New Building Code – important new requirements for workplace conduct and for enterprise agreements made after 24 April 2014

Summary

On 17 April 2014, the Federal Government published a *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014*. The Code will formally come into effect when the *Building and Construction Industry (Improving Productivity) Bill 2014*, which is currently before Parliament, comes into operation. However, the Government has announced that when the Code takes effect it will apply to enterprise agreements **made after 24 April 2014**.

For businesses covered by the Code, the Code outlaws numerous restrictive and unproductive clauses in enterprise agreements. The Code also outlaws certain types of conduct, arrangements and practices in relation to "building work" carried out by businesses covered by the Code.

"Building work" is defined broadly and is not limited to mainstream construction industry activities. For example repair work on buildings, structures and works is included, as well as the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site.

Employers covered by agreements made after 24 April 2014 that do not comply with the Code, will not be eligible to tender for or be awarded Commonwealth-funded building work.

Overview

The *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* (the Code) was issued by Senator the Hon Eric Abetz, Minister for Employment, on 17 April 2014.

The Minister has announced that the Code will formally come into operation once the *Building and Construction Industry (Improving Productivity) Bill 2013* (the Bill), comes into operation. The Labor Party and The Greens are opposed to the Bill and therefore the legislation is not expected to be voted upon in Parliament until after 1 July 2014 when the new Senate commences.

For businesses covered by the Code, the Code outlaws numerous restrictive and unproductive clauses in enterprise agreements. It will apply to enterprise agreements "made" **after 24 April 2014**. Under the *Fair Work Act 2009*, enterprise agreements are generally "made" when the employees vote to approve the agreement.

The Code also outlaws certain types of conduct, arrangements and practices in relation to "building work" carried out by businesses covered by the Code.

The Code will replace the *Building Code 2013* issued by the former Labor Government.

Who does the Code apply to?

The Code applies to businesses that carry out "building work" on projects which are wholly or partially funded by the Commonwealth Government.

The Code also applies to:

- Privately funded "building work" that businesses covered by the Code carry out; and
- "Building work" carried out by related entities of businesses covered by the Code. (Related entities are defined in section 3 of the Code and include a wide range of related bodies corporate).

The definition of "building work" in the Code is the same as the definition of "building work" in section 6 of the *Building and Construction Industry (Improving Productivity) Bill 2013*, except for the transport and supply work described in paragraph 6(1)(e) of the Bill.

The Code extends beyond mainstream construction industry activities to cover, for example, repair work on buildings, structures and works and to the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site.

When does the Code apply to a business?

A business will become subject to the Code from the time they submit an expression of interest or tender for Commonwealth funded building work on or after the date the Code formally takes effect.

Are businesses required to ensure that their subcontractors comply with the Code?

Yes. Businesses covered by the Code are required to ensure that their subcontractors act in a manner that is consistent with the Code on Commonwealth funded projects.

What does the Code require?

The Code contains detailed requirements in the following areas:

- Businesses must comply with relevant laws, instruments and orders including the *Fair Work Act 2009*, the *Independent Contractors Act 2006*, the *Competition and Consumer Act 2010*, work health and safety laws, security of payment laws, applicable awards, applicable enterprise agreements, and Court and Tribunal orders (section 9);

- Particular enterprise agreement content is prohibited (subsections 11(1), (2) and (3), as reproduced in the **Attachment** to this Advice);

- Particular conduct, practices and arrangements are prohibited (subsections 11(4) and (5) – see **Attachment**);

- If a dispute settlement term in an enterprise agreement provides for the arbitration of a dispute (e.g. by the Fair Work Commission) the term must require any decision of the arbiter to be consistent with the Code (section 15 - see **Attachment**);

- Unregistered agreements are generally prohibited, other than common law agreements with individual employees (section 10);

- Coercion, undue influence or undue pressure on contractors, subcontractors and consultants to provide above award-entitlements, to contribute to a particular fund or scheme, or to support a particular product, service or arrangement are prohibited (e.g. pressure to contribute to a particular redundancy scheme or to select a particular income protection insurance provider or to use a particular training provider) (section 12);

- Businesses must implement policies which protect freedom of association (section 13);

- Where a union official wishes to enter premises, businesses must strictly apply laws governing right of entry including ensuring that the official complies with the permit and notice requirements of the relevant legislation (section 14);

- Businesses must report actual or threatened industrial action (protected and unprotected) to the Australian Building and Construction Commission (ABCC), which will be re-established under the Bill, as soon as practicable but no later than 24 hours after becoming aware of the threat or action (section 16);

- Businesses must report to the ABCC any request or demand by a union that the business engage in conduct that appears to be for a secondary boycott within the meaning of the *Competition and Consumer Act 2010,* as soon as practicable but no later than 24 hours after becoming aware of the threat or action (section 16);

- Businesses must notify the ABCC of a breach or suspected breach of the Code as soon as practicable but no later than two working days after becoming aware of the breach and must advise the ABCC of the steps proposed to rectify the breach (section 17); and

- For projects where the Commonwealth's funding is above a specified amount, a Workplace Relations Management Plan must be developed for the project (sections 30-34 and Schedule 2 of the Code).

Who is responsible for monitoring compliance?

The ABCC is responsible for monitoring compliance with the Code.

What are the consequences of breaching the Code?

If the ABCC is satisfied that the Code applies to a business and the business has failed to comply with it, the ABCC may:

- Serve a compliance notice on the business;

- Impose an "exclusion sanction" on the business; or

- Issue a formal warning that a further failure may result in the imposition of an exclusion sanction.

An "exclusion sanction" is a period during which the business is not permitted to tender for, or be awarded, Commonwealth funded building work.

Does the Code replace the construction industry industrial relations guidelines issued by the Victorian, New South Wales and Queensland Governments?

No, the State Governments' IR Guidelines apply in addition to the Code.

Businesses that wish to be eligible to carry out work for the Commonwealth Government and the State Governments will need to ensure that their enterprise agreements, practices and arrangements comply with the Code and the relevant State IR Guidelines.

Details of the Victorian, New South Wales and Queensland IR Guidelines are provided in Ai Group Member Advice NAT 017/13.

Is your organisation Code-ready?

As is clear from the above, there are major commercial risks for a business which is not Code-compliant.

In preparing to implement the Code, Ai Group recommends that you:

1. Consider the work your organisation currently does (and is likely to do) to ascertain whether the Code applies to your business.
2. Consider whether any other businesses with which your organisation subcontracts are likely to require your organisation to be Code-compliant.
3. Consider the impact of the Code on your business.
4. Consider the impact of the Code on related entities of your business.
5. Review your current enterprise agreements for Code-compliance to ascertain whether any provisions will need to be removed from future enterprise agreements.
6. Develop a bargaining strategy for your future enterprise agreements to ensure that your agreements are Code-compliant.
7. Review your current practices and arrangements to ensure Code-compliance, including reviewing:
    a. Recruitment, employment and termination practices to ensure compliance with the freedom of association requirements of the Code;
    b. Processes for engaging and managing subcontractors;
    c. Right of entry procedures;
    d. Whether your frontline managers are aware of all the Code requirements or need some training;
    e. Dispute settling processes;
    f. Notification procedures where industrial action or secondary boycott action is taken or threatened by a union or employees; and
    g. Documentation requirements and procedures.

We recommend that organisations covered by the Code develop a Code-compliance policy and procedures.

Ai Group is well-placed to assist with the above tasks.

Further information and assistance

For further general information or assistance please call Ai Group's **BIZassistInfoline** on **1300 78 38 44**.

Ai Group's team of workplace relations advisers is well-qualified to provide detailed assistance to comply with the Code. Please contact our construction team on constructionteam@aigroup.asn.au or alternatively please contact:

Victoria: Vasuki Paul on vasuki.paul@aigroup.asn.au

NSW: Daniel Murray on daniel.murray@aigroup.asn.au

QLD: Maurice Swan on maurice.swan@aigroup.asn.au

SA: Clive Starr on clive.starr@aigroup.asn.au

If you require legal assistance please contact Ai Group Legal Pty Ltd on 1300 554 581.

You may also wish to contact Ai Group's Training Department in the relevant state to discuss any training needs which your organisation may have.

Stephen Smith
DIRECTOR – NATIONAL WORKPLACE RELATIONS

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ATTACHMENT

EXTRACTS FROM THE *BUILDING AND CONSTRUCTION INDUSTRY (FAIR AND LAWFUL BUILDING SITES) CODE 2014*

ENTERPRISE AGREEMENT CONTENT

Clauses 11 and 15 of the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* , as reproduced below, identify various requirements for enterprise agreement content. Please note that it is very important that businesses which may be bound by the Code take the time to consider all of the provisions of the Code. Enterprise agreement content is only one of many topics dealt with in the Code.

11. Content of agreements and prohibited conduct, arrangements and practices

(1) A code covered entity must not be covered by an enterprise agreement which includes clauses that:

(a) impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity;

(b) discriminate, or have the effect of discriminating against certain persons, classes of employees, or subcontractors; or

(c) are inconsistent with freedom of association requirements set out in section 13 of this code of practice.

Example 1: clauses that impose a requirement on the code covered entity or a subcontractor engaged by the code covered entity to employ a non-working shop steward or job delegate, or which result in the employment of a non-working shop steward or job delegate.

Example 2: clauses permitting officials, delegates or other representatives of a building association to undertake or administer induction processes.

Note: Subsection (3) provides a non-exhaustive list of clauses that are not permitted to be included in enterprise agreements.

(2) Subsections (1) and (3) apply in respect of enterprise agreements made after 24 April 2014.

(3) Without limiting the generality of subsection (1), clauses are not permitted to be included in enterprise agreements that:

(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;

(b) restrict the employment or engagement of persons by reference to the type of contractual arrangement that is, or may be, offered by the employer;

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

(c) require, or result in, discrimination between classes of employees because of the basis on which they are lawfully entitled to work in Australia;

(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 source or number of employees to be engaged, or type of employment offered to employees;

(e) 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;

(f) prescribe the terms and conditions on which subcontractors are engaged (including the terms and conditions of employees of a subcontractor);

(g) prescribe the scope of work or tasks that may be performed by employees or subcontractors;

(h) limit or have the effect of limiting the right of an employer to make decisions about redundancy, demobilisation or redeployment of employees 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).

Example: an amount paid that nominally incorporates payment for ordinary time and other matters such as overtime and allowances in one loaded rate.

(j) require, or have 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 building association logos, mottos or indicia to company supplied property or equipment;

(m) directly or indirectly require a person to encourage, or discourage, a person from becoming, or remaining, a member of a building association;

(n) directly or indirectly require a person to indicate support, or lack of support, for persons being members of a building association or any other measure that suggests that membership is anything other than a matter for individual choice;

(o) limit the ability of an employer to determine with its employees when and where work can be performed to meet operational requirements or limit an employer's ability to determine by whom such work is to be performed;

(p) provide for the rights of an official of a building association to enter premises other than in strict compliance with Part 3-4 of the FW Act;

(q) provide for the establishment or maintenance of an area which is intended to be designated to be used by members, officers, delegates or other representatives of a building association in that capacity.

Note 1: this section does not authorise 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, paragraph (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.

Note 2: clauses of an enterprise agreement that are inconsistent with this section will impact on a code covered entity's eligibility to tender for or be awarded Commonwealth funded building work, see subsection 23(a) of this code of practice.

Note 3: subsection 15(1) contains additional requirements for enterprise agreement content in relation to dispute settlement terms.

Conduct by parties

(4) A code covered entity must not engage in conduct, or implement a procedure or practice (howsoever described) which has, or is likely to have, any of the effects described in subsections (1) or (3) if the conduct, practice or procedure was contained in an enterprise agreement.

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 set a schedule for rostered days off that does not allow for flexibility around operational requirements.

(5) Subsection (4) does not apply if the conduct, practice, or arrangement is:

(a) expressly permitted or required by a Commonwealth industrial instrument; or

(b) necessarily linked to the code covered entity's compliance with, or conduct expressly permitted by, an industrial instrument.

Note: section 11 does not require, permit or authorise a code covered entity to fail to comply with an enterprise agreement. A failure to meet the requirements of section 11 by a code covered entity, however, renders the entity ineligible to tender for, or be awarded, Commonwealth funded work—see subsection 23(1)(a).

15. Dispute settlement

(1) A code covered entity must:

(a) ensure that an enterprise agreement that covers the entity includes a term for settling disputes in accordance with subsection 186(6) of the FW Act; and

(b) if a dispute settlement term of an enterprise agreement provides for arbitration of a dispute or other binding outcome, the entity must ensure that the term requires any decision of the arbiter to be consistent with this code of practice.

(2) Subsection (1) applies to enterprise agreements made after the date specified in subsection 11(2) of this code of practice.