24 July 2009

Mr John Carter
Committee Secretary
Senate Education, Employment and Workplace Relations Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By e-mail to: eewr.sen@aph.gov.au.

Dear Mr Carter

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

The Law Institute of Victoria (LIV) welcomes the opportunity to provide a submission to the inquiry into the Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009. Thank you for providing an extension of time in which to make our submission.

The LIV strongly supports the objects of the Bill and the introduction of safeguards, recommended by the Wilcox Review, in relation to the use of the power to compulsorily obtain information or documents. However, the LIV does have some concerns about provisions of the Bill. Some of these concerns include the new "switch off powers" and the excessively harsh penalties for those summoned persons who choose to remain silent during a compulsory investigation interview.

The LIV provides the following comments on the content and effect of the Bill:

1. **Section 51**
   The LIV generally welcomes the new safeguards provided for under section 51 of the Bill, particularly at subsection (3), which allows a person to be represented at the examination by a lawyer of the person's choice.

2. **Section 58**
   The LIV supports the introduction of section 58, which provides for the payment of reasonable expenses incurred by a witness to attend an examination. Although the LIV acknowledges that the Explanatory Memorandum to the Bill defines reasonable expenses to include travel, legal and accommodation expenses, the LIV is concerned that there is no reference to reimbursement for the loss of wages or ordinary income of the witness, taking into account the specific circumstances of the individual.

   The LIV strongly supports the recommendation of the Hon. Murray Wilcox QC in his report, which states:
   …Moreover, the party issuing the subpoena is responsible, at least in the first instance, for the person's other reasonable expenses, including loss of wages. It is unconscionable to put people in the position of being required, under threat of imprisonment, to attend a hearing as a witness, at their own expense…I recommend it be made clear in the legislation that the BCD is to bear the reasonable expenses incurred by summoned persons...[i]

   The LIV submits that this recommendation is adopted and "reasonable expenses" be clarified in the Bill. This could be achieved through amending section 58(1) to include a note stating that reasonable expenses includes (but is not limited to) travel, legal and accommodation expenses as well as loss of wages or ordinary income.

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3. Section 52(1)

The LIV draws attention to the Explanatory Memorandum outline which states that the Bill introduces reforms to *remove* the existing building industry specific laws that provide, among other things, *higher penalties for building industry participants for breaches of industrial law* [emphasis added].[ii]

These reforms have been implemented in the Bill which now provides that to the extent that the *Fair Work Act* 2009 (FWA) governs the conduct of employers, employees and industrial associations as well as penalties for contraventions, the FWA also applies unchanged to building industry participants.

The LIV is concerned that this approach towards balancing the regulation of the building industry has not been extended to persons summoned as a witness during an examination. Under the provisions of the Bill, construction workers and officials continue to be subjected to extraordinary coercive powers, powers suggested not to exist in any other industrial setting worldwide.[iii] Upon failure to comply with an examination notice, workers and officials face a maximum penalty of six (6) months imprisonment, and/or a fine. The LIV views the penalty of imprisonment in section 52(1) to be disproportionately harsh punishment for refusing to answer questions, produce information, to take an oath or make an affirmation in the course of an investigation.

There are supporters of coercive powers who cite the powers exercised by other statutory bodies such as ACCC, ATO and ASIO, as a justification for their ongoing use in the construction industry, but as the Hon. Murray Wilcox QC in his report states:
All the other Australian statutory authorities holding powers of coercive interrogation are concerned with matters of major public importance: national security, the management of the national economy and national tax system, the suspected corrupt behaviour of public officials and the suspected misconduct of police officers. Generally speaking, although not always, the suspected behaviour would amount to serious criminality. In contrast, a notice may be given under section 52 of the BCII Act in order to obtain information relevant to an investigation concerning conduct that may not be, and usually is not, a criminal offence; but merely a contravention of an industrial statute or industrial instrument.[iv]

Moreover, as Wilcox describes at paragraph 5.89 of his report, a court, not a statutory authority, performs the issuing of a subpoena and a magistrate or judge oversees the giving of evidence by the person subject to subpoena. The Bill does not afford these safeguards to construction workers and union officials upon the issuing of an examination notice, and thus some caution should be taken when imposing penalties for non-compliance.

The LIV supports the view expressed by Wilcox, and recommends that the penalty of six months imprisonment under section 52(1) be amended to reflect the nature of the offence. The LIV submits that a more proportional and appropriate penalty would be a significantly increased monetary fine.

4. Section 47(1)(d)

In issuing an examination notice, the nominated Administrative Appeals Tribunal presidential member needs to be satisfied "that *any other method* of obtaining information, documents or evidence: (i) has been *attempted* and has been unsuccessful; or (ii) is not appropriate" [Emphasis added]. The LIV submits that the wording of section 47(1)(d) needs to be clarified and that "genuine and reasonable methods" are employed to obtain the information to ensure that the use of coercive powers is a last resort.

5. Section 59B Identity cards

The LIV recommends that section 59B(4) of the Bill should be amended to specifically require a Fair Work Building Industry Inspector (Inspector) to wear a standard uniform at all times and to present their identity cards when entering premises to conduct investigations, and to anyone they speak to on the premises regarding the investigation. This protects workers and officials from self-incrimination and allows for basic procedural fairness.

The wording of item 182 of the Explanatory Memorandum is unclear. While it states that "an Inspector will be required to show his or her identity card in *particular circumstances*", it goes on to state that the Inspectors will have the same powers and functions as Fair Work Inspectors under the FWA.
Subsection 708(3) of the FWA states that "the [Fair Work] inspector must, either before or as soon as practicable after entering premises, show his or her identity card to the occupier, or another person who apparently represents the occupier, if the occupier or other person is present at the premises."

6. Section 50(2)

The LIV submits that section 50(2) of the Bill, which allows the Director a period of three (3) months to issue an examination notice to the person in relation to whom it is issued, is an unnecessarily long period of time. The length of time would impose an unreasonable burden and uncertainty on workers and officials who may be served with such a notice at any time during the 12 week period. We recommend this time period be reduced to 28 days.

7. Section 39

Section 39 of the Bill provides for the Independent Assessor to make a determination that powers to obtain information do not apply in relation to particular building projects.

Section 39(3) states that the Independent Assessor must not make a determination to exempt a building project unless they are satisfied that it would be appropriate, having regard to the object of the Bill.

The object and purpose of the Bill is stated as:

> *The object of this Act is to provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry by:*
> *(a) Ensuring compliance with workplace relations laws by **all** building industry participants…*[emphasis added]

The LIV submits that the object implies that there are no exemptions or exceptions to the purpose of the Bill and that every building and construction industry project is subject to the provisions of the Bill. The LIV further submits that to exempt particular building projects from the powers contained in the Bill would be inconsistent with the object and purpose of the Bill.

The LIV fully supports the broad application of the lawful standards contained in the Bill to the entire industry, regardless of prior history or record. The LIV submits that allowing the examination powers to be "switched off" for certain building projects appears to fly in the face of the purpose of the Bill, and may in fact provide those projects and related persons with immunity from the reach of investigation powers before the project has even begun.

The LIV questions the purpose of the "switch off powers" as it appears they would likely only apply to sites where there is a "demonstrated record of compliance with workplace relations laws, including court or tribunal orders, in connection with the building project".[v] In those cases, where there is a very low likelihood of the Fair Work Building Industry Inspectorate's compulsory examination powers being invoked, the purpose of specifically exempting those sites from the reach of the Bill is unclear. The LIV suggests that it would remove the motivation to comply with relevant laws.

Under sections 44, 45 and 47 of the Bill, an application for a compulsory examination notice must be made to and approved by a nominated AAT presidential member. The LIV submits that this, as well as other safeguards recommended by the Wilcox Review, is more appropriate and adequate protections to prevent abuses of power.

The LIV recommends that section 39 of the Bill and all other provisions relating to the Independent Assessor are deleted.

Please contact Francesca Harrison, Lawyer, Workplace Relations Section, fharrison@liv.asn.au in relation to this matter.

Yours Sincerely

Danny Barlow
President
Law Institute of Victoria

[i] Wilcox, M. "Transition to Fair Work Australia for the Building and Construction Industry Report", March 2009, (Wilcox Review) p75 at para 6.76

[ii] Explanatory Memorandum to the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill* 2009 (Explanatory Memorandum), p1

[iii] Wilcox Review p 36 at para 5.21

[iv] Wilcox Review, p57 at paras 5.88-5.89

[v] Explanatory Memorandum item 92, p16