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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT
AMENDMENT (OHS) BILL 2007**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the
Honourable Joe Hockey MP)

BUILDING AND CONSTRUCTION INDUSTRY IMPROVEMENT AMENDMENT (OHS) BILL 2007

OUTLINE

The purpose of this Bill is to amend the *Building and Construction Industry Improvement Act 2005* (the BCII Act) to:

- extend the application of the Australian Government Building and Construction Industry Occupational Health and Safety Accreditation Scheme (the Scheme) administered by the Office of the Federal Safety Commissioner to cover situations where building work is indirectly funded by the Commonwealth or a Commonwealth authority;
- ensure that persons are accredited under the Scheme at the time of entering into a contract for building work funded by the Commonwealth or a Commonwealth authority, and that the Commonwealth or a Commonwealth authority takes appropriate steps to see that such persons are also accredited while the building work is being carried out;
- extend the accreditation requirement to funding arrangements beyond those currently contemplated by the legislation;
- clarify that subsection 35(4) of the BCII Act only overrides Commonwealth provisions to the extent of any inconsistency;
- streamline the process of appointing Federal Safety Officers; and
- allow the Federal Safety Commissioner and persons working in the Office of the Federal Safety Commissioner to disclose information on the Scheme to the Minister.

The BCII Act establishes the powers and functions of the Federal Safety Commissioner and provides for the establishment of the Scheme. The BCII Act also regulates the appointment and powers of Federal Safety Officers.

The Scheme was developed in response to a recommendation by the *Royal Commission into the Building and Construction Industry*. It was designed to allow the Government to use its influence as a client and as the provider of capital to improve the construction industry's occupational health and safety (OHS) performance.

Currently, the scheme seeks to improve OHS standards in the building and construction industry by requiring the accreditation of persons entering into building contracts with the Commonwealth or Commonwealth authorities. The effect of the amendments would be that the Commonwealth or a Commonwealth authority is required to take appropriate steps to ensure that such persons are also accredited for the duration of the building work.

FINANCIAL IMPACT STATEMENT

The measures in this Bill would have no significant impact on Commonwealth expenditure.

NOTES ON CLAUSES

Clause 1 – Short title

1.1 The enacted Bill would be known as *Building and Construction Industry Improvement Amendment (OHS) Act 2007*.

Clause 2 – Commencement

1.2 Proposed section 2 specifies the commencement of various provisions of the Act. The time of commencement for particular provisions would be set out in a table in subsection 2(1).

1.3 Items 1, 2 and 4 of the table would provide that:

- the short title and commencement provisions of the Act;
- the amendments to the BCII Act relating to the appointment of consultants to the Federal Safety Commissioner; and
- the amendments relating to the disclosure of information to the Minister

would commence on the day on which the Act receives the Royal Assent.

1.4 Item 3 of the table would provide that the main amendment to the BCII Act contained in item 2 would commence on a single day to be fixed by Proclamation. However, if any of the provisions are not proclaimed to commence within six months of the Act receiving the Royal Assent, they would commence on the first day following that period of six months. It is expected that the main amendments would be proclaimed to commence before the expiration of the six month period.

1.5 A legislative note below the table would indicate that the table relates only to the provisions of this Act as originally passed by the Parliament and assented to by the Governor-General. The table would not be expanded to deal with provisions that may be inserted in this Act after Assent.

1.6 Subsection 2(2) would provide that Column 3 of the table contains additional information that is not part of the Act. Information in this column could be added to or edited in any published version of this Act.

Clause 3 – Schedule(s)

1.7 This clause would provide that any Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.

Schedule 1 - Amendments

Building and Construction Industry Improvement Act 2005

Item 1 - Section 34

1.8 Currently, section 34 of the BCII Act provides that the Secretary of the Department may engage a person with suitable qualifications and experience as a consultant to the Federal Safety Commissioner. If satisfied that a consultant engaged under section 34 is an appropriate person to be appointed as a Federal Safety Officer, the Federal Safety Commissioner may make that appointment under section 60.

1.9 The combined effect of section 34 and 60 of the BCII Act is that a person needs to be engaged by the Secretary as a consultant to the Federal Safety Commissioner prior to being appointed to the position of Federal Safety Officer. This appointment process is cumbersome.

1.10 This item amends section 34 to enable the Federal Safety Commissioner, rather than the Secretary, to appoint consultants and determine the terms and conditions of their engagement. The Federal Safety Commissioner may then appoint the person as a Federal Safety Officer if satisfied that it is an appropriate appointment.

Item 2 – Part 2 of Chapter 4

1.11 Item 2 would repeal the existing Part 2 of Chapter 4 and replace it with a new Part 2 of Chapter 4.

1.12 Subsection 35(4) currently prohibits the Commonwealth or a Commonwealth authority from entering into a contract for building work with an unaccredited person. In its current form the accreditation requirement contained in this section does not extend to building work indirectly funded by the Commonwealth or a Commonwealth authority, nor does it require an accredited person to carry out the work.

1.13 New subsection 35(4) would prohibit the Commonwealth or a Commonwealth authority from funding building work unless the contract is with builders who are accredited and would further require that the Commonwealth or Commonwealth authority takes appropriate steps to ensure that builders will be accredited while the work is carried out.

1.14 Some examples of steps that would be considered appropriate are placing a term in the contract that would require the builder to maintain accreditation, or making inquiries about the duration of the builder's accreditation.

1.15 This accreditation requirement would not apply to contracts which have been prescribed under the regulations.

1.16 New subsection 35(5) would describe the circumstances under which the Commonwealth or Commonwealth authority would be considered to be funding building work for the purposes of this section. This would include occasions where the Commonwealth or Commonwealth authority:

- directly or indirectly funds or finances the building work; or

- facilitates the carrying out of the building work by entering into, or otherwise funding or financing (directly or indirectly) a pre-construction agreement that relates to the building work.

1.17 A *pre-construction agreement* is defined in new subsection 35(8) as an agreement to lease or transfer land, a building, or a part of a building on the condition that building work will be carried out on the land, the building or the part of the building.

1.18 Examples of indirectly procured building work are:

- Commonwealth-State funding agreements where the Commonwealth provides funding to a State or a third party who then arranges for the building work to be carried out;
- works carried out by joint ventures involving the Commonwealth or Commonwealth authorities. These may be incorporated or unincorporated;
- works carried out by a wholly owned subsidiary of a Commonwealth authority with money loaned by the Commonwealth authority.

1.19 Current subsection 35(5) of the BCII Act overrides all Commonwealth laws except those expressly referring to it, regardless of their relationship with subsection 35(4). New subsection (6) would clarify that subsection 35(4) only overrides Commonwealth law to the extent of any inconsistency, unless the other provision expressly refers to this section.

1.20 Similar to current subsection 35(6) new subsection 35(7) would provide that a contravention of subsection 35(4) would not affect the validity of anything done by the Commonwealth or Commonwealth authority in relation to building work.

1.21 Subsection (8) would define relevant terms used in this section. This subsection would replicate the present definition of *accredited person*, *Commonwealth authority* and *Commonwealth provision*. The definition *Commonwealth building contract* is no longer necessary and would be removed. A definition of *builder* would be inserted.

1.22 A *builder* would mean a person who carries out any of the building work. To avoid the need for future amendment of the BCII Act a broad definition of *builder* has been adopted that would on its face extend the accreditation requirement beyond head contractors to persons they contract with. However, new subsection 35(4) provides for regulations to be made to prescribe contracts to which the accreditation requirement will not apply, and it is intended that regulations will be made to limit the accreditation requirement to head contractors.

Item 3 – After paragraph 65(5)(a)

1.23 Section 65 of the BCII Act contains provisions dealing with the protection of the confidentiality of information. These provisions apply generally to information obtained for the purposes of the BCII Act and in the course of official employment (‘protected information’) and extend to both the Federal Safety Commissioner and the Australian Building and Construction Commissioner (the ABC Commissioner) and related staff.

1.24 Subsection 65(2) makes it an offence for entrusted persons to make a record of, or disclose, protected information. The maximum penalty is imprisonment for 12 months.

1.25 Subsection 65(3) of the BCII Act contains exceptions to the prohibition in subsection 65(2) that apply in circumstances where the entrusted person is a ‘designated official’ at the time of the recording or disclosure. The definition of a ‘designated official’ in section 65(8) includes both the Federal Safety Commissioner and persons working within the Office of the Federal Safety Commissioner.

1.26 Section 65(5) limits the information that may be disclosed to any Minister to the disclosures that are required or authorised by sections 12 or 14 of the BCII Act. Section 12 and 14 of the BCII Act provide for the reporting to the Minister in certain circumstances. These sections only allow the ABC Commissioner, not the Federal Safety Commissioner, to provide reports to the Minister. Consequently the Federal Safety Commissioner cannot disclose information to the Minister under the Act.

1.27 Item 3 would insert new paragraph 65(5)(aa) which would have the effect that the prohibition on disclosures to the Minister do not apply in relation to the Federal Safety Commissioner, Federal Safety Officers, an APS employee assisting the Federal Safety Commissioner or a person engaged as a consultant under section 34 (or a person acting under a delegation under the BCII Act from one of those persons). Those designated officials would be able to disclose information to the Minister providing it falls within one of the existing exceptions in subsection 65(3).

Item 4 – Subsection 65(8)

1.28 Proposed item 4 contains an amendment consequential to the amendment in item 3.

Item 5 – Transitional – Consultants

1.29 Item 5 would contain transitional arrangements for persons who, at the time item 1 commences, are engaged as consultants under section 34 of the BCII Act. This item would provide that such persons are engaged under section 34 of the BCII Act as amended by item 1.