

**Senate Education and Employment
Legislation Committee**

Building and Construction Industry (Improving Productivity) Amendment Bill 2017

SUBMISSION BY THE
CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

10 February, 2017

1. In late 2016 the Federal Government, with the support of various cross-bench Senators, secured the passage of the *Building and Construction (Improving Productivity) Bill* 2016. The new law commenced operation on and from 1 December 2016.
2. At the same time as the new Act was being debated by Parliament, the legislature was also considering and negotiating on the terms of a new code of practice for the construction industry. Ultimately, the terms of a new Code were also agreed and the Minister issued what is now the *Code for the Tendering and Performance of Building Work* 2016 (the Code). The Code took effect on and from 2 December 2016.
3. The Code was issued by the Minister under s 34(1) of the new Act. It is a legislative instrument. It replaced another legislative instrument, the *Building Code* 2013 which was made under s 27 of the former *Fair Work (Building Industry) Act* 2012 (Cth).
4. The terms of the new Act and Code were presented by the Federal Government, and voted on by the legislature, as a single ‘package’ of reform measures. The amendment discussed below takes away a key element of that ‘package’.
5. Section 34(2E) of the Act regulates the operation of the Code in relation to employers who are parties to enterprise bargaining agreements. It provides that employers can, until at least 29 November 2018, tender and submit expressions of interest for, and be awarded, Commonwealth funded building work even though they may be a party to an enterprise agreement made before the commencement of the Code whose terms do not comply with the requirements of the Code. Section 11(2) of the Code gives further effect to that proposition.
6. These two sections are, in effect, transitional measures. They acknowledge that at any point in time the industry will consist of those who are parties to agreements with particular terms and those who are not. They give those with existing agreements a reasonable and realistic opportunity to alter their industrial arrangements to comply with the new rules.
7. The new Act and Code bring about significant changes to the rules relating to the content of enterprise bargaining agreements. For example, s. 11 of the Code now prohibits any clause that purports to impose limits on the right of an employer to ‘manage its business or improve productivity’. This and other sections of the Code will prohibit agreed clauses that attempt to reign in the casualisation of the industry, mandate apprentice numbers, limit excessive overtime on health and safety grounds or restrict the use of foreign visa holders in favour of local labour. Virtually any clause which favours the interests of workers can be ruled as ‘non-complaint’ with the Code by the new ABCC under these sections.
8. Undoubtedly, valuable, agreed and lawful employment conditions will be stripped away from thousands of workers under the new Code. The freedom to bargain for employment conditions into the future will be severely curtailed. The effects of the new rules will be felt across the industry.

9. No doubt the politicians who determined these matters will not be exposing their own conditions and entitlements to the same standards when they come to vote on the new parliamentary expenses authority later in the year. Nor, for that matter, will they have their fundamental privilege against self-incrimination overridden in the way that construction workers have. In fact, the *Independent Parliamentary Expenses Bill 2017* (Cth) expressly preserves that privilege.
10. For the public record, it should be noted there was no consultation or discussion with unions or workers about the proposed amendments by the cross-bench Senators who are the proponents of this change. Recent media reports have said that consultation has taken place with some construction industry employers through the MBA. The MBA was recently publicly attacked by one of their own former office holders as prosecuting an ideological campaign that cuts across the interests of the industry. In this environment, to act on the representations of one side of the issue is not only unjust but will lead to bad policy
11. When the rules relating to permissible enterprise agreement content change, transitional arrangements become very important. The current sections in the Act and Code recognise that those who entered into agreements whose content was perfectly lawful at the time the agreement was made should not be disadvantaged by the change to these rules. They should be given a reasonable period in which to bring their industrial arrangements into conformity with the new rules. Anything short of that would mean that the changes have a retrospective and adverse effect on law-abiding players in the industry.
12. The terms of any proposed amendment to the Code are unknown at the time of writing. However, the proposed amendment to the Act changes these transitional arrangements dramatically and fundamentally.
13. If passed, the amendment will immediately disqualify a large number of contractors who have entered into lawful enterprise agreements from being awarded Commonwealth funded construction work.
14. The only 'rights' preserved by the amendment for these contractors is the 'right' to submit a tender or expression of interest for Commonwealth work up until 1 September 2017. This is a meaningless concession, since no contractor will go to the trouble and expense of preparing a tender when they know they will ultimately be ineligible for the work. There is, in effect, no 'phase-in' period for the new rules at all.
15. The amendment will significantly reduce the pool of available contractors for Commonwealth taxpayer-funded construction work. Large, small and intermediate contractors will all be affected. The CFMEU has estimated that there are upwards of 3,000 contractors and many tens of thousands of their employees who will be prejudiced by this change. It includes those with agreements which cover trade unions and those with 'non-union' agreements. Those who have expended resources preparing tenders in the almost three months since the most recent changes were made will have their efforts reduced to nothing.
16. The end result will be that experienced, qualified and reputable contractors with settled industrial arrangements, and their employees, will be punished for doing no

more than what was expected and required of them under the law of the day. Many of these contractors will be afraid to publicly oppose these changes because to do so would damage their commercial interests.

17. The effects are not confined to construction industry players. Because of the reduction of eligible contractors, Australian taxpayers will be deprived of the benefits of the ordinary competitive commercial tender process that is essential to the delivery of quality and value-for-money construction work.
18. The amendment will severely prejudice the commercial interests of employers who have engaged with the enterprise bargaining system under the Fair Work Act, and their employees, and reward those who remained outside the system. It will give a competitive advantage to those who do not have agreements and are therefore exposed to lawful protected industrial action as attempts are made to secure agreements. This means Government projects will be more exposed to delays caused by protected industrial action than they would be if the change were not made.
19. The amendment will compel those with existing lawful agreements which no longer comply with the new Code to attempt to open up and renegotiate long-settled industrial arrangements. The employer will, in this situation, be asking its workers to give up their legally guaranteed terms and conditions of employment. That will generate unnecessary disputes.
20. Existing agreements bargained for by unions are more likely to contain beneficial clauses for workers that will offend the new Code. Many of these clauses promote broader social objectives which are in the public interest. These include clauses that promote the engagement and training of young people and apprentices, clauses that restrict anti-social working hours and clauses that require workers' health and wellbeing initiatives (such as health checks, suicide prevention, screening for dust diseases, drug and alcohol awareness). By immediately excluding contractors with these clauses in their agreements the amendment will legitimize discrimination against contractors and workers on political and ideological grounds, rather than on their commercial capacity to deliver a project on time and on budget.
21. The Commonwealth has a special obligation to act as a model client. As custodian of public funds it must seek out contractors who will provide value for taxpayer dollars. The blanket exclusion of a large swathe of industry participants who have done no more than exercise their lawful rights will not deliver that outcome. The Commonwealth must also engage in fair commercial dealing and treat contractors and workers on publicly funded jobs in an even-handed way. Arbitrary and capricious exclusions and unilateral changes to the rules of commercial engagement fall well short of any acceptable standard.
22. The Committee should recommend that the amendment be rejected.