

SUMMARY OF THE BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT ACT 2005

Adam Wallwork, Partner

Paul Barnsley, Solicitor

Mallesons Stephen Jaques,
Sydney

BACKGROUND

The new Commonwealth Building and Construction Industry Improvement Act received assent on 12 September 2005. It prohibits unlawful building industrial action and enables it to be injuncted. It also prohibits various coercive and discriminatory industrial behaviour associated with building work. It contains significant civil penalties for failures to comply with requirements of the Act and significant criminal penalties for failures to comply with requirements of the Australian Building and Construction Industry Commissioner. It is important to note that some of the provisions operate retrospectively.

WHAT THE ACT COVERS

The Act applies to 'building work', which is defined broadly to include prefabrication, site preparation and installation of fittings. The Act excludes mining work and the construction of single dwellings which are not part of a development of five or more separate dwellings. 'Building agreements' and 'building employees' are also expansively defined, with the Act capturing employment or contracts including any element of 'building work' in their scope.

The Act prohibits and creates civil penalties for 'unlawful industrial action'. This is defined as extending to any industrially motivated action in relation to building work which involves:

- delayed performance of building work in relation to an industrial dispute;
- refusing to accept or offer work on the legally prescribed terms or on the basis of an industrial dispute; and
- failure of employees to attend for building work or to perform work while attending.

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However, the definition excludes conduct agreed to by the other party and conduct undertaken on the basis of a reasonable concern about health and safety. Importantly, the Act also preserves protections for certain forms of authorised industrial action created by the Workplace Relations Act, so that key forms of industrial protest remain legal under the Act.

The prohibition on unlawful industrial action is backed by the Act's investigative functions, intended to be carried out by a newly-established Australian Building and Construction Industry Commissioner and its inspectors, which replace the previous Building Industry Task Force.

The Commissioner is given broad powers under the Act to compel attendance at hearings, testimony (including a limited displacement of the privilege against self-incrimination) and production of documents in the course of an investigation. Significant penalties are associated with a failure to comply with the Commissioner's directions. These can include imprisonment for up to six months.

More generally, the Act increases civil penalties relative to previous legislation, with maximum fines for corporations being increased from \$110,000 to \$330,000 and maximum fines for individuals similarly rising from \$6,600 to \$22,000. The Act also grants Courts the power to make orders for the payment of damages to any party who has been harmed by conduct in breach of the Act.

The Act makes other specific changes to the industrial relations framework for building work. Some are set out below.

- Restrictions are placed on industrial action called on the basis of safety concerns—the

onus of demonstrating the validity of such concerns is now placed on the body organising the industrial action.

- The definition of industrial action has been expanded to catch partial or conditional refusals to undertake work.
- The exception created by *Emwest v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2003) FCAFC 183, whereby industrial action taken during the life of a certified agreement was protected under the Workplace Relations Act provided it concerned matters not covered by the certified agreement, has been removed.
- The Act invalidates project agreements, whereby uniform entitlements are secured for all employees on a particular site, unless they are certified.
- The Act adopts, and increases the penalties associated with, the Workplace Relations Act's prohibition on 'strike pay', or payments made in relation to periods of industrial action.
- The Act creates the position of Federal Safety Commissioner (and its officers) and provides for an accreditation scheme for persons wishing to enter into Commonwealth building agreements.
- The Act also creates the basis for the Minister for Workplace Relations to prescribe a Building Code of Practice, but to date no such code has been issued.

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