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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Building and Construction Industry
Improvement Bill 2005**

No. , 2005

(Employment and Workplace Relations)

**A Bill for an Act to improve workplace relations
practices in the building and construction industry,
and for related purposes**

Contents

Chapter 1—Preliminary	1
1	Short title.....1
2	Commencement2
4	Definitions.....2
5	Definition of <i>building work</i>5
6	Definition of <i>office</i>7
9	Extension to Christmas Island.....8
10	Act to bind Crown.....8
Chapter 6—Industrial action etc.	9
Part 1—Preliminary	9
72	Definitions.....9
Part 2—Unlawful industrial action	13
73	Definition of <i>unlawful industrial action</i>13
74	Unlawful industrial action prohibited.....13
Part 3—Protected action	14
Division 1—Exceptions to protected action	14
80	Action before nominal expiry date14
Part 4—Miscellaneous	15
136	Payments in relation to periods of building industrial action15
Chapter 12—Enforcement	16
Part 1—Contravention of civil penalty provisions	16
226	Definitions.....16
227	Penalties etc. for contravention of civil penalty provision16
228	Multiple proceedings for same conduct.....18
229	Evidence given in proceedings for penalty not admissible in criminal proceedings19
Chapter 13—Miscellaneous	20
252	Jurisdiction of courts20
255	Regulations.....21

1 **A Bill for an Act to improve workplace relations**
2 **practices in the building and construction industry,**
3 **and for related purposes**

4 The Parliament of Australia enacts:

5 **Chapter 1—Preliminary**
6
7

8 **1 Short title**

9 This Act may be cited as the *Building and Construction Industry*
10 *Improvement Act 2005*.

Section 2

1 **2 Commencement**

2 (1) Each provision of this Act specified in column 1 of the table
3 commences, or is taken to have commenced, in accordance with
4 column 2 of the table. Any other statement in column 2 has effect
5 according to its terms.
6

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	
2. Sections 4 to 10	9 March 2005.	
3. Chapter 6	9 March 2005.	
4. Chapters 12 and 13	The day on which this Act receives the Royal Assent.	

7 Note: This table relates only to the provisions of this Act as originally
8 passed by the Parliament and assented to. It will not be expanded to
9 deal with provisions inserted in this Act after assent.

10 (2) Column 3 of the table contains additional information that is not
11 part of this Act. Information in this column may be added to or
12 edited in any published version of this Act.

13 **4 Definitions**

14 In this Act, unless the contrary intention appears:

15 **AIRC** means the Australian Industrial Relations Commission
16 established by section 8 of the Workplace Relations Act.

17 **award** has the meaning given by section 4 of the Workplace
18 Relations Act.

1 **building association** means an industrial association whose
2 eligibility rules allow membership by at least one of the following
3 groups:

- 4 (a) building employers;
- 5 (b) building employees;
- 6 (c) building contractors;

7 whether or not those rules also allow membership by other persons.

8 **building certified agreement** means a certified agreement that
9 applies to building work (whether or not it also applies to other
10 work).

11 **building contractor** means a person who has entered into, or who
12 has offered to enter into, a contract for services under which the
13 person:

- 14 (a) carries out building work; or
- 15 (b) arranges for building work to be carried out.

16 **building employee** means:

- 17 (a) a person whose employment consists of, or includes, building
18 work; or
- 19 (b) a person who accepts an offer of engagement as an employee
20 for work that consists of, or includes, building work.

21 **building employer** means an employer who employs, or offers to
22 employ, building employees.

23 **building industry participant** means any of the following:

- 24 (a) a building employee;
- 25 (b) a building employer;
- 26 (c) a building contractor;
- 27 (d) a person who enters into a contract with a building contractor
28 under which the building contractor agrees to carry out
29 building work or to arrange for building work to be carried
30 out;
- 31 (e) a building association;
- 32 (f) an officer, delegate or other representative of a building
33 association;
- 34 (g) an employee of a building association.

Section 4

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building work has the meaning given by section 5.

certified agreement has the meaning given by section 4 of the Workplace Relations Act.

Note: Part XV of the Workplace Relations Act extends the circumstances in which agreements can be certified under Part VIB of that Act.

civil penalty provision means section 74.

Commonwealth place means a place referred to in paragraph 52(i) of the Constitution, other than the seat of government.

conduct includes an omission.

constitutional corporation means:

- (a) a corporation to which paragraph 51(xx) of the Constitution applies; or
- (b) a body corporate that is incorporated in a Territory.

eligibility rules means rules that relate to the conditions of eligibility for membership.

employee has the meaning given by section 4 of the Workplace Relations Act.

employer has the meaning given by section 4 of the Workplace Relations Act.

Federal Court means the Federal Court of Australia.

industrial association has the same meaning as in Part XA of the Workplace Relations Act.

industrial body means:

- (a) the AIRC; or
- (b) a court or commission, however designated, exercising under an industrial law powers and functions corresponding to those conferred on the AIRC by the Workplace Relations Act.

industrial dispute (except in subsection 72(4) of this Act) has the meaning given by section 4 of the Workplace Relations Act (as affected by Part XV of that Act).

1 ***industrial instrument*** means an award or agreement, however
2 designated, that:

- 3 (a) is made under or recognised by an industrial law; and
4 (b) deals with the relationship between employers and
5 employees, concerns the relationship between an employer
6 and the employer's employees, or provides for the prevention
7 or settlement of a dispute between an employer and the
8 employer's employees.

9 ***industrial law*** means:

- 10 (a) this Act or the Workplace Relations Act; or
11 (b) a law, however designated, of the Commonwealth or of a
12 State or Territory that regulates the relationships between
13 employers and employees or provides for the prevention or
14 settlement of disputes between employers and employees.

15 ***office***, in relation to an organisation or industrial association or a
16 branch of an organisation or industrial association, has the meaning
17 given by section 6.

18 ***officer***, in relation to an organisation or industrial association,
19 means a person who holds an office in the organisation or
20 association.

21 ***organisation*** has the meaning given by section 4 of the Workplace
22 Relations Act.

23 ***penalty unit*** has the meaning given by section 4AA of the *Crimes*
24 *Act 1914*.

25 ***unlawful industrial action*** has the meaning given by section 73.

26 ***Workplace Relations Act*** means the *Workplace Relations Act*
27 *1996*.

28 **5 Definition of *building work***

29 (1) Subject to subsections (2), (3) and (4), ***building work*** means any of
30 the following activities:

- 31 (a) the construction, alteration, extension, restoration, repair,
32 demolition or dismantling of buildings, structures or works

Section 5

- 1 that form, or are to form, part of land, whether or not the
2 buildings, structures or works are permanent;
- 3 (b) the construction, alteration, extension, restoration, repair,
4 demolition or dismantling of railways (not including rolling
5 stock) or docks;
- 6 (c) the installation in any building, structure or works of fittings
7 forming, or to form, part of land, including heating, lighting,
8 air-conditioning, ventilation, power supply, drainage,
9 sanitation, water supply, fire protection, security and
10 communications systems;
- 11 (d) any operation that is part of, or is preparatory to, or is for
12 rendering complete, work covered by paragraph (a), (b) or
13 (c), for example:
- 14 (i) site clearance, earth-moving, excavation, tunnelling and
15 boring;
- 16 (ii) the laying of foundations;
- 17 (iii) the erection, maintenance or dismantling of scaffolding;
- 18 (iv) the prefabrication of made-to-order components to form
19 part of any building, structure or works, whether carried
20 out on-site or off-site;
- 21 (v) site restoration, landscaping and the provision of
22 roadways and other access works;
- 23 but does not include any of the following:
- 24 (e) the drilling for, or extraction of, oil or natural gas;
- 25 (f) the extraction (whether by underground or surface working)
26 of minerals, including tunnelling or boring, or constructing
27 underground works, for that purpose;
- 28 (g) any work that is part of a project for:
- 29 (i) the construction, repair or restoration of a
30 single-dwelling house; or
- 31 (ii) the construction, repair or restoration of any building,
32 structure or work associated with a single-dwelling
33 house; or
- 34 (iii) the alteration or extension of a single-dwelling house, if
35 it remains a single-dwelling house after the alteration or
36 extension.

- 1 (2) Paragraph (1)(g) does not apply if the project is part of a
2 multi-dwelling development that consists of, or includes, the
3 construction of at least 5 single-dwelling houses.
- 4 (3) Subject to subsection (4), **building work** includes any activity that
5 is prescribed by the regulations for the purposes of this subsection.
- 6 (4) **Building work** does not include any activity that is prescribed by
7 the regulations for the purposes of this subsection.
- 8 (5) In this section:
9 **land** includes land beneath water.

10 6 Definition of *office*

- 11 (1) In this Act, **office**, in relation to an association, means:
12 (a) an office of president, vice president, secretary or assistant
13 secretary of the association; or
14 (b) the office of a voting member of a collective body of the
15 association, being a collective body that has power in relation
16 to any of the following functions:
17 (i) the management of the affairs of the association;
18 (ii) the determination of policy for the association;
19 (iii) the making, alteration or rescission of rules of the
20 association;
21 (iv) the enforcement of rules of the association, or the
22 performance of functions in relation to the enforcement
23 of such rules; or
24 (c) an office the holder of which is, under the rules of the
25 association, entitled to participate directly in any of the
26 functions referred to in subparagraphs (b)(i) and (iv), other
27 than an office the holder of which participates only in
28 accordance with directions given by a collective body or
29 another person for the purpose of implementing:
30 (i) existing policy of the association; or
31 (ii) decisions concerning the association; or
32 (d) an office the holder of which is, under the rules of the
33 association, entitled to participate directly in any of the
34 functions referred to in subparagraphs (b)(ii) and (iii); or

Section 9

- 1 (e) the office of a person holding (whether as trustee or
2 otherwise) property:
3 (i) of the association; or
4 (ii) in which the association has a beneficial interest.
5 In this subsection, *association* means an organisation or branch of
6 an organisation, or an industrial association or branch of an
7 industrial association.
- 8 (2) In this Act, a reference to an *office* in an organisation or industrial
9 association includes a reference to an office in a branch of the
10 organisation or association.

11 **9 Extension to Christmas Island**

- 12 (1) This Act extends to the Territory of Christmas Island.
13 (2) This Act applies in relation to the Territory of Christmas Island
14 with such modifications as are prescribed by the regulations.
15 (3) In this section:
16 *modifications* includes additions, omissions and substitutions.

17 **10 Act to bind Crown**

- 18 (1) This Act binds the Crown in each of its capacities.
19 (2) Nothing in this Act renders the Commonwealth or a State or
20 Territory liable to be prosecuted for an offence.

1
2 **Chapter 6—Industrial action etc.**

3 **Part 1—Preliminary**
4

5 **72 Definitions**

6 (1) In this Chapter, unless the contrary intention appears:

7 *building industrial action* means:

8 (a) the performance of building work in a manner different from
9 that in which it is customarily performed, or the adoption of a
10 practice in relation to building work, the result of which is a
11 restriction or limitation on, or a delay in, the performance of
12 the work, where:

13 (i) the terms and conditions of the work are prescribed,
14 wholly or partly, by an industrial instrument or an order
15 of an industrial body; or

16 (ii) the work is performed, or the practice is adopted, in
17 connection with an industrial dispute (within the
18 meaning of subsection (4)); or

19 (b) a ban, limitation or restriction on the performance of building
20 work, or on acceptance of or offering for building work, in
21 accordance with the terms and conditions prescribed by an
22 industrial instrument or by an order of an industrial body; or

23 (c) a ban, limitation or restriction on the performance of building
24 work, or on acceptance of or offering for building work, that
25 is adopted in connection with an industrial dispute (within
26 the meaning of subsection (4)); or

27 (d) a failure or refusal by persons to attend for building work or a
28 failure or refusal to perform any work at all by persons who
29 attend for building work;

30 but does not include:

31 (e) action by employees that is authorised or agreed to, in
32 advance and in writing, by the employer of the employees; or

33 (f) action by an employer that is authorised or agreed to, in
34 advance and in writing, by or on behalf of employees of the
35 employer; or

Section 72

- 1 (g) action by an employee if:
2 (i) the action was based on a reasonable concern by the
3 employee about an imminent risk to his or her health or
4 safety; and
5 (ii) the employee did not unreasonably fail to comply with a
6 direction of his or her employer to perform other
7 available work, whether at the same or another
8 workplace, that was safe for the employee to perform.

9 Note: See also subsection (2), which deals with the burden of proof of the
10 exception in paragraph (g) of this definition.

11 ***constitutionally-connected action*** means building industrial action
12 that satisfies at least one of the following conditions:

- 13 (a) the action is taken by an organisation;
14 (b) the action is taken by a constitutional corporation, or
15 adversely affects a constitutional corporation in its capacity
16 as a building industry participant;
17 (c) the action is taken in connection with an industrial dispute;
18 (d) the action relates to work that is regulated by an award or
19 certified agreement;
20 (e) the action relates to the negotiation or proposed negotiation
21 of an agreement under Division 2 of Part VIB of the
22 Workplace Relations Act;
23 (f) the action occurs in a Territory or Commonwealth place.

24 ***excluded action*** means:

- 25 (a) building industrial action that is protected action for the
26 purposes of the Workplace Relations Act (as affected by
27 Division 1 of Part 3 of this Chapter); or
28 (b) building industrial action that is AWA industrial action for
29 the purposes of Division 8 of Part VID of the Workplace
30 Relations Act.

31 ***industrially-motivated*** means motivated by one or more of the
32 following purposes, or by purposes that include one or more of the
33 following purposes:

- 34 (a) supporting or advancing claims against an employer in
35 respect of the employment of employees of that employer;

Section 72

- 1 (b) supporting or advancing claims by an employer in respect of
2 the employment of employees of that employer;
3 (c) advancing industrial objectives of an industrial association;
4 (d) disrupting the performance of work.

5 The employer referred to in paragraphs (a) and (b) need not be the
6 employer whose employees do the work to which the action
7 relates.

8 (2) Whenever a person seeks to rely on paragraph (g) of the definition
9 of ***building industrial action*** in subsection (1), that person has the
10 burden of proving that paragraph (g) applies.

11 (3) For the purposes of this Chapter:

- 12 (a) conduct is capable of constituting building industrial action
13 even if the conduct relates to part only of the duties that
14 persons are required to perform in the course of their
15 employment; and
16 (b) a reference to building industrial action includes a reference
17 to a course of conduct consisting of a series of building
18 industrial actions.

19 (4) In the definition of ***building industrial action*** in subsection (1):

20 ***industrial dispute*** means:

- 21 (a) an industrial dispute (including a threatened, impending or
22 probable industrial dispute) that is about matters pertaining to
23 the relationship between employers and employees; or
24 (b) a situation that is likely to give rise to an industrial dispute of
25 the kind referred to in paragraph (a); or
26 (c) a dispute arising between 2 or more industrial associations, or
27 within an industrial association, as to the rights, status or
28 functions of members of the associations or association in
29 relation to the employment of those members; or
30 (d) a dispute arising between employers and employees, or
31 between members of different industrial associations, as to
32 the demarcation of functions of employees or classes of
33 employees; or

Section 72

- 1 (e) a dispute about the representation under an industrial law of
2 the industrial interests of employees by an industrial
3 association of employees.

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Part 2—Unlawful industrial action

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73 Definition of *unlawful industrial action*

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Building industrial action is *unlawful industrial action* if:

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(a) the action is industrially-motivated; and

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(b) the action is constitutionally-connected action; and

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(c) the action is not excluded action.

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74 Unlawful industrial action prohibited

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A person must not engage in unlawful industrial action.

Section 80

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Part 3—Protected action

Division 1—Exceptions to protected action

80 Action before nominal expiry date

Building industrial action is not protected action for the purposes of the Workplace Relations Act if:

- (a) the action is engaged in for the purpose of supporting or advancing claims:
 - (i) against an employer; or
 - (ii) by an employer;
in respect of employees whose employment is, in any respect, subject to a building certified agreement; and
- (b) the action is taken before the nominal expiry date of that agreement.

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Part 4—Miscellaneous

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136 Payments in relation to periods of building industrial action

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(1) Part VIIIA of the Workplace Relations Act applies in relation to building work with the following modifications:

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(a) references in that Part to industrial action are to be read as references to building industrial action that is industrially-motivated and constitutionally-connected;

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(b) the reference in paragraph 187AD(1)(a) of the Workplace Relations Act to 300 penalty units is to be read as a reference to 1,000 penalty units if the person is a body corporate.

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(2) Part VIIIA of the Workplace Relations Act does not apply to building work except as provided by this section.

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Chapter 12—Enforcement

Part 1—Contravention of civil penalty provisions

226 Definitions

(1) In this Part, unless the contrary intention appears:

appropriate court means the Federal Court, the Federal Magistrates Court, a Supreme Court of a State or Territory or a District Court, or County Court, of a State.

pecuniary penalty order means an order under paragraph 227(1)(a).

person, in relation to a contravention of a civil penalty provision, includes an industrial association.

(2) For the purposes of this Part, a person who is involved in a contravention of a civil penalty provision is treated as having contravened that provision. For this purpose, a person is *involved in* a contravention of a civil penalty provision if, and only if, the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced the contravention, whether by threats or promises or otherwise; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- (d) has conspired with others to effect the contravention.

227 Penalties etc. for contravention of civil penalty provision

- (1) An appropriate court, on application by an eligible person, may make one or more of the following orders in relation to a person (the *defendant*) who has contravened a civil penalty provision:
- (a) an order imposing a pecuniary penalty on the defendant;

Section 227

- 1 (b) an order requiring the defendant to pay a specified amount to
2 another person as compensation for damage suffered by the
3 other person as a result of the contravention;
4 (c) any other order that the court considers appropriate.
- 5 (2) The maximum pecuniary penalty for a civil penalty provision is
6 1,000 penalty units if the defendant is a body corporate and
7 otherwise 200 penalty units.
- 8 (3) The orders that may be made under paragraph (1)(c) include:
9 (a) injunctions (including interim injunctions); and
10 (b) any other orders that the court considers necessary to stop the
11 conduct or remedy its effects, including orders for the
12 sequestration of assets.
- 13 (4) If the contravention is a contravention of section 74, then the
14 power of the court to grant an injunction restraining a person (the
15 *defendant*) from engaging in conduct may be exercised:
16 (a) whether or not it appears to the court that the defendant
17 intends to engage again, or to continue to engage, in conduct
18 of that kind; and
19 (b) whether or not the defendant has previously engaged in
20 conduct of that kind; and
21 (c) whether or not there is an imminent danger of substantial
22 damage to any person if the defendant engages in conduct of
23 that kind.
- 24 (5) A pecuniary penalty is payable to the Commonwealth, or to some
25 other person if the court so directs. It may be recovered as a debt.
- 26 (6) Each of the following is an *eligible person* for the purposes of this
27 section:
28 (a) an inspector (within the meaning of the Workplace Relations
29 Act);
30 (b) a person affected by the contravention;
31 (c) a person prescribed by the regulations for the purposes of this
32 paragraph.

Section 228

- 1 (7) A regulation prescribing persons for the purposes of
2 paragraph (6)(c) may provide that a person is prescribed only in
3 relation to circumstances specified in the regulation.

4 **228 Multiple proceedings for same conduct**

- 5 (1) A court must not make a pecuniary penalty order against a person
6 for a contravention if the person has been convicted of an offence
7 constituted by conduct that is substantially the same as the conduct
8 constituting the contravention.

- 9 (2) Proceedings for a pecuniary penalty order against a person are
10 stayed if:

11 (a) criminal proceedings are started or have already been started
12 against the person for an offence; and

13 (b) the offence is constituted by conduct that is substantially the
14 same as the conduct alleged to constitute the contravention.

15 The proceedings for the order may be resumed if the person is not
16 convicted of the offence. Otherwise, the proceedings for the order
17 are dismissed.

- 18 (3) Criminal proceedings may be started against a person for conduct
19 that is substantially the same as conduct constituting a
20 contravention of a civil penalty provision regardless of whether an
21 order under this Part has been made against the person.

- 22 (4) If a person's conduct constitutes a contravention of a civil penalty
23 provision and section 170MN of the Workplace Relations Act,
24 proceedings relating to the contravention may be instituted under
25 either or both of the following provisions:

26 (a) section 227 of this Act;

27 (b) section 170NF of the Workplace Relations Act.

28 However, the person is not liable to more than one pecuniary
29 penalty in respect of the same conduct.

1 **229 Evidence given in proceedings for penalty not admissible in**
2 **criminal proceedings**

3 Evidence of information given by an individual, or evidence of
4 production of documents by an individual, is not admissible in
5 criminal proceedings against the individual if:

- 6 (a) the individual previously gave the evidence or produced the
7 documents in proceedings for a pecuniary penalty order
8 against the individual for a contravention of a civil penalty
9 provision (whether or not the order was made); and
10 (b) the conduct alleged to constitute the offence is substantially
11 the same as the conduct that was claimed to constitute the
12 contravention.

13 However, this does not apply to a criminal proceeding in respect of
14 the falsity of the evidence given by the individual in the
15 proceedings for the pecuniary penalty order.

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Chapter 13—Miscellaneous

252 Jurisdiction of courts

Jurisdiction where Act allows proceedings to be instituted

- 7 (1) If a provision of this Act, expressly or by implication, authorises a
8 proceeding to be instituted in a particular court in relation to a
9 matter:
- 10 (a) that provision is taken to vest that court with jurisdiction in
11 that matter; and
- 12 (b) in the case of a court of a State—the jurisdiction so vested is
13 subject to any limits to which any other jurisdiction of the
14 court may be subject; and
- 15 (c) in the case of the Federal Court or the Federal Magistrates
16 Court—the jurisdiction so vested is not limited by any limits
17 to which the other jurisdiction of the court may be subject;
18 and
- 19 (d) in the case of a court of a Territory—the jurisdiction is vested
20 so far only as the Constitution permits.

Jurisdiction in relation to modified provisions of Workplace Relations Act

- 23 (3) If:
- 24 (a) a court has jurisdiction in relation to a matter arising under a
25 provision of the Workplace Relations Act; and
- 26 (b) that provision is affected by this Act;
- 27 then that jurisdiction extends to a matter arising under that
28 provision as affected by this Act.

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

- 31 (7) Subject to this Act, the jurisdiction of the Federal Court in relation
32 to an act or omission for which an organisation, or member of an
33 organisation, is liable to be sued, or to be proceeded against for a

1 pecuniary penalty, is exclusive of the jurisdiction of any other
2 court created by the Parliament or any court of a State or Territory.

3 *Referral of matters to Full Court of Federal Court*

4 (8) At any stage of a proceeding in a matter in which the Federal Court
5 has jurisdiction under this Act, a single Judge exercising the
6 jurisdiction of the Federal Court:

7 (a) may refer a question of law for the opinion of a Full Court of
8 the Federal Court; and

9 (b) may, of the Judge's own motion or on the application of a
10 party, refer the matter to a Full Court of the Federal Court to
11 be heard and determined.

12 If a Judge so refers a matter, the Full Court of the Federal Court
13 may have regard to any evidence given, or arguments adduced, in
14 the proceeding before the Judge.

15 (9) The Federal Court has jurisdiction with respect to matters in
16 relation to which questions may be referred to it under
17 subsection (8).

18 **255 Regulations**

19 (1) The Governor-General may make regulations prescribing matters:
20 (a) required or permitted by this Act to be prescribed; or
21 (b) necessary or convenient to be prescribed for carrying out or
22 giving effect to this Act.

23 (2) Without limiting subsection (1), the regulations may make
24 provision for, and in relation to, the following:
25 (a) the signing or lodging of documents that are required or
26 permitted by this Act to be lodged with, or given to, a court;
27 (b) the manner in which, and the time within which, applications
28 under this Act may be made and dealt with;
29 (d) fees to be charged in relation to proceedings under this Act.

30 (3) Despite subsection 12(2) of the *Legislative Instruments Act 2003*:
31 (a) the first regulations made for the purposes of subsection 5(3)
32 may be expressed to take effect from the commencement of
33 that subsection; and

Section 255

- 1 (b) the first regulations made for the purposes of subsection 5(4)
2 may be expressed to take effect from the commencement of
3 that subsection; and
4 (c) the first regulations made for the purposes of subsection 9(2)
5 may be expressed to take effect from the commencement of
6 that subsection;
7 so long as those regulations are made within 120 days after the
8 commencement of this subsection.