Answers to questions on notice by the Queensland Council of Unions. Asked at a public hearing in Brisbane on 17 July 2018; received 14 August 2018.

Stephen Palethorpe
Secretary
Standing Committee on Education and Employment

On 17 July 2018, Senator Stoker asked a range of questions in relation to the *Code for the Tendering and Performance of Building Work 2016*. I undertook to take a question on notice in relation to restrictions placed on that which unions can bargain.

Section 11 of the *Code for the Tendering and Performance of Building Work 2016* place a range of restrictions on that which can be agreement between a union and employer including 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 (1) (a)
- prescribe the number of employees or subcontractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time – section 11 (3) (a)
- restrict the employment or engagement of persons by reference to the type of contractual arrangement that is, or may be, offered by the employer – section 11 (3) (b)
- require a code covered entity to consult with, or seek the approval of, a building association or an officer, delegate or other representative of the building association in relation to the source or number of employees to be engaged, or type of employment offered to employees – section 11 (3) (d)
- require a code covered entity to consult with, or seek the approval of, a building association or an officer, delegate or other representative of the building association in relation to the engagement of subcontractors - section 11 (3) (e)
- prescribe the terms and conditions on which subcontractors are engaged (including the terms and conditions of employees of a subcontractor) – section 11 (3) (f)
- prescribe the scope of work or tasks that may be performed by employees or subcontractors – section 11 (3) (g)
- provide for the monitoring of agreements by persons other than the employer and employees to whom the agreement applies – section 11 (3) (k)

The wording of section 11(1)(a), in particular, could be construed as preventing any clause that pertains to workplace health and safety whatsoever. The remaining subsections prevent any bargaining, or any need for consultation around casual employment and hours of work for part time employees or the use of labour hire.

It is worth noting that from our experience employees of labour hire providers and/or casual employees (almost exclusively coincidental) are far less likely to be willing or able to raise workplace health and safety matters. The Queensland Council of Unions set up a web site to enable employees of labour hire providers to answer a survey to provide data for a submission to the *Inquiry into the practices of the Labour Hire Industry in Queensland in 2016*. Of the 342 employees who responded, 48.5 per cent felt that they could not discuss health and safety without risking your job.

This level of concern is consistent with the findings of academic literature on the topic of the adverse effects of precarious employment on work health and safety including the following:

- Clayton, A, R Johnstone and S Sceats (2002) “The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers’ Compensation Systems” Australian Journal of Labour Law 15
- Crawley, M (2000) “Labour Hire And The Employment Relationship” Australian Journal of Labour Law 13

- Hall, R (2002) Labour Hire in Australia: Motivation, Dynamics and Prospects Working Paper 76 ACIRRT University of Sydney
- Owen, R (2002) "Decent Work for the Contingent Workforce in the New Economy" Australian Journal of Labour Law 15
- Reeve, B and R McCallum (2011) "The Scope of Employers' Responsibilities under Australian Occupational Health and Safety Legislation" Australian Journal of Labour Law 24
- Roles, C and A Stewart (2012) "The reach of labour regulation: Tackling sham contracting" Australian Journal of Labour Law 25
- Rozen, P (2013) "'But it's not safe!': Legal redress for workers who are victimised for raising a safety issue at work" Australian Journal of Labour Law 26
- Underhill E (2013) "The challenge of workplace health and safety and the changing nature of work and working environment" in Australian Workplace Relations Cambridge University Press Sydney 2013

In discussing the issue of clauses that have been rejected as a result of the building code, I have been advised that most of the provisions that have been removed from agreements were removed as a result of the 2013 Building Code. By the time the 2016 Code was introduced many of the provisions that may have offended the code had already been removed.

The following is an example of clauses drew adverse comment from Fair Work Building and Construction (the predecessor of the ABCC):

> Dispute Settlement Procedure
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> If a dispute arises about any matter under this agreement, the NES or **in relation to any other employment matte**r, including a dispute about whether a workplace right has been breached, the parties to this agreement will attempt to resolve the dispute at the workplace level. Where such discussions do not resolve the dispute the parties will attempt to resolve the dispute by further discussions with more senior levels of management. (emphasis added)
>
> Employee Representatives
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> The Employer will recognise the following rights of an employee representative/Union delegate:
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> (b) The right to be consulted and to have access to relevant information about the workplace and the Employer, **including in relation to health and safety issues** and any flexibility arrangements agreed to in accordance with the provisions of clause 2.3 of this agreement, provided that access to such information is not in breach of the provisions of the Privacy Act 1988 or the Fair Work Act 2009; (emphasis added)

The application of the previous building code has restricted the matters that can be negotiated between unions, employees and employers, including matters that directly pertain to workplace health and safety. In addition, the removal of any obligation on employers to consult with unions is an obvious attempt to restrict workers' representatives from protecting members' rights including workplace health and safety.

Senator Stoker relied upon the Section 9 (3) of the Code to suggest that it does not detract from workplace health and safety. This section self-evidently requires an entity to comply with existing workplace health and safety laws, nothing more. In our submission this does nothing more than reinforce existing obligations under state legislation.

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The concern of the union movement, that has been borne out by several inquiries, is the low level of compliance with these laws including the most recent *Best Practice Review on Workplace Health and Safety Queensland*. Collective bargaining is one means by which workers are able to improve compliance with these laws and this ability has clearly been removed by the *Code for the Tendering and Performance of Building Work 2016.* In addition, it is of concern that the ABCC might pursue workers who seek to enforce rights under the state legislation to stop unsafe work.

I trust that this response has been of some assistance to the committee in its deliberations concerning the prevention, investigation and prosecution of industrial deaths in Australia. Please feel free to contact me if any of the information contained in this email requires any further explanation.