



# Building Code 2013

as amended

made under section 27 of the

*Fair Work (Building Industry) Act 2012*

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<b>Compilation start date:</b>	25 December 2013
<b>Includes amendments up to:</b>	Amendment No. 1 to the Building Code 2013 (F2013L02196)

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## About this compilation

### This compilation

This is a compilation of the *Building Code 2013* as in force on 25 December 2013. It includes any commenced amendment affecting the legislation to that date.

This compilation was prepared on 3 February 2014.

The notes at the end of this compilation (the *endnotes*) include information about amending laws and the amendment history of each amended provision.

### Uncommenced amendments

The effect of uncommenced amendments is not reflected in the text of the compiled law but the text of the amendments is included in the endnotes.

### Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

### Modifications

If a provision of the compiled law is affected by a modification that is in force, details are included in the endnotes.

### Provisions ceasing to have effect

If a provision of the compiled law has expired or otherwise ceased to have effect in accordance with a provision of the law, details are included in the endnotes.

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Section 1

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## Part 1                      Introductory

### 1                      Name of code of practice

This code of practice is the *Building Code 2013*.

### 3                      Definitions

(1) In this code of practice:

*Act* means the *Fair Work (Building Industry) Act 2012*.

*bargaining representative* has the same meaning as in the FW Act.

*building contractor* means a building contractor that could be required to comply with this code of practice in accordance with subsection 27(3) of the Act.

*Note* This code of practice may require a person to comply with it in respect of particular building work only if:

- (a) the person is a building contractor that is a constitutional corporation; or
- (b) the person is a building industry participant and the building work is to be carried out in a Territory or Commonwealth place.

*building industry participant* means a building industry participant that could be required to comply with this code of practice in accordance with subsection 27(3) of the Act.

*Note* This code of practice may require a person to comply with it in respect of particular building work only if:

- (a) the person is a building contractor that is a constitutional corporation; or
- (b) the person is a building industry participant and the building work is to be carried out in a Territory or Commonwealth place.

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

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

*funding entity*: see section 4.

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

*industrial action* has the same meaning as in the FW Act.

*industrial association* has the same meaning as in the FW Act.

*industrial instrument* means an award or agreement, however designated, that:

- (a) is made under or recognised by an industrial law (within the meaning of the FW Act); and
- (b) relates to the relationship between an employer and the employer's employees.

*Inspector* means a person appointed as, or taken to be appointed as, a Fair Work Building Industry Inspectorate Inspector under the Act.

*over-award payment* means a payment or benefit above the amount or value of a payment or benefit set out in a designated building law.

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

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**WHS&R** means work health safety and rehabilitation.

*Note* For the definitions of the following terms, see subsection 4(1) of the Act:

- building association
  - building contractor
  - building industry participant
  - building work
  - designated building law
  - Director.
- (2) In this code of practice, an entity is a ***related entity*** of a tenderer if the entity is engaged in building work and is:
- (a) connected to the tenderer by:
    - (i) being able to control, or materially influence, the tenderer's activities or internal affairs; or
    - (ii) being able to determine, or materially influence, the outcome of the tenderer's financial and operating policies; or
    - (iii) being a member of the tenderer; or
    - (iv) being financially interested in the tenderer's success or failure or apparent success or failure; or
  - (b) a body corporate (within the meaning of the *Corporations Act 2001*) that is related to the tenderer by:
    - (i) being a holding company of the tenderer; or
    - (ii) being a subsidiary of the tenderer; or
    - (iii) being a subsidiary of a holding company of the tenderer; or
    - (iv) having one or more directors who are also directors of the tenderer; or
    - (v) controlling the tenderer.

#### 4 Funding entities

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

- (a) a Department of State of the Commonwealth;
- (b) a Department of the Parliament;
- (c) a prescribed Agency under the *Financial Management and Accountability Regulations 1997*;
- (d) a Commonwealth authority that is required by a General Policy Order, issued under section 48A of the CAC Act, to apply this code of practice;
- (e) a wholly-owned Commonwealth company that is required by a General Policy Order, issued under section 48A of the CAC Act, to apply this code of practice.

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## **Part 2                      Conduct**

### **5                      General**

This code of practice has been developed to:

- (a) promote fair, cooperative and productive workplace relations in the building and construction industry; and
- (b) assist industry stakeholders to understand the Commonwealth's expectations and requirements in relation to entities that tender for Commonwealth funded construction-related work, are awarded Commonwealth funded construction-related work, or both; and
- (c) promote workplace reform.

*Note 1* The Director is responsible for monitoring compliance with this code of practice: see paragraph 10(b) of the Act.

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

### **6                      Application of requirements**

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

*Note* This code of practice may require a person to comply with it in respect of particular building work only if:

- (a) the person is a building contractor that is a constitutional corporation; or
  - (b) the person is a building industry participant and the building work is to be carried out in a Territory or Commonwealth place.
- (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 subject to the code of practice if:
      - (i) 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; and
      - (ii) the expression of interest or tender for the building work was called for before this code of practice commenced;
    - (c) the contractor or 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;
    - (d) after the contractor or participant first becomes subject to the code of practice in accordance with paragraph (b) or (c), the contractor or participant is subject to the code in respect of all building work that is described in Schedule 1.

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- (3) The requirements of this code of practice apply only in relation to:
- (a) participation in on-site activities; and
  - (b) conduct that relates to on-site activities but does not occur on the site; including building work performed on an auxiliary or holding site separate from the primary construction site or sites.

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

### **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) comply with this code of practice; and
- (b) require compliance with this code of practice from all subcontractors before doing business with them relating to the building work, including ensuring that all contracts specifically require this code of practice to be complied with:
  - (i) at the time of lodging an expression of interest or tender; or
  - (ii) in the absence of an expression of interest or tender process, before entering into a contract; and
- (c) ensure that contracts and related documents allow Inspectors access to sites, documents and personnel to monitor compliance with this code of practice; and
- (d) ensure there is a WHS&R plan for the building work; and
- (e) ensure that, if threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or project managers report the action to the funding entity; and
- (f) respond to requests for information concerning matters relating to this code of practice made by the Director; and
- (g) proactively ensure compliance with this code of practice by subcontractors, including by confirming compliance at site or project meetings, and by making compliance a contractual obligation; and
- (h) if practicable, ensure that contractors and subcontractors initiate voluntary remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention; and
- (i) ensure that the Director is notified of any alleged breaches, voluntary remedial action taken or other matters relating to this code of practice within 21 days of becoming aware of the alleged breach.

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

### **8 Subcontractors and related bodies and entities**

- (1) A building contractor or building industry participant must ensure that:
  - (a) an agreement entered into with a subcontractor in relation to building work that is not privately funded building work requires the subcontractor to act in a manner that is consistent with this code of practice on and after entering into the agreement; and
  - (b) the requirement is not removed from the agreement.



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- (2) A building contractor or building industry participant must ensure that each tenderer of which the contractor or participant is a related entity in relation to building work that is not privately funded building work acts in a manner that is consistent with this code of practice in relation to the building work.
- (3) A building contractor or building industry participant must ensure that each tenderer to which the contractor or participant is related in relation to building work that is not privately funded building work acts in a manner that is consistent with this code of practice in relation to the building work.

**9 Compliance with laws, decisions, directions and orders**

- (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.
  - 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 in industrial action (strike pay).
  - 4 Industrial instruments.
- (2) A building contractor or building industry participant must comply with the *Competition and Consumer Act 2010* to the extent that it relates to tendering or building work.
  - (3) A building contractor or building industry participant:
    - (a) must comply with a decision, direction or order made or given by a court or tribunal that applies to the contractor or participant; and
    - (b) 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.

- (4) Subsection (3) does not apply if:
  - (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; or
  - (c) the period for appealing against the decision, direction or order has not expired; or
  - (d) the decision, direction or order has been revoked.

**10 Unregistered written agreements and other agreements**

- (1) A building contractor or building industry participant must not bargain in relation to an agreement, or make an agreement:
  - (a) that provides for terms, conditions or benefits of employment of the employer's employees (which may include over-award payments); and

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- (b) that either:
    - (i) will not be certified, registered, lodged or otherwise approved under a designated building law; or
    - (ii) the contractor or participant reasonably believes will not be certified, registered, lodged or otherwise approved under a designated building law; and
  - (c) to which subsection (3) does not apply.
- (2) In this section:
- unregistered written agreement*** means an individual or collective agreement that:
- (a) is made between an employer and either or both of the employer's employees and an industrial association; and
  - (b) provides for terms, conditions or benefits of employment of the employer's employees (which may include over-award payments); and
  - (c) has not been certified, registered, lodged or otherwise approved under a designated building law.
- (3) However, an agreement described in subsection (2) is not an unregistered written 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).
- (4) Also, a common law agreement made between an employer and an individual employee is not an unregistered written agreement.

## 11 Sham contracting

- (1) A building contractor or building industry participant must not engage in activity that is prohibited under a provision of Division 6 of Part 3-1 of the FW Act.

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*Note* When this code of practice commenced, Division 6 of Part 3-1 of the FW Act dealt with the following conduct:

- (a) misrepresenting employment as an independent contracting arrangement;
  - (b) dismissing an employee to engage the individual as an independent contractor to perform the same, or substantially the same, work;
  - (c) making a false statement in order to persuade or influence an individual who is, or was, an employee to enter into a contract for services under which the individual would perform the same work, or substantially the same work, as an independent contractor.
- (2) A building contractor or building industry participant must not enter into a service contract which is unfair or harsh within the meaning of Part 3 of the *Independent Contractors Act 2006*.

**12 Engagement of non-citizens or non-residents**

- (1) A building contractor or building industry participant must ensure that a person engaged to undertake building work for the contractor or participant (as an employee or as an independent contractor) is lawfully entitled to be so engaged under Australian law.

*Example*

The *Migration Act 1958* deals with some aspects of the lawful engagement of persons.

- (2) A building contractor or building industry participant must ensure that it complies with its responsibilities under Australian law in relation to the sponsorship, engagement and employment of a person who is not an Australian citizen.

*Example*

The *Migration Act 1958* and its subordinate legislation may impose conditions and obligations on the sponsorship, engagement and employment of persons who hold visas under that Act.

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**13 Workplace arrangements**

A building contractor or building industry participant must not engage in activity that:

- (a) requires a subcontractor or supplier (through the tendering process or otherwise) to have particular workplace arrangements in place; or
- (b) attempts to unduly influence a subcontractor or supplier (through the tendering process or otherwise) to have particular workplace arrangements in place.

*Example*

A head contractor must not coerce a contractor, subcontractor or consultant into making an over-award payment.

**14 Over-award payments and related matters**

- (1) A building contractor or building industry participant must ensure that:
  - (a) a contractor, subcontractor or consultant is not coerced into making an over-award payment; and
  - (b) undue influence or undue pressure is not exerted, directly or indirectly, on a contractor, subcontractor or consultant to make an over-award payment.
- (2) A building contractor or building industry participant must ensure that:
  - (a) a contractor, subcontractor or consultant is not coerced into contributing to a particular redundancy or superannuation fund; and
  - (b) undue influence or undue pressure is not exerted, directly or indirectly, on a person to contribute to a particular redundancy or superannuation fund.

**15 Freedom of association**

- (1) A building contractor or building industry participant must protect freedom of association by adopting policies that:
  - (a) are consistent with applicable industrial law; and
  - (b) ensure that persons are:
    - (i) free to become, or not become, members of industrial associations; and
    - (ii) free to be represented, or not represented, by industrial 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 the *Privacy Act 1988* or the FW Act; and
  - (b) 'no ticket, no start' signs are not displayed; and

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- (c) 'show card' days do not occur; and
- (d) there is:
  - (i) no discrimination against elected employee representatives; and
  - (ii) no disadvantage to elected employee representatives; and
- (e) forms are not used to require:
  - (i) an employee to identify his or her union status; or
  - (ii) an employer to identify the union status of employees; or
  - (iii) a contractor to identify the union status of subcontractors; and
- (f) individuals are not refused employment because of their union status; and
- (g) employees are not terminated because of their union status; and
- (h) reasonable requests from workplace delegates 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) 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; and
- (j) individuals are not required to pay a 'bargaining fee' (however described) to an industrial association of which the individual is not a member, in respect of services provided by the association.

**16 Right of entry**

- (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 Acts.
- 3 Part 8 of the *Occupational Health and Safety Act 2004* of Victoria.
- 4 Sections 49G and 49I to 49O of the *Industrial Relations Act 1979* of Western Australia.

*Note* The laws mentioned in this section may not regulate all circumstances in which a person (whether a permit holder or not) may be invited to visit a site or in which a person such as a principal contractor may agree to allow a person to enter a site. A building contractor or building industry participant would not contravene this section in circumstances that are not regulated by those laws.

- (2) For the purposes of subsection (1), a building contractor or building industry participant may make provision in an industrial instrument for:
- (a) entry to premises where work is performed, as permitted by the FW Act; and
  - (b) the terms and conditions on which the premises may be entered.

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**17 Dispute settlement**

- (1) A building contractor or building industry participant must:
  - (a) include a genuine dispute settlement procedure in each enterprise agreement that it enters into on or after the commencement of this code of practice; and
  - (b) comply with the other requirements of the FW Act relating to dispute settlement that apply to the contractor or participant.
- (2) The minimum requirements for a genuine dispute settlement procedure are:
  - (a) the ability for employees to appoint a representative in relation to the dispute; and
  - (b) procedures to settle the dispute at the workplace level in the first instance; and
  - (c) if a dispute is not settled at the workplace level, the capacity for a party to the dispute to refer the matter to an independent third party for mediation or conciliation; and
  - (d) if the dispute is still not settled, the capacity for an independent third party to settle the dispute by a decision binding on the parties.

*Note* The independent third party mentioned in paragraphs (c) and (d) may be Fair Work Australia.

**18 Workplace reform**

- (1) A building contractor or building industry participant must comply with the requirements of the FW Act in relation to:
  - (a) making agreements; and
  - (b) showing good faith when bargaining.

*Note* Parties to building work are subject to the good faith bargaining requirements under the FW Act. As part of those requirements, bargaining representatives for an enterprise agreement must:

- (a) respond to proposals made by other bargaining parties in a timely manner; and
- (b) give genuine consideration to proposals made by other bargaining representatives and provide reasons for responses to those proposals.

A bargaining representative is not obliged to make concessions during bargaining, or to reach agreement on terms to be included in an agreement.

- (2) A building contractor or building industry participant that is bargaining for an enterprise agreement:
  - (a) must, as part of bargaining in good faith, genuinely consider a proposal made by a bargaining representative; and
  - (b) subject to the other provisions of this code of practice—must not refuse to consider a proposal made by a bargaining representative on the ground that a third party has indicated that:
    - (i) it will not procure services from a person covered by an industrial instrument that contains a provision of a particular type; or

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- (ii) it will procure services only from a person covered by an industrial instrument that contains a provision of a particular type.

**19 Industrial impacts**

A building contractor or building industry participant must report actual or threatened industrial action to the Director of the Fair Work Building Industry Inspectorate as soon as practicable after the action or threat occurs.

**20 Work health safety and rehabilitation**

- (1) A building contractor or building industry participant must have a WHS&R management system that:
  - (a) is fully documented and clearly communicated to people in the contractor's or participant's business; and
  - (b) systematically covers the ways in which people in the contractor's or participant's business are expected to work safely; and
  - (c) shows the way in which the contractor or participant will ensure that other people work safely; and
  - (d) shows the ways in which the contractor or participant intends to improve its practices over time, including defining roles, duties and responsibilities so that persons know what they have to do, when and in what circumstances.
- (2) A building contractor or building industry participant that is required to establish a management plan for WHS&R at a site as a principal contractor must:
  - (a) prepare the plan before work commences; and
  - (b) ensure that the plan:
    - (i) complies with the law; and
    - (ii) is comprehensive and site-specific.

*Note* The Commonwealth is committed to being both a model client and to influence the WHS&R outcomes for the industry. The Commonwealth has introduced the *Australian Government Building and Construction OHS Accreditation Scheme* to be administered by the Federal Safety Commissioner in accordance with the Act. The Scheme is separate to this code of practice, and further information about the Scheme is available at [www.fsc.gov.au](http://www.fsc.gov.au).

- (3) The minimum requirements for a management plan for WHS&R at a site are:
  - (a) explicit management commitment to the plan; and
  - (b) employee involvement in the implementation of the plan; and
  - (c) arrangements for rigorous work practices analysis; and
  - (d) arrangements for proactive worksite analysis that anticipates and assigns roles and responsibilities and defines efficient procedures while on site; and
  - (e) arrangements for hazard identification, risk assessment and risk control; and

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- (f) arrangements for induction and task training including, with the consent of the contractor or participant, participation of the WHS&R representative for the site; and
- (g) arrangements for appropriate case management and rehabilitation; and
- (h) arrangements for the efficient maintenance of records.

**21 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.



## **Part 4                      Compliance and monitoring    arrangements**

### **22            Notification**

A building contractor or a building industry participant must notify the Director of a breach, or a suspected breach, of this code of practice within 21 days after becoming aware of the breach or suspected breach.

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## **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.

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- 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***).

**Notes to the Building Code 2013****Note 1**

The *Building Code 2013*, in force under section 27 of the *Fair Work (Building Industry) Act 2012*, as shown in this compilation, is amended as indicated in the Tables below.

**Table of Instruments**

Title	Date of FRLI registration	Date of commencement	Application, saving or transitional provisions
Building Code 2013	31 January 2013 (see F2013L00130)	1 February 2013	
Amendment No.1 to the Building Code 2013	24 December 2013 (see F2013L02196)	25 December 2013	

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## Table of Amendments

ad. = added or inserted    am. = amended    rep. = repealed    rs. = repealed and substituted

Provision affected	How affected
s 2 .....	rep. s. 48D LIA
Subsection 6(4) .....	rep. F2013L02196