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Inquiry into the provisions of the *Building and Construction Industry (Improving Productivity) Amendment Bill* 2017

The primary significance of Bill before the Committee is that it is intended to bring forward the commencement date of a precondition that serves to exclude certain building companies from tendering for or being awarded Commonwealth funded contracts. The current date for the commencement of the precondition is 29 November 2018. The Bill proposes that this be shortened to 1 September 2017. If the legislation passes this session of parliament, the pre-condition excluding building companies from *tendering* would commence in or around 6 months, rather than two years from the date of the Principal Act as is currently the case. The ban on being *awarded* contracts would, however, be immediate (except in relation to tenders already submitted).

The precondition relates to the content of enterprise agreements that building companies may have made with their workforce before 2 December 2016. The precondition is that such agreements must comply with the restrictions on the content of such agreements prescribed in the *Code for the Tendering and Performance of Building Work 2016* ("the Code)". The restrictions are found in clauses 11 and 11A of that Code. A cursory examination of those clauses will reveal that, of its own, the Bill before the Committee is insufficient to give effect to the intention stated in the Explanatory Memorandum. This is because the Code itself provides that until 29 November 2018, the relevant restrictions do not apply to agreements made before 2 December 2016. We assume therefore that Government will be amending the Code, or issuing a new one. As far as we are aware, the content of the proposed new or amended Code are not before the Committee. We have not been consulted about it (nor were consulted about the Bill).

In circumstances where commitments as to the content of the Code were instrumental in securing cross bench support for the passage of the Principal Act, we suspect that we are not the only ones surprised that the Government's plans for a new or amended Code have not been disclosed.

Our objections to the ABCC regime and the Code are well known. We do not repeat them here. What the Bill (in conjunction with a new or amended Code) seeks to achieve which sets it apart from the Principal Act is immediate and significant market disruption. The Principal Act in conjunction with the Code sent a clear market signal. This change in direction serves to punish those who relied on that signal and to pick winners. At its simplest, the market signal – and the law - was that existing enterprise agreements did not need to be replaced, but this new intervention means that they will need to be replaced, and quickly. But the detail is not simple.

The former Minister, in 2014, publicised an "Advance release" of a proposed Building Industry Code which contained restrictions on the content of enterprise agreements

in relevantly identical terms to those found in the Code. It was not the law. The law, as it was then (and remains today in respect of agreements made before 2 December 2016), permits building companies to tender for and be awarded government contracts without regard to those terms being present in their enterprise agreements. The Government failed numerous times to get its ABCC legislation through the Parliament. Many building companies and their workers, often represented in bargaining by unions, made lawful agreements. This continued through the change in Minister, the change in Prime Minister and before and after the election.

The types of clause prohibited by the Code and the "Advance release" are clauses that are often negotiated by unions on their members' behalf and with their endorsement, because they are in their members' interests. For example, limits on the number of hours that can be worked in a day, requiring the hiring of a minimum ratio of apprentices, classification structures, and parity clauses for contractors. Many of the types of clauses prohibited by the Code and the "Advance release" are essentially a rough proxy for distinguishing unionised companies from non-unionised companies.
What the Bill (in conjunction with a new or amended Code) therefore seeks to achieve to is to disqualify unionised companies from Commonwealth funded work, by narrowing the field of eligible tenderers to companies that have agreements that lack the features typical of union agreements. In doing so, it gives a competitive edge to those companies that were loyal to the government's legacy of proposed but undelivered policy announcements and places other law abiding companies at a competitive disadvantage. Moreover, it rewards companies who are unwilling to even agree on some most basic conditions with their workforce that are important for their safety, learning and well being in the workplace and which contribute to building and maintaining industry skills.

Those unionised, law abiding companies and their workers that relied on the law of the day and the market signal given by the passage of the Principal Act late last year now find themselves in the difficult position of needing to renegotiate and vary agreements or make new agreements in order to be eligible to be considered for and ultimately awarded Commonwealth funded work. This could prove to be time consuming, and may require bargaining out of the predicted cycle. Further, the narrowing of the field of potential government contractors reduces the scope of competition. In these circumstances the bald statement in the Explanatory Memorandum that the expected financial impact of the intended change is "nil" is highly contestable.

For all of the above reasons, we oppose the Bill and recommend it not be passed. Further, we recommend that, given the identified need to amend the Code to give effect the intention disclosed in the Explanatory Memorandum, the Government's proposed amendments to the Code (or its intended replacement code) be tabled before the Committee in full.

Yours faithfully,

Ged Kearney
President