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Review of the Operation of the *Building and Construction Industry (Improving Productivity) Act 2016 (BCIIP Act)*

The Housing Industry Association (HIA) would like to provide the following comments in response to your invitation to provide submissions to the statutory review of the BCIIP Act and associated Terms of Reference.

HIA is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

While the BCIIP Act only applies to the construction of five 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.

While imperfections in the broader workplace relations system remain, the BCIIP Act through, for example, the establishment of a stand-alone industry specific regulator in the form of the ABCC and the use of the Commonwealth's purchasing power, via the *Code for the Tendering and Performance of Building Work 2016 (Building Code)*, provides the necessary tools to assist in promoting compliance and behavioural improvements within the construction industry.

To that end, HIA remains of the view that the re-establishment of the ABCC was essential to restoring law and order to the industry. Its ongoing role in enforcing industrial peace cannot be underestimated.

The following comments elaborates on HIA's view on the relevant Terms of Reference.

The performance of the Australian Building and Construction Commission (ABCC) as a full service regulator

The ABCC is operating appropriately and effectively. The continued existence of a separate industry specific regulator is essential to maintaining law and order to the construction industry.

The effect of higher penalties to prevent contraventions of workplace laws

In its first year of operation the ABCC commenced 142 investigations¹ with penalties awarded in those matters totalling \$2,146,525.²

However, despite the increased penalties under the BCIIIP Act and the imposition of significant penalties by the Federal Court the inappropriate behaviour of some industry bodies continues.

For example, in a decision handed down on 8 March 2018, Judge Emmett of the Federal Court, Sydney, imposed the maximum penalty on the CFMEU concluding that:

“On any view, the [CFMEU] has an appalling record of non-compliance and repeated contraventions of civil penalty provisions of industrial relations legislation...It is common ground that the [CFMEU] has been found to have contravened some 136 pieces of industrial law legislation between 2000 and 2018. That is more than 7 contraventions a year on average. ...However they demonstrate a complete disregard for obeying the law in the area of industrial relations.”

Observing that its “woeful regard for lawful conduct” meant it was “not entitled to any leniency”, the judge imposed the maximum penalty of \$51,000.³

The very next day, in another decision of the Federal Court, the Full Bench imposed fines on the CFMEU and 19 of its officials and agents of more than \$800,000 for disrupting two major projects in an effort to force a construction company into signing a favourable enterprise agreement⁴. Justice Rangiah observed that:

“Their conduct involved a sustained and flagrant disregard for the workplace rights and freedom of association guaranteed under the FWA.”

Despite outcomes of this nature, it is also reported that the ABCC has recently commenced proceedings against the CFMEU for imposing a ‘closed shop’ by forcing a contractor on a Probuild construction site to join the union.

While HIA supports the higher penalties within the BCIIIP Act, the actions of some industry participants clearly remain undeterred.

The flagrant disregard for the law, despite the outcomes of various Federal Court proceedings, brings little comfort to the construction industry that the current penalty regime can deter such activities.

More concerning still is that on 27 March the merged entity, the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) came into existence. It has been reported that the merged union will have approximately 144,000 members with estimated revenues of almost \$150 million a year and more than \$300 million in assets.

The current penalties pale in comparison to these reported financial resources.

¹ 2016-2017 Annual Report pg. 6

² 2016-17 Annual Report pg. 6

³ *Australian Building and Construction Commissioner v Auimataji & Anor* [2018] FCCA 524 (8 March 2018)

⁴ *Australian Building and Construction Commissioner v Ingham (No 2) (The Enoggera Barracks Case)* [2018] FCA 263 (9 March 2018)

Compulsory examination powers

HIA continues to support the compulsory examination powers of the ABCC which 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 Workplace Health and Safety Act 2011 (Cth) also gives OHS regulators extensive powers to provide information, produce documents and appear before an inspector to give evidence.

HIA understands that the oversight by the Commonwealth ombudsman is working appropriately.

Streamlining and clarifying the application of the BCIIIP

HIA supports moves which seek to simplify and clarify the obligations of those operating in the residential construction industry.

HIA is unaware of any specific issues arising for the application of the BCIIIP when it interacts with other Commonwealth legislation.

Please feel free to contact Melissa Adler on 6245 1305 or by email at m.adler@hia.com.au if you wish to discuss this further.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LIMITED

A handwritten signature in black ink that reads "S Goodwin". The signature is written in a cursive style with a large, stylized 'S' and 'G'.

Shane Goodwin
Managing Director

cc: Jim.Gilchrist@jobs.gov.au