



THE HON JULIA GILLARD MP
DEPUTY PRIME MINISTER

Parliament House
Canberra ACT 2600

Senator Gavin Marshall
Chairman
Senate Standing Committee on Legislation Committee on
Education, Employment and Workplace Relations
Parliament House
CANBERRA ACT 2600

16 JUL 2009

Gavin
Dear Chairman

I am writing in relation to your Committee's current inquiry into the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2009* ('the Bill').

Following the introduction of the Bill into Parliament, my Department convened a meeting of the Committee on Industrial Legislation (COIL) on 26 June 2009. In some cases, COIL participants sought advice on the provisions of the Bill which related to:

- o the definition of 'interested person';
- o the definition of 'existing building project';
- o the criteria to be used by the Independent Assessor to determine whether to turn off (and on) the availability of coercive powers; and
- o the criteria to be used by the Administrative Appeals Tribunal to determine whether to issue a coercive notice.

Given the divergent views expressed by stakeholders during the extensive consultation undertaken by the Hon Murray Wilcox QC and subsequently by the Australian Government, I am writing to ensure the Committee is made aware of the Government's intentions in relation to each of these matters.

'Interested person'

It is the Government's intention that the use of coercive powers is focussed where they are needed most. The Government is determined to encourage lawful behaviour and a change in the industry's culture. As a consequence the Bill creates an office, the Independent Assessor – Special Building Industry Powers, who may, on application from 'interested persons', make a determination that the coercive interrogation powers will not apply to a specified project.

In this context, the Bill defines 'interested persons' to be the Minister for Employment and Workplace Relations and any other persons prescribed by Regulations. Subject to the outcomes of the Senate inquiry, it is the Government's intention that the Regulations prescribe all 'building industry participants' (as defined by the existing Act) in relation to the project to which the application relates, to be 'interested persons'. This means all project employers, employees, their respective associations and the client(s) would be able to make an application to the Independent Assessor.

These arrangements provide the industry with the opportunity to demonstrate that the requisite lawful culture is in place and the opportunity for the law abiding majority to not be tarred with the same brush as the unlawful rogue elements.

It is important to note that the Independent Assessor may rescind or revoke a determination to 'switch off' the availability of coercive powers to a project where the project experiences industrial unlawfulness. It is also important to note that if a determination were made and subsequently rescinded, the subsequent use of coercive powers may apply to events which occurred during the period the availability of the powers had been 'switched off'.

'Existing building project'

In my Second Reading Speech I advised the Parliament that the capacity to make application to the Independent Assessor would not apply to projects that commenced prior to 1 February 2010. This has been reflected in section 38 of the Bill which states:

This Subdivision [which relates to the Independent Assessor's ability to make determinations] applies in relation to a building project if the building work that the project consists of, or includes, begins on or after the commencement of this Subdivision. [emphasis added]

Subject to the passage of the Bill, the Subdivision will commence on 1 Feb 2010 thereby excluding all pre-existing projects.

The impact of this provision with the definition of *building work* as defined in section 5 of the current BCII Act, means that an 'existing project' would be one which has had on-site activity commence prior to 1 February 2010.

Criteria to be used by the Independent Assessor

Section 52 of the Bill proposes to introduce a new section 39(3)(a) which does not allow the Independent Assessor to make a determination in relation to a particular building project unless they are satisfied, in relation to that building project, that:

- (a) it would be appropriate to make the determination, having regard to:
 - (i) the object of this Act; and
 - (ii) any matters prescribed by the regulations; and
- (b) it would not be contrary to the public interest to make the determination.

Subject to the outcomes of the Senate inquiry, it is the Government's intention that the Regulations prescribe the Independent Assessor must be satisfied that the building industry participants in connection with the building project have a demonstrated record of compliance with workplace relations laws, including court or tribunal orders; and that the views of other interested persons in relation to the project have been considered.

These criteria are consistent with:

- the Object of the Act, which includes (a) *ensuring compliance with workplace relations laws by all building industry participants*;
- the Explanatory Memorandum (paragraph 92) which states, in part, "Matters prescribed by the regulations might include, for example, a demonstrated record of compliance with workplace relations laws, including court or tribunal orders, in connection with the building project."; and
- administrative law principles which provide affected persons the opportunity to have their views considered.

Criteria to be used to determine whether to issue a coercive notice

The Bill requires the nominated AAT presidential member to whom an application for an examination notice has been made to only issue the examination notice if the presidential member is satisfied of the following:

- (a) that the Director has commenced the investigation (or investigations) to which the application relates;
- (b) that the investigation (or investigations) are not connected with a building project in relation to which a determination under subsection 39(1) is in force;
- (c) that there are reasonable grounds to believe that the person to whom the application relates has information or documents, or is capable of giving evidence, relevant to the investigation (or investigations);
- (d) that any other method of obtaining the information, documents or evidence:
 - (i) has been attempted and has been unsuccessful; or
 - (ii) is not appropriate;
- (e) that the information, documents or evidence would be likely to be of assistance in the investigation (or investigations);
- (f) that, having regard to all the circumstances, it would be appropriate to issue the examination notice;
- (g) any other matter prescribed by the regulations.

Further, it is the Government's intention that the Regulations prescribe that the nominated AAT presidential member also considers additional criteria relating to the nature and likely seriousness of the suspected contravention and the likely impact upon the person subject to the notice. The Government's view that these criteria could be considered was set out in paragraph 128 of the Bill's Explanatory Memorandum.

I have requested that COIL meet on Wednesday 15 July 2009 in order for members to be informed of the Government's intentions in relation to each of the matters detailed in this letter. The timing of this COIL is designed to assist members in their submissions to your inquiry.

I trust this information will be of assistance to the Committee when they deliberate on the Bill.

Yours sincerely



Julia Gillard
Minister for Employment and Workplace Relations