

With the speed and large number of changes, it is inevitable that there would be adjustments to [Code for the Tendering and Performance of Building Work 2016](#) (the Code).

Amendments to the Code

Recent [amendments](#) relate to enterprise agreements. These amendments reduce the 'transitional period' from two years to 9 months, and reinstate the original intent of the Code when first announced in 2014 to only require enterprise agreements made after a certain date (24 April 2015) comply with the Code.

The result of the amendments is the creation of three streams of agreements, depending on when the agreement was [made](#):

1. on or before 24 April 2014: these agreements do not need to be assessed for compliance with the Code
2. on or after 25 April 2014 and before 2 December 2016: businesses with agreements lodged during this period may tender for building work with a non-compliant agreement before 1 September 2017, but the agreement must be assessed as compliant in order to be awarded the contract
3. on or after 2 December 2016: the agreement must be compliant with the Code and a business may not tender for work without a compliant agreement.

Agreement assessment delays

The current processing time for enterprise agreements is in excess of three months. To speed this process up, the ABCC have [published](#) a series of examples of contentious clauses that have been assessed by them. This is part of a new 'two step' assessment process, with industry participants asked to self-assess their agreement's clauses as compared to the model one before the agreement is lodged with them.

Given these significant delays, clients whose agreements fit into the second category (above), or clients wishing to make compliant enterprise agreements this year are strongly advised to seek advice now.

Transitional provisions

One area of the Code that does not appear to have been well thought through is the interaction between the previous *Building Code 2013* (the Old Code) and the Code. The rule of thumb is that businesses covered by the Old Code remain covered by the Old Code in respect of those projects but on first lodging a tender or expression of interest under the new Code, they become covered by the new Code for the new project and any future projects.

While this explanation is complicated enough, the net result is that on Old Code projects, there are a variety of permutations that can occur, since subcontractors may become covered by the new Code even though the main contractor is covered by the Old Code. In turn, this means that there are differential documentation requirements for advertisements, requests for tenders, subcontracts etc.

The ABCC have [published](#) a table that sets out the various circumstances and the implications for the different parties, including links to the applicable model clauses for transitional situations. [Model contractual](#) provisions for projects under the new Code.

Workplace relations management plan guidance material released

A central feature of the Code is the workplace relations management plan (WRMP). A WRMP is required on any projects that is directly funded projects and worth \$5m or more, and all indirectly funded projects.

The WRMP is a document that the main contractor prepares, and which provides policies and procedures for managing industrial relations risks, and particularly to demonstrate how Code compliance will be achieved on the project.

The document is more than just a 'tick and flick' exercise. The ABCC have made it clear that the WRMP will be the centerpiece of their on-site auditing activity. As a result, drafting this document will require careful consideration by each main contractor to put in place a WRMP that meets the requirements of the Code and is also workable within the business' systems and procedure so that it will be followed on-site.

The ABCC has now published a [guide](#) to assist main contractors when developing their WRMP.

Security of payments

One of the new elements of the Code are the obligations regarding security of payments. There is still limited [guidance material](#) is available in respect of this, although the key obligations are:

- To comply with all applicable security of payments laws
- Ensure payments are made in a timely manner, and not unreasonably withheld
- Have a documented dispute resolution procedure in place
- Ensure that payment disputes are resolved in a reasonable, timely and cooperate way
- Report disputed or delayed payments to the ABCC (codereporting@abcc.gov.au) and the relevant funding entity (i.e. client agency)

Note: these obligations apply to all code-covered entities, not just the main contractor, meaning that subcontractors will need to ensure that they have these processes in place as well, to deal with payment disputes from sub-subcontractors, consultants and suppliers.

These provisions also prohibit improperly pressuring a person to not use security of payment laws, or use in a particular way, as well as illegal [phoenix activity](#) to avoid payments to subcontractors.

Need more information

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



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