SUBMISSION BY THE

Housing Industry Association

To the

Senate Education, Employment and Workplace Relations Legislation Committee

on the

Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011

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1 EXECUTIVE SUMMARY

1.1 The 2002 Cole Royal Commission detailed systemic lawlessness in the Australian building industry including illegal strikes, pattern bargaining, right of entry infringements and the coercion of non-unionised subcontractors.

1.2 One of the recommendations flowing from the Cole Royal Commission was the establishment of a specialist and permanent regulatory body, the Australian Building and Construction Commission (the ABCC) to check industrially undesirable conduct and ensure that the building industry did not continue to depart from the standards of commercial and industry conduct exhibited in the rest of the Australian economy.

1.3 HIA supports the ABCC (and its predecessor the Building Industry Taskforce) - and submits that the ABCC has to date been doing a sound and effective job of law enforcement, clamping down on unions and others for illegal industrial behaviour and right of entry breaches.

~~1.5~~1.4 However its work is far from finished. Aggressive and unlawful industrial action persists as an area of concern for the industry. HIA notes that, in the 2010-2011 financial year, ten years after the Cole Royal Commission, and in spite of the ABCC, the Victorian branch of the CFMEU were fined $2.5 million by the Federal Court for breaches of the Act. The past and current union leadership in this industry, in relation to industrial action at least, has never made a genuine wholehearted commitment to upholding the law.

~~1.6~~1.5 As the building industry still needs an effective deterrent and enforcer of the rule of law, HIA does not support the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011* (the Bill). Rather, the legislative and institutional framework established to give effect to the findings of the Cole Royal Commission must be retained in its current form.

~~1.7~~1.6 In spite of bold claims by the Government that *"industrial lawlessness and thuggery will not tolerated and we are committed to maintaining a strong regulator of workplace relations for the industry"*[1], HIA does not believe that the proposed new legislation will continue to deliver the strong, independent and robust enforcement body that the building industry requires.

~~1.8~~1.7 The Bill in its current form is flawed in several key respects:

- it abolishes the ABCC, demoting the status of a specialist statutory agency to that of an inspectorate division of the Fair Work Ombudsman that is inferior to the ABCC in almost every respect;

- It cuts the maximum penalties for illegal misbehaviour from $110,000 to $33,000 thereby reducing the disincentives to engage in such behaviour, in spite of the fact that current penalties are apparently insufficient to deter union misconduct;

[1] **"Legislation to abolish the ABCC introduced to Parliament" (Press Release).** Senator the Honourable Chris Evans. 3 November 2011.

- although the compulsory examination power is retained, the procedural requirements for its exercise are overly bureaucratic, costly, prescriptive and impractical;

- it contains provisions that enable unions and other parties to apply to "switch off" the powers of the inspectorate for sites where the scrutiny of the regulator is feared, powers not found in any other Commonwealth regulatory legislation.

PART A – HIA'S GENERAL COMMENTS

2 Introductory comments

2.1 HIA is the voice of the residential building sector of the Australian economy, and represents some 40,000 members throughout Australia. The residential building industry includes both cottage construction and multi-unit apartment buildings. HIA's membership includes builders, trade contractors, design professionals, kitchen and bathroom specialists, manufacturers and suppliers.

2.2 The building industry plays a key role in the Australian economy. In November 2009, there were 980,300 persons employed in the construction industry in Australia, representing 9 per cent of the entire Australian labour force. HIA estimates that residential building alone employs around 430,000 persons based on ABS data.

2.3 The residential building industry, in particular, is one of Australia's most dynamic, innovative and highly efficient service industries and is also a key driver of the Australian economy.

2.4 In 2009/10, Australia's housing (including multi-unit and renovation) industries directly contributed approximately $72.4 billion to Australia's Economy. While this strong result accounted for 5.6 per cent of Australia's Gross Domestic Product, when combined with those primary and secondary businesses that indirectly supply to the construction industry, the overall effect is far stronger in terms of both employment and output. This flow-on impact is referred to as the multiplier effect.

2.5 In other words, over and above the direct contribution of construction activity to the economy, the construction industry has 'flow-on' impacts on the activities of other industries.

2.6 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.

2.7 Although the current definition of "building work" in the *Building Construction Industry Improvement Act 2005* (BCII Act) only applies to the construction of 5 single dwelling houses or more, many HIA members work across both the commercial, public works and housing sectors. These include builders and developers of multi-unit apartments, mixed-use buildings and public housing sites. Additionally many HIA trade contractors work for both commercial and residential builders.

3 Why the construction industry still needs a specialist regulator body in 2012 and beyond?

3.1 In 2002 the Cole Royal Commission, found an entrenched level of lawlessness in in the building and construction industry. Example of inappropriate practices and conduct include:

- widespread disregard of, or breach of, the enterprise bargaining provisions of the *Workplace Relations Act 1996*;
- widespread disregard of, or breach of, the freedom of association provisions of the *Workplace Relations Act 1996*;
- widespread departure from proper standards of occupational health and safety;
- widespread requirement by head contractors for sub-contractors to have union-endorsed enterprise bargaining agreements before being permitted to commence work on major projects in State capital central business districts;
- widespread requirement for employees of sub-contractors to become members of unions in association with their employer obtaining a union-endorsed enterprise bargaining agreement;
- widespread disregard of the terms of enterprise bargaining agreements once entered into;
- widespread application of, and surrender to, inappropriate industrial pressure;
- widespread use of occupational health and safety as an industrial tool;
- widespread making of, and receipt of, inappropriate payments; unlawful strikes, and threats of unlawful strikes; threatening and intimidatory conduct;
- underpayment of employees' entitlements;
- disregard of contractual obligations;
- disregard of federal and State codes of practice in the building and construction industry;
- disregard of the rule of law.[2]

3.2 In HIA's submissions into the equivalent 2009 Bill, we posited:

"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 have all contributed to these improvements."

3.3 Whilst it remains true that the ABCC had succeeded in improving conduct, the culture of lawlessness Cole identified in his Report has only been suppressed. It has not been eradicated. The fact that illegal strikes and other deliberate breaches of the Act still frequently occur, with the leadership, support and encouragement of construction industry union leadership, (for example on the Gold Coast hospital site in 2011), is clear proof that law

[2] Commonwealth, Royal Commission into the Building and Construction Industry, ***Final Report*** (2003) Vol 3,4-5.

enforcement remains an overriding industry priority. In these circumstances the construction industry cannot afford to lose its dedicated 'industry policeman'.

3.4 There are many members of HIA who for fear of reprisal, losing future work and "not wanting to rock the boat" do not lodge formal complaints against unions and larger commercial contractors that require that they sign their employees up to site agreements or union enterprise bargaining agreements. Over the past 12 months, there has particularly been an increase in illegal targeting by unions of independent contracting businesses and those who the engage them.

3.5 Additionally, with an industry culture already predisposed to illegal onsite militancy, the enhancement of bargaining rights under the *Fair Work Act* and the removal of many of the restrictions on prohibited content in enterprise agreements has left many in the industry once again exposed to pattern bargaining and industrial action over disputed terms, particularly those that seek to expand rights of entry or the engagement of contractors.

3.6 The consequences of illegal industrial conduct in the commercial building sector - such as illegal pattern bargaining or intimidation of independent contractors - flow on to and impact on all aspects of industry, including housing sites, and it is often the smaller non-unionised subcontracting businesses that bear the risk of illegal activity.

PART B HIA'S RESPONSE TO THE SPECIFIC PROVISIONS OF THE BILL

4 The objects of the Bill

4.1 Item 2 of the Bill seeks to repeal the existing objects of the BCII Act and replace them with new objects.

4.2 The BCII Act currently provides that its main object is to provide 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 participants and for the benefit of the Australian economy as a whole.

4.3 Section 3(2) provides that, amongst other things, these objects are to be achieved by promoting respect for the rule of law and ensuring respect for the rights of building industry participants.

4.4 HIA questions the motivation and necessity, apart from political symbolism, in replacing such a perfectly sensible and sound statement of regulatory objectives.

4.5 In fact much of the replacement text is inferior to this. For example, "safeguards on the use of enforcement and investigative powers" as one of the objects of new Act appears to be inappropriate.

5 The definition of building work – Sub-paragraph 5(1)(d)(iv)

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

5.2 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.

5.3 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 as much of an impact on the cost and time it takes to complete a project as onsite delays can.

6 The Powers of the Specialist Inspectorate

6.1 HIA supports the retention of coercive powers and believes that they are an important regulatory and administrative tool available to the Inspectorate as a law enforcement agency.

6.2 HIA notes that the Bill includes a number of "safeguards" on the exercise of coercive powers. HIA supports the provision of appropriate checks and balances on arbitrary administrative action, particularly when it involves restriction on individual rights. However HIA believes that undue attention has focused on the section 52 powers held by the ABC Commissioner. The section 52 powers are broadly similar to the investigatory powers held by other Australian law enforcement agencies, including the Australian Taxation Office, Australian Competition and Consumer Commission and the Australian Securities and Investments Commission. Section 155 of the Commonwealth Government's recently passed Workplace Health and Safety Bill 2011 also gives OHS regulators extensive powers to provide information, produce documents and appear before an inspector to give evidence. Yet these agencies do not suffer the criticism or scrutiny experienced by the ABCC.

6.3 HIA's concern with the Bill is that, on balance, it effectively waters-down powers that enable the Specialist Inspectorate to function effectively, and sends out the message that unlawful behaviour in the building industry will now be tolerated to a greater extent than in the past. HIA considers that the only possible result of any weakening of enforcement powers, in an industry with such a deplorable record of lawless behaviour, is increased lawlessness and harm to the public interest.

The issue of examination of notices

6.4 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.

6.5 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.

6.6 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.

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

6.8 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.

6.9 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.

6.10 The requirement to show that other methods to obtain documents have been attempted and have failed before exercising coercive powers is one likely to be productive of practical difficulty. At what stage can it be said that attempts to obtain documents voluntarily have clearly failed? If other methods are 'inappropriate', why must they first be attempted? Must the documents sought be specifically identified and specifically refused? What if some documents are produced but the Director suspects that others have been withheld?

6.11 These are only some of the difficulties that will arise in practice. No other Commonwealth investigative agency is required to give persons under investigation notice in advance that particular documents are to be sought compulsorily if not produced voluntarily. There is a legitimate suspicion that in many instances this would simply lead to the documents in question being destroyed.

6.12 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.

The conduct of examinations

6.13 After a presidential member of the AAT has issued the examination notice, the Bill provides further protections in circumstances where coercive powers are to be used, including:

6.13.2 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.

6.13.3 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.

HIA however does not believe that this should extend to the reimbursement of legal expenses. That would be an extraordinary provision not similarly extended to witnesses in other legal proceedings.

It must also be kept in mind that if a person is a witness to an industrial incident and have subsequently voluntarily 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.

Any subsequent right for witnesses to have their legal expenses reimbursed or paid for should be subject to the witnesses having at all times assisted the Inspectorate and in any event 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.

6.13.4 *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;*

Public interest immunity is a specific protection. 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"[3].

In these circumstances, 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 (section 53(2)), since the answers cannot be used against that person in any subsequent proceedings. Similar provisions exist in other Commonwealth legislation.

6.13.5 *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". It is a longstanding principle of law that witnesses should give their evidence independently and, for example, should not be present in court to hear other witness evidence before they have given their own. HIA considers that this provision should be removed from the Bill.

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

Penalties

6.14 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. Again, this is similar to provisions found in other Commonwealth legislation.

7 "Switch off" powers of the Independent Assessor

7.1 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. It is difficult to understand the logic of "switching off" the law in areas where the law is achieving its objectives – that simply invites in forces intent on undermining those objectives. Certainly, such a process is not thought appropriate for corporations law, consumer law or occupational health and safety law.

7.2 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 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.

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

- to exempt particular building projects from the powers contained in the Bill is inconsistent with the object and purpose of the Bill which requires "compliance with workplace relations laws by all building industry participants";
- 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 cease to operate after 3 years, with a review to take place before the end of that period on activities in the industry. If in 3 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.

Application to existing building projects

7.4 Section 38 provides that the "switch off" provisions apply to building projects if the building work begins after the commencement of the provisions.

7.5 The Government has not released any policy detail in relation to the regulations for this provision but we note that the Government's policy in relation to the regulations for the prior Bill was this that an application could be made for an existing building project provided no on-site "building work" has taken place.

7.6 A decision to "switch-off" investigative powers will increase the commercial risk for a project, and this risk needs to be priced into the tender and contract. If the "switch-off" provision is to remain, a determination should only be available for projects tendered for or for which a principal construction contract has been entered into after the commencement date of the legislation. 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

7.7 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 arbitrary and almost unfettered discretion in making a determination.

7.8 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.

7.9 Such provisions are inadequate.

7.10 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.

7.11 Likewise, interested parties who apply for a Determination are apparently at large as to grounds for their application, so long as they are relevant to the objects of the Act. There is no right of other interested parties (other than the Director) to object or lodge their own submissions, although the Independent Assessor may seek further information.

7.12 Such a process has the potential to be uncertain, complex, lengthy and expensive, both for the industrial parties and the Assessor, without any obvious public benefits flowing from the process.

7.13 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.

7.14 If the switch off provisions are enacted, then determinations must be made under a strict set of known criteria, with the opportunity for public submissions, and review on appeal by an

accountable member of the judiciary. The current appeal provisions (from the Assessor to the Assessor for reconsideration) are patently inadequate.

Time for making an application

7.15 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.

8 Removal of construction industry – specific prohibitions and penalties

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

8.2 Lowering the existing penalty maxima of $110,000 to the $33,000 that exists under the Fair Work Act is a fundamental policy error.

8.3 HIA notes that in 2010-11 alone, the Courts imposed a total of $2.570 million in penalties, of which the legal contravention of coercion accounted for 66 per cent of the total amount imposed.

8.4 The above amount included a record workplace relations penalty of $1.325 million against the CFMEU, AMWU and three union officials for numerous instances of illegal coercion and threats (including violence and property damage) that occurred during the West Gate Bridge dispute. Apparently, existing penalties were insufficient to deter unions from engaging in this type of conduct.

8.5 With such penalties considerably lessened under the new laws, the reality is recalcitrant behaviour like the type identified in the West Gate Bridge case will not only continue, it will flourish. It is the normal practice for Parliament to increase penalties where they are not an effective deterrent, not to reduce them.

8.6 In addition, watering down fines and penalties sends a poor message to the victims of industrial brutality, thuggery and other illegal behaviour, particularly given the ongoing difficulties in breaking down the veils of silence in the first place.