

Chapter 2

Key issues

Background

2.1 The building and construction industry is an integral part of the Australian economy, and is crucial to promoting jobs and driving the nation's economic growth.¹

2.2 Potential growth in the sector has been impeded for some time by workplace disputes between employers and unions, hindering efforts to ensure that the sector is efficient, safe and law-abiding. To this end, the Australian Building and Construction Commission (ABCC) legislation enacted in 2016 gave effect to the government's building industry code, designed to promote a workplace relations framework geared towards productivity, fairness, efficiency, safety and compliance with the law.²

2.3 The Code for the Tendering and Performance of Building Work 2016 (2016 Code) commenced on 2 December 2016 and sets out expected standards for all building industry participants involved in government-funded building work.³ Requirements for covered entities include:

- Workplace Relations Management Plan (WRMP) compliance
- eligibility requirements for engaging contractors on Commonwealth funded building work
- compliance with certain laws, including designed building laws, WHS laws, Competition and Consumer Act and Migration Act;
- security of payment compliance, including specific Building Code requirements
- unregistered agreements
- prohibited content for enterprise agreements made since 2 December 2016
- sham contracting
- collusive tendering practices
- above-entitlement payments
- labour market testing

1 The Hon. Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 8 February 2017, p. 6.

2 The Hon. Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 8 February 2017, p. 6. See also Australian Chamber of Commerce and Industry, *Submission 7*, p. 1.

3 Department of Employment, *Submission 4*, p. 3.

- protecting freedom of association
- right of entry
- reporting and notification requirements
- managing drug and alcohol issues in the workplace⁴

2.4 Obligations on funding entities during both the procurement and conduct of Commonwealth-funded building work include:

- Workplace Relations Management Plan (WRMP) approval by the ABCC
- eligibility requirements for engaging contractors on Commonwealth funded building work
- obtaining information from tender respondents/preferred tenderers such as commitment to training and skill development, numbers of apprentices, trainees and visa holders, prior breaches of certain laws or unsatisfied judgment debts, the extent of domestically sourced and Australian standard building materials, assessment of whole-of-life project costs, the project's impact on jobs and contribution to skills growth
- only engaging a code covered entity that only uses products that comply with Australian standards
- notifying the ABCC of relevant tenders, contracts and breaches of the Building Code⁵

2.5 The committee notes that the 2016 Code is an opt-in scheme, and as such there is no requirement for building industry participants to comply with the 2016 Code if they do not wish to engage in government-funded building work:

Building industry participants only need to comply with its requirements if they wish to submit expressions of interest, tender for or be awarded Commonwealth-funded building work.⁶

2.6 The re-establishment of the ABCC was the subject of intense scrutiny by a number of parliamentary committees—including this committee—on several occasions during the 44th Parliament. Noting this scrutiny and the fact that the Building and Construction Industry (Improving Productivity) Amendment Bill 2017 (the bill) does not introduce any new requirements,⁷ the committee's focus in this report is on the provisions of the bill.

4 See www.abcc.gov.au/building-code/building-code-2016 (accessed 13 February 2016).

5 See www.abcc.gov.au/building-code/building-code-2016 (accessed 13 February 2016).

6 Department of Employment, *Submission 4*, p. 3.

7 The Hon. Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 8 February 2017, p. 6.

Stakeholder views

2.7 The committee canvassed key stakeholders for views on the bill. Submissions from building industry representatives were broadly positive, while several unions outlined concerns relating to:

- the intention and impact of the bill; and
- a perceived lack of consultation on the bill.

2.8 These, among other concerns, were considered by the committee and are set out below.

Compliance transition period

2.9 Following extensive consultation, the government secured the passage of the ABCC legislation by agreeing to various amendments. One such amendment introduced a two-year transition period designed to provide ample opportunity for building industry participants to achieve compliance with the 2016 Code, if they chose to bid for Commonwealth construction projects.

2.10 The bill is designed to revise this transition period. If enacted, the bill would amend this transition period, bringing it forward from 29 November 2018 to the end of August 2017.⁸

Benefits of amending the compliance transition period

2.11 The Housing Industry Association (HIA), the peak national industry association for the residential construction sector in Australia, submitted that workplace disputes in the sector—marked by intimidation, coercion and anti-competitive practices—result in lost productivity and higher than necessary building costs.⁹

2.12 Master Electricians Australia (MEA) provided the table¹⁰ below to illustrate the high incidence of workplace disputes in the construction sector, relative to other sectors:

Table 2.1—workplace disputes in various sectors

	<i>Coal</i>	<i>Metal Manufacturing</i>	<i>Construction</i>	<i>Transport</i>	<i>Education</i>	<i>Other</i>
Jun 2014	0	0	4.8	1.0	9.8	2.3
Sep 2014	0	1.5	13.7	0	4.9	2.0
Dec 2014	0.1	0.4	3.2	1.6	3.5	7.2
Mar 2015	0	5.0	8.7	0.2	0.6	0.9

8 For details see Chapter 1.

9 Housing Industry Association, *Submission 1*, p. 3.

10 Master Electricians Australia, *Submission 3*, pp. 1–2.

Jun 2015	0	1.5	4.2	0.3	0.4	7.6
Sep 2015	0.7	0.5	10.8	2.9	1.2	8.9
Dec 2015	0	0.3	12.9	0	2.2	2.5
Mar 2016	0	0.6	10.8	0	4.2	10.1
Jun 2016	0.1	2.9	16.2	1.7	0.1	3.4
Sep 2016	4.3	1.0	14.5	1.9	0.5	10.7
TOTAL	5.2	13.7	99.8	9.6	27.4	55.6

2.13 In particular these figures demonstrate a clear behavioural pattern within the construction industry, with disputes at a rate approaching 400 per cent of any other single industry and 200 per cent of the coal, metal manufacturing, transport and education sectors combined.¹¹

2.14 This clearly suggests that a culture change is required in the construction industry as a matter of urgency. The current two-year transition period, HIA submitted, represents a significant delay for this much-needed reform:

This prolongs anti-productive and anti-competitive practices on the construction of tax payer funded community infrastructure.

The earlier that the Building Code has universal application to all industry participants, the sooner the construction industry and broader community will experience the cultural and productivity improvements the Building Code and restoration of the Australian and Building and Construction Commission (ABCC) are designed to address.¹²

2.15 The re-establishment of the ABCC, HIA added, will not in itself drive the positive change required in the industry. Instead, prompt adherence to specific requirements set out in the 2016 Code would play a critical part in ensuring that industrial law is enforced across the sector and behavioural improvements are achieved as a matter of priority:

A core aspect of the Building Code is Paragraph 11, which amongst other things, provides that code covered entities must not be covered by an enterprise agreement that includes clauses that 'impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity'.¹³

Section 11(3) of the Building Code sets out the restrictive and discriminatory clauses and practices that will not be permitted, including requiring contractors to employ a non-working shop steward or job

11 Master Electricians Australia, *Submission 3*, p. 1.

12 Housing Industry Association, *Submission 1*, p. 3.

13 Housing Industry Association, *Submission 1*, p. 3.

delegate, 'one in, all in' clauses where, if one person is offered overtime, all the other workers must be offered overtime whether or not there is enough work, 'jump up' provisions that prevent building contractors engaging subcontractors unless they provide certain union dictated terms and conditions to workers, and industrial arrangements requiring contractors to obtain the approval of a union over the number and types of employees that a contractor may engage on a project.¹⁴

2.16 Mr David Humphries, Senior Executive Director at HIA, concluded that a shorter transition period would be welcomed by the industry:

HIA considers that the nine-month period referred to in the amendment is a sensible compromise, making the implementation of the code more effective. It is supported by the residential construction sector.¹⁵

2.17 Ensuring that these requirements are met as a matter of urgency, HIA added, would enable businesses to 'deliver construction projects on time and on budget.'¹⁶ MEA agreed, highlighting the uncertainty caused by extended implementation delays:

It is MEA's view that the current legislative timeline of 2018 will result in a slow and drawn out implementation whereby participants, employers and employees will be in a state of flux waiting for the change to be in place. This could cause tension and unrest within the industry and would, in fact, be counterproductive to the main objective outlined in section 3(1) of the Act.¹⁷

2.18 This position was echoed by other industry stakeholders, such as the Australian Chamber of Commerce and Industry (ACCI).¹⁸

Arguments against amending the compliance transition period

2.19 The Australian Council of Trade Unions (ACTU) did not support the bill, arguing that instead of its purported objectives, the proposed bill—together with the 2016 Code—in fact seeks to 'disqualify unionised companies from Commonwealth funded work.' This, the ACTU believes, would be achieved by narrowing the field of eligible tenderers for government-funded projects to exclude companies whose enterprise agreements bear features 'typical of union agreements.'¹⁹

2.20 The Construction, Forestry, Mining and Energy Union (CFMEU) agreed, submitting that the transition period amendment would purportedly adversely affect over 3000 contractors who the CFMEU claims do not have 2016 Code-compliant agreements in place. The CFMEU claimed that if the bill is implemented these

14 Housing Industry Association, *Submission 1*, pp. 2–3.

15 Mr David Humphrey, Senior Executive Director, Business, Compliance and Contracting, Housing Industry Association, *Proof Committee Hansard*, 13 February 2017, p. 1.

16 Housing Industry Association, *Submission 1*, p. 4.

17 Master Electricians Australia *Submission 3*, p. 2.

18 Australian Chamber of Commerce and Industry, *Submission 7*, p. 2.

19 Australian Council of Trade Unions, *Submission 2*, p. 2.

contractors would be excluded from government-funded work because they are operating on the existing timeline:

The end result will be that experienced, qualified and reputable contractors with settled industrial arrangements, and their employees, will be punished for doing no more than what was expected and required of them under the law of the day.²⁰

2.21 This, the CFMEU suggested, might effectively reward non-compliance with the Fair Work Act because it would:

...severely prejudice the commercial interests of employers who have engaged with the enterprise bargaining system under the Fair Work Act, and their employees, and reward those who remained outside the system.²¹

2.22 Furthermore, the CFMEU submitted that giving companies which do not have agreements a competitive advantage might encourage 'lawful protected industrial action as attempts are made to secure agreements.' This, the CFMEU concludes, would expose government-funded building projects to more industrial disputes and delays than would otherwise be the case.²²

2.23 The Electrical Trades Union of Australia (ETU) likewise questioned the prudence of enacting the proposed legislation, and was critical of the 'rushed' nature of the committee process.²³ The ETU indicated that a considerable number of employers and employees will have to renegotiate agreements:

The changes mean that an estimated minimum of 1,500 agreements that have been struck but are thought not to comply with the 2016 Code must be renegotiated and by August.²⁴

2.24 These concerns were refuted in submissions from industry bodies. These organisations argued that the requirements of the 2016 Code, although in effect from December 2016, were extensively canvassed by the government as far back as April 2014. For example, Master Builders Australia (MBA) submitted:

At the time, the Government advised that the requirements of the 2014 Code would come into effect when the ABCC Bill commenced as an Act and confirmed that it set the standard of workplace relations conduct expected from those contractors that want to perform work funded by the Commonwealth Government.²⁵

2.25 A 2014 media release from the then Minister for Employment, cited by MBA, confirmed this:

20 Construction, Forestry, Mining and Energy Union, *Submission 5*, pp. 1–2.

21 Construction, Forestry, Mining and Energy Union, *Submission 5*, p. 4.

22 Construction, Forestry, Mining and Energy Union, *Submission 5*, p. 4.

23 Electrical Trades Union of Australia, *Submission 6*, p. 3.

24 Electrical Trades Union of Australia, *Submission 6*, p. 2.

25 Master Builders Australia, *Submission 8*, p.3.

...Contractors that choose to be eligible for Commonwealth-funded building work will need to comply with the new code. If contractors do not comply with the code, they won't be able to work on Commonwealth-funded projects.²⁶

2.26 The MBA concluded:

Master Builders continued to provide this advice consistently and without change for the entire period between the release of the 2014 Code and the debate of the ABCC Bills in November/December 2016.

It cannot be said that building industry participants were not aware of the 2014 Code or its requirements. Government regulators and agencies offered participants advice as to how the 2014 Code should be read, what its requirements meant, and how they would be enforced.²⁷

2.27 The Department of Employment (the department) provided evidence to support this position, confirming that industry participants had in excess of two and a half years to adjust their agreements to the requirements of the 2016 Code:

Regarding consultation, all stakeholders are aware that there was an advance release of the code of practice which was published in April 2014 and the department and ABCC provided extensive advice to industry participants including employers and unions in relation to the enterprise agreement content requirements. As a result the industry has had an effective notice period of two years and eight months in which participants were able to make arrangements to ensure they were able to comply with the code once it took effect.²⁸

2.28 Taking the 2014 advance release into consideration, representatives of the MBA indicated that commencing a two-year transition period from late 2016 in fact gives participants four years to put compliant agreements in place.²⁹

2.29 In considering this evidence, the committee asked the department whether the 2014 advance release of the code differed from the final 2016 version. The department explained that, although some sections differed due to amendments agreed in Parliament in 2016, the sections relating to enterprise agreement content requirements—that is, the sections relevant to the discussion above—had not changed since 2014.³⁰

2.30 MEA submitted that the transition period amendment was unlikely to have an adverse effect on most employers, suggesting that many have either already

26 Master Builders Australia, *Submission 8*, p.3.

27 Master Builders Australia, *Submission 8*, p. 4.

28 Mr Steve Kibble, Group Manager, Work, Health and Safety Policy Group, Department of Employment, *Proof Committee Hansard*, 13 February 2017, p. 28.

29 Mr Shaun Schmitke, National Director Industrial Relations, Master Builders Australia, *Proof Committee Hansard*, 13 February 2017, p. 3.

30 Mr Steve Kibble, Group Manager, Work, Health and Safety Policy Group, Department of Employment, *Proof Committee Hansard*, 13 February 2017, p. 29.

implemented the changes required, or have been aware of them for a considerable period of time.

2.31 Employers are, MEA suggested, under considerable pressure from construction unions and their ability to enact change swiftly is limited.³¹

2.32 Finally, refuting the ACTU's 'narrowing the field' claim, submitters such as Independent Contractors Australia (ICA) argued that the bill would significantly improve competition for Commonwealth-funded projects:

The Building Code will do much to increase competition in the construction sector and thus do much to enable small subcontractors and independent contractors to more effectively operate and compete in the sector. In fact the Building Code is demonstratively designed to achieve this end.³²

Variation clauses

2.33 Evidence was presented to the committee indicating that preparations for 2016 Code-compliance have been under way for some time across the industry. MBA explained that some agreements made after the requirements of the 2016 Code were announced contain built-in protections designed to ensure companies remain eligible for government-funded work.³³ Common protections include:

- Agreement by parties to terminate non-compliant agreement and negotiate compliant agreement;
- Agreement by parties to seek FWC assistance to amend agreement to ensure Code compliance;
- Automatic revocation of non-compliant clauses if agreement does not meet 2014 Code; or
- Commitment by parties to ensure compliance with Codes and laws at all times via dispute resolution processes.³⁴

2.34 MBA noted that almost all agreements containing some or all of the variation clauses above have been made with the CFMEU, reflecting the intent to ensure that agreements are compliant.³⁵

31 Master Electricians Australia, *Submission 3*, p. 3.

32 Independent Contractors Australia, *Submission 9*, p. 1.

33 Master Builders Australia, answers to questions on notice, 13 February 2017 (received 13 February 2017).

34 Master Builders Australia, answers to questions on notice, 13 February 2017 (received 13 February 2017).

35 Master Builders Australia, answers to questions on notice, 13 February 2017 (received 13 February 2017).

Additional concerns

2.35 The committee noted evidence regarding small business subcontractors and workers on temporary visas in the building and construction industry, seeking assurance that both vulnerable groups would be protected.

Protecting small business

2.36 Small businesses in the construction sector operate from a position of immense disadvantage, as explained by Independent Contractors Australia (ICA):

Repeated Royal Commission inquiries have disclosed secret agreements operating between unions and construction companies.³⁶

2.37 ICA submitted that bringing forward implementation of the 2016 Code would go a long way towards addressing currently insurmountable obstacles faced by small businesses:

The Code's most important feature is that it suppresses or prevents big construction firms from colluding with construction unions to push efficiency and profit killing industrial relations arrangements onto small construction subcontractors particularly independent contractors.

It's the enforcement of such industrial relations arrangements by unions in collusion with large (but not all) construction firms that limits or eliminates competition in the construction sector. This collusive process pushes risk down the contract chain harming the most vulnerable people at the bottom of the contract chain, the small subcontractors and independent contractors.³⁷

2.38 Overall, ICA explained, the bill would increase competition, as the 2016 Code is intended to do, and it would do so without excessive delay.³⁸ Implementing the 2016 Code without further delay would also ensure lawful behaviour on the part of not only unions, but major construction companies as well.

Supporting apprenticeships

2.39 Questions were raised about the impact of the government's policy on apprenticeships in the sector, with union representatives suggesting that implementation of the 2016 Code will stop the engagement of apprentices by construction companies:

It is the same when it comes to apprentice ratios. Unions and workers have sought to achieve ratios of apprentices to tradespeople to promote apprenticeships in the building and construction industry. That is banned by

36 Independent Contractors Australia, *Submission 9*, p. 3.

37 Independent Contractors Australia, *Submission 9*, p. 1.

38 Independent Contractors Australia, *Submission 9*, p. 1.

the Turnbull government's code and apparently is supported by enough of the crossbench to get it through.³⁹

2.40 The committee put this assertion to the Department of Employment. Representatives of the department explained that the 2016 Code is intended to promote apprenticeships without being overly prescriptive in terms of how companies implement their policies. This, the committee understands, allows companies to support apprentices whilst recognising the need for flexibility:

Some amendments were made in the act, which have been reflected in the code, to assist that [apprenticeships]. The one thing that the code does rule out is enterprise agreements where the union seeks to impose a strict ratio on the number of apprentices. The government thinks that strict ratio may not suit every contractor and so that is not consistent with the code.⁴⁰

Committee view

2.41 The committee notes that the building and construction industry is a vital component of the national economy, and supports the government's focus on fostering an industrial framework which supports productivity, efficiency, safety and fairness.

2.42 The committee has considered stakeholder views on the bill and concerns identified; however, the committee notes that many of the concerns raised are in fact in relation to the 2016 Code and the government's broader building and construction industrial relations policy, rather than the provisions of the proposed bill.

2.43 Having considered questions about the likely effect of amending the transition period on employers and employees, the committee is satisfied that ample notice of the requirements of the 2016 Code was provided. Given the considerable parliamentary debate around associated legislation which dates back to 2013, the committee also considers that divergent stakeholder views—including unions—were adequately canvassed and considered in the preparation of the government's reform agenda.

2.44 The committee is not persuaded by the argument that implementing the requirements of the 2016 Code in 2017 as opposed to 2018 would preference companies whose workplace culture adheres to the government's policies. Legislation supporting the 2016 Code was debated, fine-tuned and passed by Parliament, and the committee applauds companies which have taken steps to comply with the spirit of the law in ample time.

2.45 The committee recognises that an excessively long transition period—although well-intentioned—has resulted in unintended consequences, delays and confusion which are not in the interests of a fair and productive industrial framework

39 Mr Dave Noonan, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Proof Committee Hansard*, 13 February 2017, p. 14.

40 Mr Steve Kibble, Group Manager, Work, Health and Safety Policy Group, Department of Employment, *Proof Committee Hansard*, 13 February 2017, p. 34.

in the sector. The committee supports the objectives of the bill and urges Parliament to bring forward the full implementation of the 2016 Code.

Recommendation 1

2.46 The committee recommends that the Senate pass the bill.

Senator Bridget McKenzie

Chair

