Work Building Industry Inspectorate, as specified in section 24 – Role, of the Bill. If the Board was given the power to direct, the Director's independence would be compromised.</p>
Part 3 – Office of the Fair Work Building Industry Inspectorate <i>[Item 49, sections 26J to 26L]</i>	Not Opposed	<p>These provisions are appropriate.</p>
Section 28 – Building industry participants to report on compliance with Code <p>This section is repealed.</p> <i>[Item 50]</i>	Not Opposed	<p>We do not oppose the repeal of this section of the Act, given the compliance requirements set out in the <i>Implementation Guidelines for the National Code of Practice for the Construction Industry</i>.</p>

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
<p>Chapter 5 – Industrial action etc</p> <p>This chapter is repealed.</p> <p>[Item 51]</p>	<p>Opposed</p>	<p>The following provisions of Chapter 5 of the BCII Act 2005, need to be retained:</p> <ul style="list-style-type: none"> • Section 38 – Unlawful industrial action prohibited: This section provides for a specific penalty if unlawful industrial action is taken, with a maximum penalty of \$110,000 for a body corporate; • Section 39 – Injunction against unlawful industrial action: This section enables an injunction to be obtained if unlawful industrial action is occurring, threatened, impending or probable. <p>There are no equivalent provisions to sections 38 and 39 in the <i>Fair Work Act 2009</i>. The Act does not include a specific, stand-alone penalty for the taking of unlawful industrial action, and the provisions relating to injunctions are narrower.</p> <p>The existing penalties should continue to apply. It would be risky to reduce maximum penalties to only one third of what they currently are as proposed in the Bill. (This issue is discussed in more detail below).</p>
<p>Chapter 6 – Discrimination, coercion and unfair contracts</p> <p>This chapter is repealed.</p> <p>[Item 51]</p>	<p>Opposed</p>	<p>While the issues dealt with in this chapter are covered by Part 3-1 – General Protections, of the <i>Fair Work Act 2009</i>, the existing BCII Act 2005 contains higher penalties. Union coercion, including to employ particular persons (with militant behaviours) and to assign particular duties to them (e.g. OHS officer), is still occurring in the industry and needs to be stamped out.</p>

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<p>Chapter 7 – Enforcement</p> <p>Part 1 – Contravention of civil penalty provision</p> <p>The existing provisions of Part 1 are repealed.</p> <p>[Item 52]</p>	<p>Amendment needed</p>	<p>We oppose the removal of the existing maximum penalties which apply to all building industry participants, including employers and trade unions.</p> <p>In his report to Government, Mr Wilcox expressed the view that there is no justification for perpetuating different behavioural rules and different maximum penalties for building employees. This view is inconsistent with Mr Wilcox's reasoning that the construction industry faces unique and special challenges that justify the retention of the compulsory examination power.</p> <p>Given the level of industrial lawlessness that was prevalent in the construction industry prior to the BCII Act 2005, and the fact that an enduring change in behaviour has not yet occurred, the existing higher penalties should continue to apply. It would be risky to reduce maximum penalties to only one third of what they currently are as proposed in the Bill.</p> <p>The proposed new maximum penalties would significantly reduce the Court's discretion in determining appropriate penalties and constrain its capacity to deter unlawful behaviour.</p>

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<p>A new Part 1 is included within the Bill entitled:</p> <p>Part 1 – Powers to obtain information etc</p> <p>Division 1 – Preliminary</p> <p>This Division deals with definitions and application provisions.</p> <p>[Item 52, sections 36 and 36A]</p>	<p>Amendment needed</p>	<p>Definition of “building project”</p> <p>“Building project” needs to be more tightly defined.</p> <p>Sub-section 36(1) defines the term “building project” as a project that consists of, or includes, building work. “Building work” is defined in Section 5 of the Act and includes an extensive range of activities.</p> <p>Industry participants generally understand a “building project” as building work:</p> <ul style="list-style-type: none"> • with a scope defined in the relevant tender document; and • carried out on specific site or sites. <p>The current definition of a building project in the Bill is so widely drawn that, for example, all construction, alteration, extension, restoration, repair, demolition of buildings in a particular State, could be deemed to be a “building project”.</p> <p>This definition is particularly important when considered with Section 40 of the Bill which gives the Independent Assessor the power to make a determination that section 45 – the compulsory examination power – will not apply in relation to one or more “building projects”.</p>

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
		<p>Definition of “interested person”</p> <p>Sub-section 36(2) defines an “interested person” in relation to a building project as the Minister or a person prescribed by Regulations. This definition is particularly important when considered with Section 40 of the Bill which allows an “interested person” to apply to the Independent Assessor for a determination that Section 45 will not apply in relation to a building project.</p> <p>It is our understanding from documents provided during a meeting of COIL on 15 July 2009³ in respect of the predecessor bill that the Government’s policy intentions are reflected in the following statement:</p> <p><i>“Subject to the outcomes of the Senate inquiry, it is the Government’s intention that the Regulations prescribe all ‘building industry participants’ (as defined by the existing Act) in relation to the project to which the application relates, to be ‘interested persons’. This means all project employers, employees, their respective associations and the client(s) would be able to make application to the Independent Assessor”.</i></p> <p>If the provisions relating to the Independent Assessor are retained, despite our strong objections, the Regulations should define an “interested person”:</p> <ul style="list-style-type: none"> • for the purposes of switching off the powers – as a project owner or head contractor, as they have the greatest financial risk if the powers are switched off;

³ The Government at the time gave Ai Group permission to refer to the documents provided to COIL participants at the 15 July 2009 meeting in its submission to the Senate Standing Committee on Education, Employment and Workplace Relations regarding the predecessor bill.

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
		<ul style="list-style-type: none"> • for the purposes of switching the powers back on – as any building industry participant.
<p>Division 2 – Role of the Independent Assessor</p> <p>[Item 52, sections 36B to 43]</p>	<p>Opposed</p>	<p>Division 2 should be deleted in its entirety</p> <p>We are opposed to the concept of the compulsory examination powers being able to be “switched off” and, therefore, we are opposed to the establishment of the Office of the Independent Assessor – Special Building Industry Powers.</p> <p>Justice Wilcox recommended extensive safeguards on the use of the compulsory examination powers (which have been incorporated within the Bill and to some extent already adopted by the ABC Commissioner) but he did not recommend that the powers be able to be “switched off”.</p> <p>Sections 36B to 43 are not warranted or logical, and should be removed from the Bill.</p> <p>Division 2 would negatively change the risk profile on projects</p> <p>Any responsible client, and certainly all contractors, would take comfort from knowing that the compulsory examination powers apply during the relevant project.</p> <p>The removal of the compulsory examination powers would substantially change the industrial risk profile of a project.</p>

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		<p>Knowledge that the compulsory examination powers are available reduces the risk of industrial turmoil on a project and hence this lower risk would be taken into account in project pricing.</p> <p>In contrast, if there is the possibility that the compulsory examination powers will be “switched off” on the project, the risk of industrial turmoil increases and this increased risk would be taken into account in determining project pricing, potentially substantially increasing building costs for project owners (including Governments) and the Australian community.</p> <p>Exclusion of projects commenced prior to the commencement of the Bill</p> <p>Section 38 of the Bill states that the provisions relating to determinations by the Independent Assessor only apply “<i>in relation to a building project if the building work that the project consists of, or includes, begins on or after the commencement of</i>” Subdivision B.</p> <p>The timing of when <i>the building work that the project consists of, or includes, begins</i> will be difficult to ascertain and would result in uncertainty regarding the status of particular projects.</p> <p>To ensure certainty, the approach reflected in <i>Implementation Guidelines for the National Code of Practice for the Construction Industry</i> should be adopted. (Refer to subsection 2.1 of the Guidelines). The Independent Assessor should not be able to issue a determination in respect of any project where the expression of interest or tender was let for the first time before the commencement of Subdivision B.</p>

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		<p>The potential extremely wide scope of a determination</p> <p>The compulsory examination powers set out in Section 52 of the BCII Act 2005 relate to the gathering of information or documents, relevant to an investigation by the ABC Commissioner into a contravention of a designated building law by a building industry participant.</p> <p>In contrast, Section 39 of the Bill provides that the Independent Assessor may make a determination that Section 45 of the Bill does not apply in relation to one or more building projects.</p> <p>Therefore, the focus of the compulsory examination powers has been moved from the investigation of an individual building industry participant to a blanket exception for a poorly defined range of building activities characterised as a “building project” (see discussion above re. Section 36).</p> <p>Criteria which the Independent Assessor must apply in making decisions</p> <p>The Bill and Explanatory Memorandum give very little guidance as to the criteria the Independent Assessor must apply in making a determination under Section 39.</p> <p>The Explanatory Memorandum includes the following commentary:</p> <p><i>“The Independent Assessor must have regard to the object of the Act and any matters prescribed by the regulations when considering whether he or she is satisfied that it would be</i></p>

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		<p><i>appropriate to make a determination. Matters prescribed by the regulations might include, for example, a demonstrated record of compliance with workplace relations laws, including court and tribunal orders, in connection with the building project. The Independent Assessor must also be satisfied that it would not be contrary to the public interest to make a determination.”</i></p> <p>It is our understanding from documents provided during a meeting of COIL on 15 July 2009⁴ that the Government's policy intentions are reflected in the following statement:</p> <p><i>“Subject to the outcomes of the Senate inquiry, it is the Government's intention that the Regulations prescribe the Independent Assessor must be satisfied that the building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, including court or tribunal orders and that the views of other interested persons in relation to the project being considered.”</i></p> <p>If the provisions relating to the Independent Assessor are retained, despite our strong objections, we concur with the Government that it is essential that:</p> <ol style="list-style-type: none"> 1. building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, plus court or tribunal orders; and 2. the views of interested persons in relation to the project must be considered. <p>These issues are discussed below.</p>

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		<p>If the provisions relating to the Independent Assessor are retained, despite our strong objections, it is essential that:</p> <ul style="list-style-type: none"> • building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, plus court or tribunal orders; and • the views of interested persons in relation to the project must be considered. <p>These issues are discussed below.</p> <p>1. Demonstrated record of compliance</p> <p>All building industry participants who are likely to have any involvement in the building project should be required to have a demonstrated record of compliance with workplace relations laws, plus court and tribunal orders. Any other approach would not be logical or in the public interest.</p> <p>Furthermore, consistent with section 69 of the BCII Act 2005, building associations should be deemed to be responsible for conduct of their divisions, branches, officers, employees, delegates, etc, when determining whether the association has a demonstrated record of compliance. (NB. The Bill proposes the deletion of Section 69 and Ai Group / ACA strongly oppose this).</p> <p>2. Consultation with interested stakeholders</p> <p>Section 41 requires the Independent Assessor to provide the Director with a copy of all applications for a determination and the opportunity to make submissions in relation to the application.</p>

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		<p>If the provisions relating to the Independent Assessor are retained, despite our strong objections, it is essential that the Independent Assessor have an obligation to consult with interested stakeholders before making a determination.</p> <p>We propose that the following provision be included in the Bill, based upon Sub-section 289(1) of the <i>Fair Work Act 2009</i>:</p> <p><i>“The Independent Assessor must, in relation to every application for a determination, ensure that all ‘building industry participants’ in relation to the project to which the application applies, are given a reasonable opportunity to make written submissions and provide other relevant materials to the Independent Assessor for consideration”.</i></p> <p>Timing of applications</p> <p>Under the Bill, applications to the Independent Assessor to “switch off” the powers can be made before a project even commences. How could the Independent Assessor know whether there is “a demonstrated record of compliance with workplace relations laws, including court and tribunal orders, in connection with the building project” before the project commences?</p> <p>Before the commencement of a project it is impossible to know whether the powers will be needed. All of the employers, employees and unions who will be involved are not usually known at the commencement of the project because packages of work are typically progressively released during the life of the project. Also, it is impossible to know, in advance, what behaviours will be exhibited by building industry participants on the project.</p>

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		<p>Unless the Bill is amended, unions are likely to make an application to the Independent Assessor under Section 39 before the start of every project.</p> <p>Also, sub-section 40(4) provides for an application to be made to “turn off” the compulsory examination powers for a completed project. It is difficult to envisage circumstances where such an application and determination would need to be made.</p> <p>Reasons for decisions</p> <p>The Bill should be amended to expressly require that the Independent Assessor give written reasons for its decisions. This will promote consistency, fairness and justice. We understand that this proposal, in relation to the predecessor bill, was supported by unions</p> <p>Applications which have no reasonable prospect of success</p> <p>If the provisions relating to the Independent Assessor are retained in the Bill, a provision similar to Subsection 587(1) of the <i>Fair Work Act 2009</i> is needed to enable the Assessor to dismiss applications which have no reasonable prospect of success (eg. a further application relating to the same project when circumstances have not changed).</p> <p>The following provision is proposed:</p>

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		<p><i>“Dismissing applications</i></p> <p><i>Without limiting when the Independent Assessor may dismiss an application for a determination, the Independent Assessor may dismiss an application if:</i></p> <p><i>(a) the application is not made in accordance with this Act;</i> <i>(b) the application is frivolous or vexatious; or</i> <i>(c) the application has no reasonable prospect of success.”</i></p> <p>Resources</p> <p>The Independent Assessor is a part-time role and currently no resources appear to have been assigned to the Office to enable it to carry out its functions. The Office could conceivably receive hundreds of applications / statements from “interested persons” in relation to a single Section 39 determination.</p> <p>Summary of Ai Group / ACA's position</p> <p>In summary, as stated above, Division 2 of the Bill is not warranted or logical and needs to be deleted in its entirety.</p>
<p>Division 3 – Examination Notices</p> <p><i>[Item 52 - sections 44, 45 and 47 to 51, Item 62 – section 54A]</i></p>	<p>Amendment needed</p>	<p>The Director of the Fair Work Building Industry Inspectorate will be subjected to very substantial oversighting, including:</p> <ul style="list-style-type: none"> • An Advisory Board will make recommendations to the Director about policies, priorities and programs and any matter that the Minister requests the Advisory Board to consider;

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		<ul style="list-style-type: none"> • The Fair Work Ombudsman is a member of the Advisory Board; • The Commonwealth Ombudsman must monitor and review the exercise of the compulsory examination powers, including receiving a copy of all examination notices, plus receiving a report, video recording and transcript of every examination; • A Presidential Member of the Administrative Appeals Tribunal must issue an examination notice before the Director is able to use the compulsory interrogation powers; and • The Independent Assessor may determine that the compulsory interrogation powers do not apply to particular building projects. <p>Whilst some safeguards are warranted, it is extremely important that the Director and the Fair Work Building Industry Inspectorate are able to perform their functions effectively and without undue delays. If the Inspectorate proves to be ineffective, the risks associated with industrial lawlessness will again be priced into construction contracts, at great cost to project owners (including Governments) and the Australian community.</p> <p>Section 47 – Issue of examination notice</p> <p>Sub-section 47(1) sets out the factors which the nominated AAT member must be satisfied of in order to issue an examination notice. Such factors include:</p> <p><i>“(g) any other matter prescribed by the regulations”</i></p>

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
		<p>It is our understanding from documents provided during a meeting of COIL on 15 July 2009⁵ that the Government's policy intentions are reflected in the following statement:</p> <p><i>"Subject to the outcomes of the Senate inquiry, it is the Government's intention that the Regulations prescribe that the nominated AAT presidential member also consider additional criteria relating to the nature and likely seriousness of the suspected contravention and the likely impact upon the person subject to the notice. The Government's view that these criteria could be considered was set out in paragraph 128 of the Bill's Explanatory Memorandum".</i></p> <p>Enabling the AAT presidential member to "consider" the above two factors is one thing, requiring that the AAT presidential member be "satisfied" in respect of the above two factors is another thing entirely (as would result given the terminology used in Section 47). The imposition of such a requirement would most likely make the proposed process unworkable and potentially lead to most, if not all, applications by the Director being rejected.</p> <p>It is not appropriate for <i>"the likely impact upon the person subject to the notice"</i>, to be included as a factor to be considered. The Director and the AAT member are unlikely to know the impact that the examination will have on a person. Also, the use of the compulsory examination power is a last resort and, even if the examination is likely to have a negative impact upon the person, this should not prevent the examination going ahead if the factors set out in Section 47 of the Bill are satisfied.</p>

⁵ The Government at the time gave Ai Group permission to refer to the documents provided to COIL participants at the 15 July 2009 meeting in submission to the Senate Standing Committee on Education, Employment and Workplace Relations regarding the predecessor bill.

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
		<p>If the “<i>nature and likely seriousness of the suspected contravention</i>” is to be included in the Regulations, this factor should only be a factor that the AAT member may consider in deciding whether to issue an examination notice.</p> <p>Item 55 – Section 52</p> <p>We oppose paragraph 52(2)(b) of the Bill. A person should not be able to refuse to give information, produce a document or answer questions based upon “public interest immunity”.</p> <p>Paragraph 53(1)(c) of the existing BCII Act 2005 expressly states that:</p> <p><i>“a person is not excused from giving information, producing a document, or answering a question, under section 52 on the ground that to do so:</i></p> <p>----</p> <p><i>(c) would otherwise be contrary to the public interest.”</i></p> <p>Item 58 of the Bill would delete paragraph 53(1)(c) of the BII Act 2005 and this is opposed by Ai Group / ACA.</p> <p>Accordingly, paragraph 52(2)(b) of the Bill needs to be deleted and paragraph 53(1)(c) of the BCII Act 2005 needs to be retained.</p>

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
<p>Sunset provision <i>[Item 52, Section 46]</i></p>	<p>Opposed</p>	<p>The compulsory examination powers are needed at the present time as much as ever. While the reforms introduced after the Royal Commission addressed the unlawful and inappropriate conduct that permeated the industry, industrial unrest and disputation has been steadily increasing in the industry and damaging and unproductive industrial relations practices have been creeping back onto building and construction sites across Australia.⁶ In the Foreword to the Annual Report for the ABCC for the financial year ending 30 June 2011, the ABC Commissioner, Leigh Johns, identified that:</p> <p><i>“[d]uring 2010-11, unlawful industrial disputes, the traditional ‘bread-and-butter’ work of the ABCC, continued to occur at levels that underscored the need for strong enforcement of workplace laws. The pernicious effects of unlawful industrial action are unacceptable, particularly so on projects of social and national significance like the Monash Freeway, the Melbourne Markets relocation, Gold Coast University Hospital or the Wonthaggi Desalination Plant”.</i></p> <p>The predecessor bill originally included a sunset provision of 5 years for the compulsory examination powers. The current Bill, without logical reasoning other than the simple fact 2 years has passed since the predecessor bill, includes a sunset provision of 3 years. Ai Group and ACA maintain their original position that the sunset provision should be deleted and replaced with a review in 5 years.</p>

⁶ The ABCC Annual Report 2010-11 reveals that investigations of unlawful industrial action occurring on building and construction sites have steadily increased since 2007-08. In that year, the ABCC investigated 199 incidents of unlawful industrial action investigated. This has increased to 223 in 2010-11. (See page 40 of the ABCC Annual Report 2010-11)

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
		<p>A review after five years (say, through a Senate Committee inquiry) is appropriate, but a provision which automatically removes the powers after three years unless further legislation is passed by both Houses of Parliament is not appropriate. Prior to the powers being implemented, construction industry unions had implemented a policy of refusing to cooperate with the regulator, including refusing to allow officials or delegates to answer any questions. Unless there is a vast change in the attitudes of construction industry unions, the removal of the powers will result in the removal of the "strong cop on the beat" at the end of the sunset period. Therefore, a cautious approach is warranted.</p>
<p>Secrecy Provisions <i>[Item 71, section 57]</i></p>	<p>Not opposed</p>	<p>This section is similar to subsection 52(7) of the BCII Act 2005.</p>
<p>Payment for expenses incurred in attending an examination <i>[Item 71, section 58]</i></p>	<p>Amendment needed</p>	<p>The ABCC in 2011 adopted the recommendation of the Hon Mr Wilcox to reimburse persons examined under section 52 for the reasonable costs of travel, accommodation and other associated losses incurred in order to attend the examination.</p> <p>Section 58 is supported but the person should not be reimbursed expenses if they do not cooperate in making cost effective arrangements for carrying out the interrogation. It is important that the resources of the Fair Work Building Industry Inspectorate are not drained by claims for the payment of excessive legal expenses.</p>

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
Chapter 7, Part 2 – Fair Work Building Industry Inspectors <i>[Item 72, sections 59 to 59G]</i>	Not opposed	These provisions are appropriate.
Chapter 7, Part 3 – Federal Safety Officers <i>[Items 74, 75, 76, 77]</i>	Not opposed	These provisions are appropriate.
Section 64 – Project agreements not enforceable <i>[Item 77]</i>	Opposed	<p>Section 64 of the BCII Act 2005 was amended via the <i>Fair Work (State Referral and Consequential and Other Amendments) Bill 2009, Schedule 8</i>, to achieve consistency with the provisions of the <i>Fair Work Act 2009</i>.</p> <p>The provision implements an important recommendation of the Cole Royal Commission (Recommendation 13) and needs to be retained.</p> <p>It is also relevant that the Implementation Guidelines for the National Code of Practice for the Construction Industry (August 2009) state that:</p> <p><i>“6.1.3 The use of unregistered written agreements (other than common law agreements made between the employer and an individual employee) are inconsistent with the Code and Guidelines. The entity / entities to which such an agreement applies will be deemed non-compliant with the Code and Guidelines”.</i></p>

<i>Provisions of the Bill</i>	<i>Ai Group / ACA's Position</i>	<i>Basis of Ai Group / ACA's Position</i>
<p>Disclosure of Information by the Director and the Federal Safety Commission, various technical and consequential amendments etc</p> <p><i>[Items 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88]</i></p>	<p>Amendment needed</p>	<p>In respect of item 77 (section 64) of the Bill, the repeal of the current section 64 in the BCII Act 2005, as it relates to the enforceability of project agreements, is not supported (see above).</p>
<p>Section 69 – Building association responsible for conduct of members</p> <p><i>[Item 89]</i></p>	<p>Opposed</p>	<p>Section 69 is a very important provision of the BCII Act which prevents unions from refusing to accept any responsibility for the actions of their officials, employees and delegates.</p> <p>The provision implements an important recommendation of the Cole Royal Commission and needs to be retained.</p> <p>This provision would be essential to prevent a union denying responsibility for the actions of its divisions, branches, officials, employees and/or delegates when the Independent Assessor is determining whether the union has a “demonstrated record of compliance with workplace relations laws, plus court and tribunal orders”.</p> <p>The relevant extract from the Final Report of the Cole Royal Commission is set out below:</p> <p><i>“Issue</i> <i>In the building and construction industry, industrial action rarely occurs without the presence and encouragement of union officials and delegates. They should be presumed to act for their union as in reality they do. Yet when unions are sued or prosecuted in respect of actions of their officials or delegates, they frequently</i></p>

Provisions of the Bill	Ai Group / ACA's Position	Basis of Ai Group / ACA's Position
		<p><i>seek to deny responsibility based on technicalities, including the provisions of their rules. The unions take credit for the benefits of collective action: they should be held liable for losses caused by unlawful industrial action. The Building and Construction Industry Improvement Act should reflect this reality and thus make unions presumptively responsible for the actions of their officials and employees.</i></p> <p>Recommendation 205 <i>The Building and Construction Industry Improvement Act contain, for all relevant purposes, a deeming provision modelled on s298B of the Workplace Relations Act 1996 (C'wth)."</i></p> <p>Recommendation 205 was implemented via Section 64 of the BCII Act 2005.</p>
<p>Section 70 – Capacity, state of mind etc of person being coerced</p> <p>[Item 89]</p>	<p>Opposed</p>	<p>This topic is linked to Item 51 of the Bill. While the issues are covered by Part 3-1 – General Protections, of the <i>Fair Work Act 2009</i>, the existing BCII Act 2005 contains higher penalties. Union coercion, including to employ particular persons (with militant behaviours) and to assign particular duties to them (e.g. OHS officer), is still occurring in the industry and needs to be stamped out.</p>
<p>Rights of the Director and Fair Work Building Industry Inspectors to intervene</p> <p>[Items 91, 92 and 93]</p>	<p>Not opposed</p>	<p>Section 71</p> <p>It is essential that the Director have the right to intervene in civil proceedings before any court, relating to a building industry participant or building work.</p>

<i>Provisions of the Bill</i>	<i>Ai Group / ACA's Position</i>	<i>Basis of Ai Group / ACA's Position</i>
	Not opposed	Section 72 It is essential that the Director have the right to make submissions to FWA, in matters relating to a building industry participant or building work.
Rights of the Director and Fair Work Building Industry Inspectors to institute proceedings; Jurisdiction of Courts; Court not to require undertaking as to damages; <i>[Items 94, 95, 97, 98, 99, 100]</i>	Not opposed	We have not identified any problems with these provisions.
Section 74 – General Manager of FWA must keep Director informed <i>[Item 96]</i>	Not opposed	This notification process is essential to enable the Fair Work Building Industry Inspectorate to carry out its functions.
Definition of “protected person” <i>[Items 102, 103]</i>	Not opposed	These provisions are appropriate.

<i>Provisions of the Bill</i>	<i>Ai Group / ACA's Position</i>	<i>Basis of Ai Group / ACA's Position</i>
Section 78 – Regulations Schedule 2 – Transitional and consequential provisions re. Regulations	Not opposed	We have not identified any problems with these provisions.

Annexure A – List of ACA Members

Abigroup Limited
Boulderstone Pty Ltd
BGC Contracting Pty Ltd
Brookfield Multiplex Limited
CH2M Hill Australia Pty Ltd
Clough Limited
Downer EDI Limited
Fulton Hogan Pty Ltd
Georgiou Group Pty Ltd
John Holland Pty Ltd
Laing O'Rourke Australia Construction Pty Limited
Leighton Contractors Pty Limited
Leighton Holdings Limited
Lend Lease Pty Ltd
Lend Lease Infrastructure Pty Ltd
Macmahon Holdings Limited
McConnell Dowell Corporation Limited
Thiess Pty Limited
United Group Limited
Watpac Limited