

EXPLANATORY STATEMENT

Building Code 2013

Issued by the authority of the Minister for Employment and Workplace Relations

Subject - *Fair Work (Building Industry) Act 2012*

Subsection 27(1) of the *Fair Work (Building Industry) Act 2012* (the Act) enables the Minister for Employment and Workplace Relations to issue a code of practice that is to be complied with by persons in respect of building work (the Building Code). Subsection 27(3) of the Act provides that a person who is a building contractor that is a constitutional corporation; or a building industry participant and the work is to be carried out in a Territory or Commonwealth place is required to comply with the Building Code.

The Building Code does not create new obligations, rather it codifies existing ones contained in the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry- May 2012 (the Guidelines). This Building Code reflects the Australian Government's commitment to ensuring that participants in the building and construction industry comply with Australia's workplace relations laws.

Section 10 of the Act provides that the Director of the Fair Work Building Industry Inspectorate is responsible for encouraging compliance with the Building Code, and performing monitoring and investigation functions. If the Director determines that there has been a breach of the Building Code, the Director may report this to the Code Monitoring Group that is established by the 'Building Code 2013 – Supporting Guidelines for Commonwealth Funding Entities' (the Supporting Guidelines).

An overview of the Building Code is provided at the Attachment A.

The Supporting Guidelines set out the Commonwealth procurement obligations placed on funding entities. Through the operation of the Supporting Guidelines and the Commonwealth's broader procurement framework, funding entities are unable to contract with organisations that do not comply with the Building Code.

A Statement of Compatibility with Human Rights has been completed for the Building Code, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the measures in the Building Code are compatible with human rights. A copy of the Statement is at Attachment B.

As required by sub section 27 of the Building Code, the Federal Safety Commissioner has been consulted in relation to occupational health and safety matters. The Office of the Fair Work Building Industry Inspectorate has also been consulted.

The Building Code is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required (reference number 13944).

The Building Code commences on 1 February 2013.

PART 1 – INTRODUCTORY

1 Name of code of practice

Section 1 provides that the name of the code of practice is the *Building Code 2013* (the Building Code).

2 Commencement

Section 2 provides that the code of practice commences on 1 February 2013.

3 Definitions

Section 3 provides a list of definitions relevant to the Building Code, including industrial instrument, related entity and over-award payment.

This section provides that bargaining representative, enterprise agreement, industrial action, industrial association have the same meaning as in the *Fair Work Act 2009* (the Fair Work Act).

The definition of ‘inspector’ includes a person ‘taken to be appointed as’ a Fair Work Building Industry Inspectorate Inspector under the *Fair Work (Building Industry) Act 2012* in order to ensure that the definition captures inspectors who were appointed under previous legislation but have had their appointments preserved.

4 Funding entities

Section 4 provides for the definition of ‘funding entities.’ This definition is the same as that contained in the Commonwealth’s Implementation Guidelines for the National Code of Practice for the Construction Industry- May 2012 (the Guidelines). Funding entities include a Department of State of the Commonwealth, a Department of the Parliament and prescribed agencies under the *Financial Management and Accountability Regulations 1997*.

PART 2 – CONDUCT

5 General

Section 5 explains the purpose of the Building Code is to promote fair, cooperative and productive workplace relations in the building and construction industry. The Code will ensure industry stakeholders comply with the Commonwealth’s expectations and requirements when tendering for Commonwealth-funded construction work or when awarded Commonwealth funded construction work.

A note to this section highlights that failure to comply with the Building Code may result in building contractors and building industry participants being unable to be granted a tender for Commonwealth funded building and construction work.

6 Application of requirements

Section 6 sets out when building contractors and building industry participants will become subject to the Building Code.

Paragraph 6(2)(a) provides that building contractors and building industry participants are not subject to the Building Code unless one or more of paragraphs (b)-(d) apply.

Paragraph 6(2)(b) provides that building contractors and building industry participants are subject to the Building Code if that contractor or participant has previously submitted an expression of interest or tender for building work that is described in items 1 to 8 of Schedule 1 (Commonwealth funded building work).

The effect of this is building contractors or building industry participants who are subject to any version of the Guidelines at the date of commencement of the Code will become subject to the Code from its date of commencement.

This is a departure from the approach taken by previous versions of Guidelines, which provided that projects continued to operate under the version of the Guidelines that applied when tenders or expressions of interest were first called. Applying the Building Code to existing projects will reduce red tape and streamline compliance arrangements by allowing building contractors and building industry participants to demonstrate 'code compliance' by reference to a single set of requirements.

Paragraph 6(2)(c) provides that building contractors and building industry participants first become subject to the Building Code when that contractor or participant submits an expression of interest or tender for building work described in items 1 to 8 of Schedule 1. This paragraph ensures that building work for which expressions of interest or tender submitted after the commencement of the Building Code will attract the coverage of the Code.

Paragraph 6(2)(d) provides that, after a building contractor or building industry participant first becomes subject to the Building Code, the contractor or participant is subject to the Code in relation to all building work that is described in Schedule 1. This includes privately funded building work.

Subsection 6(3) provides that the requirements of the Code of Practice apply only in relation to participation in on-site activities and conduct that relates to on-site activities but does not occur on site, including building work performed on an auxiliary or holding site separate from the primary construction site or sites.

Subclause 6(4) provides that this Building Code, the *Fair Work (Building Industry) Act 2012* and designated building laws are a comprehensive statement of:

- the matters that building contractors and building industry participants are required to include, or not to include, in an enterprise agreement; and
- the workplace practices that building contractors and building industry participants are required to carry out, or not to carry out, in relation to building work; and
- the arrangements that the building contractors and building industry participants are required to make, or not to make, in relation to building work.

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

Section 7 establishes a range of obligations for building contractors and building industry participants to comply with when undertaking work to which the Building Code applies, including complying with the Code, ensuring that subcontractors comply with the Code, ensuring there is a WHS&R plan for the building work and ensuring that the Director of the Fair Work Building Industry Inspectorate is notified of any alleged breaches, voluntary remedial action taken or other matters related to the Code.

8 Subcontractors and related bodies and entities

Section 8 places an obligation on building contractors and building industry participants to ensure that any agreement entered into with a subcontractor about building work (that is not privately funded building work) requires the subcontractor to act in a manner consistent with the Building Code. Once entered into, the contractor or participant must not remove that requirement from the agreement. For example, a building contractor could place a specific term to this effect in all of its labour hire contracts.

Section 8 also requires building contractors and building industry participants to ensure that all relevant related entities also act in manner consistent with the Building Code in relation to Commonwealth funded building work. This prevents the corporate structure being used to avoid compliance with the Building Code. This requirement does not apply to privately funded building work (as defined) that is undertaken by a related entity.

9 Compliance with laws, decisions, directions and orders

Section 9 requires building contractors and building industry participants to comply with relevant laws, decisions, directions or orders that apply to the contractor or participant.

Subsection 9(1) requires compliance with designated building laws. The term ‘designated building laws’ is defined in section 4 of the *Fair Work (Building Industry) Act 2012* and means the Independent Contractors Act 2006, the Fair Work Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; or a Commonwealth industrial instrument.

Four examples of such laws are provided, including laws relating to general protections such as freedom of association and laws relating to the right to enter a site where building work is performed and to have access to records.

Subsection 9(2) provides that building contractors and building industry participants must comply with the *Competition and Consumer Act 2010* to the extent that it relates to tendering or building work. This does not place any new requirements on contractors or participants, but is instead aimed at encouraging compliance with those obligations.

Subsection 9(3) provides that where building contractors and building industry participants are required to comply with a decision, direction, or order made or given by a court or tribunal, they must do so as part of their compliance with the Building Code. Furthermore, contractors and

participants must not engage in activities that conflict with a decision, direction or order made or given by a court or tribunal that applies to them. The subsection does not apply if the time for compliance with the decision has not expired; the matter is subject to an appeal; the time within which to make an appeal has not expired; or the decision, direction or order has been revoked (subsection 9(4)).

10 Unregistered written agreements and other agreements

Subsection 10(1) provides that building contractors and building industry participants must not bargain in relation to an agreement, or make an agreement, if the agreement will not be certified, registered, lodged or otherwise approved under a designated building law (for example, the Fair Work Act). The prohibition also applies if the building contractor or building industry participant reasonably believes the agreement will not be certified, registered, lodged or otherwise approved under a designated building law.

The prohibition does not apply, however, if the agreement relates to the activities listed in paragraph 10(3)(a) including participation in community activities, workers' health and wellbeing initiatives and agreements to promote diversity unless the agreement links the participation in those activities with an entitlement or benefit that is prohibited under subsection 10(1).

Subsection 10(4) clarifies that a common law agreement between an employer and individual employee is not an unregistered written agreement.

11 Sham contracting

Section 11 prohibits building contractors or building industry participants from engaging in activity that is prohibited under a provision in Division 6 of Part 3-1 of the Fair Work Act, which deals with sham contracting. This section also provides that building contractors and building industry participants 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

Section 12 places an obligation on building contractors and building industry participants to ensure that persons who are engaged to undertake building work for the contractor or participant is lawfully entitled to be engaged under Australian law. For example, if a contractor is engaging a person who is not an Australian citizen, the contractor could inspect the person's visa to ensure that they are entitled to work in Australia. Contractors and participants must also ensure that they comply with any responsibilities they have under Australian law in relation to the sponsorship, engagement and employment of a person who is not an Australian citizen. This would include, for example, ensuring compliance with the provisions of the *Migration Act 1958* and its subordinate legislation in relation to visa sponsorship arrangements.

13 Workplace arrangements

Section 13 prohibits building contractors and building industry participants from requiring (e.g. through tendering) or attempting to unduly influence, a subcontractor or supplier to have particular workplace arrangements in place.

14 Over-award payments and related matters

Section 14 places an obligation on building contractors and building industry participants to ensure that contractors, subcontractors and consultants are not coerced or subject to undue influence or undue pressure (either directly or indirectly) to make an over-award payment (section 14(1)).

Building contractors and building industry participants are also required to ensure that a contractor, subcontractor or consultant is not coerced, nor undue influence or undue pressure exerted either directly or indirectly on a person, to contribute to a particular redundancy or superannuation fund (section 14(2)).

15 Freedom of association

Section 15 places an obligation on building contractors and building industry participants to adopt policies that protect freedom of association. This involves adopting policies that are consistent with applicable industrial laws and ensuring that persons are:

- free to become, or not become, members of industrial associations;
- free to be represented, or not represented, by industrial associations; and
- free to participate, or not participate, in lawful industrial activities

Subsection 15(2) sets out a range of examples illustrating how building contractors and building industry participants could comply with the section.

16 Right of entry

Section 16 provides that building contractors and building industry participants must comply with all laws of the Commonwealth, and each State and Territory to which the contractor or participant is subject, that give a permit holder of a building association a right to enter premises where work is performed if the person seeks to exercise that right. Examples of relevant Commonwealth, State and Territory laws include the Fair Work Act, work health and safety legislation and the *Industrial Relations Act 1979* of Western Australia.

17 Dispute settlement

Section 17 places an obligation on building contractors and building industry participants to include a genuine dispute resolution procedure in their enterprise agreements that are entered into on or after the date of commencement of the Building Code. Subsection (2) provides the minimum requirements for a genuine dispute settlement procedure, including the ability for employees to appoint a representative in relation to a dispute and a hierarchy of actions to be taken to resolve a dispute.

18 Workplace reform

Section 18 requires building contractors and building industry participants to comply with the requirements of the Fair Work Act in relation to making agreements and showing good faith when bargaining. Guidance is also provided in subsection 18(2) on the behaviour required of contractors and participants in order to comply with this section. In particular, subsection (18)(2) makes it clear that building contractors and building industry participants must not refuse to consider a proposal

on the ground that a third party has indicated it will or will not (as the case may be) procure service from persons that are covered by an agreement that includes a particular term.

19 Industrial impacts

Section 19 requires building contractors and building industry participants to inform the Director of the Fair Work Building Industry Inspectorate of actual or threatened industrial action as soon as practicable after the action or threat occurs.

20 Work health safety and rehabilitation

Section 20 deals with the requirement to have in place a WHS&R management system and, where relevant, a WHS&R management plan.

Subsection 20(1) requires building contractors and building industry participants to have a WHS&R management system that meets the requirements of paragraphs (a) to (d).

Subsection 20(2) requires building contractors and building industry participants who are principal contractors to, if required, establish a management plan for WHS&R that complies with relevant laws and is comprehensive and site-specific. The plan must be prepared before work commences and contain the minimum requirements listed in subsection 20(3).

21 Security of payment

Section 21 places an obligation on building contractors and building industry participants to comply with all applicable laws and requirements relating to the security of payment, ensure that they make payments in a timely manner and resolve disputes about payments in a reasonable, timely and cooperative way. This section ensures that all parties in the contract chain receive payments due to them in a timely manner.

Part 4 – COMPLIANCE AND MONITORING ARRANGEMENTS

22 Notification

Section 22 requires building contractors and building industry participants to notify the Director of the Fair Work Building Industry Inspectorate of a breach or suspected breach of the Building Code within 21 days of becoming aware of the breach or suspected breach.

Schedule 1 – Building work to which code of practice applies

Schedule 1 supports section 6 of the Building Code, which sets out when a building contractor or building industry participant will become subject to the code. This schedule lists the types of building work to which the Code applies:

- Item 1: Building work that is undertaken by or on behalf of a funding entity irrespective of its value.
- Item 2: building work that is indirectly funded by the Commonwealth by a grant or other program where funding for the building work is an explicit component of the grant program for which the value of the Commonwealth's contribution is at least \$5 million and represents at least 50% of the total construction value.

- Item 3: building work for which the Commonwealth provides assistance in advance of the commencement of construction and has an identified capital component for which the value of the Commonwealth's contribution is at least \$5 million and represents at least 50% of the total construction value.
- Item 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.
- Item 5: A Build, Own, Operate ('BOO') project initiated by an agency of the Commonwealth for the delivery of functions or services of the Commonwealth.
- Item 6: Building work that involves a pre-commitment lease to which a funding entity is a party.
- Item 7: Building work that involves a Public Private Partnership ('PPP') for the delivery of functions or services of the Commonwealth.
- Item 8: Building work that involves a Private Finance Initiative ('PFI') for the delivery of functions or services of the Commonwealth.
- Item 9: Building work whose funding is not described in items 1 to 3. This encompasses any privately funded building work that the building contractor or building industry participant engages in.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Building Code 2013

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the *Building Code 2012* (the Building Code)

Subsection 27(1) of the *Fair Work (Building Industry) Act 2012* (the FW(BI) Act) enables the Minister for Employment and Workplace Relations to issue a code of practice that is to be complied with by persons in respect of building work (the Building Code). Subsection 27(3) of the FW(BI) Act provides that the Building Code applies to a building contractor that is a constitutional corporation; or a building industry participant and the current work is to be carried out in a Territory or Commonwealth place.

The Building Code is a codification of the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry- May 2012 (the Guidelines) and reflects the Australian Government's commitment to ensuring that participants in the building and construction industry comply with Australia's workplace relations laws. As such, the Building Code acts to reinforce existing duties rather than create new ones.

Human rights implications

The Building Code reinforces requirements contained in a range of other legislative instruments, including the FW(BI) Act (under which it is made) and the *Fair Work Act 2009* by ensuring that building contractors and building industry participants meet these requirements and take steps to ensure that other parties they engage do likewise. In this way, the Building Code positively engages the human rights of workers in Australia within the existing framework. In particular, the Building Code engages the right to freedom of association and the right to work and rights in work contained in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR).

Right to freedom of association

Article 8 of the ICESCR entrenches the right to form and join trade unions and the right of trade unions to function freely subject to no limitations, unless such restriction are prescribed by law and are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others. A similar right is contained in Article 22 of the ICCPR, which provides that everyone shall have the right to freedom of association.

The Building Code advances the right to freedom of association by requiring building contractors and building industry participants to whom the Code applies to protect freedom of association by adopting policies that are consistent with applicable industrial laws and ensure persons are free to join and be represented by industrial associations, as well as participate in lawful industrial activities.

In support of this requirement, the Building Code also provides a non-exhaustive list of actions relating to freedom of association that building contractors and building industry participants must not engage in, such as requiring an employee to identify their union status on forms and refusing employment based on union status. The Building Code also reinforces the right of entry powers that are granted by existing Commonwealth, State and Territory laws by requiring building contractors and building industry participants to whom the code applies to comply with all such laws.

Through these provisions, the Building Code engages the right to freedom of association in a way that reinforces existing legislative protections.

Right to work and rights in work

Article 7 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of just and favourable working conditions, including the right to safe and healthy working conditions.

The Building Code advances this right by requiring building contractors and building industry participants to whom the code applies to have work health safety and rehabilitation management systems in place. Additionally, the Building Code requires them to, if required, establish a management plan for work health safety and rehabilitation and complies with existing laws and is both comprehensive and site-specific. In support of this requirement, the code also provides a minimum list of requirements that the management plan must contain, including an explicit management commitment to the plan and employee involvement in its implementation.

Through these provisions, the Building Code engages the workplace safety aspect of the right to work and rights in work in a way that reinforces existing legislative protections.

Conclusion

The instrument is compatible with human rights because it advances the protection of human rights.

Minister for Employment and Workplace Relations, the Honourable William Richard Shorten MP