



HOUSING INDUSTRY ASSOCIATION



Submission to the  
**Senate Education and Employment Legislation Committee**

**Building and Construction Industry (Improving Productivity) Amendment  
Bill 2017**

10 February 2017

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## 1. INTRODUCTION

HIA welcomes the opportunity to provide comment on the *Building and Construction Industry (Improving Productivity) Amendment Bill 2017*.

The Bill addresses an important issue regarding transitional arrangements for those builders and contractors who wish to tender for and contract to perform Commonwealth (and Commonwealth funded) building work.

HIA supports the Bill. If implemented, it effectively will shorten the implementation period for compliance with the *Code for the Tendering and Performance of Building Work 2016* (Building Code).

In HIA's submission, the current 2 year transitional period is too long and delays the transformative intent of the Building Code. 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.

## 2. BACKGROUND - THE IMPORTANCE OF THE BUILDING CODE

On 2 December, following the passage of the *Building and Construction Industry (Improving Productivity) Act 2016* (ABCC Restoration Act), the ABCC was re-established with a specific purpose to address these problems and to enforce the industrial law in the building and construction industry.

Intimidation, coercion and anti-competitive practices result in higher than necessary building costs and lost productivity.

The ABCC, alone, will not improve adherence to the rule of law or achieve cultural change in the industry.

The use of the Commonwealth's purchasing power, via the Code for the Tendering and Performance of Building Work 2016 (Building Code) is a necessary tool to promote compliance and behavioural improvements.

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".

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 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.

Such terms arguably impact on tender prices and during the course of the project act as an impediment to businesses to deliver construction projects on time and on budget.

### 3. TRANSITIONAL ARRANGEMENTS

When the *ABCC Restoration Act* was passed and the Building Code was introduced, building contractors with enterprise bargaining agreements that did not comply with the Building Code were given 2 years to adopt arrangements that comply.

HIA understands that the 2 year transitional period was intended to address the purported retrospectivity of the Building Code. However HIA considers 2 years is too long.

It essentially delays the transformative intent of the Building Code and the removal of the anti-productive, anti-competitive practices the Building Code and restored ABCC were designed to address.

As a general principle, HIA agrees that laws, particularly those of a penal nature, should not have retrospective effect.

HIA considers that the general principle can be distinguished in this case.

Firstly, the Code is of an “opt-in” nature and relates to prospective eligibility to tender on and work on Commonwealth government projects for which an expression of interest or tender was called for from 2 December 2016. It does not apply to projects underway before this day nor impose any additional statutory obligations or penalties.

Additionally, the policy intent of the Government on this issue has been clear and transparent for many years to all members of the industry – including building contractors, industry associations and the construction unions.

On 17 April 2014, the then Employment Minister Senator Eric Abetz issued an advance release of the new Code.

According to Senator Abetz's press release:

*“When in effect, the provisions of the code will apply in respect of enterprise agreements made after 24 April 2014. This means that from commencement of the code, contractors covered by agreements that were made after 24 April 2014 that do not comply with the code’s content requirements for enterprise agreements, will not be eligible to tender for and be awarded Commonwealth-funded building work.”*

HIA acknowledges that notwithstanding this announcement and repeated statements to this effect from Senator Abetz and current Minister Senator Cash, the construction unions continued to pursue claims and pattern agreements that whilst approved in accordance with the Fair Work Act, breached the Code’s enterprise agreement content requirements.

HIA does not criticise those building contractors that made commercial decisions to enter into such agreements with the unions. At the same time however, many builders and contractors in the industry refused to sign non-compliant enterprise agreements.

Reducing the transition period to 9 months is a sensible and pragmatic compromise that enables those building contractors that desire to work on future Government projects to change their non-compliant enterprise arrangements whilst recognising that many building contractors are already compliant.

Ultimately the Building Code and the operation of the ABCC more broadly, are intended to establish a fair and level playing field for all builders and contractors seeking to undertake construction projects for the Commonwealth government.

HIA considers 9 months is an adequate period in respect of allowing companies to manage the changes brought in by the new Building Code and continue to be eligible for future projects.