



MASTER BUILDERS
A U S T R A L I A

10 February 2017

Senate Education and Employment Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email: eec.sen@aph.gov.au

Dear Committee Secretariat,

**BUILDING AND CONSTRUCTION INDUSTRY (IMPROVING PRODUCTIVITY)
AMENDMENT BILL 2017**

Master Builders Australia ('Master Builders') appreciates the opportunity to make a submission to the Senate Standing Education and Employment Legislation Committee ('the Committee') with respect to the *Building and Construction Industry (Improving Productivity) Amendment Bill 2017* ('the Bill').

Owing to the short time frame within which submissions are due, we depart from our usual submission format on this occasion and would seek that this correspondence be taken as an overview of Master Builders' position. On the basis we are offered the opportunity to do so, we would welcome the opportunity to expand on this submission in oral evidence to the Committee.

Summary

Master Builders supports the ABCC and welcomed its re-establishment in 2016. Despite the underpinning legislation and Code being subject to an array of amendments, the return of the ABCC was in overall terms a very welcome outcome.

Master Builders did, however, oppose the amendment that created a two year 'transition' period for certain building industry participants to achieve Code compliance. We understand that this amendment was moved with a positive intention to assist the sector; however it has had wide ranging consequences.

The Bill about which the Committee now inquires will improve the *Building and Construction Industry (Improving Productivity) Act 2016* ('BCI Act') in relation to the two year transition period. It will both address and pre-empt some of the problems arising from the amendment and Master Builders therefore supports its passage.

The Committee should note that Master Builders would have preferred that no transition exist in the first instance and that the Code should have been implemented as per statements of Government and advice to industry.

While this position remains, the reality is that there is a transition period and that this Bill will reduce the extent of problems arising from it. We would encourage the Committee to find and recommend that the Bill be passed.

The Australian Building and Construction Commission (ABCC)

It is a matter of longstanding public record that Master Builders supports the ABCC. This has been a consistent position for over a decade. We supported its introduction, opposed its abolition, and advocated for its re-establishment.

While amendments were made in order to secure a successful passage of the BCI Act the return of the ABCC was an extremely positive outcome and welcomed by Master Builders and industry generally.

Ensuring the rule of law exists and is upheld in the building and construction industry is crucial given the role it plays within the Australian economy. The Committee may wish to note that since Master Builders last appeared before it, the sector has now grown to become the second largest industry in Australia, accounting for 8.1 per cent of gross domestic product, and around 9 per cent of employment.

The detail and history of building and construction industry conduct justifying the need for the ABCC is also a matter of public record. The Committee will be aware that the sector has been the subject of many inquiries, reports, reviews, and Royal Commissions. This conduct is regularly the subject of judicial commentary by the courts.

The Committee is referred to our submission of 27 September 2016 submitted with respect to the *Building and Construction Industry (Improving Productivity) Bill 2016* (ABCC Bill). This submission provided an overview of industry conduct and affirmed Master Builders support for the Bill when it was originally introduced.

Amendments to the *Building and Construction Industry (Improving Productivity) Bill 2016* (ABCC Bill)

While Master Builders supported the ABCC Bill in an unamended form, we note that a number of significant amendments were made during Parliamentary debate to secure its successful passage. By and large, those amendments were of a nature that they did not fundamentally detract from the intent of the Bill, the core function of the ABCC, and the policy outcome it seeks to achieve.

Many of them had the effect of creating additional obligations for building industry participants and the ABCC as a regulator, and created some new requirements that were inserted into *The Code for the Tendering and Performance of Building Work 2016* (2016 Code). The 2016 Code is an important aspect of the regime created by the BCI Act. Enforced by the ABCC, its importance has been canvassed on many occasions before this Committee.

Transition amendment

One exception to the above views was the amendment giving rise to the two year transition period. Master Builders opposed this amendment notwithstanding it was made with the intention of assisting the sector.

The basis of Master Builders' opposition was that the content and relevant requirements of the Code were released in advance in April 2014 ('the 2014 Code'). The Government notified industry of the 2014 Code by way of media release on 17 April 2014. An advance release version of the 2014 Code was also published.

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.

When announcing the 2014 Code, the then Minister for Employment confirmed in the media release that:

"..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."

This was also affirmed in the 2014 Code itself at section 11(2):

"Subsections (1) and (3) apply in respect of enterprise agreements made after 24 April 2014"

And also at paragraph 43 of the associated Explanatory Statement:

"Subsection 11(2) provides that subsections 11(1) and 11(3) apply in relation to enterprise agreements that were made after 24 April 2014. On 17 April 2014 the Minister of Employment announced that the code of practice would be made under the Act following its passage through both Houses of Parliament but that subsections 11(1) and 11(3) would apply in respect of enterprise agreements that were made after 24 April 2014. This means that from the commencement of this code of practice, code covered entities that are covered by an agreement made after 24 April 2014 that does not meet the requirements of section 11 will not meet the key criteria for eligibility to tender for and be awarded Commonwealth funded building work ..."

A draft report of the Productivity Commission inquiry about public infrastructure released prior to the 2014 Code announcement noted the benefit of the Government's approach of using a Code to ensure efficient and effective infrastructure delivery. The final report (dated 27 May 2014) affirmed this view noting at page 35:

"A sensible starting point is for all jurisdictions and the Australian Government to deploy the Victorian guidelines (or something akin to them) for their building codes of practice. Breaching the guidelines would potentially disqualify contractors from tendering for public infrastructure projects if they had mismanaged their industrial relations arrangements or had reached 'sweetheart' deals with unions that precluded competition from sub-contractors with lower wage costs."

Recommendation 13.1 of the final Productivity Commission report at page 46 found that:

"The Australian Government should require compliance with these guidelines as a precondition for any infrastructure funds it provides to State and Territory Governments."

At the time of the 2014 Code advance release, Master Builders advised members and building industry participants to ensure that any agreement made from 24 April 2014 onwards was compliant with the 2014 Code requirements. This advice was given on the basis that when the ABCC was re-established, it would enforce the 2014 Code requirements and compliance with same would be necessary to remain eligible to perform building work on Commonwealth funded projects.

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.

Government services (either through the Department of Employment and/or FWBC) were available to industry participants enabling them to determine if a proposed enterprise agreement would satisfy the requirement to not be inconsistent with 2014 Code requirements before it was agreed and lodged for approval.

The requirements of the 2014 Code were also the subject of much discussion and debate before three inquiries of this Committee, the Parliamentary debate, media commentary and in the public sphere generally.

The Government consistently advised industry of its policy to maintain the requirements of the 2014 Code as proposed and that compliance with same would be necessary to perform work on Government building projects when the ABCC Bill took effect. This advice was consistent and did not alter from April 2014 to November 2016.

It is understood that other similar industry associations (where relevant) who supported the re-establishment of the ABCC also provided advice to industry participants consistent with that of Master Builders and the Government.

Given the above, the last-minute proposal to have a two year transition in order to allow time for industry participants to achieve compliance with the 2014 Code requirements was unnecessary. At the time the amendment was moved, the industry had been on notice for some two years and seven months about the 2014 Code requirements.

Two years and seven months is almost exactly the same as the average nominal life of enterprise agreements in the building and construction industry which is three years. It is therefore very unlikely that a building industry participant that used an enterprise agreement and either did government work, or had the intention of being eligible to do so, would not have commenced bargaining (or had preliminary discussions relating thereto) prior to the re-establishment of the ABCC.

Further, the Committee should note that the 2014 Code requirements insofar as they affect enterprise agreements did not change and are retained in the 2016 Code.

The period between April 2014 and December 2016

While industry was aware of 2014 Code requirements during the above period, it is a matter of public record that building industry unions do not support the ABCC, the BCI Act or the Code. As such, while undertaking enterprise agreement bargaining throughout this period,

building unions encouraged the adoption of enterprise agreements that were not consistent with the requirements of the 2014 Code. In other words, they pursued agreements that accorded with their preferred 'pattern' agreement that contained non-compliant provisions.

Master Builders have long questioned the rationale for the above approach, given that this would have the effect of rendering those employers who signed pattern agreements ineligible to undertake Commonwealth funded work and this would adversely affect building union members and workers broadly.

Building industry employers who did not sign the non-compliant pattern agreement and held out to achieve an agreement that was compliant were subject to various types of action as a result.

While some building industry employers signed agreements that were not compliant, the majority either made agreements that were compliant (or purported to be) or have held out for a compliant agreement. Those who did sign non-compliant agreements did so with awareness they would not be able to tender for or undertake Commonwealth funded building work in the event the ABCC was re-established.

The effect of the two year transition period

The amendment to insert a two year transition period had a number of consequences.

First, it meant that those employers who had signed non-compliant agreements were rewarded for doing so. That is, instead of being ineligible to undertake Commonwealth funded work as the Government intended, they not only remained eligible but had a further two years within which to achieve Code compliance.

Second, it meant that those employers who had signed a compliant agreement endured difficult circumstances to remain eligible only to find themselves in the same position as those who were not compliant and who had signed voluntarily.

Third, it meant that the industry would effectively be given a period of 4 years and 7 months in order to achieve compliance with the Code. Over that period it is feasible for two separate agreements to be negotiated and made that did not meet Code requirements thereby effectively undermining the effectiveness of the ABCC and Code in generating positive industry cultural change.

Fourth, it meant that the benefit of the ABCC and Code would be significantly weakened for a further two year period. In other words, real and genuine improvements in industry participant conduct and productivity would not be realised until late 2018 delivering a policy outcome that is entirely contrary that intended by the BCI Act and Code.

Fifth, the transition period created an incentive for building unions to focus on those building industry participants who had signed non-compliant agreements at the expense of those requiring a compliant agreement.

The effect of the current Bill

If passed, the Bill will have the effect of addressing many of the problems created by the two year transition period. Importantly, it will restore a level playing field amongst industry participants in a number of ways.

First, all participants will need to be Code compliant if they are to be awarded Commonwealth funded building work. This will assist in delivering cultural change immediately on Commonwealth funded construction work and deliver better value for money to taxpayers.

Second, the period by which all participants will need to achieve Code compliance will be greatly reduced. This will bring forward the period in which overall industry cultural change will be realised.

Third, it will create a time pressure on building unions to secure and enhance the prospect of stable, productive and ongoing work for their members by ensuring industry employers are eligible to undertake Commonwealth funded building work.

Fourth, it will remove the disparity between building industry participants arising as a consequence of the two year transition period and reduce disparity insofar as tender eligibility.

Fifth (noting Master Builders preferred position that there ought not have been a transition period of any type in the first instance given almost three years familiarity with 2014 Code requirements) a nine month period within which compliance must be achieved is an appropriate and reasonable compromise that accommodates the overwhelming majority of circumstances faced by building industry participants.

Summary

Master Builders has consistently maintained support for the ABCC, the Code it enforces and the underpinning legislation.

While the re-establishment of the ABCC was a welcome and positive development for the industry overall, the associated two year transition period was opposed by Master Builders and has had far reaching consequences that undermine the operation and intent of the ABCC regime.

This Bill will rectify the consequences arising from the two year transition period and to that end we urge the Committee to recommend that it be supported and enjoy a successful passage.

Master Builders thanks the Committee for the opportunity to make this submission.

MASTER BUILDERS AUSTRALIA