

6 December 2016

NAT 024/16

ABCC Act and new Building Code are in operation - New enterprise agreement content requirements - Live, on-line event and briefings

SUMMARY

The ABCC Bill has been passed by Parliament after more than three years of debate. The legislation is now in operation, together with a new Building Code which applies to Commonwealth funded building work.

Ai Group worked very hard to secure the passage of the Bill through Parliament. Compromises were necessary to enable this important Bill to be passed, but the final package will deliver vital reforms to the Australian construction industry and the broader community.

This member advice includes detailed information about the ABCC Act and Building Code. In addition, a live, on-line event has been scheduled on Friday 16 December 2016, and briefings have been scheduled in Sydney, Melbourne, Brisbane and Newcastle in February 2017.

Overview

The [Building and Construction Industry \(Improving Productivity\) Act 2016 \(ABCC Act\)](#) came into operation on **1 December 2016**.

The ABCC Act repeals Labor's *Fair Work (Building Industry) Act 2012* and the *Building Code 2013* that was made under that Act.

The [Code for the Tendering and Performance of Building Work 2016 \(Building Code\)](#) was issued under the ABCC Act on 2 December 2016.

The Building Code contains detailed content requirements for enterprise agreements that apply to businesses which carry out Commonwealth funded building work. The transitional arrangements in the Code give building industry participants with non-compliant enterprise agreements made before 2 December 2016 some time to achieve compliance with the new enterprise agreement content requirements.

The ABCC Act restores the Australian Building and Construction Commission (**ABCC**) – a regulator with strong powers to ensure compliance with industrial laws and industrial instruments.

Penalties for unlawful conduct have been tripled and parties that are adversely affected now have access to injunctions and damages. These changes should ensure that the Construction, Forestry, Mining and Energy Union (**CFMEU**) changes its current unacceptable approach of blatantly disregarding industrial laws. If it does not, the ABCC has the necessary powers to hold the union to account.

The ABCC Act

What employers and employees are covered by the ABCC Act?

The definition of “*building work*” in section 6 of the Act plays a central role in defining the scope of the Act.

The legislation applies to employers, employees and other parties engaged in a very wide range of work in the construction industry (see s.6(1)(a), (b), (c) or (d) of the definition of “building work” in the [ABCC Act](#)). In addition, the Act extends beyond construction sites to include:

- the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site;
- Transporting or supplying goods, to be used in work covered by s.6(1)(a), (b), (c) or (d) of the definition of “building work” in the [ABCC Act](#), directly to building sites (including any resources platform) where that work is being or may be performed; and
- Certain work associated with off-shore oil and gas projects.

What provisions are included in the ABCC Act?

The ABCC Act deals with:

- The functions of the ABCC in monitoring compliance, taking enforcement action, and promoting appropriate standards of conduct;
- The powers of the ABCC, the Australian Building and Construction Commissioner (**ABC Commissioner**) and Australian Building and Construction Inspectors;
- The power of the ABC Commissioner to require a person to give information, produce documents or answer questions relating to an investigation of a suspected contravention of the ABCC Act or a designated building law;
- The making of a Building Code to prescribe the standards which businesses which undertake Commonwealth funded building work are expected to comply with;
- The functions of the Federal Safety Commissioner in promoting work health and safety and in the operation of the WHS Accreditation Scheme;
- The prohibition of unlawful industrial action;
- The prohibition of unlawful pickets;
- The prohibition of numerous types of coercion against persons (including employers), in relation to:

- whether to employ, or not employ, a particular person;
- whether to engage, or not engage, a particular independent contractor;
- whether to allocate, or not allocate, particular duties or responsibilities to an employee or contractor;
- the nomination of particular superannuation funds (except in respect of protected industrial action); and
- the making, variation or termination of an enterprise agreement (except in respect of protected industrial action).
- Prohibiting the taking of action against a building employer because its employees are covered or not covered by an award or enterprise agreement; and
- Offences, civil penalties, injunctions and damages.

What penalties are included in the ABCC Act?

Civil penalties of up to \$170,000 for corporations and \$34,000 for individuals are included in the ABCC Act. In addition, damages can be ordered by a Court.

The Building Code

What is the purpose of the Building Code?

The Code is aimed at:

- Ensuring that enterprise agreements and site practices which apply to Commonwealth funded building work do not prevent the work being carried out productively and efficiently;
- Promoting compliance with the ABCC Act, designated building laws and the Code;
- Encouraging the development of safe, healthy, fair, lawful and productive building sites;
- Identifying the Commonwealth's expectations of, and requirements for, Code covered entities; and
- Establishing an enforcement framework under which Code covered entities may be excluded from being awarded Commonwealth funded building work if they do not comply with the Code.

Who does the Building 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 s.3 of the Code and include a wide range of related bodies corporate).

The definition of “building work” in the Code (Schedule 1) is the same as the definition of “building work” in s.6 of the [ABCC Act](#), except for:

- the transport and supply work described in s.6(1)(e) of the Act; and
- the off-site prefabrication of made-to-order components to form part of any building, structure or works, as described in s.6(1)(d)(iv), unless that work is performed on an auxiliary or holding site that is separate from the primary construction site or sites.

The ABC Commissioner may exempt a building contractor or building industry participant from compliance with the Code if the building work involves the provision of essential services related to the supply of electricity, natural gas, water, waste water or telecommunications. An exemption must be issued in writing.

When does the Building Code apply to a business?

A business becomes subject to the Code from the time it, or one of its related entities, submits an expression of interest or tender for Commonwealth funded building work **on or after 2 December 2016**.

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

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

Accordingly, all businesses which carry out work on Commonwealth funded projects will be required to comply with the Code.

What does the Building 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 (s.9).
- Particular enterprise agreement content is prohibited for agreements that apply to building work (s.11(1) and (3), as reproduced in the **Attachment** to this Advice). Transitional arrangements apply for enterprise agreements made before 2 December 2016. See s.11(2) and the description of the transitional arrangement below.
- Particular conduct, practices and arrangements are prohibited (s.11(4) and (5) – see **Attachment**).
- Enterprise agreement clauses which attempt to avoid the enterprise agreement content requirements in s.11 are prohibited (s.11A – see **Attachment**). Transitional arrangements apply for enterprise agreements made before 2 December 2016. See s.11A(2) and the description of the transitional arrangements below.
- 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 Building Code (section 15 - see **Attachment**). Transitional arrangements apply for enterprise agreements made before 2 December 2016. See s.15(2) and the description of the transitional arrangements below.
- Unregistered agreements are generally prohibited, other than common law agreements with individual employees (s.10).
- A Code covered entity must not engage in sham contracting (s.11B) or collusive tendering practices (s.11C).

- A Code covered entity must comply with security of payment laws, ensure that payments which are due are made in a timely manner, and comply with various other related requirements as outlined in s.11D of the Code.
 - A Code covered entity must report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due, and comply with various other requirements relating to disputed payments as outlined in s.11E of the Code.
 - As set out in s.11F of the Code, a Code covered entity must ensure that no person who is not an Australian citizen or Australian permanent resident (within the meaning of the *Migration Act 1958*) is employed to undertake building work for the Code covered entity unless:
 - The position is first advertised in Australia;
 - The advertising was targeted in such a way that a significant proportion of suitably qualified Australian citizens and Australian permanent residents would be likely to be informed about the position;
 - any skills or experience requirements set out in the advertising were appropriate to the position; and
 - the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job.
- Note: The Migration Act 1958 and associated Regulations contain requirements relating to the engagement of persons who are not Australian citizens or Australian permanent residents.*
- 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 is prohibited) (s.12).
 - Businesses must implement policies which protect freedom of association (s.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 (s.14).
 - Businesses must report actual or threatened industrial action (protected and unprotected) to the ABCC as soon as practicable but no later than 24 hours after becoming aware of the threat or action (s.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 (s.16(4)).
 - A Code covered entity must ensure there is an approach to managing drugs and alcohol issues in the workplace to help ensure that no person attending the site is under the influence of alcohol or drugs (s.16A and Schedule 4).
 - For projects where the Commonwealth's funding is above a specified amount, a Workplace Relations Management Plan (**WRMP**) must be developed for the project (ss.25, 30-34 and Schedule 2 of the Code).
 - WRMPs must include a fitness for work policy to manage alcohol and other drugs in the workplace, including drug and alcohol testing (s.32(2)(a) and Schedule 4).
 - 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 (s.17).
 - Before entering into a contract in respect of Commonwealth funded building work, the Government must ensure that preferred tenderers provide the following information (s.25A):
 - the extent to which domestically sourced and manufactured building materials will be used to undertake the building work;
 - whether the building materials to be used to undertake the building work comply with relevant Australian standards

published by, or on behalf of, Standards Australia;

- the preferred tenderer's assessment of the whole-of-life costs of the project to which the building work relates;
- the impact on jobs of the project to which the building work relates; and
- whether the project to which the building work relates will contribute to skills growth.

Who is responsible for monitoring compliance?

The ABCC is responsible for monitoring compliance with the Code.

What transitional arrangements apply to current enterprise agreements?

Enterprise agreements "made" before 2 December 2016 do not need to comply with the enterprise agreement content requirements in s.11(1) and (3), s.11A and s.15(2) of the Code until 29 November 2018. An enterprise agreement is "made" on the date that the employees vote to approve the agreement under s.181 of the *Fair Work Act 2009*.

How should businesses ensure compliance with the new enterprise agreement content requirements?

Before making any new enterprise agreement, businesses that wish to carry out work on Commonwealth funded projects will need to submit the proposed agreement to the ABCC and obtain a letter confirming that it complies with the Building Code.

What are the consequences of breaching the Code?

If the ABC Commissioner is satisfied that the Code applies to a business and the business has failed to comply with it, the ABC Commissioner may refer the matter to the Minister with a recommendation that an "exclusion sanction" be imposed on the business (s.18).

Failure to comply with the Code includes failure to comply with 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 industrial instruments, orders, the enterprise agreement content requirements and the numerous other requirements of the Code.

Where such a matter has been referred to the Minister, the Minister may impose an "exclusion sanction" or issue a formal warning that a further failure may result in the imposition of an exclusion sanction.

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

Is your organisation Code-compliant?

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

Ai Group recommends that you:

1. Consider the work your business currently does and the work that your business may do in the future, to ascertain whether the Code applies, or may apply, to your business;
2. Consider whether any other businesses with which your organisation subcontracts are likely to require your business to be Code-compliant;
3. Consider the impact of the Code on your business; and
4. Consider the impact of the Code on related entities of your business.

If your business is a Code covered entity, a related entity of a Code covered entity, or is likely to subcontract to a Code covered entity, Ai Group recommends that you review your current practices and arrangements to ensure Code compliance, including reviewing:

1. Your enterprise agreements made before 2 December 2016 to ascertain whether any provisions will need to be removed before 29 November 2018 (see above explanation of the transitional arrangements);
2. Your bargaining strategy for future enterprise agreements to ensure that your agreements are Code-compliant;
3. Recruitment practices;
4. Employment and termination practices to ensure compliance with freedom of association requirements;
5. Processes for engaging and managing subcontractors;

6. Right of entry procedures;
7. Dispute settling processes;
8. Drug and alcohol policies;
9. Security of payment processes;
10. Notification procedures where industrial action or secondary boycott action is taken or threatened by a union or employees;
11. Notification and rectification procedures relating to any breaches of the Code;
12. Documentation requirements and procedures;
13. Your Code compliance policy and procedures; and
14. Whether your senior managers, and frontline managers are aware of all the Code requirements or need some training.

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

Ai Group has been assisting many head contractors and their subcontractors with Code compliance requirements including advice and assistance on issues of coverage, enterprise agreements, development of code compliance processes and procedures, right of entry protocols and associated training.

Ai Group has regular interaction with the ABCC and the Department of Employment to ensure the most accurate interpretation on the Code.

Assistance to members

Live, on-line event

Ai Group has scheduled a live, online event on Friday 16 December 2016 between 11am and Noon AEDT, to provide an overview of the ABCC Act and the Building Code. This event is interactive to allow members to ask questions they may have regarding the recent changes.

[Register here](#)

Member briefings

Ai Group has scheduled member briefings on the ABCC Act, the Building Code and other construction industry workplace relations issues, as follows:

- **Sydney**, Wednesday 22 February 2017, 8.30am-10.30am, Ai Group, 51 Walker Street, North Sydney NSW, 2060.
- **Melbourne**, Friday 24 February 2017, 10.00am - Noon, Ai Group, Level 2, 441 St Kilda Road, Melbourne, VIC, 3004.
- **Queensland**, Thursday 23 February 2017, 10.00am-Noon, Ai Group, 202 Boundary Street, Spring Hill, QLD, 4000.
- **Newcastle**, Tuesday 28 February 2017, 11.30am-1.30pm, Ai Group, Suite 1, "Nautilus", 265 Wharf Road, Newcastle, NSW 2300.

To register, please email Nicole Pandal Cruz of Ai Group on Nicole.PandalCruz@aigroup.com.au or telephone 02 9466 5540.

Do you require further advice?

For information or assistance, please contact the **Ai Group Workplace Advice Line** on 1300 55 66 77.

Should you require any detailed advice on the ABCC Act, the Building Code, enterprise agreements, union issues or any other workplace relations matters, [Ai Group](#) and [Ai Group Workplace Lawyers](#)' team of professional workplace relations advisers and lawyers are available to assist you.



Stephen Smith
Head of National Workplace Relations Policy

EXTRACTS FROM THE *CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016*

ENTERPRISE AGREEMENT CONTENT

Clauses 11 and 15 of the [Code for the Tendering and Performance of Building Work 2016](#) 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 in respect of building work 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) Until 29 November 2018, subsections (1) and (3) do not apply to building contractors and building industry participants in respect of an enterprise agreement made before this code of practice commences.
- (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;
- Note:* this does not prevent the inclusion of clauses in an enterprise agreement that encourage the employment of apprentices.
- (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(1)(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).

11A Attempts to avoid section 11 requirements

- (1)** A code covered entity must not be covered by an agreement in respect of building work which includes clauses that:
- (a)** purport to remedy, or render ineffective, clauses in an enterprise agreement that are inconsistent with section 11, including clauses which:
 - (i)** provide for clauses in the enterprise agreement to be read in a manner that is consistent with subsections 11(1) and (3); or
 - (ii)** provide for clauses in the enterprise agreements to have no effect if they are inconsistent with subsection 11(1) or subsection 11(3); or
 - (b)** require or provide for the application of terms and conditions contained in an enterprise agreement that does not cover and apply to the relevant employer and employees.
- (2)** Until 29 November 2018, subsection (1) does not apply to building contractors and building industry participants in respect of an enterprise agreement made before this code of practice commences.

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 in respect of building work 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)** Until 29 November 2018, subsection (1) does not apply to building contractors and building industry participants in respect of an enterprise agreement made before this code of practice commences.