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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the
Honourable Kevin Andrews MP)

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

OUTLINE

The Building and Construction Industry Improvement Bill 2005 will make certain forms of industrial action unlawful and provides improved access to sanctions against unlawful industrial action in the form of injunctions, pecuniary penalties and compensation for loss.

The Bill replicates, with some modifications, the industrial action provisions of the Building and Construction Industry Improvement Bill 2003 dealing with unlawful industrial action. At a later date, it is intended that Government amendments to the Bill will be made to introduce further amendments, based on the provisions of the Building and Construction Industry Improvement Bill 2003, to provide a comprehensive workplace relations reform package for the construction industry.

Consistent with the Royal Commission into the Building and Construction Industry recommendation that a new “statutory norm” of industrial action be established to bring greater clarity to the regulation of industrial action, these provisions, subject to constitutional limitations, apply broadly within the building and construction industry.

Chapter 6 of the Bill sets out what constitutes unlawful industrial action and makes the taking of such action a civil penalty provision. Industrial action will not be unlawful if it is protected action or AWA industrial action within the meaning of the *Workplace Relations Act 1996*. It also provides for increased maximum penalties for a body corporate that breaches the strike pay provisions in Part VIIIA of the *Workplace Relations Act 1996*.

Chapter 12 provides an appropriate enforcement regime. It sets out penalties for contravention of civil penalty provisions, orders that a court may make, and who may apply for these orders. The orders that a court may make include an order to pay damages to any person who suffers loss as a result of a contravention of the unlawful industrial action prohibition.

Chapter 13 provides for various courts to be conferred with the jurisdiction to hear matters under the Building and Construction Industry Improvement Act. This chapter also provides that Regulations can be made prescribing matters under this Act.

FINANCIAL IMPACT STATEMENT

The Bill will confer additional jurisdiction on federal courts.

REGULATION IMPACT STATEMENT – BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT BILL 2005

Overview

This Building and Construction Industry Improvement Bill (the BCII Bill) encapsulates the Government's response to workplace relations recommendations from the Royal Commission into the Building and Construction Industry (the Royal Commission) in relation to unlawful industrial action.

Prior to the introduction of the 2003 version of the BCII Bill, the Government consulted with industry participants – unions, peak employer associations, contractors, employees and small business as well as the general public and State and Territory governments to seek their views on the proposed reforms.

Following the Minister's announcement on 4 November 2004 that the Government would reintroduce the BCII Bill, the Minister is again consulting with industry participants on the content of the Bill. Although the Government plans to introduce the BCII Bill in the second week in March, consultation on possible Government amendments and additions to the BCII Bill will continue.

Current Situation

1. In relation to industrial action, participants in the building and construction industry are currently regulated in the same manner and to the same extent as all other industries covered by the *Workplace Relations Act 1996* (the WR Act). Employees and employers are subject to a range of obligations imposed by the WR Act. The WR Act has been amended on a number of occasions since 1996 to improve its operation.
2. This regulation impact statement outlines specific measures included in the BCII Bill to address industrial action in the building and construction industry. The measures described below will cause structural and cultural change in the building and construction industry, which has not been achieved through existing mechanisms.

Problem

3. The Royal Commission was established to conduct an inquiry into unlawful or otherwise inappropriate practice and conduct in the building and construction industry. The inquiry was focussed on the commercial building and construction industry which includes non-residential building and engineering construction sectors and is worth \$46 billion.
4. The final report of the Royal Commission provides compelling evidence of the need for reform in this industry. According to the Final Report of the Royal Commission, the industry's lawlessness is manifested as criminal conduct, unlawful conduct, including breaches of the WR Act and OHS legislation, and a disregard for revenue statutes. The report concludes that at the root of this lawlessness is a reality that "those engaging in unlawful conduct will not be held to account by criminal proceedings, proceedings for penalties or for loss occasioned to others by unlawful conduct." (Vol 3 P5.12).
5. Inappropriate conduct is defined by the Royal Commissioner as behaviour that infringes the WR Act, a person's right of choice or other conduct which departs from recognised norms of civility and behaviour.
6. The Royal Commission concluded that there is a conflict between the short-term project profitability focus of building contractors and clients on the one hand, and the long-term aspirations of the union movement to control and regulate the industry for the benefits of its

members. The short-term focus driven by profitability means that quick-fix commercial expediency can supplant insistence on legal rights, adherence to ethical and legal norms and the pursuit of legal remedies. This inequality of bargaining power is sometimes exploited, resulting in high levels of unlawful or inappropriate conduct.

7. The Royal Commission concluded that the mechanisms available to enforce legal rights in relation to unprotected industrial action are time consuming and expensive. The Commissioner identified that the costs of unprotected action are felt by businesses immediately, but recovery of losses incurred could take years. Unlawful industrial action has continued in the building and construction industry because unlawful conduct is not punished and losses are not recovered.

8. Recently unions have been applying pressure to employers in the building industry to renegotiate existing agreements well in advance of their expiry dates. They have also indicated their willingness to take industrial action to influence industry participants to accede to their demands.

9. If unions were to take industrial action during the life of a certified agreement, it would be likely to be unprotected action under the WR Act. However, this and other remedies under the WR Act are insufficient support for employers in resisting the approaches of unions. This recent example of behaviour is consistent with the Royal Commissioner's definition of inappropriate conduct.

10. The pivotal role the industry has in underpinning a modern and competitive economy is threatened through this unlawful conduct which may result in serious inefficiencies and costs.

11. All industries will benefit from an efficient commercial building industry. Econtech found the Australian economy could gain significantly if workplace practice in the construction sector could match the standards in the domestic housing building sector – the Consumer Price Index would be 1 per cent lower, there would be an annual gain in economic welfare of \$2.3 billion. The building and construction sector contributed 6.3 per cent to GDP in 2002-03. In a fully efficient industry, Econtech found real GDP would be 1.1 per cent higher.

12. Small businesses are an essential element of the industry, representing almost 99 per cent of the entire industry. These businesses are the most exposed to the impact of lawlessness, particularly in relation to unlawful industrial action.

Objective

13. In considering its response to the findings and recommendations of the Royal Commission in relation to industrial action, the Government's aim is to restore the rule of law in the building and construction industry.

Options

1) Maintaining the status quo

14. This approach would allow participants within a significant Australian industry to continue to disregard the current regulatory framework and severely impact on the continued profitability of the industry.

2) The Government's reform proposal

15. The reform proposal will provide additional legislative support to the industrial action elements of the WR Act which have been shown by the Royal Commission to be ineffective in the building and construction industry. The BCII Bill focuses attention on unlawful industrial action,

an area that was identified by the Royal Commission as requiring reform. However, the relevance of the WR Act for the overall regulation of the industry will be maintained.

16. To address the deep-seated problems in the industry, the Royal Commission recommended that a new statutory norm on industrial action be established to bring greater clarity, and enable more effective enforcement, of industrial action laws.

17. The provisions of the BCII Bill dealing with industrial action and increased penalties for breaches of the strike pay provisions will operate from the date of introduction. Many certified agreements in the building and construction industry are due to expire later in the year. The retrospective character of this Bill will ensure that unions that take unlawful industrial action prior to the nominal expiry date of these and other existing agreements in the coming months, will be subject to the sanctions and greater penalties provided by the BCII Bill. Likewise parties who are affected will be able to seek damages to recover any losses they suffer.

18. The BCII Bill will give effect to the Royal Commission's recommendations by:

- (a) making unlawful industrial action, other than protected industrial action, with industry participants able to seek damages to recover any losses they suffer due to unlawful action; and
- (b) improving the compliance regime, by increasing penalties for unlawful industrial action and enhancing access to damages for this conduct.

Impact Analysis

General impact of the reform proposal

1. In general terms, there is a very limited additional regulatory burden imposed by the reform proposal. The scope of the BCII Bill reflects the need to capture the unlawful and inappropriate conduct identified by the Royal Commission. The provisions of the BCII Bill will apply to employees, contractors, employers, employer organisations and unions in the commercial sector of the building and construction industry. Although the scope and definitions of the BCII Bill have been developed to cover the commercial sector, there will be businesses whose operations are not limited to the commercial construction sector that will in some cases also be covered by aspects of the new laws. This will ensure that all inappropriate conduct is caught.

2. There are no additional reporting requirements for industry participants.

3. The impact of this proposal is discussed below in more detail.

Economy wide impacts

4. The impact of the Government's reform proposal on the economy as a whole is likely to be beneficial. In general terms, the reform proposals may hasten the realisation of the full potential of the building and construction industry by curbing unlawful behaviour which is damaging to businesses.

5. According to Access Economics, activity in all sectors of the building and construction industry, including engineering and non-residential building, is forecast to increase by over 16 per cent during the period to 2006. The reform proposal will ensure that costly delays caused by unlawful action on projects in the industry do not act as an obstacle to increased productivity.

6. All industries would benefit from an increase in output as a result of the reduction in costs to the building and construction industry.

7. The likely gains experienced within the economy overall will also be experienced by the small business participants in the industry. Small business, in the form of sub-contractors, comprises, in

raw number terms, approximately 99 per cent of firms in this industry. Given the composition of the industry, the Royal Commission noted that small business are the most exposed to the impact of lawlessness and pressure from the unions (Vol1 P12.30) so are likely to benefit disproportionately from the reforms. However, it is difficult to accurately quantify the impact likely to be experienced by small business against this proposal.

Impact analysis of specific proposals to be implemented under the BCIIIB

Proposal:

Industrial action

47. The Royal Commission found that over the last six years, the level of industrial disputation in the building and construction industry has been at least twice and sometimes five times the national average. Time lost due to industrial action has a significant impact on continuity of work and can substantially increase the costs of a project.

48. Industrial action can affect the reputation of a particular State or of Australia as a good place to invest. The existing legal framework does not adequately address the problem, with employers finding the current remedies available to be cumbersome, slow and costly to pursue. Unions understand the practical delays any employer faces in seeking to challenge their actions through existing measures provided under the WR Act and know that by adopting tactics such as industrial campaigns they can damage the employer commercially without risking legal repercussions.

49. The BCII Bill seeks to address these issues by clarifying what constitutes unlawful industrial action. If unions or other parties take unlawful industrial action they will be liable for a maximum civil penalty of 1 000 penalty units for a body corporate or 200 penalty units in other cases . A Court can also make an order for damages for any loss caused by unlawful industrial action.

50. Under this Bill the onus relating to action taken based on occupational health and safety concerns would be reversed. This measure will prevent spurious occupational health and safety concerns being used to justify industrial action about other issues.

Impact:

51. Through the preferred option, a reduction in unlawful industrial action and improved access to damages for affected parties would increase productivity and is likely to have flow on benefits for allied industries.

Conclusion and recommended option

83. The provisions of the Bill are directed at addressing the entrenched culture of lawlessness identified by the Royal Commission.

84. Option two, the Australian Government's reform proposal as set out in the BCII Bill is the recommended option. Through providing a clear distinction between lawful and unlawful industrial action and ensuring parties are liable for any loss they cause to other parties through their actions, the Bill will increase confidence and certainty in the industry. This Bill will ensure that the law applies equally to building unions, employers and other industry participants.

Implementation and review

85. The Department has in place a sufficient system for monitoring the framework of workplace relations and it will continue to monitor the effectiveness of the legislative changes on the building and construction industry.

NOTES ON CLAUSES

Clause 1- Short Title

1.1 This is a formal provision specifying the short title of the Act as the *Building and Construction Industry Improvement Act 2005*.

Clause 2- Commencement

- 1.2 Clause 2 sets out a table specifying when the various provisions of the Act are to commence.
- 1.3 Sections 1 to 2 and anything in this Act not elsewhere covered by the table will commence on the day on which this Act receives the Royal Assent.
- 1.4 Sections 4 to 10 commence at the time of introduction of the Bill into the House of Representatives.
- 1.5 Chapter 6 commences at the time of introduction of the Bill into the House of Representatives.
- 1.6 Chapters 12 and 13 commence on the day on which this Act receives the Royal Assent.

Clause 4- Definitions

- 1.7 Clause 4 defines the terms used in the Bill. The definitions appear in alphabetical order in the Bill. However, for the purposes of the Explanatory Memorandum, definitions have been grouped together to aid interpretation. Only key definitions are explained here.
- 1.8 *Building certified agreement* is defined to mean any certified agreement that has application to building work, regardless of whether that certified agreement also applies to any other kind of work. The term *certified agreement* has the same meaning that it has in section 4 of the WR Act.
- 1.9 *Building association* is defined to mean any industrial association (which is defined to have the same meaning that it has in Part XA of the WR Act) whose *eligibility rules* (rules that relate to the conditions of eligibility for membership) allow membership by at least one of the following groups:
- building employers;

- building employees;
 - building contractors.
- 1.10 An industrial association will be a building association if its eligibility rules allow membership by any of the above groups, regardless of whether the rules also allow membership by any other persons. For example, an industrial association representing a range of businesses including building employers would be a building association.
- 1.11 *Building contractor* is defined to mean a person who has entered into, or offered to enter into, a contract for services under which the person carries out building work, or arranges for building work to be carried out. The term encompasses both independent contractors as well as contractors and subcontractors who engage employees or other contractors to perform building work.
- 1.12 *Building employee* is defined to mean both a person whose employment consists of, or includes, building work and a person who accepts an offer of engagement as an employee for work that consists of, or includes, building work. An employee that performs some building work and also performs other work will be a building employee for the purposes of this Bill. *Employee* has the same meaning as in section 4 of the WR Act and does not include a person who is undertaking a vocational placement.
- 1.13 *Building employer* is defined to mean an employer who employs, or offers to employ, building employees. *Employer* has the same meaning as in section 4 of the WR Act and includes a person who is usually an employer and an unincorporated club.
- 1.14 *Building industry participant* is a broad term encompassing persons and entities engaged in or involved with the building industry. Each of the following is a building industry participant:
- a building employee;
 - a building employer;
 - a building contractor;
 - a person who enters into a contract with a building contractor under which the building contractor agrees to carry out building work or to arrange for building work to be carried out (that is, a client of a building contractor);
 - a building association;
 - an officer, delegate or other representative of a building association; or
 - an employee of a building association.
- 1.15 *Industrial dispute* has the meaning given by section 4 of the WR Act, including the additional matters in subsection 4(3) of that Act.

Clause 5- Definition of *building work*

- 1.16 This definition is integral to the understanding and application of the Bill. It determines the scope of the Bill by forming the basis of terms such as building employee and building agreement, and hence terms such as building employer and building association. The

- coverage of all provisions of the Bill is ultimately determined by reference to the definition of building work.
- 1.17 In order to ensure appropriate coverage for the legislation the definition of *building work* is broad. It is defined to mean any of the activities listed in paragraphs (1)(a) to (d).
- 1.18 Paragraph (a) covers building activities:
- construction, alteration, extension, restoration, repair, demolition, dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent.
- 1.19 To avoid doubt, paragraph (b) lists the same activities in relation to railways and docks but makes it clear that such activities in relation to railway rolling stock are excluded.
- 1.20 Paragraph (c) covers building activities that relate to the fit-out of buildings such as the installation in any building, structure or work of fittings including: heating; lighting; airconditioning; ventilation; power supply; drainage; sanitation; water supply; fire protection; security; and communication systems.
- 1.21 Paragraph (d) covers all activities that are necessarily preparatory to or for the purpose of rendering complete any of the activities listed in paragraphs (a) to (c). Specific examples are provided, but the coverage of paragraph (d) is not limited to those examples.
- 1.22 Paragraphs (e), (f) and (g) set out exceptions to the definition of building work.
- 1.23 Paragraphs (e) and (f) exclude extraction and mining activities.
- 1.24 Paragraph (g) excludes activities associated with domestic building. The Bill intends, as far as possible, to exclude the domestic housing sector from the coverage of the Bill. Any work that is part of a project for the construction, repair or restoration of a single-dwelling house or a building, structure or work associated with a single-dwelling house is excluded from the definition of building work (subparagraphs (1)(g)(i) and(ii)).
- 1.25 Alteration and extension activities will also be excluded from the definition of building work, where those activities are performed on a single-dwelling house and the resulting structure remains a single-dwelling house (subparagraph (1)(g)(iii)).
- 1.26 Dismantling and demolition activities will also be excluded from the definition of building work, where they are part of a project for the construction or repair etc. of a single-dwelling house.
- 1.27 The domestic building sector exception does not apply where the activities are performed as part of a project that is part of a multi-dwelling development consisting of, or including the construction of, at least 5 single-dwelling houses (subclause (2)).
- 1.28 Regulations may be made to supplement the definition.
- 1.29 Subclause (3) allows regulations to be made to include additional activities. Subclause (4) allows activities to be excluded from the definition. It is intended that regulations will be made where it is not clear whether or not a particular activity falls within the definition.

Clause 6- Definition of office

- 1.30 This clause defines the term *office* in relation to an association.
- In this context, the term “association” includes both an organisation registered under Schedule 1B to the WR Act and an industrial association (as defined in Part XA of the WR Act), as well as a branch of such an organisation or association (subclause (2)).
- 1.31 The term *office* is defined in similar terms to the definition of office in Schedule 1B to the WR Act, and covers:
- certain designated positions in organisations and associations or their branches (paragraph (1)(a));
 - other positions, the holders of which have direct responsibilities relating to the management, policy determination or rule-making and rule-enforcement functions of organisations, associations and their branches (paragraphs (1)(b), (c), (d) and (e)).
- 1.32 The definition excludes persons who carry out functions of the kind mentioned above, but only under direction to implement existing policy or decisions (paragraph (1)(c)).

Clause 9- Extension to Christmas Island

- 1.33 Clause 9 provides that this Act extends to Christmas Island and applies in relation to Christmas Island with such modifications as are prescribed by the regulations.

Clause 10- Act to bind Crown

- 1.34 This clause provides that the Bill applies to the Crown in right of the Commonwealth and each of the States and Territories, but that this does not mean that the Commonwealth of a State or Territory can be prosecuted for an offence under the Bill.

CHAPTER 6- INDUSTRIAL ACTION ETC

6.1 Chapter 6 sets out rules relating to industrial action for the building and construction industry. The Chapter:

- renders certain kinds of industrial action unlawful, and
- modifies what may be protected action for the purposes of the WR Act.

Part 1- Preliminary

6.2 This Part contains relevant industrial action definitions for Chapter 6.

Clause 72 – Definitions

building industrial action

6.3 Building industrial action is defined broadly to encompass conduct by employers and employees that adversely affects the performance of building work.

6.4 Paragraphs (e), (f) and (g) describe exceptions to the definition of building industrial action. Paragraph (e) excludes action by employees that has been authorised or agreed to in advance and in writing by the employer of those employees. Paragraph (f) excludes action by an employer that has been authorised or agreed to in advance and in writing by or on behalf of the employees of that employer. The requirement for the action to be authorised or agreed to in advance and in writing is intended to prevent the application of pressure on parties to authorise industrial action retrospectively.

6.5 Paragraph (g) excludes action by an employee where that action is based on a reasonable concern by the employee about an imminent risk to his or her own health and safety and the employee did not unreasonably fail to comply with any direction of his or her employer to perform other available work that was safe for the employee to perform. The employer may direct the employee to perform available work at the same or any other workplace.

constitutionally-connected action

6.6 A definition of constitutionally-connected action is required in order to constitutionally limit the broad operation of building industrial action in circumstances where it is necessary to do so. Only one of the conditions needs to be met in order to provide a constitutional basis for regulating the industrial action.

excluded action

6.7 The term “excluded action” is used to designate the kinds of industrial action that will not be unlawful industrial action under this Bill. Only protected action under the WR Act as modified by this Bill and AWA industrial action will be excluded action. In accordance

with the recommendations of the Royal Commissioner, action protected under State and Territory legislation will not be excluded action for the purposes of this Bill.

industrially-motivated

- 6.8 This term is used to distinguish conduct that is generally recognised as industrial action from conduct that, while technically falling into the broad definition of building industrial action, would not be considered to be industrial action as that term is commonly understood. For example, a mere failure to attend for work may occur for a number of reasons and will not necessarily be considered to be industrial action unless the failure to attend is for one of the reasons, or for reasons including one of the reasons, listed in this definition.
- 6.9 In order for action to be industrially-motivated, it is not necessary that it be taken solely for one of the reasons listed in the definition, nor must a reason listed in the definition be the dominant purpose for the action. It must merely be one of the purposes for which the action is taken. Where, for example, the purpose is to disrupt the performance of work in order to attain a particular goal, the action will be industrially-motivated.
- 6.10 For action to be industrially-motivated, it is not necessary for the action to be taken to support or advance claims against the employer of the employees taking the action. Action by employees to support or advance claims by a separate group of employees against a different employer will also be considered industrially-motivated.
- 6.11 If a person seeks to argue that they have not engaged in industrial action on the grounds that the action falls within the exception for action based on an imminent risk to health and safety, the onus is on that person to prove that the action was based on a reasonable concern about an imminent risk to health and safety (subclause (2)). This provision has been included to prevent persons engaging in industrial action from avoiding responsibility for their actions by relying on spurious health and safety risks.
- 6.12 Subclause (3) is modelled on subsection 4(9) of the WR Act. Paragraph (3)(a) makes it clear that action, such as the implementation of work bans, by either an employee or employer will still be building industrial action, even if it relates to only part of the duties that an employee is required to perform in the course of employment. Paragraph (3)(b) makes it clear that industrial action may include a course of conduct.

Part 2 – Unlawful industrial action

- 6.13 This Part contains provisions to prevent the occurrence of unlawful industrial action.

Clause 73 – Definition of *unlawful industrial action*

- 6.14 *Unlawful industrial action* is defined as all constitutionally-connected, industrially motivated building industrial action that is not excluded action (as defined in clause 72). For example, where the reason, or one of the reasons for the industrial action is a demarcation dispute between unions, such action will be unlawful industrial action.

Clause 74 – Unlawful industrial action prohibited

- 6.15 Clause 74 prohibits a person from engaging in unlawful industrial action. This is a civil penalty provision. The maximum civil penalty that may be imposed is 1 000 penalty units for a body corporate and 200 penalty units in other cases.
- 6.16 Clause 227 of the Bill will allow an action in relation to unlawful industrial action to also be brought by any eligible person in the Federal Magistrates Court or any Supreme, District or County Court of a State or Territory.
- 6.17 Subclause 227(4) provides an appropriate court with power, in respect of a contravention of this clause, to grant an injunction regardless of whether it appears to the court that the defendant intends to engage again, continue to engage or has previously engaged in unlawful industrial action and regardless of whether there is an imminent danger of substantial damage to any person if the defendant engages in unlawful industrial action.

Clause 80 – Action before nominal expiry date

- 6.18 Clause 80 makes it clear that where the employment of employees is subject, in any respect, to a building certified agreement or agreements, building industrial action taken prior to the nominal expiry date of any one of those agreements will not be protected action.
- 6.19 This provision is largely modelled on section 170MN of the WR Act. However, the reference to “in any respect” in subclause (1) is designed to address an apparent anomaly in the WR Act identified by the Federal Court in *Emwest v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2003) FCAFC 183. In that case, the court held that section 170MN of the WR Act did not prevent employees taking protected industrial action in respect of issues not covered by a certified agreement. This is contrary to the intent of the provision.

Clause 136 – Payments in relation to periods of building industrial action

- 6.20 Clause 136 adopts, with modifications, Part VIIIA of the WR Act, which deals with “strike pay”. The effect of this clause is to prohibit employers from making payments, and employees from accepting payments, in relation to any periods of building industrial action that are industrially-motivated and constitutionally-connected.
- 6.21 This is a civil penalty provisions with a maximum penalty of 1000 penalty units for a body corporate. For cases other than a body corporate, the existing maximum penalty under the WR Act of 300 penalty units will continue to apply.
- 6.22 Applications in relation to contraventions may be made to the Federal Court by the Minister, a person who has an interest in the matter or any other person prescribed by the regulations. Application may also be made by the employer in relation to contraventions of section 187AB of the WR Act, as modified by this Bill.

- 6.23 Paragraphs 187AD(c) and (d) of the WR Act allow the Federal Court, in respect of contraventions, to make injunctions (including interim injunctions) and any other orders considered necessary to stop the contravention or remedy its effects.
- 6.24 Subsection 187AD(2) of the WR Act makes it clear that the Court must not make an order requiring a person to pay an employer compensation for a contravention of section 187AB if the employer has itself contravened section 187AA by making a payment.

CHAPTER 12 – ENFORCEMENT

Part 1 – Contravention of civil penalty provisions

Clause 226 – Definitions

- 12.1 Subclause (1) contains relevant definitions for the purposes of Chapter 12 Part 1.
- 12.2 Subclause (2) outlines the circumstances in which a person is taken to have been “involved in” in a contravention of a civil penalty provision.

Clause 227 – Penalties etc. for contravention of civil penalty provision

- 12.3 An “eligible person” may apply to an “appropriate court” in respect of a contravention of a civil penalty provision.
- an “eligible person” is: an inspector (within the meaning of the WR Act), a person affected by the contravention, or a person prescribed by the regulations (subclause (6))
 - an “appropriate court” means the Federal Court, the Federal Magistrates Court, a State or Territory Supreme Court or a District Court or County Court of a State.
- 12.4 Subclauses (1)-(3) set out the orders that a court can make against a person who contravenes a civil penalty provision.
- 12.5 The court may order a pecuniary penalty. The maximum pecuniary penalty that may be ordered is 1,000 penalty units if the defendant is a body corporate and otherwise 200 penalty units.
- By operation of section 4AA of the Crimes Act 1914, the value of a penalty unit is currently \$110.
- 12.6 The court may also order:
- damages payable to a specified person;
 - any other order the court thinks appropriate (including an injunction or an order for the sequestration of assets).
- 12.7 If a person contravenes clause 74 of the Bill (which prohibits unlawful industrial action), then subclause (4) sets out the circumstances in which the court can grant an injunction restraining a person from engaging in such conduct.
- 12.8 A penalty ordered under this clause is payable to the Commonwealth or some other person if the court directs. The penalty may be recovered as if it were a judgment debt (subclause (5)).
- 12.9 Subclause (7) allows regulations made for the purpose of prescribing a person as an “eligible person” (i.e. a person able to bring proceedings for breach of a civil penalty provision) to limit the circumstances in which the person may make an application.

Clause 228 – Multiple proceedings for same conduct

- 12.10 To avoid double penalties in respect of the same conduct, subclause (1) prevents a court from making an order for a pecuniary penalty against a person if the person has already been convicted of an offence constituted by substantially the same conduct as the contravention of a civil penalty provision.
- 12.11 Subclause (2) provides that where criminal proceedings have commenced in respect of conduct that is substantially the same as that relating to proceedings for a pecuniary penalty order for a contravention of a civil penalty provision, the civil proceedings are stayed. If the person is later convicted of the offence, then the proceedings for an order for breach of the civil penalty provisions are dismissed. Otherwise, the proceedings may be resumed.
- 12.12 Subclause (3) ensures that if an order in respect of a contravention of a civil penalty provision has been made, criminal proceedings relating to substantially the conduct may still be instituted.
- 12.13 Subclause (4) provides that if a person's conduct constitutes a contravention of a civil penalty provision and section 170MN of the *Workplace Relations Act 1996*, proceedings relating to the contravention may be instituted under either or both section 227 of this Act and section 170NF of the *Workplace Relations Act*. However, it provides that the person is not liable to more than one pecuniary penalty in respect of the same conduct. This will not prevent a person who has had a pecuniary penalty imposed on them for a breach of s. 170MN of the *Workplace Relations Act 1996* from having an order made against them to pay damages to a specified person or any other order the court considers appropriate under paragraphs (b) or (c) of subclause 227(1).

Clause 229 – Evidence given in proceedings for penalty not admissible in criminal proceedings

- 12.14 Clause 229 prevents admission of evidence in criminal proceedings where the evidence was previously given in proceedings for a pecuniary penalty order relating to contravention of a civil penalty provision and the criminal proceedings relate to substantially the same conduct. An exception is made for criminal proceedings regarding false evidence given in the civil penalty proceedings.

CHAPTER 13- MISCELLANEOUS

Clause 252 – Jurisdiction of courts

13.1 This clause deals with a range of matters affecting the jurisdiction of the courts in relation to provisions of this Act and the WR Act as affected by this Act.

Jurisdiction where Act allows proceedings to be instituted

13.2 Paragraph (1)(a) provides that where a provision of this Act authorises a proceeding to be instituted in a particular court in relation to a matter, that provision is taken to vest the court with jurisdiction in that matter.

13.3 In relation to a State Court, paragraph (1)(b) provides that the jurisdiction vested in the court by a provision of this Act is subject to the same limits as any other jurisdiction of that court.

13.4 Paragraph (1)(c) provides that the jurisdiction vested in the Federal Court or Federal Magistrates Court by a provision of this Act is not subject to any limits which may apply to other jurisdictions of the court.

13.5 In relation to a Territory Court, paragraph (1)(d) provides that the jurisdiction vested in the court by a provision of this Act is vested only so far as permitted by the Constitution.

Jurisdiction in relation to modified provisions of Workplace Relations Act

13.6 Subclause (3) specifies that where a court has jurisdiction in relation to a matter under a provision of the WR Act and that provision is affected by this Act, then that jurisdiction extends to a matter arising under that WR Act provision as affected by this Act.

Exclusive jurisdiction of Federal Court for certain matters involving organisations etc.

13.7 Subclause (7) is modelled on subsection 414(1) of the WR Act and provides that the Federal Court has exclusive jurisdiction for certain matters involving building organisations.

Referral of matters to the Full court of the Federal Court

13.8 Subclause (8) provides that a Judge of the Federal Court may, at any stage of a proceeding in a matter, refer a question of law for the opinion of the Full Court of the Federal Court or refer the matter to the Full Court of the Federal Court to be heard and determined.

13.9 Where a Judge refers a matter the Full Court of the Federal Court may have regard to evidence given, or arguments adduced, in the proceeding before the Judge.

13.10 Subclause (9) provides that the Federal Court has jurisdiction to deal with the questions referred to it under subclause (8).

Clause 255 – Regulations

- 13.11 The Governor-General may make regulations prescribing matters where this Act requires or permits that matters to be prescribed or where it is necessary or convenient for the matters to be prescribed for carrying out or giving effect to this Act.
- 13.12 Subclause (2) specifies matters for which the regulations may make provision.
- 13.13 Subclause (3) provides that the first Regulations made for the purposes of subclauses 5(3), 5(4) and 9(2) may be expressed to take effect from the date of introduction of the Bill, provided that the regulations must be made within 120 days after the commencement of the relevant subsection.
- 13.14 This will allow regulations to be made to include or exclude activities from the definition of building work (subclauses 5(3) and 5(4)) or to modify its application to Christmas Island (subclause 9(2)) and for those regulations to take effect from the date of introduction. This approach has been taken due to some items of the Bill taking effect from the date of introduction.