BUILDING AND CONSTRUCTION INDUSTRY WORKPLACE REFORM—CURRENT CONTROVERSIES

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INTRODUCTION

This paper examines aspects of the building and construction industry specific workplace reforms that are generating controversy. The technical details of the legislation are only mentioned where they are essential to understanding the controversy that currently exists.

REFORM IMPACT

The Cole Royal Commission[1] comprehensively documented the workplace relations woes of the industry, specifically focusing upon unacceptable and unlawful behaviours of unions in the commercial sector. The findings of the Royal Commission were supported by the work of the Interim Building Industry Taskforce which became the Building Industry Taskforce (the Taskforce) and then the Australian Building and Construction Commissioner (the ABCC) subsequently. The Taskforce published two reports that thoroughly documented the unacceptable face of the building and construction industry.[2] In addition, the ABCC has published an Annual Report that summarises the first nine months of its activities,[3] as well as two reports on its compliance activities.[4]

The September 2005 Taskforce report[5] highlighted the rationale for specific building industry workplace reform. It found that the industry norm was to disregard the Workplace Relations Act 1996 (Cth) (WRA) and adhere instead to 'the law of the jungle'. The Taskforce reported that incidences of inappropriate industrial pressure, which may involve violent and thuggish behaviour, contribute to the lawless culture that has plagued the industry.

The Government has emphasised that the specific reforms for the building and construction industry have been introduced to change the culture identified by the Cole Royal Commission, the Taskforce and the ABCC. The ABCC has said that:

> Prosecutions (in the sense of civil penalty proceedings) have centred on recurring issues in the building industry, such as coercion, strike pay and unlawful industrial action. The ABCC is prepared to take on unlawful aspects of the ingrained culture within the building and construction industry. Apart from the immediate impact, prosecutions highlight to the industry that the law will be enforced on building sites.[6]

The Building and Construction Industry Improvement Act 2005 (Cth) (BCII) passed the Parliament on 7 September 2005 and received Royal Assent on 12 September 2005. It has been amended in many respects by the recent and much heralded WorkChoices legislation.[7]

The BCII is not the only means by which building and construction workplace reform has been brought into effect. Appendix 1 is an attempt to show the principal reform measures, noting that a major element of the reforms, the independent contractors' legislation package,[8] is not yet in force.

The changes brought about by WorkChoices, however, are of a different complexion to the industry specific reforms. They arise from the Government's desire to move away from the traditional institutions of industrial relations, to vest more power in the industry participants rather than third parties. This contrasts with the building and construction industry reforms where an emphasis has been placed on empowering a third party to enforce the law in the industry, principally by prosecuting the offenders, as

indicated in the ABCC quotation set out earlier.[9] The general and the industry specific reforms were, on the other hand, fuelled by the idea that workplace reform will positively affect productivity.[10] In the building and construction industry adherence to the rule of law is a factor that directly affects certainty and hence productivity.

As Singleton from the Cato Institute has observed:

(L)aw in our society serves an essential practical function—that is, to supply the ground rules so that businesses, investors, and individuals can plan their actions to avoid disputes with one another. Disputes and the risk of disputes vastly raise the risk and cost of new ventures. That is, the most important function of the law is to lower the risks of uncertainty in making long term plans.[11]

Lack of certainty drives up costs in every part of the system, making time lines and expenditure harder to predict. As a result, risk factors attached to cash flows will be higher and expected net present values of projects are lower. When that uncertainty is deliberately and unlawfully generated by a stakeholder in the system, a stakeholder that has an economic interest in raising its share of the economic rent, then governments need to act and in this instance the Commonwealth Government has acted decisively. This action protects the community by ensuring that the cost of infrastructure, schools and hospitals in particular, is not inflated by this factor.

As Brian Seidler, Executive Director of Master Builders New South Wales has said in response to how reform is positively affecting the industry:

There were suggestions that contractors had to allow for up to 30 per cent of a tender for illegal industrial activity. The industry can tender properly without worrying about grotesque industry problems.[12]

WorkChoices has sought to achieve productivity increases from a different foundational basis by elevating agreement making to centre stage. Discarding the rigidities of an Award based system and permitting parties to reach enterprise bargains that are mutually beneficial should raise productivity especially where more flexible patterns of work emerge. This factor is also highly relevant to building and construction industry productivity where part of the unions' prior strategy was to require adherence to so–called agreements that were submitted on a 'sign up or else' basis.

Already Master Builders is receiving a groundswell of feedback that the reforms are positive and have generated increased productivity, especially where employers have moved away from inflexible working conditions, such as 'lock down' days where no work may be undertaken on a specific day, that have been part of the union based pattern bargains. The opportunity now exists under WorkChoices, supported by the enforcement structures of BCII, for agreements to be made which mutually advantage employers and employees.

On 18 December 2006 Master Builders released the results of its quarterly survey that showed industrial relations have dramatically fallen as an obstacle to business efficiency. Over three quarters of builders surveyed believe industrial relations were having only a slight or nil effect on their business activity in the December quarter 2006, with the overall index down sharply on the previous quarter and during the course of the past year. From December 2003 to December 2006, members' concern about industrial relations acting as a business constraint has more than halved.[13]

ABCC JURISDICTION

As mentioned earlier, from 1 October 2005, the ABCC took over the work of the Taskforce. The ABCC is the independent statutory 'body'[14] that the Royal Commissioner believed would be pivotal to bring about the required change to the industry's culture where respect for the rule of law was absent.[15] At the core of the new building and construction industry workplace relations reforms is reliance on this well empowered statutory body to enforce the rule of law. Much of the BCII is centred on the powers and operations of the ABCC.

Essentially, the ABCC is an industry watchdog, invested with broad powers to investigate breaches of the BCII and the WRA (as substantially amended by the WorkChoices legislation).[16] There is a substantial focus upon the enforcement of workplace relations law. Where industrial misconduct collides with breaches of other laws (criminal law and trade practices law in particular) the ABCC is nonetheless not empowered to act directly. These matters must be referred to the agencies responsible for enforcement in those specific areas. This is less than efficient and causes delays, industry frustration and the engendering of a mentality that perceives the ABCC as overly bureaucratic. It also, pointedly, does not assist to rid the industry of the extortion and other criminal activities that, sadly, are still being experienced. This is said without criticism of the ABCC whose hands are tied by the jurisdiction the statute confers.

The perspective that the ABCC should move closer to

The principal thrust of the ABCC, as required by the jurisdiction conferred by the BCII, has been to focus upon eliminating unacceptable industrial practices. These practices include those undertaken by the unions using their leverage to dislocate building and construction industry work programmes.

the model of a one stop shop emanates from the findings of the Royal Commissioner. The Royal Commissioner was firmly of the view that the ABCC should monitor, investigate and prosecute[17] any breaches of industrial law, criminal law and aspects of civil law in relation to the building and construction industry.[18]

Recommendations 188 and 189 of the Cole Report have not, to my knowledge, been fully implemented. The issue that the Royal Commissioner confronted consisted of two prongs: the lack of inter–agency cooperation and proper authority to investigate. Firstly, to investigate and ensure the appropriate prosecution of offences committed against Commonwealth criminal law, federal police officers and prosecutors should be seconded to work with the ABCC. They would then also need to be authorised to investigate breaches of any Commonwealth law applicable to the building and construction industry.

From this proposition arose the recommendations referred to which are as follows:

Recommendation 188
The Australian Building and Construction Commission have attached to it Australian Federal Police officers and officers of the Commonwealth Director of Public Prosecutions.

Recommendation 189
The Building and Construction Industry Improvement Act authorise the Australian Building and Construction Commission and its officers to investigate breaches of any Commonwealth law applicable to the building and construction industry.[19]

The jurisdiction of the ABCC is certainly narrower than envisaged by Cole. There are unacceptable criminal elements who operate in the industry and who must be targeted.

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The Cole Royal Commission correctly assessed the commercial vulnerability of the industry. The Royal Commissioner identified the source of union coercive power. He found that head contractors and subcontractors are subject to severe cost penalties for delayed completion of construction projects. Industrial action causes immediate loss from standing charges and overheads, and potential loss from liquidated damages.[20] These losses put pressure upon head contractors and subcontractors to give in to industrial demands. If the short term cost of the demands is less than the actual and projected loss on a particular project, the usual result is that the demand, whether or not it is lawful, is met. That is because of the short term project profitability focus of the industry which is highly competitive.

Getting the work and performing the contract without triggering liquidated damages clauses is a matter of survival. It is this focus upon the need to endure in an unforgiving commercial market that means an independent body that is empowered to take action to enforce the law was conceived of as a necessity. Otherwise, unions, operating in this environment, have few prospects of the employers taking appropriate sanctions against them. This is a message that must be reinforced and is

the mainstay of the rationale for having an independent body to enforce the law, a body which has taken action to suppress unlawful industrial action in the industry.

The ABCC has extensive powers and the BCII has higher penalties than ever previously legislated in the industrial relations field, although the fines under, for example, the Trade Practices Act 1974 (Cth) are substantially higher.[21]

Persons who refuse to produce documents or information to the ABCC face a term of imprisonment of six months for a first time offence. This has a real practical application for builders as they are likely to be required to provide evidence that will form the basis of a compliance action by the ABCC. Builders have been required to provide such documents as subcontract conditions, including special conditions that deal with any aspect of industrial relations, or safety or wage records to determine whether strike pay was paid, or records of conversations with unions and others. These documents may then be used to corroborate verbal evidence given during a compulsory interview.

Section 52 of the BCII states that the ABCC may, by written notice, compel a person to produce information or documents or attend before the ABCC or Deputy ABCC and answer relevant questions if certain criteria are satisfied. The criteria are that the ABCC believes on reasonable grounds that the person:

• has information or documents relevant to an investigation into a contravention by a building industry participant;[22] or

• is capable of giving evidence relevant to such an investigation.

It is this provision that the CFMEU has seized upon to generate community debate that the ABCC is able to operate without due regard for civil liberties.[23] That criticism has been answered by the ABCC as follows:

The ABCC has this reserve power because people often encounter reprisals and intimidation if they are seen to be co–operating with an investigation. The ABCC compliance power is used as a last resort and only after a person has chosen not to co–operate voluntarily with an investigation. Also, in exercising the power, a number of important protections are afforded to the person involved. The protections include the right to legal representation, 14 days written notice and immunity from prosecution.[24]

The ABCC perspective is that it is assisting to enforce the rights of the community against those who break the law even though the right to silence of the person required to give evidence has been taken away.[25] This perspective is reinforced by the provisions of the BCII preventing the information from being used in any other proceedings save for some limited exceptions. One such example is where a person has provided false or misleading information or documents or where a Commonwealth official has been obstructed.[26]

The BCII therefore denies a pre–trial right of silence but reinforces the linked but more efficacious doctrine of a privilege against self incrimination in subsequent proceedings. In other words, whilst this right has been denied in the first instance, it is reinforced in respect of any proceedings that may be subsequently brought.[27] In addition, section 54 BCII must be taken into account. Persons who provide information to the ABCC will have protection against any civil or criminal proceedings in relation to the provision of that information. It follows therefore that there remain adequate protections for those who are investigated by the ABCC and that the attack on its powers based upon a notion of the denial of civil liberties is misconceived.

As is evident from the earlier comments about the ABCC's jurisdiction excluding criminal matters, Master Builders' conception of the ABCC has been as an agency that will assist smaller builders and subcontractors in particular to exercise their rights under the law. This is especially necessary in the commercial environment, previously mentioned in this paper, where smaller, generally poorly resourced companies are particularly vulnerable. This position has been maintained since the Cole Report was published but that notion is becoming increasingly less likely as a reality. Master Builders therefore calls for an expansion in the jurisdiction of the ABCC to include criminal matters as originally envisaged by the Royal Commissioner.

Master Builders has encouraged employers to contact the ABCC in any circumstance where they require advice or assistance relating to industrial relations. However, the ABCC has become viewed as an 'industry policeman' because it now enforces industrial law, particularly relating to coercion and intimidation of subcontractors, against employers and is the auditor of compliance with the National Code and Guidelines at the grass roots level. Further, under the independent contractors' legislation, the ABCC has been given a major new role in prosecuting employers in relation to offences against that legislation, also discussed later. But whilst this expansion in jurisdiction is understandable, the ABCC is not the entity envisaged by Master Builders following

the Government's adoption of the majority of the Cole Report's recommendations. This vision will not be fulfilled until the vesting of the criminal jurisdiction referred to earlier occurs and prosecutions are taken against those who brutally coerce and extort and who have connections with organised crime.[28]

Ultimately, the ABCC must grasp this nettle as there is little or no action in this area from the traditional police force. This has been explained by the former head of the Taskforce and now a Deputy Commissioner with the ABCC, Mr Nigel Hadgkiss, as follows:

'(P)olice tend to have the attitude that whenever criminal conduct occurs in relation to a construction site, the matter is of an 'industrial' nature. The police attitude is that it is their function to maintain the peace, not enforce the criminal law.'[29]

In light of this disturbing factor, the Commonwealth Government should act, and act quickly.

NATIONAL CODE AND GUIDELINES

The Government has made it plain that it has used and will continue to use its purchasing power to effect reform in the industry. Feedback from members is that this instrument of reform has had a far reaching effect and has been a catalyst for members entering into new workplace agreements that are Code and Guidelines compliant.

Government action in enforcing strict compliance with the Code and Guidelines has meant that, in order to qualify for Commonwealth work, builders have had to meet a range of requirements that are in addition to the general workplace and OH&S laws. These reforms penetrate to all industrial arrangements, including common law agreements. The reach of the Code and Guidelines is consequently greater than the WorkChoices reforms which are directed squarely at industrial instruments that are 'officially' registered, now via lodgement with the Office of the Employment Advocate (OEA).

This aspect of the 'reach' of the Code and Guidelines has been given prominence following a commendable change made to the Guidelines in November 2006. From 3 November 2006 the Code applies to workplace agreements that are unable to be registered under WorkChoices. The Guidelines do not permit unregistered agreements to include matters that would be, if they were included in a workplace agreement, prohibited content.[30]

The Government wanted to move against comprehensive deals made outside of the WorkChoices system. The 'side deal' that existed in the electrical contracting industry, for example, set out that an air conditioned office, with computer facilities, must be maintained on site for the union representative. There was a mandatory 'meeting' with the Electrical Trades Union whenever the electrical contractor won a major tender as well as open ended hours provided to site representatives to attend their industrial relations and OH&S tasks. None of these matters offended the Guidelines before the change but now fall foul of the idea that, if there were in a registered agreement, they would amount to prohibited content.[31]

The Code and Guidelines have teeth. Not only in the way in which they affect union's plans to bypass the WorkChoices reforms, just discussed, but also in the manner in which those who do not comply on the ground have now been sanctioned. Recently, the first instances of sanctions against companies which breached the Code and Guidelines have been made public.

In November 2006, the ABCC announced that three building and construction companies were precluded from tendering for Australian Government funded work for a period of three months for breaches of the Code and Guidelines.

The companies were found to have breached the Code and the Guidelines when tendering for work on the Department of Defence Marlu Curu project in South Australia. In each case, the businesses had been found to have engaged in anti–competitive, collusive tendering behaviour which breached the Code and Guidelines. The Federal Court has previously ruled that these businesses had breached the Trade Practices Act 1974 following action brought by the Australian Competition and Consumer Commission.[32]

Members regularly report to Master Builders that the ABCC has increased its auditing work associated with the Code and Guidelines and, whilst this engenders additional administration, in large part the industry is supportive of the reforms which can be effected in this manner.

Some State Governments, nevertheless, have indicated that they may well erect Codes of their own which would counteract the effect of the Commonwealth Code and Guidelines.[33] In Queensland we have urged the State Government there not to induce a situation where a contractor would effectively have to choose to undertake Commonwealth or State Government work.

In this regard, the most contentious provision in the proposed Queensland Code deals with the recommendation that head contractors would have to ensure all subcontractors satisfy

a specified 'no disadvantage test' as well as to maintain the required standard in relation to their own industrial instruments. The relevant policy paper states as follows:

DEIR has signalled its intention to develop a 'no disadvantage test' clause and policy statement directing general application in government contracts to ensure that the overall terms and conditions of employment of employees of suppliers are no less than those that applied prior to 27 March 2006 and that rates of pay have been adjusted regularly in line with movements of the Queensland Minimum Wage. The aim of the clause would be to ensure that employees of suppliers of goods and services to the Queensland Government receive, as a minimum, wages and conditions no less favourable than those in place pre Work Choices, and that those wages and conditions are updated to incorporate general rulings made by the Queensland Industrial Relations Commission.[34]

In essence the head contractors would have to include a contract condition which required that the contents of a subcontractor's industrial instruments satisfy this minimum requirement. Interfering with the industrial conditions of third parties in this manner would, we believe, contravene the National Code and Guidelines and also introduce unacceptable inflexibilities into the workplace arrangements of building industry participants.

The industrial relations 'pendulum'[35] is about to swing, bringing with it consequences that would induce an illogical clash between State based and Commonwealth regulation. This likely controversy should be avoided by pressuring governments to not make procurement policy a battlefield over workplace ideology.

INDEPENDENT CONTRACTORS LEGISLATION

Following Master Builders' and other lobbying the Coalition went to the 2004 election with a commitment to protect the status of independent contractors. On 22 June 2006 the then Minister for Employment and Workplace Relations, the Hon Kevin Andrews, introduced two bills into Parliament dealing with independent contracting. The federal laws proposed to override a number of State laws as well as creating new provisions that would no longer permit State laws to deem contractors to be employees, establishing a national unfair contracts jurisdiction, and cracking down on 'sham' contracting arrangements.

The Independent Contractors Act 2006 (IC Act) and the consequential Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (WRIC) were passed by the Federal Parliament on 4 December 2006 (Royal Assent 11 December). Some changes have been made to the originating Bills following a Senate Committee Inquiry, to which Master Builders gave two submissions, but the legislation is not entirely satisfactory. Whilst the Bills have passed, the legislation is not expected to commence until the end of the first quarter of this year but with a default commencement of 11 June 2007.

Master Builders has been generally supportive of the legislation because it, at least, provides a basis upon which contracting arrangements are able to be distinguished from employment arrangements, preserving freedom of contract. The legislation also consolidates unfair contracts laws that were being increasingly used (in NSW in particular) to extend 'unfair

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dismissal style' provisions to commercial contracts.

The consolidation of the unfair contracts jurisdiction can be a two–edged sword. This is because from the date of the effect of the legislation there will be in place a single national scheme for the review of independent contractor arrangements. This will provide new jurisprudence for challenging the terms of engagement of contractors who are individuals or who are working directors of the company with which the contract was effected.

In addition the WRIC has introduced harsh penalties for parties who enter into sham arrangements by creating an offence of misrepresenting a person to be an independent contractor when they are an employee at common law. The following two other offences are created which could be used as a weapon against employers:

• dismissing a person in order to engage them as an independent contractor, with a reverse onus of proof ie the employer must have evidence that this was not the intention should there be a change in the status of a person engaged; and

• making a false statement to persuade the person to become an independent contractor.

For a body corporate these offences attract a penalty of a maximum of $33,000.

Master Builders has opposed the creation of these offences, as have other employer groups. Part of the reason for opposition is because unions have the capacity to bring applications in respect of these offences. Further, as indicated earlier in this paper, the ABCC has been vested with a clear role as prosecutor of these offences. The ABCC is able to mount an application to the courts where an offence has been committed by a body corporate or individual which is governed by the BCII.[36]

Master Builders believes that the independent contractors legislation would be more effective if it were not able to be used to impede the very freedom of contract that it is designed to protect. This could occur by unions using, for example, the reverse onus of proof set out in what will become section 902(3) WRA. Proposed section 902 provides that an employer will not be able to dismiss or threaten to dismiss an employee for the sole and dominant purpose of engaging them as an independent contractor to perform the same or substantially the same work, and penalties apply. There is a presumption that this is the employer's sole and dominant purpose unless the employer proves otherwise.[37] Master Builders is concerned that this presumption will add to the administrative burden of employers and with the fluctuations of the building and construction industry, this requirement may create difficulties at a practical level. This offence should be removed as it is an undue restriction on the freedom of contract and appears to fly in the face of the methods of operation in the building and construction industry whereby individuals regularly work as both employees and as sole trader businesses or in partnerships, usually with their spouse.

This is one example of the need to monitor the legislation so that it becomes an instrument of reform rather than a weapon of those who wish to swing the pendulum away from the protection of freedom of contract by, for example, increasing litigation that pushes the boundaries of the unfair contracts jurisdiction. Master Builders will be liaising with Government following the

coming into effect of these new laws to ensure that they do act to advance rather than impede reform.

CONCLUSION

This paper has traversed a number of areas where controversy dogs the workplace relations system. Despite any protests to the contrary, the system and culture did need to change. This is evident from the fact that workplace reform is having a practical effect in the industry with a very large reduction in working days lost in the industry and early signs of productivity improvements. Most of the controversy that is currently generated relates to the desire of a number of parties to forcibly swing the IR pendulum back to the model that Work Choices has displaced.

Master Builders wants a system of workplace relations that adds to the business efficiencies that the current reforms are assisting to generate. Master Builders does not want to see the current reforms watered down. There indeed are arguments in favour of strengthening a number of the reforms, especially in the area of the independent contractors' legislation.

REFERENCES

1. Commonwealth of Australia, Final Report of the Royal Commission into the Building and Construction Industry February 2003 www.royalcombci.gov.au

2. Commonwealth of Australia, Interim Building Taskforce, Upholding the Law—One Year On: Findings of the Interim Building Industry Taskforce, March 2004 and Commonwealth of Australia, Taskforce, Upholding the Law—Findings of the Building Industry Taskforce, September 2005

3. Commonwealth of Australia, Office of the Australian Building and Construction Commissioner, Annual Report 2005–2006 http://www.abcc.gov.au/abcc/Reports/AnnualReports/

4. Commonwealth of Australia, Office of the Australian Building and Construction Commissioner, Report on the Exercise of Compliance Powers by the ABCC for the Period 1 October 2005 to 30 June 2006 and Report on the Exercise of Compliance Powers by the ABCC for the Period 1 October 2005 to 31 December 2006 http://www.abcc.gov.au/abcc/Reports/LegalReports/

5. Note 2

6. Note 3 at p 32

7. Workplace Relations Amendment (WorkChoices) Act 2005 (Cth) which amended the WRA

8. Independent Contractors Act 2006 (Cth) and the Workplace Relations Legislation (Amendment) Independent Contractors 2006 (Cth) will come into full force by 11 June 2006 unless earlier proclaimed.

9. The Office of the Workplace Services (OWS) is a separate statutory authority that has a role in prosecuting civil penalty offences for employers other than those in the building and construction industry. This role is akin to that of the ABCC but the OWS cannot act as a third party intervener in matters in the Australian Industrial Relations Commission or the courts.

10. See IMF Confirms Benefits of WorkChoices, Says Andrews, Workplace Express, 20 April 2006 where the following is stated:

The IMF's Word Economic Outlook: Globalization and Inflation, April 2006 report says on page 34 that: 'In Australia, recent reforms to the industrial relations system and changes to the tax and benefit systems will improve work incentives, and should set the stage for continued strong employment growth.

11. S Singleton, Capital Markets: The Rule of Law and Regulatory Reform http://www.cato.org/pubs/wtpapers/990913catorule.html accessed 9 February 2007

12. Quoted in M Dunckley and M Skulley, Blue Skies Smile on Victorian Builders, Australian Financial Review, 1 February 2007 p 44

13. Master Builders Australia, IR No Longer A Drag, Media release, 18 December 2006

14. See Vol 11 p 29, para 137 of Cole's report. The office of the ABCC comprises a large number of staff that operate to administer the BCII Act.

15. At p 27 of Vol 11 of the Cole Royal Commission report supra note 1, the Royal Commissioner sets out 8 reasons for the establishment of an independent statutory body to investigate and enforce the law.

16. General reference is made to the WorkChoices reforms, but specific reference will be made to the amended WRA.

17. This is not meant in the sense of taking the formal prosecution function which will remain vested in the Director of Public Prosecutions but in advancing the case so as to prosecute it for trial

18. My emphasis supra note 1 at Vol 11 p 31

19. Id at p 45

20. http://www.lectlaw.com/def/l045.htm (accessed 4 May 2006) contains a helpful definition of liquidated damages. The nub of the definition is as follows: 'The amount of money specified in a contract to be awarded in the event that the agreement is violated. The fixed amount which

a party to an agreement promises to pay to the other, in case he shall not fulfil some primary or principal engagement into which he has entered by the same agreement'.

21. The Trade Practices Act 1974 (Cth) carries heavy penalties for corporations and individuals. For breaches of Part IV (restrictive trade practices), corporations face penalties up to a maximum of $10 million. Individuals face penalties up to a maximum of $500,000.

22. This term is widely defined in s4 BCII as follows:

Building industry participant means any of the following:

(a) a building employee;

(b) a building employer;

(c) a building contractor;

(d) a person who enters into a contract with a building contractor under which the building contractor agrees to carry out building work or arrange for building work to be carried out;

(e) a building association;

(f) an officer, delegate or other representative of a building association;

(g) an employee of a building association.

23. See for example CFMEU, Building Workers Back Journalists on Free Speech, Media release, 25 August 2005 http://www.cfmeu.asn.au/construction/press/nat/20050825_civilliberties.html as well as television advertisements aired in October 2006

24. Office of the Australian Building and Construction Commissioner, ABCC Slams the CFMEU's Misleading Advertising Campaign, Media release, 26 October 2006

25. It is necessary to distinguish between the right to silence and the privilege against self–incrimination. These are issues analysed in an Issues Paper produced by the Victorian Parliamentary Scrutiny of Acts and Regulations Committee, The Right to Silence: Examination of the Issues, June 1998 http://www.parliament.vic.gov.au/sarc/Right_to_Silence/Issues_Paper/tablecontents.htm accessed 3 May 2006

26. s52 BCII

27. The common law privilege against self–incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production of the document would tend to incriminate that person: Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328, 335

28. See N McKenzie and C Houston Building Sites Infiltrated by Mafia The Age 9/6/2006 p 1

29. Editorial Disturbing Allegations that the Government Cannot Ignore The Age 16/6/2006 p12

30. As specified in the Workplace Relations Regulations 2006 (Cth)

31. Principally Regulations 2.8.5(1)(g), (2), (7) and 2.8.7. For a detailed examination of what is prohibited content for the purposes of a WorkChoices agreement see the OEA website as follows: http://www.oea.gov.au/graphics.asp?showdoc=/employers/prohibitedcontent.asp#index1

32. http://www.workplace.gov.au/workplace/Category/PolicyReviews/BuildingConstruction/GuidelinesFromNov2005

33. For example the Queensland Government see http://www.qgm.qld.gov.au/02_policy/spp_review.htm

34. Queensland Government, Department of Public Works, State Purchasing Policy Review Policy Paper, November 2006 p 47

35. Term invented by Mr Stephen Knott see for example paper entitled The Changing Face of Employee Relations March 2006 at p 15 where the following is said:

Our hope for the future is that the IR pendulum stops swinging and there is bi–partisan support for a single, simple National IR system that supports business efficiencies and working. relationships within enterprises.

36. New section 73A BCII inserted by Clause 18 Schedule 2 WRIC

37. Proposed section 902(3) WRA.

38. Sourced from Master Builders Australia, Fact Sheet 1—Workplace Reform in the Building & Construction Industry and Work Choices, January 2007

39. The Honourable Joe Hockey MP, Minister for Employment and Workplace Relations & Minister Assisting the Prime Minister for the Public Service—Media Release 21 February 2007

Richard Calver's paper was presented to the Master Builders Association of Newcastle on 22 February 2000. Reprinted with permission.

The legislation referred to by the author has been gazetted to commence upon 1 March 2007 as indicated in the extract (Appendix 2) from the Minister's media release set out hereunder.

APPENDIX 1[38]

REFORM MEASURE	EFFECTIVE DATE
• BCII administered by the ABCC	•Stricter rules re unlawful industrial action retrospective to 9 March 2005 •ABCC commenced 1 October 2005 •Other provisions took effect 12 September 2005
• Building and Construction Industry Improvement Regulations 2005	•1 October 2005, as amended
• WorkChoices legislation, WRA as amended by the Workplace Relations Amendment (WorkChoices) Act 2005	•Bill received royal assent on 14 December 2005 •New regime in operation from 27 March 2006 •WRA amended in December 2006
• Principally the Workplace Relations Regulations 2006	•WorkChoices regulations commenced operation on 27 March 2006, but have since been amended
• Independent Contractors Act 2006	•1 November 2005 changes significant •June 2006 reissue took into account changes brought about by the WorkChoices legislation •Further revision in November 2006 to ensure side deals do not contain prohibited content •Industry Guidelines discontinued (announced by the Government on 12 December 2006)
• Workplace Relations Legislation Amendment (Independent Contractors) Act 2006	•Bills received royal assent on 11 December 2006 but not yet commenced

APPENDIX 2[39]

NEW PROTECTION FOR INDEPENDENT CONTRACTORS AND WORKERS

People who work as independent contractors will soon have greater flexibility in how they run their business under new laws which will take affect from next month.

Minister for Employment and Workplace Relations, the Hon Joe Hockey MP, today announced that the Independent Contractors Act 2006 and the Independent Contractors Regulations 2007 will commence on 1 March 2007.