

The Senate

Education and Employment
Legislation Committee

Building and Construction Industry (Improving
Productivity) Amendment Bill 2017 [Provisions]

February 2017

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ISBN: 978-1-76010-524-2

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Mr Nicholas Craft, Senior Research Officer

Ms Kate Campbell, Senior Research Officer

Ms Amy Walters, Research Officer

Mr Abe Williamson, Administration Officer

Committee web page:

www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment

PO Box 6100
Parliament House
Canberra ACT 2600

Ph: 02 6277 3521
Fax: 02 6277 5706
E-mail: eec.sen@aph.gov.au

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Chapter 1

Introduction

Reference

1.1 The Building and Construction Industry (Improving Productivity) Amendment Bill 2017 was introduced into the House of Representatives on 8 February 2017 by the Hon. Peter Dutton MP, Minister for Immigration and Border Protection.¹

1.2 The Selection of Bills Committee recommended that the bill be referred for inquiry, as it 'requires investigation on the consequences of a shorter proposed transition period'.²

1.3 On 9 February 2017, the Senate referred the provisions of the Building and Construction Industry (Improving Productivity) Amendment Bill 2017 (the bill) to the Education and Employment Legislation Committee (the committee) for inquiry and report by 15 February 2017.³

Background to the bill

1.4 In late 2016, the government re-established the Australian Building and Construction Commission (ABCC) with the *Building and Construction Industry (Improving Productivity) Act 2016* (the BCI Act). The ABCC commenced in December 2016, and is intended to ensure:

...that building work is carried out fairly, efficiently and productively in the building and construction industry.⁴

1.5 A key component of the regulatory framework supporting the ABCC Act is the Code for the Tendering and Performing of Building Work 2016 (2016 Code). The Code was issued by Senator the Hon. Michaelia Cash, Minister for Employment (Minister) on 2 December 2016.⁵

1.6 The 2016 Code stipulates that any building companies seeking to undertake Commonwealth-funded building work must have enterprise agreements (EAs) with employees that comply with:

...right of entry laws for union officials, freedom of association provisions protecting workers' rights to join or not to join a union, and work health

1 *Votes and Proceedings*, No. 29, 8 February 2017, p. 497.

2 Selection of Bills Committee, *Report No. 1 of 2017* (9 February 2017), Appendices 2 and 3.

3 *Senate Hansard*, 9 February 2017, p. 25.

4 ABCC, 'About' at www.abcc.gov.au/about, (accessed 9 February 2017).

5 Senator the Hon. Michaelia Cash, Minister for Employment, 'New building code to improve conduct and boost productivity on building sites', *Media Release*, 2 December 2016.

and safety and security of payment laws or risk losing access to Commonwealth-funded building work.⁶

1.7 According to the Explanatory Memorandum, the BCI Act contains a transitional provision that temporarily exempts some building companies from the requirement to comply with the 2016 Code.⁷ Essentially, this means that all building contractors who had active EAs when the Code was issued on 2 December 2016 are able to apply to be awarded Commonwealth building work until 29 November 2018, even if their EAs are not Code-compliant.⁸

1.8 The bill currently being considered seeks to bring forward the expiry of this exemption, from 29 November 2018 to 31 August 2017.

Purpose of the bill

1.9 In the second reading speech introducing the bill into the House of Representatives, the Hon. Peter Dutton MP, Minister for Immigration and Border Protection, highlighted that the building industry is a vital sector of the Australian economy and noted:

Ensuring an efficient, safe and law-abiding building and construction industry is crucial to promoting jobs, driving economic growth and managing the transition to a more diversified economy.

This is why the government last year re-established the Australian Building and Construction Commission to ensure building work is carried out fairly, efficiently, lawfully and safely for the benefit of all Australians.⁹

1.10 Minister Dutton also outlined how the 2016 Code drives reform of, and boosts productivity in, the building sector by:

...prohibiting restrictive clauses in enterprise agreements that limit the ability of a contractor to manage its business or improve productivity, as well as those that give unions disproportionate power on building sites.¹⁰

6 Senator the Hon. Michaelia Cash, Minister for Employment, 'New building code to improve conduct and boost productivity on building sites', *Media Release*, 2 December 2016.

7 Building and Construction Industry (Improving Productivity) Amendment Bill 2017, *Explanatory Memorandum*, p. i.

8 This means active enterprise agreements that had been voted on and approved by employees. Senator the Hon. Michaelia Cash, Minister for Employment, 'New building code to improve conduct and boost productivity on building sites', *Media Release*, 2 December 2016. See also subsection 34(2E) of the *Building and Construction Industry (Improving Productivity) Amendment Act 2016* and section 11 of the Code for the Tendering and Performing of Building Work 2016.

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

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

1.11 Minister Dutton also spoke of the benefits that the bill would bring, particularly how it would increase productivity and reduce costs in the construction sector:

These amendments will ensure key provisions of the Building Code that seek to improve productivity and reduce costs will be achieved in a more timely fashion.

In turn, this will create the conditions needed to fund the construction of more schools, hospitals and other important social infrastructure, at a price we can afford.¹¹

Overview of the bill's provisions

1.12 The bill has one schedule containing three items, which will be discussed in turn.

1.13 Item 1 would amend subsection 34(2E) of the BCI Act to bring forward the expiry date of the exemption from 29 November 2018 to 31 August 2017. The Explanatory Memorandum states that:

It also limits the scope of the exemption to only enabling the submitting of expressions of interest or tenders. The effect of this change is that a building industry participant with a non-code compliant enterprise agreement (made before 2 December 2016) can still submit expressions of interest or tender for relevant building work, but would need to ensure that they have a code compliant enterprise agreement before they could be awarded a contract to perform the relevant building work.¹²

1.14 Item 2 would amend the note under subsection 34(2E), replacing it with two notes. The Explanatory Memorandum summarises the effect of these notes:

Note 1 explains that the effect of subsection 34(2E), as amended, is that while building industry participants may submit expressions of interest or tender for building work before 1 September 2017, they cannot be awarded (and perform) that work unless and until they meet the relevant enterprise agreement content requirements.

Note 2 replicates the note that was repealed. It explains that subsection 34(2E) does not apply in relation to enterprise agreements made after the commencement of the 2016 Code.¹³

1.15 Item 3 clarifies that amendments made to subsection 34(2E) of the BCI Act would 'only apply in relation to expressions of interest, or tenders, for building work submitted after Schedule 1 commences'.¹⁴

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

12 Building and Construction Industry (Improving Productivity) Amendment Bill 2017, *Explanatory Memorandum*, p. 2.

13 Building and Construction Industry (Improving Productivity) Amendment Bill 2017, *Explanatory Memorandum*, pp. 2-3.

1.16 The Explanatory Memorandum outlines the effects of this amendment:

The practical consequence of this application provision is that if a building industry participant submitted an expression of interest or tendered for building work between 2 December 2016 and the commencement of Schedule 1, the building industry participant would remain eligible to be awarded that building work until 28 November 2018 even if a building enterprise agreement that covers the building industry participant does not comply with any one or more of the requirements of the 2016 Code.

For the avoidance of doubt, if a building industry participant submitted an expression of interest or tendered for building work on or after 2 December 2016 and was awarded that work before the commencement of Schedule 1, the building industry participant is entitled to undertake, or continue to undertake, that work after the commencement of Schedule 1.¹⁵

Financial implications

1.17 The Explanatory Memorandum includes a financial impact statement that notes the bill would have no fiscal impact.¹⁶

Compatibility with human rights

1.18 The bill's statement of compatibility of human rights states that the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.¹⁷

Scrutiny of Bills Committee

1.19 At the time of drafting, the Senate Standing Committee for the Scrutiny of Bills had not reported on the bill.

Conduct of the inquiry

1.20 Details of the inquiry were made available on the committee's website.¹⁸ Owing to the short timeframe of the inquiry, the committee decided not to make a general invitation for written submissions. Instead, the committee chose to contact a

14 Building and Construction Industry (Improving Productivity) Amendment Bill 2017, *Explanatory Memorandum*, p. 3.

15 Building and Construction Industry (Improving Productivity) Amendment Bill 2017, *Explanatory Memorandum*, p. 3.

16 Building and Construction Industry (Improving Productivity) Amendment Bill 2017, *Explanatory Memorandum*, p. ii.

17 Building and Construction Industry (Improving Productivity) Amendment Bill 2017, Statement of Compatibility with Human Rights, *Explanatory Memorandum*, p. 4.

18 Senate Standing Committee on Education and Employment, Building and Construction Industry (Improving Productivity) Amendment Bill 2017, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/ConstructionAmendment (accessed 10 February 2017).

limited number of relevant organisations to invite submissions. Submissions were received from nine organisations, as detailed in Appendix 1.

1.21 A public hearing was held in Canberra on 13 February 2017. A list of witnesses who appeared at the hearing is available in Appendix 2.

Structure of this report

1.22 This report consists of two chapters:

- This chapter provides a brief background and overview of the bill, as well as an overview of the administrative details of the inquiry.
- Chapter 2 discusses the issues raised by submitters to the inquiry. It also outlines the committee's views and recommendations.

Acknowledgement

1.23 The committee thanks those organisations which contributed to the inquiry by preparing written submissions and giving evidence at the public hearing.

Notes on references

1.24 References in this report to the Hansard for the public hearing are to the Proof Hansard. Please note that page numbers may vary between the proof and official transcripts.

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

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

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.

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

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 'impose or purport to impose limits on the right of a code covered entity to manage its business or improve productivity.'¹⁴

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

Australian Greens Dissenting Report

1.1 The Building and Construction Industry (Improving Productivity) Amendment Bill 2017 (the bill), represents the triumph of big business over the independence of the Senate.

1.2 If passed the bill will remove transitional arrangements previously agreed to by the Senate and instead, in effect, require immediate compliance with the new Building Code by any company wishing to successfully tender for government work.

1.3 Evidence to the committee and discussions in the media have highlighted the chaos this will impose on the building industry.

1.4 Thousands of agreements will need to be negotiated or renegotiated and many companies will not be able to tender for government work over the next 12 months, as agreements covering the workforce will not comply with the Building Code.

1.5 As the CFMEU stated in its submission to the committee:

The amendment will significantly reduce the pool of available contractors for Commonwealth taxpayer-funded construction work. Large, small and intermediate contractors will all be affected. The CFMEU has estimated that there are upwards of 3,000 contractors and many tens of thousands of their employees who will be prejudiced by this change. It includes those with agreements which cover trade unions and those with 'non-union' agreements. Those who have expended resources preparing tenders in the almost three months since the most recent changes were made will have their efforts reduced to nothing.

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. Many of these contractors will be afraid to publicly oppose these changes because to do so would damage their commercial interests.¹

1.6 Evidence to the committee by the Electrical Trades Union also highlighted how the electricity sector in states such as South Australia could be harmed by the passage of this legislation and the Code as employers seek to widen its coverage to sectors beyond the building industry.²

1.7 Taxpayers will also be harmed by the bill:

Because of the reduction of eligible contractors, Australian taxpayers will be deprived of the benefits of the ordinary competitive commercial tender

1 CFMEU, *Submission 5*, pp. 3–4.

2 Mr Lance McCallum, National Policy Officer, Electrical Trades Union of Australia, *Proof Committee Hansard*, 13 February 2017, pp. 17 and 23.

process that is essential to the delivery of quality and value-for-money construction work.³

1.8 The Australian Greens do not support the reestablishment of the ABCC and we did not support the original Building and Construction Industry (Improving Productivity) Amendment Bill and the Building Code or the amended compromise reached between Senator Hinch and the Prime Minister.

1.9 As elaborated in evidence and submissions to the committee the Building Code will prohibit from agreements clauses that limit the casualisation of the building industry, set apprentice numbers, limit excessive overtime on health and safety grounds or restrict the use of foreign visa holders in favour of local workers. The Code will also allow the reinstated ABCC to rule many other areas of enterprise agreements that are favourable to workers as non-compliant.

1.10 Despite this we acknowledge that the role of the Senate is a House of Review and that in this case a compromise position had been reached last year that reflected the views of a majority of the Senate.

1.11 As was discussed at the time the amendments would have allowed a more realistic time frame for the industry to transition to new agreements that comply with the Code.

1.12 As the CFMEU points out in its submission:

When the rules relating to permissible enterprise agreement content change, transitional arrangements become very important. The current sections in the Act and Code recognise that those who entered into agreements whose content was perfectly lawful at the time the agreement was made should not be disadvantaged by the change to these rules. They should be given a reasonable period in which to bring their industrial arrangements into conformity with the new rules. Anything short of that would mean that the changes have a retrospective and adverse effect on law-abiding players in the industry.⁴

1.13 Instead Senator Hinch and Senator Xenophon have struck a deal with the government overturning the agreement reached by the Senate.

1.14 We do not know the complete content of the deal or what if any promises have been made. But we do know that the striking of this deal by Senator Hinch and Senator Xenophon, after big business lobbying, not only puts at risk the rights of workers and jeopardises the industry, it makes a mockery of the independence of the Senate.

1.15 It also opens to question any other position expressed by these Senators in the future. It is now clear that any agreements, on legislation or positions, struck only months before can now be reversed by these Senators. Their word can no longer be taken for granted.

3 CFMEU, *Submission 5*, p. 4.

4 CFMEU, *Submission 5*, p. 2.

1.16 Their support for this legislation is not only a betrayal of building workers and workers in their states, it is a betrayal of the role of the Senate as a proper House of review.

1.17 The Australian Greens will not participate in this further diminution of workers' rights, therefore we will vote against this bill.

Recommendation 1

1.18 The Australian Greens recommend that the bill not be passed.

Senator Lee Rhiannon

Appendix 1

Submissions and additional information

<i>Submission Number</i>	<i>Submitter</i>
1	Housing Industry Association
2	Australian Council of Trade Unions
3	Master Electricians Australia
4	Department of Employment
5	Construction, Forestry, Mining and Energy Union
6	Electrical Trades Union
7	Australian Chamber of Commerce and Industry
8	Master Builders Australia
9	Independent Contractors Australia

Answers to questions taken on notice

Public hearing in Canberra, 13 February 2017

- 1 Answer by Mr Lance McCallum of the Electrical Trades Union to a question taken on notice from Senator Xenophon.
- 2 Answer by Master Builders Australia to questions taken on notice from Senators Xenophon and McKenzie.
- 3 Answers by the Department of Employment to written questions on notice from Senator McKenzie, received 13 February 2017.
- 4 Answers by Tom Roberts of the CFMEU, to written questions on notice by Senator McKenzie, received 14 February 2017.
- 5 Answers by Tom Roberts of the CFMEU to questions taken on notice by Senator Xenophon, at a public hearing in Canberra, 13 February 2017.

Tabled documents

- 1 Document tabled by Senator Cameron at a public hearing in Canberra, 13 February 2017.
- 2 Document tabled by Mr Lance McCallum of the Electrical Trades Union of Australia at a public hearing in Canberra, 13 February 2017.

Appendix 2

Public hearings

Parliament House, Canberra, 13 February 2017

Committee Members in attendance: Senators McKenzie, Marshall, Cameron (participating member), Hinch (participating member), Roberts (participating member), Rhiannon (substitute member) and Xenophon (participating member).

Witnesses

Housing Industry Association

Ms Kristin Brookfield, Chief Executive Industry Policy

Mr David Humphrey, Senior Executive Director, Compliance and Contracting

Master Builders Association

Mr Wilhelm Harnisch, Chief Executive Officer

Mr Shaun Schmitke, National Director Industrial Relations

Master Electricians Association

Mr Jason O'Dwyer, Manager Advisor Services

Australian Council of Trade Unions

Mr Trevor Clarke, Director, Industrial Policy

Construction, Forestry, Mining and Energy Union

Mr Dave Noonan, National Secretary

Mr Tom Roberts, Senior National Legal Officer

Mr Travis Wacey, Policy Research Officer, Construction

Electrical Trades Union

Mr Dave Mier, National Assistant Secretary

Mr Lance McCallum, National Policy Officer

Department of Employment

Mr Steve Kibble, Group Manager, Work Health and Safety Policy Group

Ms Sarah Costelloe, A/g Branch Manager, Work Health and Safety Policy Branch

Ms Rebecca Quill, Senior Government Lawyer, Workplace Relations Legal Group

