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Committee Secretary
Senate Education, Employment and Workplace Relations Committee
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Dear Mr Carter

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

The Housing Industry Association (HIA) welcomes the opportunity to provide a submission on the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* ("the Bill").

HIA is the largest building industry organisation in Australia with over 42,000 members. HIA's diverse range of members include employers in the residential and commercial construction sector, trade contractors, suppliers and manufacturers.

BACKGROUND

The Bill states that the main object of the retitled *Fair Work (Building Industry) Act 2009* (the Act) is to:-

> "provide a balanced framework for cooperative, productive and harmonious workplace relations in the building industry".

HIA supports this general statement of principle along with many of the measures implemented under the Bill, including the establishment of the Office of the Fair Work Building Industry Inspectorate (the Specialist Inspectorate). Importantly this will enable the construction industry to continue to have a specialist enforcement agency once the ABCC is abolished.

However HIA have concerns with several aspects of the Bill, including:

1. **The definition of "building work" which seeks to exclude off-site pre-fabricated work and continues to exclude residential construction from coverage under the Act;**
2. **The watering down of the new Specialist Inspectorate's coercive powers;**
3. **the inclusion of "switch off" provisions; and**
4. **the removal of construction industry specific provisions and penalties.**

Why does the construction industry still need a specific body?

In recent years, the building industry has experienced comparative improvements in the behaviour of industry participants and a decrease in the type of lawlessness and anarchy that were identified by the Cole Royal Commission. The Building and Construction Industry Improvement Amendment Act 2005 (the "current Act"), the establishment of the ABCC and the ongoing operation of the National Code and Guidelines[1] have all contributed to these improvements.

However reform does not happen overnight and the industry still has some way to go in engendering the long term cultural change that would enable the objects of the Act to be achieved.

For instance, in the short period since the commencement of the *Fair Work Act 2009* ("FW Act") on 1 July 2009, HIA has already received a marked increase in the number of calls for advice and assistance from members in relation to union right of entry incursions. In these cases, HIA members have variously reported that unions:

- have sought to enter sites without giving proper notice and refusing to display appropriate entry permits required under the FW Act;
- asserted occupation health and safety as a ground to obtain employment records;
- warned builders off engaging certain independents contractors; and
- have harassed onsite staff.

Although rules relating to the "misuse" of right of entry are much the same in the FW Act as those provided for under the *Workplace Relations Act 1996*, it appears that some union officials are trying to test the boundaries of the new laws; unfortunately much of the underlying culture remains.

To enable a long term cultural change, HIA submits the bulk of the current institutional framework embodied in the ABCC needs to continue without some of the significant "watering down" of powers contemplated in the Bill.

HIA'S RESPONSE TO THE SPECIFIC PROVISIONS OF THE BILL

HIA's comments and suggestions on some specific provisions of the Bill follow:

1. The definition of building work

Item 48 of the Bill purports to amend the current definition of "building work" under the Act to exclude off-site prefabrication.

HIA submits that offsite work should continue to be monitored. Many contractors involved in the offsite prefabrication of certain building components such as cabinets and window frames will also be involved in the on-site installation of those components.

A likely impact of the amendments will be that it is easier to negatively influence projects from the supply end. Delays in the supply and delivery of manufactured components can have much of an impact on the cost and time it takes to complete a project as onsite delays can.

[1] Reference is made to the National Code of Practice for the Construction Industry and the versions of the Implementation Guidelines revised in 2003 and 2006.

HIA is similarly disappointed that the Bill will continue to exclude residential construction from the coverage of protection.

The entire industry requires coverage and protection.

To a large extent, residential building has traditionally been insulated from many of the industrial issues confronting civil and commercial construction. This is in part due to the engagement of specialist contractors by builders rather than employees and the relatively small scale of construction for single, detached dwellings.

However, many HIA members and contractors do not operate exclusively in the residential sector. The recent Federal Government's stimulus measures have opened opportunities for HIA members in the public works and commercial sectors.

Additionally, in some of the states and regions where the construction unions maintain a militant and aggressive presence, the residential sector offers a "soft" target. The Specialist Inspectorate should be able to deal with right of entry infringements on housing sites.

2. The Powers of the Specialist Inspectorate

HIA submits that the coercive powers currently available to the ABCC under the current Act must be retained by the Specialist Inspectorate for it to remain relevant as the "cop on the beat".

HIA have concerns that the number of attempts in the Bill to provide safeguards on the exercise of coercive powers in effect water-down powers that enable the Specialist Inspectorate to function effectively and send out the message that unlawful behaviour in the building industry will not be tolerated.

The issue of examination of notices

We note that the Bill include a number of safeguards on the Inspectorate Director's ("Director") use of coercive powers to require witnesses to appear for questioning or produce documents. The major safeguard is the requirement that the Director apply in writing to a presidential member of the Administrative Appeals Tribunal (AAT) for the issue of an examination notice before the coercive powers can be exercised.

Section 47 provides that in order to issue the examination notice, the presidential member must be satisfied, amongst other things, that:

- there are reasonable grounds to believe that a particular person has information or documents relevant to an investigation that has commenced;
- obtaining that information or those documents is likely to be important to the progress of the investigation;
- having regard to the nature and likely seriousness of the suspected contravention, it is reasonable to require the person to attend to provide that information or those document; and
- that other methods of obtaining the documents or information have been attempted and have either been unsuccessful or are inappropriate.

Under section 46, the Director is required to swear an affidavit in support of any application for an examination notice.

Further matters may be prescribed in the regulations. We note that the Government's policy is for the regulations to prescribe that the presidential member also considers criteria relating to the nature and seriousness of the suspected contravention and the likely impact upon the person subject to the notice.

HIA acknowledges that these safeguards are intended to prevent the Director inappropriately using the powers for minor matters and where other avenues for progressing the investigation are available. However the contemplated process is cumbersome, with risks of delay and an unnecessarily high threshold.

Even though the Director may make the affidavit on "knowledge and belief", the requirement that the Director provide a sworn statement is excessive. There is no similar threshold in relation to issue of a subpoena in civil litigation or the issue of a warrant by a police officer.

Additionally, it is questionable how the Director will be able to swear to the "likely impact upon the person" to be questioned? This would require an enquiry into the individual person's state of mind, something that is not possible even on "knowledge and belief" only.

The conduct of examinations

We note that the Bill provides that after the presidential members has issued the examination notice, there are further increased protections in circumstances where coercive powers are to be used, including:

- *The person interviewed may, if he or she so chooses, be represented at the examination by a lawyer of the person's choice;*

  HIA supports the right for witnesses to retain legal representation of their own choosing.

- *Persons summonsed for examination will be reimbursed for their reasonable expenses, including all reasonable legal expenses;*

  HIA does not oppose that witnesses be reimbursed their reasonable costs and expenses in complying with an examination notice.

  However it must also be kept in mind that if a person is a witness to an industrial incident and have subsequently refused to assist in the Director's investigations such that the Director has been required to go through the formal process of obtaining an examination notice and proceeding to a formal examination, then significant public expenses may already have been incurred in this process.

  In respect of reimbursement of legal expense, there needs to be an appropriate check to prevent potential abuse, such as the unnecessary engagement of senior counsel. Lawyers should not have their costs reimbursed on an indemnity basis. HIA recommends that regulations include a scale of costs and charges for this purpose.

Also, any subsequent right for witnesses to have their legal expenses reimbursed or paid for should be subject to the witnesses having properly responded to the examination notice. Witnesses who have unreasonably refused to cooperate with the Specialist Inspectorate or have breached their obligations under section 52 should be responsible for their own costs.

- *A person will not be required to give information, produce a document or answer questions if to do so would disclose information that is the subject of legal professional privilege or would be protected by public interest immunity;*

  According to Cross on Evidence, the essential feature of the rule of public interest immunity is that:

  > "evidence will be excluded where it is harmful to State interest, not where it may be merely inconvenient or embarrassing"[2].

  Having regard to its specific and difficult nature, HIA consider it rare that a person's refusal to give evidence on the grounds of public interest immunity will be correctly made.

  HIA supports the continued abrogation of the right to refuse to answer a Specialist Inspectorate's question on the grounds of self incrimination

- *The Director must not require the person to undertake not to disclose information or answers given at the examination or not to discuss matters relating to the examination with any other person*

  Whilst HIA supports the right of a person to discuss their evidence with their lawyer, there is now a risk that witnesses will collaborate to "get their story straight".

Penalties

HIA supports the maintenance of the current penalty of six months' imprisonment for persons who fail to give the required information at an examination, produce the required documents or attend to answer questions.

3. "Switch off" powers of the Independent Assessor

HIA oppose the "switch off" provisions that enable the Independent Assessor - Special Building Industry Powers to issue determinations that exempt particular building projects from investigations by the Director.

If a project is proceeding harmoniously and without industrial relations incident, then project participants should have no reason to fear the Section 52 examination powers. Simply put, those powers will not be required.

The only purpose or reason by which parties would seek to "switch off" the coercive examination powers for a particular project would be so that they could behave onsite as they like without fear

[2] ***Cross on Evidence***, p. 27035

that they may be subsequently examined on their behaviour. Parties that comply with industrial relations laws do not need to be rewarded by being excused from having to answer questions on future projects. HIA does not expect an industry participant, except the unions, to make applications under these provisions.

HIA further submit the "switch off" provisions are inappropriate for several other reasons:

- the requirement that a Director would be required to make an application to the Independent Assessor to switch their statutory powers back on represents an undue burden. The fact that the Director already is required to apply to a presidential member of the AAT for authorisation for use of the coercive powers is a significant enough check;
- the coercive powers will sunset after 5 years, with a review to take place before the end of that period on activities in the industry. If in 5 years time the industry has improved to the extent that these powers are no longer required, then that is an appropriate time to consider whether or not the powers should be exercised; not in the hybrid manner contemplated by the Bill;
- the laws will contribute to uncertainty during the construction process given that they can be switched back on as well.

We make the following specific comments and observations in relation to these provisions:

Application to existing building projects

Section 38 provides that the switch off provisions apply to building projects if the building work begins after the commencement of the provisions (1 February 2010). We note that the Government's policy in relation to the regulations for this provision proposes an application could be made for an existing building project provided no on-site "building work" has taken place.

HIA submits that if the power to make a determination is available it should only be available for projects tendered for or for which a principal construction contract has been entered into after February 2010. Determinations should only be available for specific sites rather than building projects as a whole. Such an application should be made before the commencement of the project.

Process for considering determinations

The process for issuing an examination notice under sections 45 and 47 contains an extensive list of prescriptive criteria that must be satisfied by the Director. On the other hand, the Independent Assessor has an almost arbitrary discretion in making a determination.

Under section 39(3) the Independent Assessor must have regard to broad and sweeping notions such as the object of the Act and "public interest" considerations in making a determination.

HIA notes that although the Government's policy intention is to refer to a narrower range of relevant factors in the Regulations, such as a record of compliance with workplace relations laws, we are concerned that both the present provisions in the Bill and criterion proposed to be in the Regulations lacks sufficient detail. The Bill should be amended to reflect a zero tolerance stance on industrial misbehaviour.

The ambiguities in section 39 are compounded by section 41. Under this section, the Independent Assessor must give the Director a copy of an application for a determination and then a reasonable

opportunity to make submissions. Apart from this requirement, there is otherwise a very broad discretion open to the Independent Assessor in the process used and the investigations undertaken to make a determination. Further there is no time limit.

Additionally, under section 41(5) whilst the Independent Assessor must make a decision on the determination, there is no express requirement to give reasons in support of that decision. Given the high level of discretion afforded to the Independent Assessor, HIA submits that for the process to maintain consistency, legitimacy and accountability, written reasons must support any determination made.

If the switch off provisions are enacted, then determinations must be made under a strict set of rigid criteria by an accountable member of the judiciary, not a politically appointed bureaucrat.

Time for making an application

Under section 40(4) an application can be made before, during and after a building project. This could arguably contribute to uncertainty before the commencement of a project, especially during project funding phase.

4. Removal of construction industry – specific prohibitions and penalties

The strong penalties under the current Act serve as a strong incentive to adhere to the industrial relations laws.

The enhancement of bargaining rights and the removal of many of the restrictions on *prohibited content* under the *FW Act* exposes the construction industry to a renewal of pattern bargaining and industrial action over disputed terms, such as those that seek to limit the engagement of independent contractors or impose excessive over-award payments. These have been historical issues in the construction industry.

HIA is concerned that by removing the construction industry-specific prohibitions on unlawful industrial action, coercion and discrimination such behaviour will return.

Yours sincerely

HOUSING INDUSTRY ASSOCIATION LTD

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