

The [Code for the Tendering and Performance of Building Work 2016](#) (the Code) came into effect on 2 December 2016. Although in operation, the politics leading up to this (and the resulting amendments), mean the practical obligations on businesses are not yet fully known. However, businesses are already required to comply with it if they want to win Commonwealth funded construction projects.

This is issued to clients as an interim measure pending further information being made available.

This update focusses on some of our observations of the terms of the Code and what it will likely mean in practice. It is not intended to provide detailed discussion of Code compliance (see our earlier update). More detail about the operation of the Code can be found in the Code's [explanatory statement](#).

Application of the Code

A business is only required to be compliant with the Code if they tender for, or provide an expression of interest to, a Code project on or after 2 December 2016. Work covered by the previous *Building Code 2013* remains covered by that Code (or an earlier code, as the case may be).

Workplace Relations Management Plan (WRMP)

A key plank of the Code – and something completely new – is the requirement that on most Code-covered projects, main contractors have a WRMP that has been approved by the ABCC, prior to the contract being let. The WRMP must include policies and procedures regarding Code compliance, and the main contractor must ensure that all subcontractors comply with the WRMP. The WRMP is more than just a policy document – it is expected to be used by the ABCC as the basis for its onsite compliance audits.

The WRMP is the cornerstone of compliance and enforcement under the Code. In addition to its use in auditing, the Code provides the ABCC with a role in the tender process. This allows it input into the way industrial relations (and other) matters are managed, and to vet main contractor involvement. The ABCC's involvement from an early stage may be significant on high profile construction projects.

The role of the ABCC in policing the Code

The Code places the Australian Building and Construction Commission (ABCC) at the heart of the procurement process. In addition to the WRMP (see above), each agency is required to notify the ABCC of any contract let, and to whom it was let providing a starting point for all code auditing activity.

At the back end, the Minister retains the discretion to issue sanctions when recommended by the ABCC. It can be expected there will be a sharper focus on compliance and a much higher probability of sanctions. The decision to impose or not impose a sanction will include consideration of whether the breach was intentional, ongoing, subject to prompt notification and voluntary rectification.

Enterprise agreements

Much like previous Codes, the Code requires enterprise agreements to be compliant with the Code's obligations. The effect of one of the amendments is that agreements made on or prior to 1 December 2016 do not need to comply until 30 November 2018. An enterprise agreement is [made](#) on the day a valid majority vote in favour of it, having followed the processes in the *Fair Work Act 2009* and otherwise complying with that Act. As a result, there are two streams of agreements:

- Agreements made on or prior to 1 December 2016: businesses are entitled to 'self-assess' their agreement's compliance. To do this, they must complete a [self-declaration](#) form.
- Agreement made on or after 2 December 2016: the business must have the agreement assessed for compliance by the ABCC. It is strongly recommended that this is done before an agreement is

made because, once made, the agreement [must be lodged](#). If the agreement is found to be non-compliant after it is made, the business will not be able to tender for Code work until the agreement is approved and then varied (likely several months). Unfortunately, because there are no set timelines for assessments, negotiations are likely to take an extended time, something that presents new challenges, especially when dealing with bitter or highly-charged negotiations.

Over-award payments

Many employers do not have enterprise agreements and instead pay employees an amount above the award (or have enterprise agreements that have nominally expired and pay 'above-agreement'). There is no requirement under the Code to have an enterprise agreement, but the Code prohibits 'unregistered agreements' or practices that have the same effect. This means that if, during an audit, an employer is found to be paying all employees of the same classification the same amount, they are at risk of being found to have an unregistered agreement or a practice with that effect. As such, employers will need to assess whether to make an enterprise agreement, or put in place documented contractual arrangements (such as Individual Flexibility Agreements) with individual employees to demonstrate compliance.

Contract documents

As with previous Codes, the ABCC have published [model contract clauses](#) for use on Code projects.

Drug and Alcohol testing

Compulsory drug and alcohol testing was [previously introduced](#) but the focus is expected increase. For main contractors, having a suitable policy in place is a specific requirement of the WRMP (with the associated auditing, see above). For all other employers, they must ensure their policies permit testing.

Reporting obligations

A lesser understood aspect of previous versions of the Code was the obligation to report certain matters to the ABCC. The Code requires parties to report any actual or threatened industrial action on Code project (where [protected](#) or unprotected) by their own employees within 24 hours. For all other projects, the business must report any unprotected industrial action taken by its employees. Business must also report any breach or suspected breach of the Code within 2 days of becoming aware of it and look to self-remedy the breach within 14 days. Reporting can be done via email to codereporting@abcc.gov.au.

Stopping unprotected industrial action

In addition to reporting obligations, the Code places a positive obligation to take steps (where reasonable) to stop unprotected industrial action. In practice, this could extend to a positive obligation on the employer to lodge [proceedings](#) in the Fair Work Commission to prevent action being taken.

Right of entry

The Code requires strict adherence to right of entry rules. Union officials are not otherwise permitted onsite. The WRMP must provide clear policies and procedures about right of entry and union interaction. Like all other Code matters, if there is a breach of the WRMP this must be reported to the ABCC.

Need more information

If you would like further information or advice about the Code, or assistance in drafting documentation for Code compliance, please contact the team at Fair Work Lawyers.

The information contained in this publication is general in nature and does not constitute legal advice. The reader should seek legal advice in relation to their own specific circumstances, and generally in relation to Code compliance.
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