



Building and Construction Industry Building Code XX 2014

*Building and Construction Industry (Improving Productivity) Act
2013.*

I, Eric Abetz, Minister for Employment, issue the following code of practice under subsection 34(1) of the *Building and Construction Industry (Improving Productivity) Act 2013*.

Dated ~~2013~~XX 2014

Eric Abetz
Minister for Employment

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**Contents will be completed
when the code is closer to
finalisation.**

Part 1 Introductory

1 Name of code of practice

This code of practice is the Building and Construction Industry Building Code XX2014.

2 Commencement

This code of practice commences at the same time as section 3 of ~~the~~ *Building and Construction Industry (Improving Productivity) Act 2013*.

3 Definitions

(1) In this code of practice:

above-entitlements payment means a payment or benefit above the amount or value of a payment or benefit required to be paid under a Commonwealth industrial instrument or industrial law (within the meaning of the FW Act).

Editorial change- definition moved.

Act means the *Building and Construction Industry (Improving Productivity) Act 2013*.

building contractor means a building contractor that ~~is a constitutional corporation~~ could be required to comply with this code of practice in accordance with section 34 of the Act.

Technical change following changes to the definition of building industry participant.

Note—see subsection 34(3) of the Act provides that the code may require a person to comply with it in respect to building work only if the person is a building contractor that is a constitutional corporation.

Technical drafting change. Revised to avoid confusion with the definition of 'building industry participant' in the BCI(IP) Bill which is broader and includes union officials.

building industry participant means a building industry participant that ~~is~~ could be required to comply with this code of practice in accordance with section 34 of the Act.

This note is intended to help clarify that unions are not generally covered by the code. Some delegates will be, if they perform building work in a territory or commonwealth place.

Note subsection 34(3) of the Act provides that the code may require a person to comply with it only if the person is a building industry participant carrying out work in a Territory or Commonwealth place. An officer, delegate, or other representative of a building association would not a building industry participant for the purposes of this code of practice unless they perform building work.

Note—see subsection 34(3) of the Act.

Building work has the same meaning as in section 6 of the Act, but does not include work that is described in subparagraph 6(1)(e) of the Act.

Commonwealth funded building work: see items 1- 8 of Schedule 1.

New definition to assist readability (c/f consultation draft which referred to 'work that is not privately funded building work')

Section 6

~~CAC Act means the *Authorities and Companies Act 1997*.~~

Consequential change.

~~CMG means the Code Monitoring Group that consists Senior Executive Service representative from each of the Department of Finance and Deregulation, the Department of Employment, the Office of the Federal Safety Commissioner, the Department of Prime Minister and Cabinet, the Department of Defence and the Department of Infrastructure and Transport. The Australian Building and Construction Commissioner and the Office of the Fair Work Ombudsman are non-voting members of the CMG~~

Consequential change.

~~Conditions for participation means minimum conditions with which a respondent must demonstrate compliance, in order to participate in an expression of interest or tender process (however described) for the respondent's submission to be considered.~~

Consequential change.

~~enterprise agreement has the same meaning as in the FW Act.~~

~~funding entity: see section 4.~~

~~FW Act means the *Fair Work Act 2009*.~~

~~head contractor means the person with management or control of the building site.~~

New definition is needed for new duty in section 8.

~~industrial action has same meaning as in FW Act.~~

These terms are defined in the Bill and it is appropriate that those definitions apply, rather than FW Act definitions.

~~industrial association has the same meaning as in the FW Act~~

~~Inspector means a person appointed as, or taken to be appointed as, an Australian Building and Construction Inspector under the Act.~~

~~above entitlements payment means a payment or benefit above the amount or value of a payment or benefit required to be paid under a Commonwealth industrial instrument, or industrial law (within the meaning of the FW Act).~~

Editorial change- see above.

~~privately funded building work: see item 9 of Schedule 1.~~

Editorial change see new definition of 'Commonwealth funded building work'.

~~Work Health and Safety law means each of the following:~~

- ~~• *Work Health and Safety Act 2011 of the Commonwealth*~~
- ~~• *Work Health and Safety Act 2011 of New South Wales*~~
- ~~• *Occupational Health and Safety Act 2004 of Victoria*~~
- ~~• *Work Health and Safety Act 2011 of Queensland*~~
- ~~• *Occupational Safety and Health Act 1984 of Western Australia*~~

Change made following consultation.

Stakeholders requested this be removed because it is unnecessary to define the term.

- ~~Work Health and Safety Act 2012 of South Australia~~
- ~~Work Health and Safety Act 2012 of Tasmania~~
- ~~Work Health and Safety Act 2011 of the Australian Capital Territory~~
- ~~Work Health and Safety (National Uniform Legislation) Act 2011 of the Northern Territory~~

WRMP means Workplace Relations Management Plan.

See new sections in Part 6

Note Some terms used in the Building Code have defined meanings in the Act. For the definitions of the following terms, see subsection 4(1)5 of the Act:

- ABC Commissioner
- building association
- building contractor
- building industry participant
- building work
- Commission
- Commonwealth industrial instrument
- designated building law
- Director
- ~~(2)~~ Industrial action
- Industrial association

Editorial changes.

(2) In this code of practice, an entity is a *related entity* of a building contractor or building industry participant if the entity is engaged in building work and is:

- (a) connected to the building contractor or building industry participant by:
- (i) being a member of the building contractor or building industry participant; or
 - (ii) being financially interested in the success or failure or apparent success or failure of the building contractor or building industry participant; or

~~(b) is:~~

Section 6

- (b) ~~(i)~~—a related body corporate (within the meaning ~~given by~~ of section 50 of the *Corporations Act 2001*) of the building contractor or building industry participant;
- (c) ~~(ii)~~—an associated entity (within the meaning ~~given by~~ of section 50AAA of the *Corporations Act 2001*) of the building contractor or building industry participant; or
- (d) ~~(iii)~~—controlled (within the meaning ~~given by~~ of section 50AA of the *Corporations Act 2001*) by the building contractor or industry participant.

(3) In this Code of practice, an *exclusion sanction* means a period during which a building contractor or building industry participant is not permitted to tender for, or be awarded, Commonwealth funded building work. An exclusion sanction may:

- (a) be for any period that the ABC Commissioner is satisfied is appropriate, but no longer than 1 year in duration;
- (b) be subject to conditions that apply the exclusion sanction only to a division of a business operating in a particular State or Territory;
and
- (c) be extended to related entities if the ABC Commissioner is satisfied it is appropriate to do so.

New definition- see new provisions in Part 4.

4 Funding entities

In this code of practice, each of the following is a *funding entity*:

- ~~(a) a Department of State of the non-corporate Commonwealth;~~
- ~~(b) a Department entity within the meaning of the Parliament;~~
- (a) ~~(e)~~ a prescribed Agency under the *Financial Management Public Governance, Performance and Accountability Regulations 1997 Act 2013*;
- (b) ~~(d)~~ a Commonwealth authority a corporate Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013* that is required by a General Policy Order, issued under section 48A of the CAC Act, to apply to comply with this code of practice; because of the operation of a government policy order.
- ~~(e)~~ a wholly-owned Commonwealth company that is required by a General Policy Order, issued under ~~Note~~ section 48A22 of the *CAG Public Governance, Performance and Accountability Act*, to apply this code 2013 provides for the issuing of practice government policy orders.

Definition now aligns with the new PGPA Act which will commence 1 July. No substantive change to the meaning of the term.

Part 2 Conduct

5 General

This code of practice has been developed to:

- (a) ~~(a)~~ — promote an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building contractors and building industry participants; and
- (b) ~~(b)~~ — assist industry stakeholders to understand the Commonwealth's expectations of and requirements in relation to for entities that choose to tender for Commonwealth funded construction-related building work, are awarded Commonwealth funded construction-related building work, or both; and
- (c) establish an enforcement framework under which building contractors and building industry participants may be excluded from tendering for or being awarded Commonwealth funded building work if they do not comply with this code of practice.

Note 1— The Australian Building and Construction ABC Commissioner is responsible for monitoring compliance with this code of practice: see paragraphs 16 (a) and (b) of the Act.

Note 2— A failure to comply with this code of practice may result in a being unable to be granted a tender for Commonwealth funded construction-related work.

Changes made to emphasise that the code is an opt in scheme.

New subsection added to reflect the incorporation of enforcement provisions.

6 Application of requirements

- ~~(1) This code of practice sets out requirements to be complied with by building contractors, building industry participants and funding entities in respect of building work.~~

~~Section 3 defines the terms 'building contractor' and 'building industry participant'.~~

- ~~(2) A building contractor or building industry participant becomes subject to this code of practice as follows:~~

- ~~(a) the contractor or participant is not subject to the code of practice in respect of any building work unless one or more of paragraphs (b) to (d) apply;~~

~~(b) the contractor or participant becomes~~

- ~~(c) the contractor or~~

6 Application of requirements

- (1) A building contractor or building industry participant is subject to the code of practice if:

Technical drafting changes have been made to section 6 to improve clarity. The effect of the section is the same.

Section 6

- (a) ~~(i)~~ — the contractor or participant submitted an expression of interest or tender for building work that is described in any of items 1 to 8 of Schedule 1; and
- (b) ~~(ii)~~ — the expression of interest or tender for the building work was called for before this code of practice commenced;

Example: if a building contractor submitted a tender for Commonwealth funded building work in 2009, the building contractor is subject to the code of practice when it commences. The Code will apply to the contractor even though the project began in 2009.

- (2) If (1) does not apply, a building contractor or building industry participant becomes subject to the code of practice when the contractor or participant submits an expression of interest or tender for building work that is described in any of items 1 to 8 of Schedule 1;
- (3) — ~~(d)~~ — after the A building contractor or building industry participant first becomes subject to the code of practice in accordance with paragraph (b) subsections (1) or (e), the contractor or participant is 2) is subject to the code in respect of all building work that is described in Schedule 1.

Note: Some obligations in the code of practice only apply when the building contractor or building industry participant is undertaking Commonwealth funded building work, see for example section 8.

Part 3 Requirements to be complied with by building contractors and participants in respect of building work

67 7 General responsibilities of building contractors and building industry participants

Building contractors and building industry participants undertaking building work to which this code of practice applies must:

- (a) ~~(a)~~ comply with this code of practice; and
- (b) respond to requests for information concerning matters relating to this code of practice made by the ~~Director~~ ABC Commissioner

Note ~~Additional requirements may apply in respect of Commonwealth procurement.~~

Note removed because it was redundant.

78 Subcontractors and related bodies and entities

- (1) ~~(1)~~ This section applies in relation to work that is not privately Commonwealth funded building work.
- (2) ~~(2)~~ A building contractor or building industry participant must ensure that any request for expression of interest or request for tender (however described) for building work requires a respondent:
 - (a) to comply with this code of practice;
 - (b) to be eligible to perform Commonwealth funded building work at the time of lodging the expression of interest or tender; and
 - (c) to submit a WRMP for the project that has been approved by the ABC Commissioner in accordance with Part 6 of this code of practice, if the building work is of a type described in Schedule 2.
- (3) A building contractor or building industry participant must not enter into an agreement with a subcontractor that is subject to an exclusion sanction or is excluded from undertaking work funded by a State or Territory government.
- (4) If the building work is of the type described in Schedule 2, a building contractor or building industry participant must not enter into an agreement with a subcontractor that has not submitted a WRMP for the project that has been approved by the ABC Commissioner in accordance with Part 6 of this code of practice.

New subsections (2) and (3) added to ensure that all builders on Commonwealth funded projects will be required to comply with the code.

Subsection (4) will require all subcontractors on a Commonwealth funded project to have their own WRMP. See also Part 6.

Section 9

~~(2)~~(5) A building contractor or building industry participant must ensure that an agreement entered into with a subcontractor in relation to building work requires the subcontractor to comply with this code of practice.

(3) ~~————~~ *Note: subsection 4 applies to verbal agreements as well as written agreements.*

~~(3)~~(6) A building contractor or building industry participant must ensure that subcontractors of the building contractor or building industry participant comply with this code of practice.

(7) ~~(4)~~ ~~————~~ A building contractor or building industry participant must, ~~if where reasonably practicable,~~ ensure that subcontractors of the building contractor or building industry participant ~~initiate voluntary~~ take remedial action to rectify non-compliant behaviour when it is drawn to their attention.

Change made after consultation with stakeholders. The reference to 'voluntary remediation' was unnecessary.

~~(4)~~(8) A building contractor or building industry participant must ensure that each related entity of the building contractor or building industry participant complies with this code of practice ~~in relation to building work.~~

(9) ~~9~~ ~~————~~ A building contractor or building industry participant that is the head contractor at a particular site must ensure that all subcontractors on site comply with this code of practice.

Subsection added to ensure that head contractors are responsible for ensuring that all contractors on a site comply with the code.

89 Compliance with laws, decisions, directions and orders

(1) ~~————~~ (1) A building contractor or building industry participant must comply with all designated building laws that apply to the contractor or participant.

Examples

1. ~~Laws relating to general protections such as freedom of association, the right to enter premises where building work is performed and to have access to records.~~

2. ~~Laws relating to the right to enter a site where building work is performed and to have access to records.~~ 3. ~~Laws relating to payments made to employees for time spent engaged inuring periods of industrial action (strike pay).~~

4. ~~Commonwealth industrial instruments.~~

(2) ~~————~~ (2) A building contractor or building industry participant must comply with the *Competition and Consumer Act 2010* to the extent that it relates applies to the contractor or participant in relation to tendering for or undertaking building work.

The example has been reworded because the reference to general protections was confusing in light of adverse action and coercion issues. Other examples are sufficient.

~~(3)~~ ~~(3) A building contractor or building industry participant must comply with relevant Work Health and Safety laws to the extent that they apply to the contractor or participant in relation to building work.~~

~~(4)~~ ~~A building contractor or building industry participant: must comply with all laws and other requirements that apply to the contractor or participant in relation to the security of payments that are due to persons.~~

~~(5)~~ ~~— (a) A building contractor or building industry participant:~~

~~(a)~~ ~~must comply with a compliance notice issued under section 99 of the Act;~~

~~(b)~~ ~~must comply with a decision, direction or order made or given by a court or tribunal that applies to the contractor or participant; and~~

~~(c)~~ ~~must not enter into, participate in or facilitate an arrangement or practice which conflicts with a decision, direction or order made or given by a court or tribunal that applies to the building contractor or building industry participant.~~

Note An infringement notice or provisional improvement notice issued by an Inspector is not a decision, direction or order made or given by a court or tribunal.

~~(5)(6)~~ ~~— (5) Subsections (4) does not and (5) do not apply if:~~

~~(a)~~ ~~(a) — the period for payment, or for other compliance with the decision, direction or order, has not expired; or~~

~~(b)~~ ~~the decision, direction or order is the subject of an appeal; stayed or~~

~~(c)~~ ~~the period for appealing against the decision, direction or order has not expired; or~~

~~(b)~~ ~~(d) — the decision, direction or order has been revoked.~~

~~10~~ ~~Security of payment~~

~~A building contractor or building industry participant must:~~

~~(a)~~ ~~comply with all applicable laws and other requirements relating to the security of payments that are due to persons; and~~

~~(b)~~ ~~ensure that payments made by the contractor or building industry participant are made in a timely manner; and~~

~~(c)~~ ~~as far as practicable, ensure that disputes about payments are resolved in a reasonable, timely and cooperative way.~~

Moved from section 10. Stakeholders were concerned that the obligation in section 10 of the consultation draft was too vague and too onerous.

Change made to ensure persons are required to comply with orders until they are overturned or stayed.

See above. The obligation has been moved and narrowed.

Section 10

910 Unregistered written agreements and other agreements

(1) ~~(1)~~—A building contractor or building industry participant must not bargain in relation to an agreement, make an agreement, or implement an agreement:

(a) ~~(a)~~—that provides for terms, conditions or benefits of employment of the employer's employees (which may include above-entitlements payments); and

(b) ~~(b)~~—that either:

(i) ~~(i)~~—will not be registered, lodged or otherwise approved under the FW Act; or

(ii) ~~(ii)~~—the contractor or participant reasonably believes will not be registered, lodged or otherwise approved under the FW Act; and

~~(c) to which subsection (3) does not apply.~~

(2) ~~(2)~~ ~~subsection~~ Subsection (1) does not apply to an agreement that is a common law agreement made between ~~and~~ an employer and an individual employee.

Example: an unregistered site agreement or project agreement between a head contractor and relevant union would be an unregistered written agreement.

~~(3) This section does not apply to an agreement to the extent that the agreement:~~

~~(a) relates to participation in:~~

~~(i) community, welfare or charitable activities; or~~

~~(ii) initiatives to promote the employment of women, Indigenous, mature age or other groups of workers disadvantaged in the labour market; or~~

~~(iii) workers' health and wellbeing initiatives (such as health checks, suicide prevention, screening for dust diseases, drug and alcohol awareness and treatment); or~~

~~(iv) waste reduction, carbon pollution reduction and recycling initiatives; or~~

~~(v) programs to reduce bullying, sexual harassment or workplace discrimination; or~~

~~(vi) initiatives to encourage fair, cooperative and productive workplace relations across the industry; or~~

~~(vii) initiatives to promote the take up and completion of apprenticeships, such as mentoring programs; and~~

~~(b) does not provide for an entitlement or another benefit related to that participation as mentioned in paragraph (1)(a).~~

The ES will clarify that we don't intend to prohibit these sorts of agreements.

4011 **42 Content of agreements**

(1) A building contractor or building industry participant must not enter into an enterprise agreement, ~~other agreement, or arrangement~~ (however described), which ~~include~~includes clauses that:

- (a) restrict, or have the effect of restricting, productivity improvement;
- (b) discriminate, or have the effect of discriminating against certain persons, classes of employees, or independent contractors; or
- (c) are inconsistent with freedom of association ~~principles~~requirements set out in section 13 of this code of practice.

~~(1) A building contractor or building industry participant must not implement an agreement, arrangement, or engage in a practice, which is likely to have the any of the effects in paragraphs (1)(a)–(e).~~

(2) Subsection (1) does not apply to an agreement that was entered into before XX March 2014.

~~(2)(3) Without limiting the generality of subsections subsection (1) and (2), those subsections that subsection prohibits clauses, practices or arrangements that:~~

- (a) prescribe the number of employees or independent contractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time;
- (b) restrict the employment of persons by reference to employment status;

Example: an agreement or practice that prohibits or limits the employment of casual or daily hire employees.

(c) require, or ~~results~~result in, building contractors or building industry participants giving preference to the engagement of Australian citizens, or ~~restricts~~restrict the engagement of persons who are not Australian citizens but who are lawfully entitled to work in Australia;

(d) require a building contractor or building industry participant to consult with, or seek the approval of, a ~~union~~building association in relation to the employment, number, source, or employment status of employees;

Subsection (4) prohibits practices that would have the effect of clauses prohibited in subsection (3); we think that this will have a similar effect as the prohibition on 'arrangements'.

The prohibition on implementing agreements has been removed because it increased the practical likelihood of accessorial liability arising. It is considered sufficient that a person is prohibited from entering into EAs which are inconsistent with this section, or from engaging in similar practices. We think that this will in effect prohibit all of the behaviour that we intend to target.

The early announcement date will be inserted into subsection (2). This will mean that persons who enter into agreements with prohibited clauses after the announcement will be precluded from tendering for Commonwealth funded building work.

See also subsection (5) below.

Section-12 Content of agreements

- (e) require a building contractor or building industry participant to consult with, or seek the approval of, a unionbuilding association in relation to the engagement of, or number of independent contractors;
- (f) prescribe, or seek to prescribe, the terms and conditions on which independent contractors are engaged (including the terms and conditions of employees of an independent contractor);
- (g) prescribe, or ~~seek~~ seek to prescribe, the scope of work or tasks that may be performed by employees or independent contractors;
- (h) include selection criteria ~~effor~~ for redundancy that seek to override a building contractor or building industry participant's right to make decisions about redundancy based on operational requirements;

Example: an arrangement or practice whereby employees are selected for redundancy based on length of service alone.

- (i) prohibit the payment of a loaded rate of pay (whether or not expressed as an annual amount) that nominally compensates for penalties, disability allowances or similar.
- (j) require, or has the effect of requiring, the allocation of particular work to individual employees only if that allocation is extended to all other employees in the class of employees to which the individual employee belongs;

Example: a clause or practice that prevents an individual employee being selected to perform overtime unless other employees are similarly provided overtime.

- (k) provide for the monitoring of agreements by persons other than the employer and employees to whom the agreement applies;
- (l) include requirements to apply unionbuilding association logos, mottos or indicia to company supplied property or equipment;
- (m) -establish an inflexible arrangement for the taking of rostered days off;
- (n) provide for the establishment or maintenance of unionbuilding association sheds.

Note: this section does not require the taking of action that would constitute a contravention of the FW Act, and should be read in a manner that ensures consistency with that Act. For example, subparagraph (d) does not override section 205 of the FW Act which provides that an enterprise agreement must include a consultation term that provides for consultation on major changes at the workplace.

This note has been added to clarify the interaction between section 11 and the FW Act.

Clauses of an enterprise agreement that are inconsistent with this section will impact on a building contractor's eligibility to tender for or be awarded Commonwealth funded building work see sections 24, 25, and 26 of this code of practice.

- (4) A building contractor or building industry participant must not engage in a practice which has or is likely to have any of the effects described in subsection (1).

Example: a contractor must not attempt to circumvent the code by agreeing to run a redundancy process on the basis of a 'last on first off' rule or agree to a set schedule for rostered days off that does not allow for flexibility around operational requirements. Such agreements may be made outside of the process of bargaining for an enterprise agreement.

- ~~(3)~~(5) Subsection (4) does not apply if the practice complies with an enterprise agreement that was entered into before XX March 2014.

13 Above entitlement payments and related matters

12 Above-entitlement payments and related matters

- (1) A building contractor or building industry participant must not organise or take, or threaten to organise or take action with intent to coerce a contractor, subcontractor or consultant into making an above entitlement payment.
- (2) ~~(2)~~ a building contractor or building industry participant must not exert, directly or indirectly, undue influence or undue pressure on a contractor, subcontractor or consultant to make an above entitlement payment.
- (3) ~~(3)~~ A building contractor or building industry participant must:
- (a) ~~(a)~~ not not organise or take, or threaten to organise or take, action with intent to coerce a contractor, subcontractor or consultant into contributing to a particular redundancy or superannuation fund or scheme, or supporting a particular product; and
- (b) ~~(b)~~ not exert, directly apply, or indirectly attempt to apply, undue influence or undue pressure is not exerted, directly or indirectly, on a person to contribute to a particular redundancy or superannuation fund or scheme, or to support a particular product.

14 Example: a building contractor must not coerce a subcontractor into contributing to a particular redundancy or superannuation fund.

This subsection reflects similar provisions in the Victorian Guidelines that prohibit persons from circumventing the Guidelines by entering into informal arrangement or simply engaging in practices.

Editorial changes, language has been aligned with similar provisions in the FW Act.

Editorial changes have been made to align language with that used in similar provisions of the FW Act,

The provisions have also been broadened to ensure that coercion in relation to other funds is also prohibited. Stakeholders are concerned with 'training schemes' and the like.

Section 14

4413 Freedom of association

(1) A building contractor or building industry participant must protect freedom of association by adopting policies that:

(a) ensure that persons are:

(i) free to become, or not become, members of industrial building associations; and

(ii) free to be represented, or not represented, by industrial building associations; and

(iii) free to participate, or not participate, in lawful industrial activities.

(2) Without limiting subsection (1), the building contractor or building industry participant must ensure that:

(a) personal information is not dealt with in breach of accordance with the Privacy Act 1988 and the FW Act; and

(b) 'no ticket, no start' signs are not displayed; and

(c) signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities are not displayed; and

(e)(d) 'show card' days do not occur; and

(d)(e) ——— (d) there is:

(i) no discrimination against elected employee representatives; and

(ii) no disadvantage to elected employee representatives; and

(e)(l) forms are not used to require:

(i) an employee to identify ~~his or her union status~~ whether they are a member of a building association; or

(ii) an employer to identify ~~the union status~~ whether they are a member of employees a building association; or

(iii) a building contractor to identify ~~the union status of whether employees or subcontractors are a member of a building association~~; and

This is intended to prohibit posters referring to workers as 'scabs'.

Editorial changes.

~~(f)(g)~~ ~~_____~~ ~~(f)~~ individuals are not refused employment because of their union status they are, or are not, a member of a building association; and

~~(g)(h)~~ ~~_____~~ ~~(g)~~ the employment of employees ~~are~~ is not terminated because of their union status they are, or are not, a member of a building association; and

~~(h)(i)~~ ~~_____~~ ~~(h)~~ reasonable requests from a workplace ~~delegates~~ delegate to represent an employee of the contractor or participant in relation to a grievance, a dispute or a discussion with a member of an industrial association are not refused; and

~~(i)(j)~~ ~~_____~~ ~~(i)~~ requirements are not imposed, or attempted to be imposed, on a contractor, subcontractor or employer to:

(i) employ a non-working shop steward or job delegate; or

(ii) hire an individual nominated by a union building association; and

~~(j)(k)~~ ~~_____~~ ~~(j)~~ individuals are not required to pay a 'bargaining fee' (however described) to an ~~industrial~~ building association of which the individual is not a member, in respect of services provided by the association; and

~~(k)(l)~~ ~~_____~~ ~~(k)~~ employee representatives, site delegates, or other union building association representatives do not undertake or administer site induction processes.

~~12~~ 14 **45—Entry to premises where building work is performed**

(1) A building contractor or building industry participant must comply with all laws of the Commonwealth and each State and Territory to which the contractor or participant is subject ~~to~~ that give a permit holder of a building association a right to enter premises where work is performed and where the permit holder seeks to exercise that right.

Examples

1 The FW Act.

2 Work Health and Safety laws.

(2) A building contractor or building industry participant must, so far as is reasonably practicable, ensure that entry to a ~~site~~ premises by an officer of an ~~industrial~~ building association, acting in that capacity, occurs only in accordance with subsections (3) and (4).

Section 16

- (3) ~~(3)~~ Entry to a workplace by an officer of an industrial building association to premises where building work is performed must be for a purpose permitted by the Part 3-4 of the FW Act or a relevant Work Health and Safety law.

Editorial changes.

Example: a contractor could permit entry for the purposes of holding discussions with workers where the permit holder provides the requisite notice and complies with all requirements in the FW Act. ~~Permitting informal entry~~ However, inviting an officer of a building association to enter the site other than in accordance with those requirements would breach this code of practice.

Examples broadened for clarity.

- ~~(3)~~(4) When an officer of an industrial building association exercises a right to enter premises under Part 3-4 of the FW Act or a Work Health and Safety law, the ~~entry~~ officer must comply with all relevant legislative requirements including permit and notice requirements.

Note: officer is a defined term in the Act and includes officials and employees of an industrial association.

4315 16 Dispute settlement

- (1) A building contractor or building industry participant must:
- (a) ensure that an enterprise agreement that covers the contractor or participant includes a term for settling disputes in accordance with section 186(6) of the FW Act that it enters into on or after the commencement of this code of practice;
 - (b) ensure that employees are able to appoint a representative in relation to a dispute; and
 - (c) comply with the other requirements of the FW Act relating to dispute settlement that apply to the contractor or participant; and
 - (d) if a dispute settlement procedure term of an enterprise agreement provides for arbitration by of a third party a building dispute, the contractor or building industry participant must ensure that the procedure provides that term requires any decision made by of the arbiter must to be consistent with the Building Code this code of practice.

Editorial changes.

Editorial changes.

4416 17 Industrial impacts

- (1) ————A building contractor or building industry participant must report actual or threatened industrial action by employees of the building contractor or building industry participant to the Australian Building and Construction Commission as soon as practicable, but no later than 24 hours, after becoming aware of the action or threat occurs or action.

Change made to ensure a person is only required to report action that they are aware of. Otherwise the provision may operate unfairly.

(2) A building contractor or building industry participant must, to the extent reasonably practicable, take steps to prevent or bring an end to unprotected industrial action taken by the employees of the building contractor or building industry participant.

Note: subsection (2) may, depending on the circumstances, require a person to take legal action where remedies are available.

Added for consistency with section 8.11 in Victorian Guidelines.

Section 17

Part 4 Compliance and, monitoring and enforcement arrangements

4517 18 Notification

- (1) ~~(1)~~—A building contractor or a building industry participant must notify ~~the Australian Building and Construction Commission~~ of a breach, or a suspected breach, of this code of practice as soon as practicable, but no later than 7 working days after becoming aware of the breach or suspected breach. ~~—~~
- (2) ~~—(2)~~—Where a notification under subsection (1) is made in relation to a breach of this code of practice, the building contractor or building industry participant must notify ~~the Australian Building and Construction Commission~~ of the steps taken to rectify the breach within 28 days of providing the notification.

18 Consequences of breaching the Building Code

- (1) The ABC Commissioner may impose an exclusion sanction on a building contractor or building industry participant if the ABC Commissioner is satisfied that:
- (a) the building contractor or building industry participant has failed to comply with this code of practice; or
- (b) the building contractor or building industry participant has failed to comply with a compliance notice issued under section 99 of the Act in relation to this code of practice.

Note: when considering whether to impose an exclusion sanction, the ABC Commissioner will consider factors such as whether the failure to comply with the Building Code was intentional, ongoing and/or subject to timely voluntary rectification.

- (2) The ABC Commissioner may impose an exclusion sanction on a building contractor or building industry participant that has acquired ownership or beneficial use of some or all of the assets (whether tangible or intangible) of another building industry contractor or building industry participant ('the acquired building industry contractor or acquired building industry participant') if the ABC Commissioner is satisfied that:
- (a) the acquired building industry contractor or acquired building industry participant failed to comply with this code of practice; or

A number of new sections have been inserted to deal with enforcement and sanctions.

(b) the acquired building industry contractor or acquired building industry participant failed to comply with a compliance notice issued under section 99 of the Act in relation to this code of practice.

19 Decision to impose an exclusion sanction

(1) If the ABC Commissioner proposes to impose an exclusion sanction under section 18, the ABC Commissioner must give a written notice to the building contractor or building industry participant:

(a) informing the applicant of the details of the alleged breach; and

(b) advising the building contractor or building industry participant that they may, by a specified date (being not less than 28 days after giving the notice), make a submission to the ABC Commissioner in relation to the proposed sanction.

(2) After the date specified in a notice under subsection (1), the ABC Commissioner must:

(a) if the building contractor or building industry participant has made a submission — consider that submission; and

(b) whether or not the building contractor or building industry participant has made a submission — decide whether to impose a sanction; and

(c) within 14 days after making that decision, give the building contractor or building industry participant written notice of the decision, including the reasons for the decision.

20 Application for review by Minister

Making an application

(1) A person who is subject to an exclusion sanction may apply to the Minister for review of a decision by the ABC Commissioner to impose an exclusion sanction.

(2) The application must be made within 28 days after the date of the notice of the ABC Commissioner's decision, or such longer time as the Minister allows.

(3) The application must:

(a) state the reasons why the application is being made; and

Section-17

(b) provide any information or documents relating to those reasons.

Withdrawing an application

(4) The person may withdraw the application at any time before the review is completed.

(5) The application may be withdrawn in writing or in another manner approved by the Minister.

21 Decision by Minister

(1) If a person applies under section 20 for review of a decision by the ABC Commissioner, the Minister must review the decision and:

(a) affirm the decision; or

(b) vary the decision; or

(c) set the decision aside and substitute a new decision.

(2) The Minister must give the person written notice of the Minister's decision under subsection (1).

(3) The notice must set out:

(a) the terms of the decision made as a result of the review; and

(b) written reasons for that decision; and

(c) the person's rights to have that decision reviewed.

22 Application to the Administrative Appeals Tribunal for review

(1) An application may be made to the Administrative Appeals Tribunal by a person who is subject to an exclusion sanction for review of a decision of the Minister under section 21.

(2) Section 27 of the Administrative Appeals Tribunal Act 1975 does not apply to application made under this code of practice.

Note section 27 provides that any affected person may apply for review of a decision.

Part 5 Funding Entities

23 Key criteria for eligibility to tender for and be awarded Commonwealth funded building work

- (1) To be eligible to tender for, or be awarded, Commonwealth funded building work a building contractor or building industry participant must:
- (a) comply with section 11 of this code of practice when participating in a tender process; and
 - (b) must not be subject to an exclusion sanction; and
 - (c) must not be excluded from undertaking work funded by a State or Territory government.

4624 19 Expressions of interest and tenders

- (1) ~~(1) A funding entity must ensure that any request for expression of interest or request for tender (however described) for building work to be undertaken for or on behalf of the funding entity includes conditions for participation to the following effect requires a respondent:~~
- (a) ~~(a) that a respondent must to comply with this code of practice when undertaking the Code; Commonwealth funded building work; and~~
 - (b) ~~(b) that, to be eligible to perform Commonwealth funded building work at the time of lodgement of the lodging an expression of interest or tender, the respondent must not be precluded from tendering for Australian Government funded building and construction work; and~~
 - (c) ~~(to submit a WRMP for the project that has been approved by the ABC Commissioner in accordance with Part 6 of this code of practice to the funding entity, if the building work is of a type described in Schedule 2)~~
- (2) A funding entity must ensure that tender processes and calls for expressions of interest (however described) are conducted in a manner consistent with the Building Code this code of practice and must ensure that (a) respondents are only permitted to participate in tender processes (however described) only where the respondent meets the eligibility requirements of compliance with the Building Code to perform Australian Government funded building and construction work; and set out in section 23.

Editorial changes to introduce new concept of 'eligibility criteria'. The change largely does not affect the way the provisions work however the requirement that a person not be excluded from performing state funded work is additional.

Editorial changes have been made to this section.

New requirement to reflect incorporation of Part 6.

Section 19

~~(b) that, at all stages of the tender process (however described), the respondent is not precluded from tendering or performing Australian Government funded building and construction work.~~

4725 ~~20~~ Contracts

~~(1) A funding entity must ensure that it applies the Building Code in accordance with the CMG and Ministerial decisions.~~

~~(2) A funding entity must ensure that it does not enter into a contract with any person or entity that:~~

~~(1) (a) does not meet the key eligibility requirements of compliance with the requirements of the Building Code to perform Australian Government funded building and construction work; set out in section 23.~~

~~(b) is on the exclusion list as determined by the Code Monitoring Group (CMG) as a member of a group that is precluded from tendering or performing Australian Government funded building and construction work;~~

~~(2) (3) A funding entity must only enter into a contract with a person or entity if the funding entity is satisfied that the person or entity will comply with this code of practice when undertaking the work.~~

Example: a funding entity may be satisfied of future compliance if the person has a history of compliance with this code of practice.

~~(2)(3) A funding entity must not enter into a contract with any person or entity that:~~

~~(a) (a) has had an adverse decision, direction or order made by a court or tribunal for a breach of a designated building law, work health and safety law or competition and consumer law; and~~

~~(b) (b) has not fully complied, or is not fully complying, with the such a decision, direction or order; and~~

~~(c) (4) has not submitted a WRMP that has been approved by the ABC Commissioner in accordance with Part 6 of this code of practice.~~

~~(3)(4) Subsection 3 does not apply if:~~

~~(a) (a) the period for payment, or for other compliance with the decision, direction or order, has not expired; or~~

~~(b) the decision, direction or order is the subject of an appeal; stayed or~~

~~(c) the period for appealing against the decision, direction or order has not expired; or~~

Editorial changes.

New requirement. This will ensure that there are consequences (other than sanctions) for repeated failures to comply with the code or past guidelines. Past compliance will be relevant to the assessment of whether the funding entity will comply with the code.

See Part 6.

(b) ~~(d)~~ the decision, direction or order has been revoked.

~~21~~ **Notification of breaches**

26 Notification of head contractor

Funding entities must:

(1) ~~(a)~~ notify the CMG Secretariat Commission when a tender process is completed and a building contractor or building industry participant has been awarded a contract to undertake building work. The notification must include:

(a) the name of the building contractor or building industry participant;
and

(b) a description of the work; and

(c) the location of the proposed work; and

(d) the cost of the project; and

(e) proposed project start and completion dates.

~~4827~~ **Notification of breaches**

(1) ~~the ABCC~~ Funding entities must:

(a) notify the Commission of all allegations of breaches of the Building Code this code of practice within 21 days of the Funding Entity becoming aware of the alleged breach;

(b) ~~(b)~~ notify the Commission when a tender process is completed and a building contractor or building industry participant has been awarded a contract to undertake building work;

~~(b)(c)~~ respond to requests for information concerning Building Code matters related matters to this code of practice made on behalf of CMG or by the ABCC Commission; and

~~(e)(d)~~ ~~(e)~~ respond to requests for information that arise in relation to a project are responded to and respond to alleged breaches, with initial actions designed to encourage the voluntary modification or cessation of noncompliant behaviour.

This section has been inserted to assist with enforcement and monitoring. It will enable the ABCC to keep an up to date record of Commonwealth funded projects.

Section Commission when a tender process is completed and a building contractor or building industry participant has been awarded a contract to undertake building work.

Part 6 Workplace Relations Management Plans

New Part inserted to give effect to decision that WRMPs are dealt with in the Code, rather than administratively.

28 Requirement for a WRMP

This Part sets out the process for approval of WRMPs by the ABC Commissioner and provides for review of those decisions.

Note: section 26 provides that a funding entity must not enter into a contract with any person or entity that has not submitted a WRMP that has been approved by the ABC Commissioner.

29 Application for approval and content of WRMP

- (1) Building industry contractors and building industry participants may apply to the ABC Commissioner to have a WRMP approved.
- (2) An application to the ABC Commissioner for approval of a WRMP must be made in the manner and form required by the ABC Commissioner.
- (3) The proposed WRMP must demonstrate how the building contractor or building industry participant (*the applicant*) proposes to comply with the requirements of this code of practice, including the matters listed in subsection (7).
- (4) The proposed WRMP must be accompanied by any supporting evidence required by the ABC Commissioner.
- (5) If an application for approval of a WRMP by the ABC Commissioner does not contain sufficient information to enable the ABC Commissioner to make a decision whether or not to approve the proposed WRMP, the ABC Commissioner may ask the applicant to provide additional information. The request must be confirmed in writing and must specify the date (not being less than 14 days) by which additional information is to be given.
- (6) If the applicant does not provide the additional information requested under subsection (4), the application is taken to have been withdrawn.
- (7) In addition to demonstrating how the applicant proposes to comply with the requirements of this code of practice on a particular project, the proposed WRMP must:
 - (a) explain the systems, processes and procedures that the head contractor has in place (or will put in place) to:

- (i) clearly and effectively communicate how the requirements of this code of practice apply to all participants on site, including subcontractors; and
- (ii) promote a fair, efficient and productive workplace;
- (iii) deliver the project on time and within budget.

Example: a building contractor or building industry participant must be able to demonstrate how the requirement to promote productive and efficient workplaces can be met in the context of any of the following (if applicable):

- 1) restrictions on when work can be performed, such as mandated or fixed rostered day off schedules and one-in-all-in arrangements;
- 2) the potential for unexpected costs or increased costs during the life of a project, such as site allowances which are not quantifiable at the time of contracting;
- 3) adoption of terms and conditions common to a project or industry and which are not specific to, or reflect, the needs of the enterprise; and
- 4) impositions or restrictions on the engagement and/or utilisation of labour.

(b) address the following:

- (i) how workplace arrangements will be regulated;
- (ii) approaches that have been adopted to develop and maintain a productive workforce, ensuring the optimal use of labour requirements (e.g. approach to managing inclement weather and heat, and Rostered Days Off);
- (iii) the approach to relationship management with employees, employee representatives and/or building associations, including but not limited to, the approach and process for communicating with the workforce;
- (iv) the approach to managing site access by third parties;
- (v) the approach to ensuring compliance with statutory workplace rights including, but not limited to, freedom of association, freedom from unlawful coercion and undue influence and freedom from unlawful discrimination;
- (vi) the identification of workplace relations risks in relation to the project and details as to the proposed approaches to managing those risks; and

Section Commission when a tender process is completed and a building contractor or building industry participant has been awarded a contract to undertake building work.

(vii) the management of subcontractors.

30 Approval of a WRMP

- (1) The ABC Commissioner must approve the proposed WRMP if satisfied that the proposed WRMP demonstrates how the building industry contractor or building industry participant will comply with the requirements of this code of practice on the project to which the WRMP relates and addresses the matters prescribed in subsection 30(6).
- (2) The ABC Commissioner must notify the applicant within 5 days of making the decision to approve the proposed WRMP.
- (3) If the ABC Commissioner does not make a decision within 30 days after receiving the application under section 29 or additional information requested under subsection 29(5), the ABC Commissioner is taken to have refused to approve the WRMP.

31 Refusal to approve a WRMP

- (1) If the ABC Commissioner proposes to refuse to approve a proposed WRMP, the ABC Commissioner must give a written notice to the applicant:
 - (a) informing the applicant of the reasons for the proposed refusal; and
 - (b) advising the applicant that they may, by a specified date (being not less than 14 days after giving the notice), make a submission to the ABC Commissioner in relation to the proposed refusal.
- (2) After the date specified in a notice under subsection (1), the ABC Commissioner must:
 - (a) if the applicant has made a submission in relation to the proposed refusal to approve the WRMP — consider that submission; and
 - (b) whether or not the applicant has made a submission — decide whether to approve or refuse to approve the WRMP; and
 - (c) within 14 days after making that decision, give the applicant written notice of the decision, including the reasons for the decision.

32 External review

(1) An applicant may apply to the Administrative Appeals Tribunal for review of a decision of the ABC Commissioner under section 31.

(2) The application must be made within:

(a) 28 days after the day on which the decision first came to the applicant's notice; or

(b) any longer time the Administrative Appeals Tribunal allows.

33 Compliance

(1) A building contractor or building industry participant must comply with an approved WRMP on the project to which the WRMP relates.

(2) A head contractor must ensure compliance with the WRMP by a subcontractor on the project to which the WRMP relates to the extent that the WRMP applies in relation to the subcontractor.

Schedule 1 Building work to which code of practice applies

(subsection 6(2))

- 1 Building work that is being undertaken by or on behalf of a funding entity (irrespective of the value of a project).
- 2 Building work:
 - (a) that is indirectly funded by the Commonwealth by a grant or other program in circumstances in which funding for the building work is an explicit component of the grant or program; and
 - (b) for which:
 - (i) the value of the Commonwealth's contribution to the project that includes the building work is at least \$5,000,000, and represents at least 50% of the total construction project value; or
 - (ii) the Commonwealth's contribution to the project that includes the building work is at least \$10,000,000 (irrespective of its proportion of the total construction project value).
- 3 Building work:
 - (a) for which the Commonwealth provides assistance in advance of the commencement of construction; and
 - (b) which has an identified capital component; and
 - (c) for which:
 - (i) the value of the Commonwealth's contribution to the project that includes the building work is at least \$5,000,000, and represents at least 50% of the total construction project value; or
 - (ii) the Commonwealth's contribution to the project that includes the building work is at least \$10,000,000 (irrespective of its proportion of the total construction project value).
- 4 A Build, Own, Operate, Transfer ('BOOT') project initiated by an agency of the Commonwealth for the delivery of functions or services of the Commonwealth.

5 A Build, Own, Operate ('BOO') project initiated by an agency of the Commonwealth for the delivery of functions or services of the Commonwealth.

6 Building work that involves a pre-commitment lease to which a funding entity is a party.

7 Building work that involves a Public Private Partnership ('PPP') for the delivery of functions or services of the Commonwealth.

Note A PPP involves the creation of an asset through financing and ownership control by a private party and private sector delivery of related services that may normally have been provided by the Commonwealth. An agency of the Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user.

8 Building work that involves a Private Finance Initiative ('PFI') for the delivery of functions or services of the Commonwealth.

Note A PFI involves the creation of an asset through financing and ownership control by a private party and private sector delivery of related services that may normally have been provided by the Commonwealth. An agency of the Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user.

9 Building work whose funding is not described in items 1 to 3 (*privately funded building work*).

Note

~~1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See www.comlaw.gov.au.~~

Schedule 2 **Building work for which a
Workplace Relations Management
Plan is required**

See Part 6.

(subsection xxx)

1 Commonwealth funded building work for which:

- (i) the value of the Commonwealth's contribution to the project that includes the building work is at least \$5,000,000, and represents at least 50% of the total construction project value;
or
- (ii) the Commonwealth's contribution to the project that includes the building work is at least \$10,000,000 (irrespective of its proportion of the total construction project value).