

AUSTRALIAN CAPITAL TERRITORY



MASTER BUILDERS
AUSTRALIA

CEO

SPECIAL BULLETIN

18 June 2009

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009 (the Bill)

Introduction

The purpose of this special bulletin is to inform members about the terms of the Bill which is proposed as the replacement of the *Building and Construction Industry Improvement Act, 2005 (Cth)* (the BCII Act) from 1 February 2010. The Bill was introduced into Parliament on 17 June 2009. It is not a definitive analysis but provides an overview.

Prior to the 2007 election, the Labor Party promised that it would retain the Office of the Australian Building and Construction Commissioner (the ABCC) until 31 January 2010, when it would be replaced by a specialist Fair Work inspectorate. The Bill takes forward that election promise. However, on a number of occasions the Hon Julia Gillard Deputy Prime Minister has indicated that the Government will retain "a tough cop on the beat," including in her Second Reading speech on the Bill.¹ In Master Builders' view the inspectorate established by the Bill falls short of being a tough cop on the beat. It creates a "red tape" cop.

The Government also committed to consult with industry stakeholders about the replacement legislation. Hence, in June 2008 the Deputy Prime Minister appointed the Hon Justice Murray Wilcox QC, a retired Federal Court judge, to consult and report on matters related to the creation of the specialist Fair Work Inspectorate. Mr Wilcox provided his report to Government at the end of March 2009. A large number of the provisions of the Bill are based upon his report but there are elements of the Bill which do not follow his recommendations, particularly the "switching off" mechanism discussed below.

Overview of the Bill

The BCII Act will be repealed. As part of that process, there are significant changes to the current legislative framework including the removal of industry specific unlawful industrial action and penalty provisions. There is also a contraction of building work covered by the Bill, discussed below.

The successor body retains the right to exercise coercive powers, but on a restricted basis. There are a number of so called safeguards attached to the exercise of the powers. In

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addition, there is a mechanism where the powers are able to be “switched off,” and is discussed below.

The Bill retains the Office of the Federal Safety Commissioner.

ABCC to be replaced

This Bill gives effect to the Government’s election commitment to abolish the ABCC and transfer its responsibilities to a specialist Fair Work inspectorate from 1 February 2010. The Government has resisted calls to abolish the ABCC early, although the Minister will issue a notice to the ABCC that puts operational constraints around the exercise of its coercive powers from August this year.²

The Bill creates the new Office of the Fair Work - Building Industry Inspectorate (the Building Inspectorate) and provides that this new agency will ensure compliance with the general workplace relations laws, as prescribed in the Fair Work Act 2009 by all building industry participants. There are in effect no separate substantive building and construction industry laws to be administered. The Building Inspectorate will operate like the Fair Work Ombudsman, as an enforcement agency rather than as an agency which stands in the shoes of industry participants as a means of acting against unlawful industrial action.

The Building Inspectorate

The Building Inspectorate created by the Bill will be headed by an independent Director appointed by the Minister. The Director will manage the operations of the Building Inspectorate and will not be subject to oversight or control by other statutory office holders.

This model gives effect to Mr Wilcox’s recommendation that the Director have ‘operational autonomy.’

As recommended by Mr Wilcox, the Bill also creates an Advisory Board to make recommendations to the Director on the policies and priorities of the Building Inspectorate. While the Advisory Board will not determine the Inspectorate’s policies and priorities, the Director will consider their recommendations when determining the policies and priorities of the Building Inspectorate. The Board is required to meet twice per year.

Scope and Penalties

Consistent with Mr Wilcox’s recommendations, the definition of ‘building work’ will be amended to remove its coverage of off-site work.

As recommended by Mr Wilcox, the Bill removes:

- higher penalties for building industry participants for breaches of industrial law
- broader circumstances under which industrial action attracts penalties in relation to the building industry. The Fair Work Act Part 3-3 will govern industrial action with no separate building industry regulation.

There will in effect be a much less focus upon combating unlawful industrial action and legitimate industrial action will be more broadly defined in line with the Fair Work Act. In addition, it is unclear whether the Building Inspectorate will, as an example, be an agency which the Regulations will authorise to bring an action under section 423 of the Fair Work Act where an enterprise is suffering significant economic harm because of protected industrial action. This appears unlikely under the model adopted for the Bill.

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The Retention of Coercive Powers

Similar powers to those currently exercised by the ABCC are retained. However, the following constraints or “safeguards” are also part of the Bill as recommended by Mr Wilcox:

- use of the powers is dependent on a presidential member of the Administrative Appeals Tribunal being satisfied a case has been made for their use
- persons required to attend an interview may be represented by a lawyer of their choice and their right to claim legal privilege and public interest immunity will be recognised
- persons required to attend a interview will be reimbursed for their reasonable expenses
- all interviews are to videotaped and undertaken by the Director or their deputy
- the Commonwealth Ombudsman will monitor and review all interviews and provide reports to the Parliament on the exercise of this power, and
- the powers will be subject to a five year sunset clause.

The last dot point means that in February 2015 the provision will come to an end. The government has announced that there would be a review of the powers prior to this time.

It will be difficult for the Building Inspectorate to use the powers. Before an “examination notice” is issued by the AAT (ie that the inspectorate can proceed to obtain information under compulsion) the presidential member must be satisfied that:

- all other methods of obtaining the material or evidence have been tried or were not appropriate
- the information or evidence would be likely to be of assistance to the investigation, and
- it would be appropriate, having regard to all of the circumstances, to issue the examination notice.

Switching Off Mechanism

The Bill creates an office, the Independent Assessor – Special Building Industry Powers, who may, on application from stakeholders, make a determination that the coercive interrogation powers will not apply. All projects that commenced prior to 1 February 2010 will remain covered by coercive powers. All projects that commence on or after 1 February 2010 will start with the coercive powers ‘switched on’.

On projects that commenced on or after 1 February 2010 an “interested person” will be able to make an application to the Independent Assessor to have coercive powers switched off in relation to a specific project. The legislation does not make it clear as to who is to be “an interested person.” The Bill says that it is the Minister and other persons prescribed by the Regulations.

In determining whether to switch off the coercive powers, the Independent Assessor must be satisfied that:

- (a) it would be appropriate to make the determination, having regard to:
 - (i) the objects of the Bill
 - (ii) any matters prescribed by the regulations
- (b) it would not be contrary to the public interest to make the determination.

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In the event that a project where the coercive powers have been switched off experiences industrial unlawfulness the Independent Assessor may rescind or revoke the original decision; thereby switching the powers back on. Additionally, the Director of the Building Inspectorate may request the Independent Assessor reconsider the decision at any time based on changes in circumstances on a specific project.

These bureaucratic mechanisms appear to Master Builders to be unnecessary and tortuous. The compliance powers are already treated as a last resort mechanism by the requirements imposed upon the relevant Presidential member of the AAT, discussed above.

The Office of the Federal Safety Commissioner

The Bill retains the provisions of the BCII Act that relate to the Office of the Federal Safety Commissioner and the related OHS Accreditation Scheme.

Conclusion

The Bill clearly disappoints. There is no focus upon curbing unlawful industrial action. There are no industry specific provisions of substance that the agency must administer. Instead the agency will be internally focussed with walls of constraints on its most vital tool in extracting information: the ability to summon and obtain information that will be respected and held confidential. The Bill's emphasis on the new inspectorate examining building industry agreements and compliance with the new National Employment Standards will also mean a greater level of actions against employers. It will be an inspectorate rather than an agency with a principal focus on tackling unlawful industrial action.

Master Builders will strongly advocate changes to the Bill to give affect to the Government's commitment keep a strong cop on the beat through the Senate Committee process and in other forums.

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