



20 January 2012

Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

**Inquiry into the Building and Construction Industry Improvement Amendment
(Transition to Fair Work) Bill 2011**

Thank you for the opportunity to make a submission on this Bill.

We have written an academic article on the primary Act that this Bill seeks to amend. It is attached, as published as 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21 *Australian Journal of Labour Law* 244. We reached the conclusion in this article that the coercive investigatory powers given to the Australian Building and Construction Commission by the primary Act are unwarranted.

We welcome the safeguards in the amending Bill. These safeguards are of a kind recommended in our article and by the Wilcox Inquiry into the Transition of the Australian Building and Constitution Commission to a Specialist Division of Fair Work Australia.

In our article (at pages 264-5), we commented on the absence of an approval system for the use of the coercive powers. This Bill proposes that the Director must apply to a nominated AAT presidential member for the issue of an examination notice. The matters of which the member must be satisfied before issuing an examination notice are clearly set out in the Bill. These include: other methods of obtaining the information must be have been attempted and been unsuccessful or be inappropriate; the information would be likely to be of assistance in the investigation; and, in all the circumstances, it would be appropriate to issue the examination notice. Conditioning

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use of coercive powers upon the approval of a presidential member of the AAT will remove both the possibility and the perception that the powers may be used for inappropriate, even ideological, purposes. Other safeguards that we draw particular attention to are the:

- imposition of a three year sunset clause;
- video-taping of examinations;
- granting of an expanded role to the Commonwealth Ombudsman; and,
- exclusion of information that is the subject of legal professional privilege or public interest immunity from the requirement that a person give information, produce a document or answer questions at an examination.

These safeguards mean that the Bill will bring about much needed improvements to the primary Act.

We continue, however, to have concerns about the scope of the coercive powers. These powers continue to be premised on whether a person 'has information or documents relevant to an investigation' or 'is capable of giving evidence that is relevant to an investigation'. The breadth of these requirements means that any person, including a child or a mere bystander, may be required to give information (including personal information, such as their political views) if it is relevant to an investigation of minor breaches of industrial law and industrial instruments. These issues are discussed at pages 256-8 and 261-2 of our article. There is also a continuing problem with the failure to recognise the privilege from self-incrimination in the Bill. The importance of the privilege is discussed at pages 258-61 of our article. We believe that coercive powers of this nature are not justified in the industrial setting. The preferable course would be to remove the powers entirely, and to have a strong and effective enforcement and investigation regime that applies across all industries.

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