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INFORMATION SHEET

HIA Contracts and the Carbon Tax

The introduction of the tax on carbon emissions from 1 July 2012 under the *Clean Energy Act 2011* and related legislation ('carbon tax') is likely to mean that builders will face price increases for building materials and other inputs into housing construction. The cost of new home building will inevitably increase. HIA estimates that when the tax is fully implemented, the cost increase for an average new house due to the carbon tax will be in the range of 0.8% up to 1.7%.

However, the actual increase in any particular case will depend on the style, size and design of the home, the material specifications and inclusions, site conditions, the extent to which increased costs are passed on to builders and contractors and ultimately the consumer, and the degree of product substitution – including both material specification variations and substituting locally made building materials and products with materials and products manufactured off shore.

It will not be possible for builders to personally verify to what extent a price increase is actually due to the tax and how much is due to other factors. Builders will have to rely on suppliers to tell them what component of any price increase is due to the tax, and the ACCC has issued stern guidelines warning about misrepresentation in this area. Assuming a builder is told by a supplier, and reasonably believes, that a price increase of a particular amount is due to the Carbon Tax, can the builder pass the extra cost on to the client when entering into a new contract? The answer is yes, but caution must be taken that any communications concerning specific Carbon Tax related increases are consistent with ACCC guidelines.

More specifically, can a builder pass on extra costs in a contract signed before 1 July 2012 for work carried out after that date? There are two possible options:
A. Where a contract is entered into before 1 July 2012, and a price increase occurs during the construction period, HIA contracts in all States and Territories (except South Australia) provide a limited facility to pass this price increase on to the client. HIA contracts allow cost pass-on only to the extent the price increase is due to a new tax, and only where this is 'introduced' or 'takes effect' after the date of the contract.

A builder seeking to rely on this clause must therefore be able to show that –
1. The tax was introduced after the date of the contract. (Note: It is arguable that the tax was introduced in November 2011, however, as the effect was unquantifiable at that time, it is likely that this argument will fail); and,

2. There was a consequential increase in cost to the builder which was caused by the tax. Builders will need to prove that the increase was caused by the tax and not by some other cause, which may require evidence from manufacturers.

B. A contract is signed before 1 July 2012, where a member wishes to insert a special condition into contracts to reflect possible increases due to the Carbon Tax. As a guide, an indicative special condition is attached.

(Note: Special conditions allowing the passing on of carbon tax increases are likely to be productive of disputation, costly to administer, and place a high onus on builders to substantiate that any increases claimed are, in fact, wholly due to the Carbon Tax. Members are advised to seek professional advice before including and relying on a special clause in a building contract) 2