Labor Senators' Dissenting Report

Implications of arbitrarily changing implementation date

1.1 The Coalition's majority report has been very quick to focus exclusively and literally on the provisions of the bill, stating that the bill does not introduce new requirements, but rather merely brings forward the date at which requirements of the Code take effect. This is a two-pronged strategy to: a) distract attention away from the significant upheaval implementation of the government's policies has had and is yet to have; and b) trivialise the intentions and effects of early implementation of the Code.

1.2 Labor Senators reject the premise of this argument. Firstly, discussing the implementation date of a policy—any policy—without consultation on its substance and consequences is disingenuous. Secondly, arbitrarily halving the amount of time participants in the building and construction industry have to comply with the Code may seem trivial to the government, but it has palpable consequences for employers and employees in the real world.

1.3 The arbitrary timeframes set by this government were laid bare during the inquiry when Senator Hinch revealed how the original two year timeframe was determined:

> To use the parliamentary word 'compromise', the Prime Minister came up with it, wrote the date 29 November 2018 on a piece of paper and slid it across the desk to me to try to get somewhere between their nine months and my open-ended one. And that is why, Senator Marshall, it came to the two years.[1]

1.4 Labor Senators also wish to dispel the myth contained in the Coalition's majority report that the 2016 Code was somehow completely settled back in 2014 due to the 'advanced release' document. The argument that industry participants should rely on the 2014 Code, which was twice rejected by the Parliament when the original ABCC bill was defeated, and which never came into force, defies logic. Officials from the Department of Employment also confirmed that there were differences between the 2014 and 2016 Codes:

> The 2016 code that was issued by the minister once the ABCC bill, if we can call it that, was passed by the parliament and commenced in December 2016 is different to the advance release. The main reason it is different is that the provisions of the bill as amended, primarily because there were amendments made in the [ABCC] legislation in November [2016]…[2]

1.5 Labor Senators urge colleagues in the Senate to examine the concerns raised about this bill, which include those set out below, and ask themselves why the

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1 Senator Derryn Hinch, *Proof Committee Hansard*, 13 February 2017, p. 32.

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

government is seeking to steamroll Parliament into almost immediate implementation of the Code.

The bill discourages competition and causes instability

1.6 By significantly bringing forward the date of implementation of the Code without warning, the government is targeting companies with agreements with features typical of those with strongly unionised workforces. The bill uses the government's procurement power to give a competitive edge to non-unionised companies.[3] As put by the Construction, Forestry, Mining and Energy Union (CFMEU), the bill would unfairly disadvantage companies which have been operating on the basis of existing laws:

> The Commonwealth has a special obligation to act as a model client. As custodian of public funds it must seek out contractors who will provide value for taxpayer dollars. The blanket exclusion of a large swathe of industry participants who have done no more than exercise their lawful rights will not deliver that outcome. The Commonwealth must also engage in fair commercial dealing and treat contractors and workers on publicly funded jobs in an even-handed way. Arbitrary and capricious exclusions and unilateral changes to the rules of commercial engagement fall well short of any acceptable standard.[4]

1.7 It is also a shot across the bow for all companies with enterprise agreements which respect workers' safety, job security and basic rights, and should ring alarm bells for the wider public.

1.8 Furthermore, the government points to the fact that, if the bill is passed, non-compliant companies will still be able to tender for government-funded work, but will not be able to undertake such work before they become Code-compliant. The reality is, however, that the cost of preparing tendering documents represents a significant financial risk for companies which bid for work that they will not be allowed to undertake if the bill is passed. The committee heard that a tender for a large Commonwealth project could run to hundreds of thousands or even millions of dollars.[5]

1.9 Finally, companies have no guarantee of being deemed to be compliant in time, because securing a new agreement takes negotiation, compromise and time:

> If you are taking things out of their agreements, they [workers] are going to have a view about that, just like any contract negotiation. So that is complicated, and you go back to a majority vote to vary or terminate the agreement and you have the Fair Work Commission involved. You have to send it off to the faceless people at the ABCC, as it is now, who are taking up to a couple of months to assess whether something is in the code or not.

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

4 Construction, Forestry, Mining and Energy Union (CFMEU), *Submission 5*, p. 4.

5 Mr Dave Noonan, National Secretary, Construction and General Division, CFMEU, *Proof Committee Hansard*, 13 February 2017, p. 25.

> Let me tell you the interpretations about what is compliant or not, even on the previous code, were absolutely bizarre and ideological. So that is what we are going to get and that is what the industry is facing.[6]

1.10 This, Labor Senators agree, is a recipe for instability in the sector.

1.11 The Government produced no modelling or analysis to suggest it understands the impact this bill will have on the building and construction industry. The Government was unable to provide evidence of the number of companies that are affected by the proposed legislation—that is to say the Government can't say what proportion of the industry will be detrimentally affected by the proposal.

1.12 The Government was also unable to produce evidence that the proposed legislation will lead to more competitive, lower cost, better for value for money tenders. In fact, tax payers can assume that by reducing the pool of available employers to tender for Commonwealth construction work that the cost of tenders will in fact increase.

Lack of transparency and consultation

1.13 This bill should not be considered without detailed examination of its impact, which the government is seeking to prevent by rushing this bill through Parliament. The bill should not even have been introduced into Parliament without consultation across the industry, as it has been. The few organisations representing workers' interests which made submissions to this inquiry reported that they were not given an opportunity to discuss this bill before it was introduced.[7]

1.14 Of additional concern is the fact that, as pointed out by the Australian Council of Trade Unions (ACTU), evidence suggests that the government is planning to issue a new, or amended Code, without proper consultation. The ACTU warned that:

> …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.[8]

Pushing casualisation of the workforce

1.15 The Code this bill seeks to foist upon the industry over a year earlier than previously indicated would deter agreements from containing clauses which limit casualisation. This will encourage employers to increase the proportion of casual workers they hire.

1.16 Workers in the building and construction industry, like workers across much of the economy, benefit from job security and the conditions ongoing employment provides. In addition underemployment—people who are in paid work but do not have

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6 Mr Dave Noonan, CFMEU, *Proof Committee Hansard,* 13 February 2017, pp. 25–26.

7 ACTU, *Submission 2*, p. 1.

8 ACTU, *Submission 2*, p. 1.

access to regular work—is already a problem in the building and construction industry, as it is in many industries. The Code will only exacerbate this problem.

Stripping the right to agree apprentice ratios

1.17 The Code, and this bill which seeks to rush its implementation, would restrict agreements from containing ratios of apprentices.[9] It also restricts agreements containing ratios of mature workers or women in industries where they are underrepresented.[10]

1.18 Representatives of the ETU explained the practical impacts of the early introduction of the Code:

> We cannot have ratios of apprentices. It does not matter what the fluffy words say at the start of the bill. We cannot now, we cannot in the future, have a ratio of apprentices or older workers, mature workers. We have had ratios in Victorian agreements. We have had ratios for females to try to get them into the industry. We cannot do it. We are not allowed to do it.[11]

1.19 There are real, tangible consequences to removing ratios. By not having apprenticeship ratios, for examples, employers can effectively transfer apprentices to a labour hire company—that is, have apprentices do the same job on the same site for less money:

> That is exactly what they have done. The employers in New South Wales went through a process of laying off apprentices and telling them to apply for work with NECA, the employer association's group training scheme, and then brought them back on $7 or $9 an hour less.[12]

> They all got put back on the award. The normal course of events is that the apprentice attracts a ratio of the tradesmen's rate. So if the tradesmen's rate is 45 bucks an hour, a first-year apprentice might get about 40 per cent of that—42 per cent, to be precise. They put them back on the award, and the award is 22 bucks an hour. They have cut their wages in half. This is not to be taken with a pinch of salt; this is reality.[13]

1.20 This is an alarming step for the government to take, one which unashamedly enables employers who want to avoid paying fair and agreed wages.

1.21 In fact the 2016 Code is so broadly written, particularly Section 11 which prohibits in enterprise agreements any clauses that 'impost or purport to impose limits on the right of a code covered entity to manage its business or improve productivity.'[14]

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9 Mr Dave Noonan, CFMEU, *Proof Committee Hansard,* 13 February 2017, p. 14.

10 Mr Dave Meir, National Assistant Secretary, Electrical Trades Union of Australia (ETU), *Proof Committee Hansard,* 13 February 2017, p. 16.

11 Mr Dave Meir, ETU, *Proof Committee Hansard,* 13 February 2017, p. 16.

12 Mr Dave Meir, ETU, *Proof Committee Hansard,* 13 February 2017, p. 24.

13 Mr Dave Meir, ETU, *Proof Committee Hansard,* 13 February 2017, p. 16.

14 *Code for the Tendering and Performing of Building Work 2016*, paragraph 11(1)(a).

1.22 As a result there is grave uncertainty about clauses which are legitimate and undoubtedly in the national interest in existing enterprise agreements. These clauses include those which have the effect of:

- requiring employers to provide nationally accredited and adequate asbestos awareness training;
- require consultation, discussion and implementation on strategies to overcome barriers to entrance and retention of women in the industry;
- require the provision of suicide awareness and prevention advice and training;
- have an agreed impairment policy; and
- require endeavours to ensure boots and workwear provided to workers are Australian made.

1.23 That the department of employment couldn't give a definitive answer on the issue of Australian made clothing during the hearing is of concern.[15]

Application of the Code beyond the construction sector

1.24 The Committee heard evidence from the ETU of the Code being applied far beyond the construction sector and into the essential services sector. South Australian Power Networks (SAPN) is the electricity network company that owns the poles and wires of South Australia's electricity network. SAPN's current enterprise agreement expired in December 2016 and during negotiations for a new agreement advised that they are seeking the new EBA to be Code compliant. Evidence was tabled to confirm this in the form of an internal negotiations update from the Acting CEO to the company workforce.[16] For more than a decade the South Australia's electricity network has been free of serious industrial disputes yet now that is at serious risk as a direct result of the 2016 Code. As a result, where the Code is being applied far beyond the construction industry, it is likely to produce industrial disputation where there was none previously, thereby having the exact opposite effect to its stated intention.

1.25 The Code was designed for construction sites not essential services such as electricity and to see it applied in a sector well beyond the Government's intention is extremely alarming. SAPN is the first power network company to seek to apply the Code and if successful could provide a precedent that will see electricity generators and network companies in every state across the country do the same.

1.26 The inappropriate application of the Code beyond the construction sector is further compelling evidence that the BCI Act and the Building Code are not only unjust, they are unworkable and add further serious weight to the argument that the

15 Mr Steve Kibble, Group Manager, Work, Health and Safety Policy Group, Department of Employment, *Proof Committee Hansard*, 13 February 2017, p. 31.

16 Mr Lance McCallum, National Policy Officer, Electrical Trades Union of Australia, tabled document, *South Australian Power Networks Enterprise Agreement Update*, 13 February 2017; see also Mr Lance McCallum, National Policy Officer, Electrical Trades Union of Australia, *Proof Committee Hansard*, 13 February 2017, pp. 17 and 23.

bill should not be supported and that a mandatory legislative exemption for the provision of essential services related to supply of electricity, natural gas, water, waste water, or telecommunications from the Building Code must be established if the Code exists at all.

Conclusion

1.27 The proposed legislation displays the government's barefaced contempt for the health of the building and construction industry, the interests of contractors and workers and the parliamentary process. Having forced the passage of its ABCC legislation through Parliament last year by doing frenzied backroom deals with the cross-bench, the government is now—not even three months later—trying to backtrack on the concessions that it made.

1.28 According to the Coalition majority report's thinly-veiled argument, legislating for rights and protections is "prescriptive". Labor Senators unashamedly oppose this position and advocate for the protection of workers' rights. Labor Senators reject this bill's attempt to strip away hard-won protections and replace them instead with empty words about how the government supports fairness.

1.29 Labor Senators warn against rushing this bill through parliament without proper examination. Given the potential impact of this legislation, Labor Senators urge caution and call on Senators to resist the government's attempts to steamroll the Senate into passing this bill.

Recommendation 1

1.30 Labor Senators recommend that the Senate reject the bill.

Senator Gavin Marshall
Deputy Chair

Senator the Hon Doug Cameron
Participating member