

**THE EXPOSURE DRAFT BUILDING
AND CONSTRUCTION INDUSTRY
IMPROVEMENT BILL 2003**

**SUBMISSION BY THE AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY**

OCTOBER 2003



SUBMISSION OF THE AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY (ACCI) ON THE EXPOSURE DRAFT BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2003

Background

1. The Australian Chamber of Commerce and Industry (ACCI) is Australia's peak national body of employer associations. Members of ACCI represent employers of all sizes, in all regions and across all industry sectors. ACCI and its members have particular, but not exclusive, interest in workplace and industrial issues.
2. ACCI membership is not limited to but includes industry associations specific to the building and construction industry, such as the Master Builders' Association of Australia, the Housing Industry Association of Australia, the National Electrical Communication Association and the Master Plumbers' and Mechanical Services Association of Australia.
3. All ACCI members have been consulted in the development of this response. However, the ACCI response does not limit or derogate from the position individual ACCI members may independently adopt or express.

Introduction

4. The Australian Chamber of Commerce and Industry (ACCI) strongly supports workplace reform in the commercial building and construction industry.
5. ACCI supported the establishment of the Cole Royal Commission in 2001.
6. ACCI also supported the establishment of the interim building taskforce following the first report of the Cole Royal Commission in August 2002.
7. ACCI presented a submission to the Royal Commission in September 2002, and participated in a conference conducted by the Commission on occupational health and safety in the building and construction industry.
8. Upon the release of the report of the Royal Commission in March 2003, ACCI prepared a detailed response to all 212 recommendations and delivered that response to government in May 2003.

9. ACCI has now developed these observations on the *Building and Construction Industry Improvement Bill 2003*, released publicly as an exposure draft by the then federal Minister for Employment and Workplace Relations the Hon. Tony Abbott MP in September 2003 ('the draft Improvement Bill'). These observations should be read in conjunction with ACCI's earlier submissions.
10. Broadly speaking, our interests are twofold:
- To support and advance the well-being of private employers and contactors in the building and construction industry; and
 - To strengthen the Australian economy of which the building and construction industry is a major component.

The draft Improvement Bill

11. The September 2003 edition of the 'ACCI Review' published an article '*The Moment of Truth for Building Industry Reform*' (copy attached).
12. That article concluded as follows:
- "The stakes are now high. The industry has been at this point before. Expensive inquiries. Problems independently identified. Recommendations for change. The test is whether in 2003/04 governments, parliaments and the industry at all levels have the will and wisdom to move beyond the status quo into a necessary period of reform."*
13. The draft *Building and Construction Industry Improvement Bill 2003* is one crucial manifestation (but not the only element) of the necessary reform. Passage of separate legislation of this type was a specific recommendation of the Cole Royal Commission.
14. The underpinning rationale for this Bill is strongly supported by ACCI. From the draft Improvement Bill much else by way of reform can and should flow. The Bill would introduce a new legal and regulatory regime for workplace conduct in the commercial building and construction industry. New, clearer and stronger laws are a precondition for 'on the ground' reform to work practices, attitudes and culture. The success of new regulators, the extent to which additional resources can make a difference, and the effectiveness of enforcement largely depend on the strength of the legal regime and the rights and obligations it provides.
15. The draft Improvement Bill seeks to implement about 120 of the recommendations of the Cole Royal Commission. The Royal Commission made 212 recommendations. The

Bill is only part of the response to the Royal Commission. Although it is in this sense limited, the areas where the Bill responds are the major reform areas identified by the Royal Commission.

16. In an overall sense, the draft Improvement Bill represents a fair and reasonable implementation of the 120 recommendations of the Royal Commission that it seeks to implement.

17. There are a number of specific matters of policy and drafting detail that ACCI raises in this submission. Many of the recommendations of the Royal Commission were not accompanied by suggested legislative amendments and therefore policy and drafting judgements need to be made by the government and the parliament when translating recommendations into proposed law.

18. The areas where the Bill responds to the Royal Commission are primarily in relation to:

- Workplace relations and workplace conduct;
- Commonwealth procurement code of practice;
- Health and safety (including establishment of the Federal Safety Commissioner – ‘FSC’);
- Establishment of the Australian Building and Construction Commission (ABCC) and ABC Commissioner; and
- Offences and Penalties.

19. It does not substantially respond in relation to:

- Training and skill development;
- Workers compensation;
- Corporate governance/phoenix companies;
- Taxation;
- Superannuation;
- Industry funds;
- Security of payment; and
- Employee entitlements.

20. ACCI’s submission in response to the recommendations of the Royal Commission supported or supported with modifications, 194 of the 212 recommendations.

Accordingly, the Bill does not include a number of areas where ACCI has supported or is prepared to support (in whole or part) Royal Commission recommendations.

21. Aside from the proposed clause 51(2)(k) (concerning new AIRC powers to set caps on working hours) and clause 62 (defining genuine bargaining), the Bill does not enact provisions in relation to matters which ACCI opposed or did not support in our May 2003 submission responding to the Royal Commission.
22. The federal government's timetable for responding to the draft Improvement Bill is very tight (4 weeks). A tight timeframe in this instance is justified - it is a priority to get the Bill into the parliament and the process of parliamentary and political review underway – so long as the government is willing to maintain consultation with industry throughout this process and consider amendments to the Bill on matters not raised during the 4-week consultation.
23. ACCI will consider making further responses on the Bill once it (or it in another form) is introduced into the parliament.
24. ACCI's response to the draft Improvement Bill does not deal with all issues. Consistent with our submission in response to the recommendations of the Royal Commission, matters of detail in a number of key areas are best dealt with by employer and business organisations that are directly involved in the building and construction industry.

Length and Complexity

25. The draft Improvement Bill is long and complex. This is not ideal. Industry would prefer it otherwise. In some respects the drafting could be briefer if the parliament was to accept less prescription and more discretion for regulators and enforcers (for example, sections 84 to 132 – on secret ballots – some 30 pages of draft legislation, could be substantially reduced if the requirement for ballots were mandated in legislation but the rules for conducting ballots were set by regulations or in rules of the Australian Industrial Relations Commission). Whether length and complexity is avoidable in a subject matter such as this (where competing interests need to be balanced and where loopholes need to be closed) is a moot point. The general law relating to workplace relations in Australia, the *Workplace Relations Act 1996*, is also just as long and complex.

26. To assist working through the detailed Bill, the information pack released is a valuable and useful resource. Upon passage of the Bill and prior to its commencement the government should arrange for further information kits to be made available within the industry – similar to the information distributed in 1996 upon the passage of the Workplace Relations Act 1996.

Consequential and Transitional Issues

27. The government has not released a draft consequential provisions or transitional provisions Bill. One will be needed and has been foreshadowed. While it is recognised that transitional arrangements are shaped by the detail of the new legislation, its absence restricts the capacity of industry to fully assess industry impact of the draft Improvement Bill. Transitional arrangements from the current regulatory regime to the proposed new law are very important in a dynamic industry of this size, with its high level of ongoing commercial activity. The impact of the proposed new laws (or transition from the old to the new) on existing industrial agreements and existing commercial contracts needs to be carefully thought through. ACCI reserves its position until it sees the form of transitional or consequential provisions.

28. Areas where consequential and transitional provisions will be particularly important are: the certification of agreements made as a result of pattern bargaining, the terms and implementation of the code of conduct on existing commercial and industrial arrangements, the terms and implementation of the accreditation scheme on tendering and the enforceability of existing project agreements.

Interaction with the existing Workplace Relations Act 1996 ('WRA')

29. The draft Improvement Bill establishes a specific regime for workplace laws applying to "building work" (as defined). It does so in multiple areas, including in relation to:

- Bargaining and agreement making;
- Powers of the Australian Industrial Relations Commission (AIRC);
- Industrial action;
- Secret ballots;
- Duties of industrial organisations;
- Rights of entry;

- Freedom of association; and
- Industrial offences.

30. In doing so, the draft Improvement Bill covers the same or similar subject matters as the WRA. When considering the draft Improvement Bill it is important to note that the Bill will not wholly displace the operation of the WRA in the building and construction industry.

31. The Overview to the draft Improvement Bill says that “the *Workplace Relations Act 1996* will continue to provide the basis for workplace relations regulation in the industry but the draft Improvement Bill strengthens and in some respects extends its provisions”.

32. In this instance, ACCI supports separate workplace legislation for this industry given the findings of the Cole Royal Commission, and the apparent failure of the WRA to have provided adequate legal underpinning to deter or prevent the serious and unacceptable workplace conduct identified by the Royal Commission.

33. ACCI would have preferred one federal legislative instrument to govern workplace relations law in the building and construction industry.

34. Given that two legislative instruments are proposed to govern common subject matters for this industry, the potential exists for legal disputes over the application of laws or inconsistency of laws. This could in turn lead to unnecessary costs, and frustrate the enforcement of the new laws or the application of the new laws by the courts. This would not be in the interests of the objects of reform as set out by the Royal Commissioner and the draft Improvement Bill itself. However, ACCI acknowledges that the task of drafting a wholly separate legislative regime is likely to have considerably delayed the commencement of the legislative process and thereby delayed the task of industry reform.

35. Fortunately, the draft Improvement Bill foresees the abovementioned problem and seeks to deal with it. Generally it adopts the approach that where specific workplace laws are established for the building industry by the draft Improvement Bill on a subject matter that is common with the WRA, then the draft Improvement Bill displaces the more general WRA provisions. In absence of a wholly separate legislative regime, ACCI considers the proposed approach as the ‘next best option’. The draft Improvement Bill does this by a series of specific provisions scattered throughout the Bill which indicate whether (or to what extent) the WRA has any application to a

common subject matter. These provisions in the draft Improvement Bill are important, but not complex. The need to ensure that the delineation between the draft Improvement Bill and the WRA (or any other common legislative instrument of that matter) is a crucial legal and drafting issue.

Constitutional Basis of the Draft Improvement Bill

36. The Overview to the draft Improvement Bill says that “the draft Improvement Bill will have a wide application through the use of a range of constitutional powers, including the corporations power. Approximately 60 per cent of businesses in the building and construction industry, employing around 90 per cent of the industry’s employees, are incorporated. Broad coverage of the draft Improvement Bill is also ensured through the comprehensive definition of building work”.

37. ACCI supports wide use of available constitutional powers in the proposed new laws, including the corporations power. It is not desirable that workplace reform be compromised by gaps in coverage created simply by virtue of constitutional or legal impediments that are capable of being overcome using existing Commonwealth powers.

38. Where limits on Commonwealth powers do exist, ACCI would urge State governments to consider complementary legislation to fill the regulatory gaps.

39. Industry is interested in laws that are clear to understand and straightforward to enforce. Challenges to the validity of laws frustrate their application and enforcement. It is important that the constitutional provisions of the draft Improvement Bill are structured to minimise the potential for legal or constitutional challenges.

Objects (Clause 3)

40. The clause is supported. However it should be improved by including two new objects that referred to:

- “achieving high levels of employment in the building industry” and
- “increasing labour force participation in the building industry, including the participation of young people and of women”.

41. The omission of 'employment' from the objects is a deficiency, particularly given that the draft Improvement Bill will govern the exercise of arbitral powers over the industry by the AIRC.

Definitions (clauses 4, 5, 6, 7 and 8)

42. These are important clauses. The definitions in the Bill form the basis for determining the most basic of all questions – who will be covered by the new law. The definitions in these clauses are generally supported, but some further clarification is required, as set out below.

43. The clause 4 definition of 'bargaining services' is confined to Part VIB activity (i.e. fees for certified agreements) and does not capture fees concerning State agreements. The use of the corporations power in the Bill could (and should) be used to cover a wider range of demands for bargaining services fees than the current definition. The definition should be broadened to cover demands for such fees under State agreements using the corporations power.

44. At the outset, it is vital that employers know whether or not they are 'building employers', because the Bill does not define the 'building and construction industry'. Instead, it defines 'building work' in clause 5 and then links its regulatory scheme to the undertaking of 'building work'. 'Building work' is very broadly defined and then amended by explicit exemption. A 'building employer' is one who employs (or offers to employ) a 'building employee'. A 'building employee' in turn is one whose employment 'consists of building work'.

45. ACCI supports the approach which seeks to define the industry broadly but to expressly provide for exclusions with respect to the domestic housing industry and the resources sector.

46. It would not be desirable for narrower definitions to apply as this would provide scope for the unlawful, coercive or unacceptable practices as found by the Royal Commission to still occur in the excluded area, and for it to be without an adequate legal or enforcement regime to deal with such practices.

47. The content of the definition and these exclusions has been assessed by ACCI. Individual employer bodies representing industry in the housing and the resources sector may provide specific suggestions if amendments are sought.

48. Clause 5(1)(g) should be amended to include 'demolition work' as part of 'building work'.
49. Clause 5(d)(iv) needs clarification. It extends the definition of 'building work' to prefabrication of 'components' off site. ACCI supports a definition which includes building work conducted off-site but this raises issues that need to be clarified. Is it the purpose for which the component is made that determines if its manufacture is included under the Bill, or is it the fact that it is delivered and used on a building site? What if it is delivered after manufacture to a third party (say, a contractor) and then taken on site? What is the position where the component is manufactured for multiple purposes or uses, and where (as would commonly be the case) some of the components find their way onto building sites whilst others do not?
50. The Overview to the draft Improvement Bill says that "the legislation excludes the domestic housing sector to the extent possible, however in some circumstances the draft Improvement Bill will apply to employees or employers who operate in the domestic housing sector, eg where they operate in both the domestic and non-domestic housing sector of the industry. For example, where a workplace agreement will apply to both domestic housing and other construction work, the draft Improvement Bill will apply to the bargaining process."
51. The exclusion of the domestic housing sector is based on the fact that it was not included in the terms of reference of the Royal Commission. Indeed, March 2003 Commonwealth commissioned research by Econtech indicates that if the commercial construction sector matched the labour productivity of the housing industry then commercial construction would produce a one per cent boost in GDP, a one per cent cut in inflation and \$2.3 billion worth of benefits to consumers every year. This explains why the focus of this Bill is on the commercial construction sector and not the housing sector.
52. Sub clauses (1)(e) and (f) have the effect of excluding from the definition of building work the activities associated with extraction and production of oil and gas and minerals. ACCI supports suggestions from the resources sector that after the word "extraction" the words "and processing" be added to both paragraphs. This would better describe the full range of activities involved in the production of hydrocarbons and minerals.

53. ACCI supports the definitions of “office” and “objectionable provision” in clauses 6 and 7 (noting that as a result, encouragement or discouragement clauses for association membership would be objectionable provisions in agreements).
54. The “pattern bargaining” definition in clause 8 raises a number of issues. The most important is its interrelationship with clause 68 project agreements. ACCI supports restrictions on pattern bargaining as proposed by the Bill and prohibitions on protected industrial action in support of pattern bargaining claims. ACCI also supports the proposal in the Bill to recognise the enforceability of project agreements. The distinction between pattern bargaining and bargaining to establish a project agreement is important. This seems to be made adequately in the Bill, although ACCI seeks clarification that genuine project agreements (clause 68) established in the form of an award rather than an agreement would also be enforceable. Clause 8(4) excludes from the definition of pattern bargaining proposed agreements which are characteristic of project agreements. The definition of “single business” in clause 8(1)(b) should be clarified as the WRA definition in s170LB(1) of the WRA (the WRA section allowing for multi employer project agreements), and the certification of project agreements referred to in clause 68 should be confirmed as a reference to the certification processes under the WRA.
55. ACCI understands that the drafting intention is that the definition of “pattern bargaining” and the operation of clause 68 will work in this way. This is a matter that would be assisted by a statutory note in both clause 8 and clause 68.

Australian Building and Construction Commissioner (ABCC) (clauses 11 to 25)

56. The draft Improvement Bill provides for the appointment of an Australian Building and Construction Commissioner and sets out his or her functions, duties and powers. Deputy Commissioners will assist the ABCC. The ABCC will have functions and powers broadly described as investigation, enforcement and prosecution designed to achieve lasting cultural change.
57. The Overview to the Draft Improvement Bill says that “the ABCC will have information gathering powers. Building inspectors will regularly visit building sites to monitor compliance with the WR Act, the draft Improvement Bill and the Australian government’s code of conduct for the construction industry and its implementation guidelines (the code). Building inspectors will be supported by a team of lawyers, financial analysts, industry experts and support staff.”

58. It goes on to say “the ABCC will either deal with matters or refer them to a more appropriate body. The ABCC will rely on a range of sources to monitor and act on issues in the industry: telephone hotline, spot visits at the invitation of a party, referral from other entities - eg police, Australian taxation office, the Australian competition and consumer commission (acc), peak industry bodies and unions. It will be a proactive body, not just responding to complaints but also having a strong inspector presence on construction sites. The ABCC will initially have offices in Melbourne, Sydney, Perth and Brisbane. These key offices will service the northern territory, south Australia, Tasmania and the Australian Capital Territory. ”
59. Further “in practical terms, the ABCC will function as the industry ‘watch dog’. Building inspectors will visit high risk sites frequently. The legal supporting team will have expertise in workplace relations law and will develop additional expertise relevant to this industry. The team will assist in legal proceedings for contraventions of relevant legislation.”
60. The creation of the ABCC as outlined in the Bill and above is supported by ACCI.
61. The functions and powers of the ABCC in clause 12 appear necessary and adequate given the findings of the Royal Commission. These provisions are consistent with the Royal Commission recommendations and ACCI submissions. It is crucial that the ABCC have an on the ground capacity and be proactive. This includes in regional Australia. There is also no reason why all capital cities should not have some presence from an ABCC officer.
62. Clause 13 concerning Ministerial directions to the ABC Commissioner should be narrowed. Whilst on administrative matters or matters of a general nature there may be a need for directions from the executive, it is important that the ABC Commissioner exercises discretion, judgement and work priorities, investigations and programmes independently and in accordance with law. ACCI would not object to the deletion of clause 13 from the Bill. In the event that it was retained, then redrafting along the lines of section 83BC(1) of the WRA would be appropriate (ministerial directions of a general nature to the federal Employment Advocate).
63. The effect of clause 16 is that the annual report of the Commissioner is more or less a statistical statement of activities. It could, and should, be more than that. ACCI would submit that the clause be amended to require the ABC Commissioner to include in the annual report a statement of industry performance against the objects of the Improvement Act – a critique of progress against the objects.

64. What is not clear from the draft Improvement Bill is how the ABCC will deal with potential clashes of powers with those of the Australian Competition and Consumer Commission (ACCC) or the AIRC. In what circumstances will the Federal Court or other courts be able to issue injunctions to stop the ABCC doing its work if unions invoke the jurisdiction of the AIRC, or if another industry party invokes the jurisdiction of the ACCC? ACCI generally agrees with the scheme of the Bill whereby the ACCC retains its powers with respect to the Trade Practices Act as they relate to industrial matters in this industry (eg secondary boycotts, anti competitive conduct).
65. ACCI also draws attention to clause 15 – delegation of powers. Delegation of powers by the ABCC under clause 15 should be required to be published so industry can be aware of the delegation and its terms. The Bill should be amended to make publication a requirement.
66. Consideration should also be given to whether the powers in clause 225(6) and the obligations in 226(1) go too far – whether a person should retain the right to not answer questions of an ABCC Commissioner under oath and not be able to rely on the right to not self incriminate. Queries may arise whether this is a power that can be exercised in an administrative capacity, as envisaged.

The Building Code (clauses 26 to 30)

67. These provisions, so far as they go, are broadly consistent with the Royal Commission recommendations and ACCI submissions.
68. However clause 26 needs further consideration. On the face of the legislation (although, this may not be the practice) there are inadequate checks and balances on the executive in the development and promulgation of the Code. The clause is a brief conferral of power to issue a 'document'. Statutory recognition of the Code raises a need for more direct reference to the checks and balances relating to its development and implementation – including industry consultation. If they are not to be included in the Bill itself, consideration should be given to the explanatory memorandum to the Bill or the second reading speech including reference to these aspects.

Federal Safety Commissioner (clauses 31 to 49)

69. The draft Improvement Bill provides for the appointment of the Federal Safety Commissioner (FSC) and sets out his or her functions, duties and powers. The

Overview says that “the Commonwealth, by establishing the FSC and acting as a model client, confirms its commitment to improving occupational health and safety (ohs) in the building industry.”

70. ACCI supports the establishment of the these FSC, as recommended by the Royal Commissioner. The role of the FSC is to promote and enhance OHS in the building and construction industry via implementing best practice initiatives to drive OHS performance improvement on Commonwealth funded construction projects.

71. However, to avoid confusion the title should have some specific building or construction industry designation to it (eg ‘Federal Construction Industry Safety Commissioner’).

72. The functions set out in clause 32 appear appropriate. However, the Bill makes no reference to the interaction of the role of the FSC with the current role of the National Occupational Health and Safety Commission (NOHSC), also a statutory body. NOHSC does not have the specific functions of the FSC as outlined in clause 32 but there is overlap – for example, NOHSC has a role in promoting OHS in all industry (including the building and construction industry). The implementation by NOHSC of the ten year NOHSC National Strategy, adopted by all Australian governments and the two peak employer and employee associations (ACCI and the ACTU) in May 2002 identifies the construction sector as a priority industry. There are also other OHS agencies (in States, and federally – Seacare and Comcare).

73. The draft improvement Bill should include an additional function para (i) as follows:

‘working co-operatively with the National Occupational Health and Safety Commission or other statutory health and safety agencies whose function includes the promotion of health and safety in relation to building work’.

74. Clause 33 (Ministerial directions) should also be amended – ACCI repeats the comments it made in relation to the corresponding clause 13 (see above).

75. Clause 47(7) tries to reflect an understandable principle, but is too vague and will re-open loopholes for industrial disputes to find their way back into the industry under the guise of OHS disputes. It should be deleted, or redrafted.

76. One of the FSC’s major functions is to ensure that employers and contractors who want to work on Commonwealth projects make OHS a key factor in the way they go about their business. This is proposed to be achieved by the FSC enforcing the OHS aspects of the Code and operating the accreditation scheme (clause 50).

77. ACCI's earlier submissions on these recommendations emphasised how important it is for a sensible approach to be taken in the exercise of these powers given that OHS issues are the mutual responsibility of multiple parties on building sites and are capable of being misused for industrial purposes.
78. Further, ACCI is concerned at the lack of checks and balances in clause 50, relating to the development and implementation of the accreditation scheme – including industry consultation and rights of review against decisions. The scheme would have significant consequences – as the Overview says “the FSC, through an accreditation scheme, will test contractors’ OHS credentials on-the-job, as well as through their management policies and systems, before they enter into contracts for commonwealth work other than on projects below a certain value or other exempted cases. The Commonwealth will not enter into a contract with a non-accredited contractor. This will lift the profile of OHS in the procurement process. Introduction of the scheme will be staged so as to develop a pool of ‘qualified’ contractors.”
79. Despite the far reaching nature of this proposal, no criteria is specified for the accreditation scheme in clause 50 – it is to be established by regulation. The regulations need to satisfy the concerns of industry in this regard and a draft should be made available to industry before passage of the Bill. The basis upon which decisions are made and OHS performance is credentialed and assessed is important. Consistency of approach is vital and subjective decisions should not be made that create differential treatment or commercial consequences between one company and another. Rights of review or appeal must exist.
80. The FSC will also oversee more intensive OHS inspections on Commonwealth jobs. The Royal Commissioner found that the presence of inspectors improved OHS outcomes, including the National Code.
81. ACCI supports OHS inspectorates so long as inspectors recognise that education and prevention are also a key part of effective enforcement, and that they are truly independent particularly when dealing with OHS complaints that have or may have an industrial relations context or motivation.

Awards and AIRC Arbitral Powers (clauses 51 and 52)

82. The Overview to the draft Improvement Bill says that it “provides for further simplification of building and construction industry awards. Awards will be limited to

providing only basic minimum entitlements. The scope of some existing allowable matters will be tightened. The legislation will make explicit various matters that are not intended to fall within the scope of allowable award matters.”

83. ACCI supports these objectives.

84. They are met by the Bill – other than in two respects.

85. Clause 51(2)(k) is an extension – not a limitation – on the existing arbitral powers of the AIRC over the building and construction industry. Under that clause the AIRC would have the power – on an industry wide basis – to set the maximum number of hours that an employee could work overtime. This would allow the AIRC to arbitrate a cap on hours in all of the industry as defined in the definition of ‘building work’ in clause 5.

86. A cap on hours is a measure that will not meet the objects of the Bill. It is a failed French experiment that is even discredited in European countries. ACCI acknowledges that this power was recommended by the Royal Commissioner. ACCI opposed that recommendation – as did employer bodies generally. Allowing industry wide caps on hours is inconsistent with the Bill’s industry wide prohibition on pattern bargaining. Mandatory caps on hours (if there are to be any, and it is hard to see a case for any if OHS issues are managed properly) are matters that should be dealt with on a workplace level – not an industry level. Given that the draft Bill establishes a substantial and new regulatory regime for OHS in this industry, it would be appropriate to (at the very least) allow that new regulatory regime to operate before taking the extreme step of conferring additional arbitral powers on the Commission - when in every other respect clause 51 seeks to do the very opposite.

87. ACCI also seeks an amendment to clause 51(t) (outworkers) in the context of this industry. The clause has been taken directly from the WRA where it was (and has) been designed to operate primarily in the textile, clothing and footwear awards. Clause 51(15) of the draft Improvement Bill defines “outworker” to mean an employee “who performs work at a private residential premises”. This does not appear to be consistent with the policy of the draft Bill, and the express terms of the clause 5 definition of “building work” which excludes the residential housing sector from all other aspects of the Bill. There is no logic in the Bill applying special AIRC powers to the housing sector given the clause 5 exclusion. Excluded industry sectors will remain covered by section 89A of the WRA which defines the general arbitral powers of the AIRC. If left unamended, it could be argued that this provision covers house building, repair or renovation work, as a house building site is ‘residential premises’. If this reasoning

were accepted by a court, absurd and unintended results could flow. Technically the operation of clause 51(2)(k) coupled with clause 51(15) could allow the AIRC to cap working of overtime hours for an employee in the housing industry despite the fact that (1) the Royal Commission did not concern itself with the housing industry; (2) the government's policy and the policy of the draft Bill is to exclude the housing industry; and (3) the AIRC does not have this power over the housing industry even under current industrial laws. An amendment to this provision is essential to clarify the fact that the 'work' in question means 'building work' as defined in clause 5.

88. Further, ACCI seeks a clarification to clause 51(4)(b) of the draft Bill (exclusion of training or education). ACCI agrees with the policy of this sub clause – the AIRC should not be setting training or education structures for this industry where they are set by employers and other bodies within the industry and in the training sector. However, the AIRC is required to set the wages and conditions that underpin training arrangements in this (and other) industries. Whilst wages and conditions are allowable matters under the proposed clause 51(2) ACCI believes that it should be put beyond doubt that descriptions of training programmes in awards that are part of the establishment of wages and conditions are allowable. The words in brackets in clause 51(4)(b) should be extended to add “ or in relation to the wages or conditions of employment of trainees or apprentices”. If this is not considered necessary given the potential use of the incidental power in clause 51(7) to assuage industry concerns, the explanatory memorandum could make this point clear or a statutory example as per above could be included in a note to clause 51(7).

89. The legislation will include a requirement that the AIRC take into account the desirability of reducing the number of allowances when it simplifies a building award (clause 52). This principle is supported, but clause 52 appears to be too vague and given the experience under section 89A of the WRA, a clearer direction needs to be given to the AIRC of specific statutory intent.

Bargaining and Certified Agreements (clauses 53-70)

90. The Overview to the draft Improvement Bill says that the Bill will “improve the bargaining framework by focussing on genuine bargaining at the enterprise level, restricting pattern bargaining and providing for mandatory ‘cooling off’ periods during which protected industrial action is not permitted.”

91. ACCI agrees with these objectives, and the Bill largely meets these objectives.

92. The Bill encourages genuine bargaining at the enterprise level. The legislation retains the rights of employers and employees to choose the approach to bargaining which best suits their needs and circumstances. The draft Improvement Bill provides that failure to engage in genuine bargaining may result in the suspension or termination of a bargaining period.
93. However ACCI does not agree with the terms of clause 62. It is not necessary to achieve the objects of the Bill for 'genuine bargaining' to be defined in this manner – particularly when pattern bargaining is defined and outlawed. The definition in clause 62 is highly process driven and its focus on process will allow for disputes over process – when the substance of the claims and the position of parties on the claims should determine the question. ACCI prefers that clause 62 reflect the existing WRA provisions (as interpreted by the AIRC to focus more on outcomes, than process) supplemented by the proposed cooling off and other measures in the draft Bill.
94. Under the Bill agreements will only be able to be certified if they deal exclusively with matters pertaining to the employer-employee relationship and if the AIRC is satisfied that the agreement was not reached through pattern bargaining. Industrial action cannot be taken in pursuit of claims that do not pertain to the employment relationship. Agreements will not be permitted to include retrospective pay rises, unless the AIRC is satisfied that the employer was the cause of the delay in agreement making.
95. Parties and the ABCC will be able to seek an injunction to stop pattern bargaining conduct occurring – in both the federal and State systems as well as bargaining for informal agreements. The draft Improvement Bill also makes it clear that pattern bargaining is not 'genuine bargaining' and that the AIRC can suspend or terminate a bargaining period where a party engages in pattern bargaining.
96. Employees will have the right to select whether they wish to be represented by a union in bargaining. Unions will not have an automatic right to represent employees.
97. All of these (other than clause 62) are sensible measures that reflect the recommendations of the Royal Commission. Indeed they are crucial to reform. Coercion in agreement making is at the heart of the standover tactics in the industry that gives rise to unlawful industrial action, anti competitive practices, agreements that barely reflect a mutuality of interests and militant and unlawful union power over contractors or labour supply.
98. As mentioned above, ACCI has carefully examined the provisions in clause 68 relating to project agreements. The amendments proposed above needs to be made.

99. ACCI also suggests that clause 66(4)(a)(i) (identity of person appointing agent) is too broad – it should only relate to where the disclosure is “authorised” by the performance or function of the registry official.

Industrial Action (clauses 71 to 139)

100. The draft Improvement Bill will make unlawful all industrial action within constitutional limits, other than protected industrial action, with industry participants able to recover any losses they suffer due to unlawful action.

101. ACCI supports these measures. They are consistent with the Royal Commission recommendations, the WRA and ACCI submissions.

102. However a number of amendments are suggested.

103. ‘Building industrial action’ should be more broadly defined to include action which has the effect on the employer of the withdrawal or limitation of labour for whatever purpose (other than the reasonable OHS purposes outlined in the Bill.) A number of decisions of the AIRC have started to develop a proposition that the withdrawal of labour is not industrial action if it is for the purpose of making a political protest. This is a loophole that is neither the intention of the WRA, the Royal Commission nor this Bill – yet it has been inferred into law. Building unions have used such a loophole and can be expected to seek to do so again, based on public comments by the union leadership.

104. ACCI does not see the need for a concept (or definition) of “industrially motivated”. Apart from potentially giving even more scope for unions to take politically motivated industrial action against employers (see above), it only appears to limit the concept of unprotected action. Industrial action should not be permitted if it is not protected action. Motivation and intention is an additional and unnecessary factor which is likely to complicate enforcement measures.

105. In any event para (b) of the definition of “industrially motivated” dealing with ‘claims by an employer’ should be removed. An employer seeking to reform and change work practices (as the objects of the Bill so clearly envisage) or making as a matter of course changes to employment or workplace rules or conditions as part of the well accepted areas of management care and control should not be unwittingly exposed to a suggestion by unions that work practice changes are unprotected industrial action by the employer. The Bill should be amended in all respects to remove this potential. Lessons can be learned from reform initiatives by employers in other industries since

the commencement of the WRA. Some unions resisting reform have taken injunctive action against employers seeking to implement changes to work practices in a manner that was not intended by the WRA. Provisions which open the door for unions in the building industry and their teams of legal advisers to likewise under the draft Bill should be removed.

106. A minor change should also be made to the clause 71 definition para (b) of 'constitutionally-connected action'. Currently it reads "the action is taken by a constitutional corporation, or adversely affects a constitutional corporation in its capacity as a building industry participant." To avoid interpretation problems, it would be wise to put another comma in, after the second 'corporation'. This would remove possible ambiguity.
107. To assist the ABCC in its monitoring and compliance role, the draft Bill contains requirements that industry participants provide the ABCC with specified information about industrial activity, such as demands for strike pay and threats of industrial action and cessation of industrial action. ACCI supports these measures as they are part of the scheme recommended by the Royal Commission to achieve changes in workplace conduct. However regulations which prescribe the detail of these obligations (such as clause 75(2) dealing with cessation of industrial action) need to be prepared in consultation with industry to ensure that the obligations are realistic in terms of time frames and content.
108. Clause 134(1) should be extended to include, in this obligation on an employee, a similar obligation on union official or union who commences building industrial action.
109. Under the Bill, a party taking unlawful action will be exposed to penalties and damages. There will be improved access to sanctions in the form of injunctions, pecuniary penalties and compensation for loss suffered as a consequence of unlawful action. Parties will be able to bring an action in relation to unlawful industrial action in the Federal Court, federal magistrates court and State and Territory courts.
110. These measures are supported. However ACCI (at least in this industry) supports clause 138 which would not require a certificate to be obtained from the AIRC prior to the commencement of action in tort.
111. The provisions in clause 139 (anti-suit provisions) are needed and supported if enforcement is to operate widely and in the most appropriate and convenient judicial forum.

112. The provisions in clause 133 which improve access to AIRC orders in respect of unlawful industrial action are generally supported. However it is not clear how the powers of the AIRC to make orders under clause 133 relate to the existing WRA powers under 127. Are they in lieu of s127 applications? This should be clarified.
113. Clauses 133(6)(and (7) seem to imply that the extent of loss, damage or inconvenience from unlawful action is relevant to whether orders against unlawful action will be made. This is not appropriate. Unlawful action is unlawful as such, and the capacity to obtain interim or final orders against such action should not require proof of degrees of damage. If the objects of the Royal Commission are to be met – that is, the rule of law restored – then the rule of law should be able to be enforced by s133 orders without reference to the degree of loss from breaching the law. Clause 133(7) is particularly concerning in this regard, as it extends this qualifying sentiment to final orders, not just interim orders. It is also difficult to see how or why it could be relevant to such a question that a person taking unlawful action is award covered or agreement covered. Yet clause 133(7)(a) does just that. Nor is the word “undesirable” in (7)(b) appropriate – something unlawful should not be subject to shades of grey.
114. The ABCC will be able to engage a loss assessor to assess the cost to an employer of industrial action. An assessment will be evidence of the loss suffered in any subsequent court proceedings.
115. These provisions are also supported and appear consistent with the Royal Commission recommendations.
116. ACCI also supports the provisions to prevent spurious OHS concerns being used to justify industrial action about other issues, and the tightening of the strike pay provisions.
117. Access to protected industrial action in pursuit of a single business agreement will remain, but with appropriate additional requirements, including:
- Mandatory cooling off periods after 14 days; and
 - A requirement for a secret ballot by employees before industrial action.
118. Clause 80 (cooling off period after 35th day of protected action) is supported in principle but the discretions in sub clause (3) and (4) are too broad if the provision is to have its desired effect. In this industry it cannot be expected that a union taking protected action will ‘cool off’ without the issuing of a certificate (and even then it may defy the certificate). Too much discretion in the proceedings to issue a certificate will

result in 35 days becoming a longer period and will also reduce the likelihood that the industrial action will cease after 35 days – which is after all what the provision is intended to achieve.

119. ACCI supports these provisions, subject to the comments (above) concerning the potential to reduce the detail in the balloting provisions (not the requirement to ballot) by translating them into regulations or AIRC rules.
120. Clause 85 definition of “prescribed number” is supported as a reasonable mechanism to have secret ballots where the number of employees is less than 10. A similar provision could be considered in clause 64 where no such mechanism exists (representation ballots to initiate bargaining).

Freedom of Association, Discrimination and Coercion (clauses 140 to 174)

121. The draft Improvement Bill seeks to strengthen freedom of association (FOA) provisions so that a wider range of inappropriate behaviour identified by the Royal Commission is effectively dealt with.
122. The draft Bill also seeks to prohibit discrimination and coercion in relation to whether or not a person has a particular form of workplace agreement or an agreement with particular terms with their employees, or whether a person should be engaged or assigned particular duties.
123. In general these provisions are supported and appear consistent with the Royal Commission recommendations and ACCI submissions.
124. The statutory note in clause 151 concerning ‘no ticket no start’ is too weak. ‘No ticket no start’ is an unlawful practice and should be described as such without qualification.
125. It is important though that they (like the industrial action provisions) are not misused against employers in a manner that is outside the statutory intent. For example, an employer seeking to lawfully offer a WRA section 170LK agreement or an Australian Workplace Agreement to employees who are currently under a section 170LJ collective union certified agreement (or vice versa) should not be exposed to claims that employees are being discriminated against on the basis that “they are entitled to the benefit of an industrial instrument” (clause 154(h) of the draft Bill), simply by virtue of the employer making that offer.

126. The protection in clause 157 should extend to contractors, not simply employers.
127. ACCI queries whether clause 160 allows an industrial association offering discounted services to members.
128. Clause 168 needs to be expanded. The reverse onus of proof in the WRA has been a substantial impediment to enforcement of FOA in cases of unlawful conduct. We are pleased it has been removed for interim injunctions. It should be removed at the very least for all applications for injunctions, not merely interim injunctions.
129. The draft Bill provides that in limited circumstances, State freedom of association regimes will continue to operate concurrently. ACCI accepts this, so long as federal laws prevail in law and in the practice of inspectorates in cases of inconsistency.
130. Coercion provisions should be extended to apply to industrial instruments that are not certified or not intended to be certified.

Right of Entry (clauses 175 to 205)

131. The Royal Commission considered improving compliance with right of entry (ROE) provisions to be a key reform priority and made a number of recommendations for changes to the current legislative arrangements as they apply in the building industry. Enhancing the ROE system to clearly spell out parties' rights and responsibilities, and limit the scope for State laws to be used to circumvent federal requirements is a feature of the draft Improvement Bill. The ABCC is proposed to play a key role in enforcing the new ROE regime.
132. To prevent abuse of ROE entitlements, the draft Improvement Bill improves the current process for issuing, suspending or revoking permits. The rights and responsibilities surrounding permits is more clearly spelt out. The draft Improvement Bill will strengthen the requirements for obtaining a permit and expands the grounds for suspension or revocation of permits to ensure that only 'fit and proper' persons exercise rights of entry.
133. These provisions are supported by ACCI and appear consistent with the Royal Commission recommendations and ACCI submissions.
134. The draft Improvement Bill provides that where a federal permit is suspended or revoked, entry to a building site is not permitted under State law.

135. ACCI accepts that there have been examples of State laws being used to try to override decisions on federal permits; these provisions are needed to overcome loopholes created by the provision or existence of State permits – or entry under the guise of an occupational health or safety or workers compensation related permits.
136. However under clauses 192 and 210 a permit holder who is excluded but who holds a State right of entry permits for OHS purposes will still be able to enter. ACCI strongly opposes this exclusion as it creates an unnecessary loophole in the law which could be exploited to avoid the more rigorous scheme set up under the draft Bill.

Accountability of Registered Organisations (clauses 206-220)

137. To improve the accountability of registered organisations, the draft Improvement Bill contains measures to further enhance financial reporting and disclosure requirements for registered organisations operating in the building industry. The draft Bill will also regulate the deduction of membership fees, expand the grounds for the deregistration of organisations and allow the Federal Court to disqualify a person from being an officer or exercising specific powers in an organisation if found to have contravened the draft Improvement Bill, WRA or State industrial law.
138. The draft Improvement Bill also deems conduct by officials, employees and members to be conduct of the organisation other than in certain circumstances. It empowers the court to undo transactions by organisations which move assets and income beyond the reach of creditors to avoid paying court ordered damages for industrial action.
139. These provisions are generally supported by ACCI as they are consistent with the recommendations of the Royal Commission.
140. However ACCI suggests that clause 211 be amended. We agree that deregistration, as a sanction, should be available where there is a pattern of behaviour in breach of injunctions. However, given the strengthened penalties for and access to injunctions, it would not seem appropriate that a single failure to comply (which is punished by separate sanction) be sufficient for deregistration.
141. Clause 212 also appears to be too subjective in its potential application. Given the significance of disqualification, criteria of an objective character should be set out before such orders are made.

Enforcement, Remedies and Miscellaneous (clauses 221 to 250)

142. The draft Improvement Bill proposes to improving the compliance regime, by increasing penalties and enhancing access to damages for unlawful conduct.
143. The draft Bill establishes a two-tier civil penalty regime. The first tier addresses more serious contraventions, eg unlawful industrial action and is set at a maximum of 1000 penalty units (\$110,000) for a body corporate and 200 penalty units (\$22,000) in other cases. The second tier, is set at a maximum of 100 penalty units (\$11,000) for a body corporate and 20 penalty units (\$2,200) in other cases will address less serious contraventions. The maximum penalties for breach of award or agreement obligations are also increased. The draft Bill allows costs to be ordered in line with normal court processes.
144. Subject to observations elsewhere in this submission, these provisions are supported by ACCI and appear consistent with the Royal Commission recommendations and ACCI submissions.