



Australian Government

Department of Employment

SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

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

**SUBMISSION OF THE
DEPARTMENT OF EMPLOYMENT**

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Introduction

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Standing Committee on Education and Employment Inquiry into the Building and Construction Industry (Improving Productivity) Amendment Bill 2017 (the Bill).
2. The building and construction industry is a vital sector of the Australian economy. Ensuring an efficient, safe and law-abiding building and construction industry is crucial to promoting jobs, driving economic growth and delivering important public infrastructure on time and on budget.
3. A crucial factor to drive reform and boost productivity is the content requirements for enterprise agreements contained in the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code). This is achieved by prohibiting restrictive clauses in enterprise agreements that limit the ability of a building industry contractor to manage its business or improve productivity.

History of amendments

4. The *Building and Construction Industry (Improving Productivity) Act 2016* (the Act) commenced on 2 December 2016.
5. Subsection 34(1) of the Act provides that the Minister may, by legislative instrument, issue one or more documents that together constitute a code of practice that is to be complied with by persons in respect of building work.
6. During debate of the Act, an amendment was moved by Senator Hinch and supported by the Parliament that inserted subsection 34(2E). This subsection provides that, if a document issued under subsection 34(1) includes requirements in relation to the content of building enterprise agreements, a building industry participant may, before 29 November 2018, submit expressions of interest, tender for and be awarded building work funded (whether directly or indirectly) by the Commonwealth or a Commonwealth authority even if a building enterprise agreement, made before the document is issued, that covers the building industry participant does not comply with any one or more of the requirements.
7. This had the practical effect of exempting enterprise agreements made before 2 December 2016 from the enterprise agreement content rules of the 2016 Code until 29 November 2018.
8. On 2 December 2016, the Minister for Employment, Senator the Hon Michaelia Cash, issued the 2016 Code.
9. The 2016 Code sets out the Australian Government's expected standards for all building industry participants involved in Commonwealth-funded building work. The 2016 Code contains requirements in relation to enterprise agreement content that affect the eligibility to submit expressions of interest, tender for or be awarded Commonwealth-funded building work. The 2016 Code reflects the transitional exemption as set out in subsection 34(2E) of the Act.
10. The 2016 Code is an opt-in scheme. 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.

Building and Construction Industry (Improving Productivity) Amendment Bill 2017

11. The Government introduced the Bill into the House of Representatives on 8 February 2017.
12. The Bill would bring forward the full implementation of key provisions of the 2016 Code relating to enterprise agreement content so the benefits of the 2016 Code can be realised sooner.
13. The Bill would amend subsection 34(2E) of the Act to bring forward the expiry of the transitional exemption to the end of 31 August 2017.

14. The Bill would also limit the scope of the transitional exemption so that the exemption applies to the submitting of expressions of interest or tenders, but not the award of Commonwealth-funded work. The effect of this change would be that an employer 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. This amendment is important as it is intended to 'level the playing field' for building industry participants in the following categories:
 - a) building industry participants with an enterprise agreement that has passed its nominal expiry date and is not code-compliant. One reason an enterprise agreement that has passed its nominal expiry date is not code-compliant might be because the enterprise agreement was made before the advance release of the code of practice was published in April 2014.
 - b) building industry participants with an enterprise agreement that has not passed its nominal expiry date (an 'in term' enterprise agreement) and is not code-compliant.
15. The effect of allowing the 'awarding' of building work under subsection 34(2E) is that those with an enterprise agreement that has passed its nominal expiry date may be discriminated against in the tender process and not be awarded particular building work because they are more likely to be subject to protected industrial action during the life of the building work than a building industry participant with an 'in term' enterprise agreement that is not code-compliant (who, under the existing provisions, could be awarded the building work). This amendment ensures that all building industry participants with non-code compliant enterprise agreements are treated equally in the sense that they are required to make their agreement code-compliant within the same timeframe.
16. The Bill would also make appropriate transitional arrangements to ensure that the rules that apply to tender processes that have already commenced are not changed. This will mean that if a building industry participant to whom subsection 34(2E) of the Act applies submitted an expression of interest or tender between 2 December 2016 and the commencement of these amendments, they would remain eligible to be awarded that particular building work until the end of 28 November 2018.

Effect of the amendments

17. Subsection 34(2E), as proposed to be amended, would apply in relation to Commonwealth-funded building work as follows:
 - a) For building work awarded before the commencement of the proposed amendments – the relevant building industry participant would be entitled to undertake, or continue to undertake, that work after the proposed amendments commence, even if their enterprise agreement, made before 2 December 2016, is not code-compliant.
 - b) For an expression of interest submitted between 2 December 2016 and the commencement of the proposed amendments – a building industry participant would be eligible to be awarded that building work until the end of 28 November 2018, and can undertake that work, even if their enterprise agreement, made before 2 December 2016, is not code-compliant.
 - c) Between the commencement of the proposed amendments and 31 August 2017 – a building industry participant that is covered by an enterprise agreement, made before 2 December 2016, that is not code-compliant would be eligible to submit the expression of interest or tender, but could not be awarded the relevant building work unless and until that enterprise agreement is code-compliant.
 - d) From 1 September 2017 – a building industry participant that is covered by an enterprise agreement, made before 2 December 2016, that is not code-compliant would not be eligible to submit an expression of interest, tender for or be awarded Commonwealth-funded building work.
18. The Bill would not change current arrangements in relation to tenders submitted before 2 December 2016.

Consultation

19. An advance release of the code of practice was made available on the Department's website in April 2014 and a further advance release was made available in November 2014. As a result, the industry had an effective notice period of two years and eight months in which participants were able to make arrangements to ensure that they were able to comply with the Code once it took effect. The Department has provided extensive advice to a range of industry participants, including both employer and employee associations, and construction industry employers in relation to the enterprise agreement content requirements in the code of practice since the advance release was first published.