SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

BUILDING AND CONSTRUCTION INDUSTRY (IMPROVING PRODUCTIVITY) AMENDMENT BILL 2017

MASTER BUILDERS AUSTRALIA

RESPONSE TO QUESTIONS ON NOTICE

Senator Xenophon asked:

What provisions of the Code prevent the engagement of women, raising safety matters, or training such as asbestos awareness?

Answer from Master Builders:

There is much public debate about the 2016 Code and its effect. Much of this debate is inaccurate or misleading. It is relevant to note a number of matters for background.

- The Bill currently under Committee consideration does not change or alter the content or effect of the 2016 Code – rather – it affects the timing of the 2016 Code and the degree to which building industry participants must demonstrate compliance.

- There are other laws and regulations that apply to all workplaces, including those in the building and construction industry, such as discrimination, safety, and industrial laws. These other laws operate irrespective of the 2016 Code and cannot be over-ridden.

- The 2016 Code will apply to the content of enterprise agreements and the related conduct on building sites covered by those agreements. All enterprise agreements made (irrespective of whether the 2016 Code applies to them or not) must be subsequently considered and approved by the Fair Work Commission.

- The Fair Work Commission must, when considering the agreement, ensure that it provides conditions that leave workers better off overall. This is done by applying a "Better Off Overall Test" commonly known as the BOOT. If it is found that employees to be covered by an enterprise agreement will not be better off overall under its proposed terms, it will not be approved by the Fair Work Commission. This applies across the board and includes agreements made in the building and construction industry.

- In addition, the Fair Work Commission will not approve an agreement that is inconsistent with other applications laws and regulations, including the National Employment Standards set out in the *Fair Work Act 2009*.

Safety

In terms of safety laws, the Committee should be aware that the ABCC only regulates industrial relations laws, not safety laws. The states and territories regulate safety laws, and regulators such as WorkSafe NSW, are answerable to the state government.

In evidence given to the Committee in 2016 (19 February 2016), the Department of Employment made the following observation that remains true to the current Act:

> *"The Building and Construction Industry Improvement Act 2005 then, and the ABCC Bills now, contain no provisions that would prevent legitimate safety issues in the building and construction industry from being raised and addressed by employees, unions, or work health and safety regulators."*

Master Builders notes that Subsection 9(3) of the 2016 Code is explicit in ensuring workplace health and safety laws are observed. The EM notes that this subsection:

> *"requires code covered entities to comply with work health and safety laws to the extent they apply to building work, including strict compliance with processes for electing health and safety representatives and right of entry for officials of registered organisations. This does not place new obligations on code covered entities, but rather, reinforces that code covered entities are required to strictly comply with existing obligations. These obligations may arise under Commonwealth, state or territory laws."*

Female employees

In terms of female workers, the 2016 Code does not prevent initiatives to promote the employment of female workers in the building and construction sector and specifically bans clauses that are discriminatory.

The 2016 Code contains a provision that requires building industry participants to ensure an enterprise agreement does not contain terms that:

> *"discriminate, or have the effect of discriminating against certain persons, classes of employees, or subcontractors"*

In addition, the associated EM notes that the 2014 Code (that remains true for the 2016 Code) is not intended to operate to prohibit:

> *"initiatives to promote the employment of women, Indigenous, mature age or other groups of workers disadvantaged in the labour market; or…."*

Training

In terms of training, the section 24(d) requires a building industry participant:

> *"to demonstrate a positive commitment to the provision of appropriate training and skill development for their workforce. Such commitment may be evidenced by compliance with any state or territory government building training policies and supporting the delivery of nationally endorsed building and construction competencies;"*

Section 9 (3) is more explicit and specifically notes the obligation of building industry participants in relation to asbestos related safety training as follows:

> *"A code covered entity must comply with work health and safety laws, including work health and safety training requirements and asbestos safety requirements, to the extent that they apply to the entity in relation to building work, including strict compliance*

with procedures for the election of health and safety representatives and right of entry requirements."

Master Builders believes that building unions are not concerned about the nature of training, but the provider of the training. It is not uncommon for building unions to require employers to agree to use a particular provider of a product or service as a condition of signing an EBA.

This issue was canvassed in great detail during proceedings before the Royal Commission in to Trade Union Governance and Corruption. It is common for building unions to restrict employers to the use of 'union approved' training providers that subsequently are a source of income for the union, or use the training session as a way to encourage attendees to join the union.

Section 11 (3) (b) of the 2016 Code notes this and prevents building unions from forcing a training provider upon a workplace against its will as follows:

"(A code covered entity must not)…. apply, or attempt to apply, undue influence or undue pressure on a person to contribute to a particular fund or scheme, or to support a particular product, service or arrangement."

The example immediately underneath this section of the Code clarifies it by way of example.

"Example: a building contractor must not place undue pressure on a subcontractor to select a particular income protection insurance scheme or to make use of a particular training provider."

Senator McKenzie asked:

The CFMEU have said that many builders are dismayed by the proposed amendment but would not speak out publically for fear of retribution from the ABCC. Are there any builders who want to support the amendment but won't speak out for fear of retribution from the CFMEU? What retribution do they fear?

Answer from Master Builders:

Master Builders has not received a report, complaint, concern or expression from a building industry employer that they feared retribution from the ABCC for speaking out against the proposed amendment.

Further, Master Builders have never heard any building employer raising concerns regarding retribution from the ABCC. It is hard to envisage how the ABCC would even seek retribution against building industry employers or what basis exists for same (either at law or in practice).

On the other hand, Master Builders notes that there is an extensive history of retribution from building unions against those building industry participants who speak publicly about matters in such a way that is not consistent with union views. It is for this reason that they are members of Master Builders.

The Royal Commission into Trade Union Governance and Corruption canvassed many examples of where employers were subject to retribution for adopting a view different to that of the Union. A selection of examples from the Final report of the Royal Commission follows:

Final Report of the Royal Commission into Trade Union Governance and Corruption

Volume 1:

- Page 12 para 10

Volume 2:

- Page 411 para 387
- Page 731 para 119

Volume 3:

- Page 57 para 28
- Page 98 para 134
- Page 100 para 139
- Page 102 para 144
- Page 102 para148
- Page 103 para149
- Page 105 para 156
- Page 106 para 158
- Page 124 para 214
- Page 124 para 215
- Page 124 para 216
- Page 131 para 232
- Page 133 para 238
- Page 133 para 239
- Page 133 para 240
- Page 134 para 241 (b)
- Page 134 para 242
- Page 134 para 243
- Page 186 para 42 (e)
- Page 187 para 46
- Page 193 para 60
- Page 432 para 191
- Page 529 para 127
- Page 536 para 144

Volume 4

- Page 276 para 102
- Page 279 para 115
- Page 280 para 117
- Page 280 para 119
- Page 298 para 180
- Page 315 Para 5

Volume 5:

- Page 44 para 2
- Page 112 para 146,147 & 148
- Page 129 para 11
- Page 393 para 1
- Page 577 paras 3-4

Senator McKenzie asked:

Does the Fair Work Act allow for agreements to be terminated by the parties and replaced by a new agreement – one that is Code compliant? Does the Act also allow agreements to be varied by the parties, and that would allow the parties to agree to vary an agreement to make it Code compliant?

Answer from Master Builders:

The Fair Work Act (the Act) allows for agreements to be terminated. The process for same depends on whether the agreement is within its nominal life or has passed its nominal expiry date. Crucially, the processes are overseen by the Fair Work Commission who must approve a termination or variation of an agreement.

Under the Act, employers and their employees may agree to terminate an enterprise agreement within its nominal life. An employer may request that the employees endorse the termination by voting for it. Once this has occurred a party is required to seek approval of the termination by making application to the Fair Work Commission. The termination of an agreement has no effect unless it is approved by the Commission.

If an enterprise agreement has passed its nominal expiry date, any of the parties to the agreement may apply to the Commission for the termination of the agreement. If an application for the termination of an agreement is made, the Commission must terminate the agreement if:

- satisfied that it is not contrary to the public interest to do so, and
- the Commission considers it appropriate to terminate the agreement.

If an agreement is terminated the employer and employees may negotiate a new agreement that is Code compliant.

Further, employers and their employees may agree to *vary* an enterprise agreement, but such a variation has no effect unless it is approved by the Fair Work Commission. An employer may request that the employees endorse the variation by voting for it. In addition, any of the parties to an enterprise agreement may apply to the Commission for a variation of their agreement to remove ambiguity or uncertainty.

Such a variation would allow an agreement to become Code compliant. A variation operates from the day specified in the Commission's decision to vary the agreement.

It is worth noting that the FWC must apply the tests noted at the beginning of this document to satisfy compliance with the BOOT and NES.

Senator McKenzie asked:

Don't many enterprise agreements actually contain clauses that provide the parties with a trigger to terminate or vary the agreement should the Code come into operation and the agreement be found to be non-compliant? Can you give an example of such an enterprise agreement?

Answer from Master Builders:

Master Builders is aware that some builders have made agreements after the date on which the 2016 Code was released in advance that are not compliant with its terms. However, agreements made in these circumstances commonly contain built in protections to ensure they remain eligible for Commonwealth work. The built in protections are set out in agreement clauses. Common types are:

- 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.

It is important to note that almost all agreements containing a variation clause have been made with the CFMEU. This reflects the intent of the CFMEU to enable the EBA parties to meet the new requirements of the Code and establishes a process to achieve this that has been approved by both the FWBC and the Fair Work Commission. Master Builders understands that in Queensland, a variation clause has been part of the 'pattern' EBA advanced by the Queensland CFMEU since early 2015.

Examples of the four types of variation clauses noted above (extracted from actual agreements) follow:

Examples clause: Agreement by parties to terminate non-compliant agreement and negotiate compliant agreement

> *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.*
>
> *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.*
>
> *The Employer will seek to ensure that no Employees are financially disadvantaged as a result of the termination of the Agreement.*

Example clause: Commitment to future compliance

> *If, subsequent to approval, any clause of this agreement is deemed inconsistent with the Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 the*

parties will address any inconsistency through an application to vary the agreement pursuant to the Fair Work Act 2009.

Example clause: Agreement by parties to seek FWC assistance to amend agreement to ensure Code compliance

The Employer, the Union and Employees recognise that government clients are an important source of work and that ensuring continued capacity to comply with written government purchasing guidelines will enhance availability of work and security of employment.

If the Union agrees in writing that the Employer will be ineligible to tender for government work due to a term in this Agreement then the Employer, the Union and the Employees covered will immediately seek a variation of this Agreement dealing with the notified issue to the extent necessary for the Employer to again be eligible to tender for government work.

Where the Employer is notified in writing by a government agency responsible for monitoring of a government purchasing guideline that it considers that the Employer will be Ineligible to undertake government work due to a term in this Agreement, the following process will be undertaken:

(a) The Employer will provide the written notification from the government agency to the Union for its consideration; and

(b) The Union will provide the Employer with a written response within seven (7) days to advise whether the Union agrees with, or disputes, the written notification from the government agency.

If the Union disputes that the Employer will be ineligible to tender for government work due to a term of this Agreement, then the Employer or the Union may notify the Fair Work Commission of a dispute regarding the Agreement, and seek for it to be resolved by the Commission pursuant to clause 7 of this Agreement.

The reference to government purchasing guidelines in this clause includes, but is not limited to, the Building Code 2013. The terms of any variation required under this clause may be determined under the dispute resolution procedure in this Agreement. The intent of this clause is that the Employer is eligible to tender for government work.

Example clause: Agreement to automatically revoke clauses

In the event that the Code comes into force and a provision of this Agreement is deemed as being non-compliant with the Code, the parties will take all necessary and reasonable steps to vary the Agreement so that the non-compliant provision of the Agreement is Code compliant. Actions taken by a party under this clause are not an extra claim.