



Incorporated Victoria No A0050004U
ABN: 54 403 453 626
www.independentcontractors.net.au
PO Box 13103 Law Courts 8010 Vic

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

Independent Contractors Australia strongly supports the *Building and Construction Industry (Improving Productivity) Amendment Bill 2017*.

We request the speedy passing of the Bill thus bringing forward to this year the implementation of the *Code for the Tendering and Performance of Building Work 2016* (Building Code).

1. Protecting competition and small business subcontractors

The reason we support the Bill is that the Building Code is a cornerstone to the protection of small business subcontractors in the construction sector.

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.

This is the true commercial environment typical in construction that must be reformed. Construction unions are effectively in collusive, anti-competitive arrangements with big construction firms and the unions are primary enforcers of such anti-competitive arrangements.

These collusive anti-competitive arrangements circumvent the spirit and intent of Australia's competition laws under the masquerade of and through the industrial relations 'carve out' provisions of the competition laws.

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.

Below we supply some evidence from the Building Code that demonstrates the pro-competition and pro-small business design of the Building Code.

2. Construction unions and nonsense chaos claims

We note media reports that the construction unions are predicting and warning of ‘chaos’ in the sector because thousands of companies have signed union agreements that are non-compliant with the Building Code. The unions reportedly predict that as a consequence there will be few construction firms able to tender for or do government funded work.

On the evidence however, such ‘warnings’ are at best nonsensical fabrications and at worst deceptive lies.

The lead construction union, the CFMEU has in place thousands of agreements built around a pattern bargaining style template modeled, it is understood, largely on the CFMEU’s 2016 agreement with the giant construction firm Lend Lease. In the Lend Lease agreement the CFMEU undertakes to terminate the agreement if the agreement is not compliant with the Building Code and to negotiate a new agreement that is compliant.

It could be said that in effect the CFMEU has conceded the legitimacy of the Building Code and has agreed to comply. Yet publicly they complain!

The *East Coast Lend Lease CFMEU EBA 2016 July 2019* reads as follows;

7.3 Compliance for government funded building work

- (a) It is recognised by the Parties that whilst this Agreement is in operation, Commonwealth, State or Territory Governments may impose particular requirements on the content of enterprise agreements in order for the Company to be eligible for future government funded building work. It is essential that the Agreement is compliant with any such requirements in order for the Company to remain eligible to tender for future government funded building work. If any new requirements are promulgated during the life of this Agreement, which impact on the content of this Agreement, this clause will be applied.
- (b) In this event, the Parties agree to apply to the FWC to terminate this Agreement in accordance with the Fair Work Act (within 7 days of any such requirement being promulgated) and the Company and Employees will commit to negotiating a replacement Agreement which is compliant with any such requirements.

The Western Australian *Lend Lease CFMEU 2016 to 2020* agreement reads in a near identical way.

- 5.3 It is recognised by the Parties that whilst this Agreement is in operation, Commonwealth or State Governments may impose particular requirements on the content of enterprise agreements in order for the Employer to be eligible for future government funded building work. It is essential that the Agreement is compliant with any such requirements in order for the Employer to remain eligible to tender for future government funded building work. If any new requirements are promulgated during the life of this Agreement, which impact on the content of this Agreement, this clause will be applied.

- 5.4 In the event that the circumstances referred to in clause 5.3 arise, the Parties

agree to apply to the FWC to terminate this Agreement in accordance with the Act (within 7 days of any such requirement being promulgated) and the Employer and Employees will commit to negotiating a replacement Agreement which is compliant with any such requirements.

In the Lend Lease agreements at least the CFMEU has clearly undertaken to create and commit to Building Code compliant agreements.

3. Evidence of the Pro-Competition and Pro-Small Business design of the Building Code

Below are extracts from the *Code for the Tendering and Performance of Building Work 2016* with our commentary. These are just examples of clauses in the Building Code. We have highlighted them because of the protections they deliver for small business contractors. They demonstrate the importance of bringing the Building Code into operation as soon as feasible if small business people are to have a 'fair go' in the construction sector.

3A. *Compliance with competition laws.*

The Code requires compliance with competition laws.

9 (2) A code covered entity must comply with the Competition and Consumer Act 2010 to the extent that it applies to the entity in relation to tendering for, or undertaking building work.

11C (1) A code covered entity must not engage in collusive tendering practices

These clauses arguably bring into play a commercial imperative for compliance with competition laws. It is one thing for a firm to suffer a fine for breaching competition laws. Such fines are often just a 'cost of doing business.' It is all together different if a construction firm breaches or circumvents competition laws and then risks denial of access to billions of dollars of construction work. This focuses the attention of construction executives toward compliance.

In addition and subject to clarification, we surmise that compliance with the CCA includes the requirement to also comply with the new small business unfair contract protection laws (effective from November 2016). If so, the Building Code gives real teeth to the small business unfair contract protections. If a large construction firms imposes unfair contracts on a small subcontractor, the large firm risks denial of access to government work.

3B *Prohibits secret agreements*

Repeated Royal Commission inquiries have disclosed secret agreements operating between unions and construction companies. Clause 10 of the Building Code bans secret agreements. Our keen interest is the banning of secret agreements that disadvantage small business subcontractors. The following clause bans secret agreements;

10 (1) (c) that restricts or limits the form or type of engagement that may be used to engage subcontractors

3C *Small Business Protections*

Collusive agreements between construction unions and some large construction firms commonly have clauses that impose control over small business subcontractors and

independent contractors. The Building Code prohibits such clauses thus delivering protections to small business people and their workers.

Clauses are banned that

11 (1) (b) discriminate, or have the effect of discriminating against certain persons, classes of employees or subcontractors

11 (3) ...that:

(a) prescribe the number of employees or subcontractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time.

(b) Restrict the employment or engagement of persons by reference to the type of contractual arrangement that is, or may be offered by the employer...

(f) prescribe the terms and conditions on which subcontractors are engaged (including the terms and conditions of employees of subcontractors)

Payment of small business subcontractors on time is a requirement of the Building Code. This is a hugely important reform that should not be delayed.

11D (1) A code covered entity must

(b) ensure that payments which are due and payable by the code covered entity are made in a timely manner and are not unreasonably withheld

In our view, a great deal of illegal ‘phoenix’ activity is arguably associated with union activity. Whatever the case however it is small business contractors and independent contractors who are frequently victims of phoenix activity, as is the Australian Taxation Office and other statutory bodies! Importantly the Building Code denies those conducting phoenix activity from being eligible for government work. This is another important reform aspect that should not be delayed.

11D (2) A code covered entity must not engage in illegal or fraudulent phoenix activities for the purpose of avoiding any payment due to another building contractor or building industry participant or other creditor.

4. Summary

The Building Code should be looked at in terms of the specific reform measures it implements. These reforms are significant. We urge the quick passing of the *Building and Construction Industry (Improving Productivity) Amendment Bill 2017* so that the Building Code can be implemented as soon as feasible.