

## The New ABCC: The Fair Work Building Industry Inspectorate

The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2012 was passed through the House of Representatives on Thursday 16 February 2012.

The Bill, once passed by the Senate, will replace the Building and Construction Industry Improvement Act 2005 (BCII Act) with the *Fair Work (Building Industry) Act 2012*.

### Workplace Relations Update

The major amendments proposed by the Bill are as follows.

#### The definition of the Building Industry

The definition of "building industry" will be amended to exclude a reference to off-site prefabrication of made to order components. This will exclude from the coverage of the new Act, manufacturing that takes place in permanent off site facilities and is separate to the building project. Please note that pre-fabrication of building components on auxiliary or holding sites that are separate from the primary construction site will remain covered by the definition of building work.

#### The creation of the Building Inspectorate

The Office of the Australian Building and Construction Commissioner (the ABCC) will be replaced by the **Fair Work Building Industry Inspectorate** (the Building Inspectorate).

The Building Inspectorate will be headed by a **Director** (appointed by the Minister) who has similar functions and powers to the ABC Commissioner. One of the key functions of the Director is to promote harmonious, productive and cooperative workplace relations in the building industry and compliance with designated building laws and the Building Code by building industry participants.

Another body that is proposed to be established under the Bill is the **Fair Work Building Industry Inspectorate Advisory Board** (the Advisory Board).

The Advisory Board will be comprised of the Director, the Fair Work Ombudsman, and up to five other part time members, including one member from a union and one from an employer background. The purpose of the Advisory Board is to make recommendations to the Director on policies to guide the performance of the Building Inspectorate's functions and exercise of its powers, its priorities and programs.

#### Who does this affect?

- Building employers
- Manufacturers of building components
- Contractors
- Building employees

#### Article Highlights

- Australian Building and Construction Commissioner (ABCC) will be replaced by the Fair Work Building Industry Inspectorate and Advisory Board.
- The Building Inspectorate's powers will be reduced with specific industrial action and coercion provisions removed.
- The regulation of industrial action and coercion in the building industry will become the same as other industries.



### Limited power in relation to settled proceedings

The BCII Act gave the ABC Commissioner the power to intervene in or commence proceedings even when a matter had been settled between the building industry participants.

The Director of the Building Inspectorate will not have similar powers.

The Bill provides that if the Director is a joint applicant or has intervened in building proceedings and the matter is then settled between the other parties, or discontinued, the Director must not continue to participate in the proceedings. Similarly, if the Director was not involved in building proceedings which are then settled or discontinued, the Director can not institute fresh proceedings in relation to that matter.

This restriction on the Directors' powers would prevent cases such as the recent one where the ABCC intervened and urged the Federal Court to reject the settlement agreement between Contractors at Woodside's Pluto Project and the various unions including the CFMEU. The parties struck a deal that the Contractors would recommend to the Court a full suspension of the agreed individual penalties of \$8,500 faced by 1335 workers. The ABCC disagreed with a full suspension on the basis that it would send the wrong message on general deterrence and may encourage others to take similar action.

### Specific industrial action and coercion provisions will be removed

The BCII Act contained extensive unlawful industrial action and coercion provisions that were specific to the building industry. For example, the ABC Commissioner had the power to make an application for an injunction to stop industrial action, which includes a ban, limitation or restriction on the performance of a particular aspect of work to advance the industrial objectives of a union.

The BCII Act contained specific maximum penalties for building industry participants breaching these provisions (\$110,000 for corporations and \$22,000 for individuals).

The Bill proposes to remove these industry specific provisions. The effect of this is that the regulation of industrial action and coercion in the building industry will be same as every other industry and will be governed by the *Fair Work Act 2009* (FW Act). Building industry participants will no longer be subject to higher penalties. The maximum penalties for breaching the relevant provisions will be reduced to \$33,000 for corporations and \$6,600 for individuals.

### Power to obtain information

The BCII Act allowed the ABC Commissioner, if the Commissioner believed on reasonable grounds that a person had information or documents relevant to an investigation, to issue a written notice requiring that person to provide information, produce documents, or attend before the Commissioner to answer questions relevant to the Commissioner's investigation (Notice). Failure to comply with a Notice carried

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a penalty of imprisonment for 6 months.

The Bill proposes to remove this automatic right to issue a Notice. Under the Bill, before issuing a Notice, the Director of the Building Inspectorate must first apply to a nominated Presidential Member of the Administrative Appeals Tribunal (ATT) for permission to do so (see section 45 of the Bill).

Moreover, before granting permission to issue a Notice, the Presidential Member must be satisfied that, among other things:

- all other methods of obtaining the materials or evidence are either inappropriate or have been attempted and were unsuccessful;
- the information or evidence would likely be of assistance to the investigation;
- it would be appropriate having regard to all the circumstances, to issue the Notice; and
- any other matters prescribed by the Regulations.

Failure to comply with a Notice remains a criminal offence, breach of which may result in imprisonment of up to 6 months. However, the Bill now includes a note that the Court may impose a monetary penalty instead of, or in addition to, a term of imprisonment (maximum penalty of \$3,300 for individuals or \$16,500 for corporations).

### Exemptions

The Bill also creates the office of the Independent Assessor - Special Building Industry Powers (the **Independent Assessor**). The Independent Assessor may, on application by an "Interested Person", make a determination that section 45 (the power to issue a Notice to provide information, produce documents or answer questions of the Director) of the new Act does not apply in relation to one or more specific building projects. The consequence is that a Notice cannot be issued in relation to that building project.

An "Interested Person" is defined as the Minister or any other person defined by the Regulations.

Before granting the determination, the Independent Assessor must be satisfied that it would be appropriate to make the determination having regard to:

- the objects of the Act;
- any matters prescribed by the Regulations; and
- it would not be contrary to the public interest to make the determination.

At this stage the Regulations have not been drafted. However, the explanatory memorandum suggests that matters prescribed by the Regulations might include, for example, a demonstrated record of compliance with workplace relations laws,



including court or tribunal orders, in connection with the building project.

### Fair Work Building Industry Inspectors

The Bill provides for the appointment of Building Industry Inspectors that will replace the ABC's Inspectors.

A Building Industry Inspector has the same functions and powers as a Fair Work Inspector (inspectors who are employed by the Fair Work Ombudsman), but the powers of a Building Industry Inspector may only be exercised in relation to a building matter. A building matter is a matter that relates to a building industry participant (for example a building employee, a building employer, a building contractor etc).

Some examples of the powers of Building Industry Inspectors are listed below:

- make applications for orders in relation to contraventions of civil remedy provisions contained in the FW Act;
- make applications to Fair Work Australia in relation to persons who hold entry permits for the purposes of exercising rights of entry;
- exercise compliance powers for the purpose of determining whether the FW Act or a Fair Work Instrument is being complied with; and
- issue compliance notices where an Inspector reasonably believes that a person has contravened a Fair Work Instrument.

The Fair Work Inspectors now also have the obligation and power to monitor compliance with the Building Code.

### Where to from here?

The Bill is still to be put to the vote in the Senate. At this stage the indications are that the Bill will be approved by the Senate. However, there may be further amendments that are made to fine-tune or modify the final provisions of the Bill before it becomes law. For example, we are aware that the Greens are still agitating for amendments to remove the Building Inspectorate's proposed coercive powers.

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