Senate Education and Employment Committee Inquiry into the Building and Construction Industry (Improving Productivity) Bill 2013, and the Fair Work (Registered Organisations) Amendment Bill 2013
Melbourne

4 October 2016

HIA's Answers to Questions taken on notice

Senator KAKOSCHKE-MOORE: In your view, where would be the most appropriate point for compliance to be checked? At the point of entry into Australia? Or distribution?

Mr Humphrey: For the benefit of the committee, I am not a subject matter expert on these particular matters. I do not think I could say there is a one-size-fits-all where you could say that every product coming into Australia could be checked going through a Customs process. I do not think that is manageable. But, again, I probably will not speak any more on matters that we do have other experts within HIA who are more fully briefed on.

Senator KAKOSCHKE-MOORE: If you could take that on notice—if there are other members within your organisation who could help contribute to that—that would be great.

HIA's Answer

There are a number of options in relation to the management of building products to ensure they are fit for purpose regardless of their place of manufacture. However there is unlikely to be any single solution in relation to the management of imported products that will provide 100% certainty.

Much more needs to be done to place obligations on the supplier of defective and non-conforming building products and to more appropriately reduce the risk to the purchaser, in particular, builders and trade contractors, and the consumer.

HIA has identified a number of areas (see for instance HIA's submission to the 2015 Senate Economics Reference Committee Inquiry into Non-Conforming Building Products) where the regulatory framework for the building product supply chain could be improved.

HIA considers that there needs to be an obligation on companies supplying building products to ensure they are fit for purpose at the point of sale. There is also an opportunity to consider whether certain products should be specifically listed for inspection at the point of entry to the country or be required to provide more information at their compliance with Australian building standards.

The option to specify product information in government procurement policies is a live consideration at the present time. However it is critical to ensure this does not limit the rightful entry of products manufactured anywhere across the globe that do meet Australian requirements. it is for this reason that the point of sale is more likely to be an effective point in the supply chance to control manufacturers and suppliers, at the same time as improving the ability of the customer to demand and purchase conforming products.

Senator CAMERON: Why should the code prevent unlimited ordinary hours being worked in any day on a construction site? Why should the code deny an employee's ability to have a day off on Christmas Day, Easter Sunday and public holidays? Why should the code restrict the encouragement of apprentices on a building and construction site? Why should the code discourage discrimination against mature workers? Why should the code include agreed stable and secure shift arrangements or rosters being outlawed? Why should the code provide that construction workers' conditions and entitlements cannot be eroded? Why should the code provide that equality and fairness on-site for construction workers is illegal? Why should the code impact on the right of construction workers to have a safe workplace?

You cannot talk about this bill without the code, so I am asking specifically that you come back on notice on those specific issues.

You cannot talk about this bill without the code, so I am asking specifically that you come back on notice on those specific issues. Can both the HIA and the MBA have a look and provide details on the amount of unprotected industrial action there has been in the industry. In terms of this 30 per cent IR premium, are you saying that there should be a 30 per cent reduction in construction workers' wages and conditions?

HIA's Answer

From the outset, HIA notes that the current and proposed 2014 Draft Code only applies to those entities who choose to tender for Commonwealth funded building work.

The majority of HIA's membership do not work on nor tender for Commonwealth government projects which would be covered by the Code.

However in the time available to provide a response to the Senator's question, HIA offers these general comments.

HIA understand that some of these examples draw on certain claims made by the unions, including the Electrical Trades Union (ETU) and CFMEU with respect to the impact of the Code.

In HIA's submissions there is nothing in the 2014 Draft Code that directly does any of the things claimed by the unions.

The Draft Code requires compliance with the *Fair Work Act 2009,* applicable industrial awards and/or enterprise agreements, and work health and safety laws, including:

- all prohibitions on strike pay laws;
- all entry requirements to exercise a statutory right of entry (RoE); and
- all procedures for the election of health and safety representatives.

The purpose of the Draft Code, is set out in section 5, to:

"promote an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry".

Necessarily, unregistered or informal side agreements do not comply with the Draft Code.

Whilst HIA's response to the Senator's question is intended to be general, several of the Senator's questions appear to relate to rostering arrangements or days when work is performed on site.

A core aspect of the Draft Code, is Paragraph 11 which provides that code covered entities must not be covered by an enterprise agreement that includes clauses that:

"impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity".

A key issue in managing any construction project is managing work stoppages and when work is to be performed. Whenever work stops, the principal contractor already has locked-in site cost overheads which continue to accrue. This is a significant cost factor in assessing the ability to affordably deliver community and public infrastructure.

It is HIA's understanding that certain template pattern enterprise agreement clauses, such as those that inflexibly lock in the union's predetermined rostered days off (RDO) calendar and impose mandatory construction site shutdowns, irrespective of the demands or needs of the project concerned, or the views or wishes of the employer or individual employees covered by the agreement, might be susceptible for review under the Code.

Subparagraph 11(3)9), for instances, bans clauses that limit the ability of an employer to determine with its employees when and where work can be performed to meet operational requirements or limit an employer's ability to determine by whom such work is to be performed.

However, as part of the Code compliance process, HIA understands each enterprise agreement is assessed by the Department/ relevant regulator against the Code on its merits.

Further as it relates to public holidays, it should be noted that the National Employment Standards (NES) gives access to an entitlement for employers to request and employees to refuse to come to work on public holidays (both with a requirement of reasonableness). This an entitlement and protection available to all workers covered by the *Fair Work Act* and is not something capable of being eroded by an enterprise agreement, the proposed Builder Code or otherwise.

In term of the question directed to industrial action, in HIA's submission the ABS data clearly indicates that the introduction of the ABCC in late 2005 helped to reduce the rate of industrial disputes in the construction industry.

Before the ABCC, the number of working days lost per 1000 employees in construction was five times as much as for all industries (56.1 versus 10.4 days).

During the ABCC's operation, there was a large reduction (9.6 days versus 4.2 days).

HIA notes that a criticism of the ABS data is that it does not disaggregate protected and unlawful unprotected industrial action.

In HIAs view, this criticism is somewhat a "strawman" argument in that it attempts to disprove the prevalence of unlawful industry activity in the construction industry.

Firstly, even allowing for cyclical spikes and an element of lawful activity related to enterprise bargaining negotiations, the construction industry is arguably overrepresented in the overall data set and has been for many years.

Working days lost in the construction industry due to industrial disputes has been consistently higher than the average across all industries since 2012.

As recently as the ABS figures for Industrial Dispute for the June 2016 quarter, the construction industry had the highest number of working days lost by industry (16,200), accounting for 66% of total working days lost.

The ongoing activities of the FWBC and the high number of Federal Court proceedings relating to unprotected industrial action is well reported and demonstrates such unlawful activity in the industry is widespread.

The 2014-15 Annual Report of the FWBC cites that during that period, FWBC investigated 142 instances of unlawful industrial action, this is up from 112 the preceding year (https://www.fwbc.gov.au/about/accountability-and-reporting/fwbc-annual-report-2014-15/fwbc-investigations).

Some recent notable cases where union officials were held to be conducting unprotected industrial action include:

Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union & Ors [2016] FCCA 1692 (8 July 2016)

Director of the Fair Work Building Industry Inspectorate v Adams [2015] FCA 828 (12 August 2015)

Director, Fair Work Building Industry Inspectorate v Cradden [2015] FCA 614 (12 June 2015)

In addition, current ABS statistics on Industrial Disputes are likely to understate the amount of unlawful industrial activity occurring as currently work stoppages of less than ten working days lost are excluded from collection, as are go-slows and overtime bans.

Senator LAMBIE: In your time, have either of you ever come across any organised crime that was involved in the building and construction industry?

HIA's Answer

No, not personally.