Inquiry into Building and Construction Industry (Improving Productivity) Amendment Bill 2017

Department of Employment - Responses to Questions on Notice

Notes:
"the Code" refers to the *Code for the Tendering and Performance of Building Work 2016*
"the Act" refers to the *Building and Construction Industry (Improving Productivity) Act 2016*
"the Bill" refers to the Building and Construction Industry (Improving Productivity) Amendment Act 2017
"Fair Work Act" refers to the *Fair Work Act 2009*
"Department" refers to the Department of Employment

Responses to questions on notice from Senator McKenzie

1. *We've heard various claims from trade unions before this Committee about the alleged effect of the Code. For example, it's been alleged that this amendment will result in more workplace deaths in the construction industry – is that true?*
    - There is nothing in the Bill or Code that would result in more workplace deaths or which would adversely affect safety in the construction industry.
    - The Code requires a code-covered entity to comply with relevant work health and safety laws, including work health and safety training requirements and asbestos safety requirements. A breach of these requirements could lead to an employer being precluded from undertaking future Commonwealth funded building work.
    - Work health and safety on building sites is primarily the legislative and regulatory responsibility of state and territory governments.
    - The Act also establishes the Australian Government Building and Construction Work Health and Safety Accreditation Scheme. The Scheme requires contractors to be accredited to work on Commonwealth-funded building sites. Accredited companies have better safety records.

2. *It's also been claimed that this will stop the engagement of apprentices by construction companies – is that correct?*
    - The Code does not prevent or restrict the employment of apprentices.
    - The Code simply prevents union-imposed pattern agreements from prescribing a rigid ratio of apprentices for every building contractor, regardless of their size or ability to accommodate them.

3. *It's been claimed that the amendment Bill and the Code will encourage the casualisation of the workforce – is that correct?*
    - The Code will not lead to the casualisation of employment in the construction industry.

4. *Is a clause in a construction industry enterprise agreement mandating conversion to full-time employment by a casual after 6 weeks consistent with casual conversion clauses in other industries? In fact, is it even consistent with the casual conversion clause in the underlying construction industry award, as set by the Fair Work Commission?*
    - The provisions in CFMEU pattern agreements that mandate conversion to full-time employment after just six weeks are out of step with community standards.

- For example, the modern award for the construction industry provides for employee choice to convert after six months. Specifically, the Building and Construction Industry General On-Site Award 2010 [MA000020], clause 14.8 (a), provides that:

  A casual employee, other than an irregular casual employee, who has been engaged by a particular employer for a sequence of periods of employment under this award during a period of six months, thereafter has the right to elect to have their contract of employment converted to full-time or part-time employment if the employment is to continue beyond the conversion process.
- The clauses unduly restrict flexibility for both employers and workers.
- For those reasons, the CFMEU clauses are inconsistent with the Code.

5. *What is the casual employee incidence in the construction industry, compared to that for the all-industry average? Would you consider them to be similar?*
   - The casual employee incidence in construction is very similar to the all-industry average.
   - The latest ABS figures (for November 2016) are 27.4 per cent for the construction industry and 25.5 per cent for the all-industry average.

6. *If all of those are untrue, what kind of clauses will be prohibited by the Code? Can you provide some examples of clauses that would be deemed to be non-compliant? Have any of those clauses been used in recent projects?*
   - Examples of clauses that would be deemed to be non code-compliant would include the types of clauses below. The Department does not have data on whether these clauses have been used in recent projects.

Type of clause	**Source**	**Text**
Allowing the holding of stop work meetings for up to four hours per day at full pay	CFMEU Queensland Pattern	*'The Employer agrees to Employees attending Union meetings or participating in Union activities during working hours and that the Employees shall be entitled to receive payment for attendance at those meetings/activities provided that:* *a) the Union provides the Employer with written notice of the intention to hold the meeting/undertake the activities prior to commencement;* *c) the duration of the meeting/activities is two hours or less (the duration of the meeting I activities may be extended beyond two hours by way of agreement between the Union and the Company). Authority to grant extension by the Employer rests with the General Manager or their nominee;* *c) up to two meetings/activities of up to two hours each may be held per shift, either consecutively or separately, provided that notice is given.'*

Type of clause	Source	Text
Mandating wage rates - 'Jump up'	CFMEU Queensland Pattern Agreement	*'Where Employees are working on a site where a site specific major project agreement is in place and is more favourable to such Employees than this agreement, the more favourable entitlement applies.'*
Employers required to promote union membership	ETU Victorian Pattern Agreement	*Collective industrial relations will continue as a fundamental principle of the Employer. Union membership shall be promoted by the Employer to all prospective and current Employees.'*
Restricting the hiring of supplementary Labour	CEPU NSW Pattern Agreement	*'Where the company decides to engage supplementary labour, the company will look to source from an electrical contracting company that have enterprise agreements prior to sourcing from labour hire companies.'*
Employers required to provide unions with employee information	CFMEU Queensland Pattern Agreement	*'The employer will provide any information to the union about employees that the union requires.'*
Preventing the use of Contractors	CFMEU Queensland Pattern Agreement	*'If the employer wishes to engage contractors and their employees to perform work in the classifications covered by this agreement, the employer must first consult in good faith with potentially affected employees and their union. Consultation will occur prior to the engagement of subcontractors for the construction works.'*
Mandating when Rostered Days Off can be taken	CFMEU Queensland Pattern	*'13 of the 26 RDOs each calendar year are "Industry RDOs" upon which work must not be performed except where the Union Secretary (or someone appointed by him for the purpose of this subclause) agrees in writing (e.g by email)'.*
Allowing unfettered union entry onto building sites	CFMEU Queensland Pattern Agreement	*'A standing invitation exists for any representative of the union covered by this agreement to enter any place where employer, employees or representatives are for purposes including, but not limited to, dispute resolution or consultation meetings but not for purposes for which a right of entry exists under Part 3-4 of the FW Act.'*
Restricting Productivity Schemes	CFMEU Queensland Pattern Agreement	*'Productivity schemes will be prohibited unless written agreement has been reached with all parties to this agreement.'*

7. *Does the Fair Work Act allow for agreements to be terminated by the parties and replaced by a new agreement – one that is Code compliant? Does the Act also allow agreements to be varied by the parties, and that would allow the parties to agree to vary an agreement to make it Code compliant?*
    - Building industry participants that wish to make an existing enterprise agreement code-compliant can negotiate with their employees to vary their enterprise agreement. Alternatively, they could seek to terminate that agreement in accordance with the Fair Work Act and, if they wish, bargain with their employees in relation to a new enterprise agreement.
    - Protected industrial action cannot be organised or engaged where an employer has not agreed to bargain or initiated bargaining and no majority support determination has been made.
    - For completeness, protected industrial action cannot be taken during the nominal life of an enterprise agreement (i.e. an 'in term' agreement).
    - There is nothing in the Code that changes the rules in the Fair Work Act about bargaining for or making enterprise agreements.

8. *Don't many enterprise agreements actually contain clauses that provide the parties with a trigger to terminate or vary the agreement should the Code come into operation and the agreement be found to be non-compliant? Can you give an example of such an enterprise agreement?*
    - Some enterprise agreements include clauses that commit the parties to amendments in the event that the new Code was introduced.
    - A recent survey of 100 enterprise agreements by the Department of Employment found that 16 per cent of agreements include these types of clauses.
    - An example of an agreement with such a clause is the *Lendlease Building / CFMEU (New South Wales, Australian Capital Territory, Victoria and Tasmania) Agreement 2016*

        7.3 Compliance for government funded building work
        (a) It is recognised by the Parties that whilst this Agreement is in operation, Commonwealth, State or Territory Governments may impose particular requirements on the content of enterprise agreements in order for the Company to be eligible for future government funded building work. It is essential that the Agreement is compliant with any such requirements in order for the Company to remain eligible to tender for future government funded building work. If any new requirements are promulgated during the life of this Agreement, which impact on the content of this Agreement, this clause will be applied.
        (b) In this event, the Parties agree to apply to the FWC to terminate this Agreement in accordance with the Fair Work Act (within 7 days of any such requirement being promulgated) and the Company and Employees will commit to negotiating a replacement Agreement which is compliant with any such requirements.
        (c) The Company will seek to ensure that no Employees are financially disadvantaged as a result of the termination of the Agreement.

9. *Does the Code potentially mean that no companies will be available to perform construction work if they are all non-Code compliant? Will they be locked out of tendering for Commonwealth work?*
    - The Code only applies to building industry participants that wish to undertake Commonwealth funded building work. Building industry participants that do not want to do this work do not need to comply with the Code. It is an opt-in scheme.

- Building industry participants have had since 2014 to bring their enterprise agreements into line with the new Code – an advance release of the Code as released by the Government in April 2014.
- The value of current Commonwealth funded building work is significant, with future contracts running into tens of billions of dollars. This is a very strong incentive for companies to ensure they are code-compliant or become code-compliant if they wish to undertake Commonwealth funded building work.
- As noted above, some enterprise agreements already included clauses that committed the parties to amendments in the event that the new Code was introduced (16 per cent based on a sample analysed by the Department).
- As the average tender process can range from 8 weeks to some months - depending on the size of the project – non-code compliant companies can still tender and undertake the process to vary their enterprise agreements to make them code compliant in the meantime.

10. *How is it fair that enterprise agreements that were lawfully made under one Federal law – the Fair Work Act – are not lawful under the Code?*
    - The Code does not affect the lawfulness of enterprise agreements made under the Fair Work Act.
    - As noted above, there is nothing in the Code that changes the rules in the Fair Work Act about bargaining for or making enterprise agreements. For example, parties must still bargain in good faith and the enterprise agreement must pass the better off overall test.

<u>Responses to questions on notice by Senator Xenophon</u>

1. *Does the Code will make it harder to mandate the use of Australian made products on construction sites?*
    - Whether a clause in an enterprise agreement is consistent with section 11 of the Code (which sets out the enterprise agreement content requirements) will depend on the specific text of the enterprise agreement and consideration of that text in context.
    - On the face of it, a clause dealing with the use of Australian made products would not be inconsistent with the Code.
    - It is also worth noting that the Code (clause 25A) requires the preferred renderer to provide the funding entity with information about the extent of the use of domestically sourced building materials.

2. *Are clauses that contain asbestos training for workers allowed in enterprise agreements under the Code?*
    - Whether a clause in an enterprise agreement is consistent with section 11 of the Code (which sets out the enterprise agreement content requirements) will depend on the specific text of the enterprise agreement and consideration of that text in context.
    - On the face of it, a clause dealing with asbestos training would not be inconsistent with the Code.

3. *Can section 11F of the Code be overridden? Does it provide any protection for local workers?*
    - Section 11F of the Code gives effect to subsection 34(2D) of the Act in relation to the engagement of non-citizens or non-residents. It does provide protection for local workers.

- It is worth noting that the *Migration Act 1958* and its subordinate legislation also contain requirements relating to the engagement of persons that are not Australian citizens or Australian permanent residents.

4. *Does the Code make right of entry harder for union officials?*
    - The Code does not override the right of entry provisions in the Fair Work Act.