

EXPLANATORY STATEMENT

Building and Construction Industry (Consequential and Transitional Provisions) Rules 2016

Issued by the authority of the Minister for Employment

Subject - *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016*

Building and Construction Industry (Consequential and Transitional Provisions) Rules 2016

The *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (the Act) deals with consequential and transitional matters relating to the transition from the institutions, functions and powers created by the *Fair Work (Building Industry) Act 2012* (the old Act) to the new regime created under the *Building and Construction Industry (Improving Productivity) Act 2016* (the new Act).

Item 26 of Schedule 2 to the Act enables the Minister to make rules prescribing matters required or permitted by the Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The rules may also prescribe matters of a transitional nature (including prescribing any saving or application provisions) relating to the repeals or amendments made by the Act, or the enactment of the new Act.

Subsection 33(3A) of the *Acts Interpretation Act 1901* provides that a power to make an instrument of legislative character (including rules) with respect to particular matters shall be construed as including a power to make such an instrument with respect to a particular class or particular classes of those matters.

Item 1 of Schedule 1 to the Act repeals the old Act. The effect of this repeal is that the *Building Code 2013* (the old Code), which was made under section 27 of the old Act, will cease to operate on the day on which section 3 of the new Act commences (the transition time).

The purpose of the *Building and Construction Industry (Consequential and Transitional Provisions) Rules 2016* (the Rules) is to ensure that the obligations contained in the old Code continue to apply to the particular building work to which the old Code applied immediately before the transition time. That is, building work for which a building contractor or building industry participant submitted an expression of interest or tender before the transition time, whether or not the relevant contract had been entered into or the actual building work had commenced.

This is necessary because the *Code for the Tendering and Performance of Building Work 2016* that is proposed to be made under section 34 of the new Act (the new Code), will only apply prospectively. That is, it will only apply in relation to building work for which an expression of interest or tender is submitted after its commencement.

Without the Rules, building work to which the old Code applied would no longer be subject to any code of practice.

Details of the Rules are set out in [Attachment A](#).

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*. The Rules commence on the day after they are registered on the Federal Register of Legislation.

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

Consultation on the Rules was not required as they are of a transitional nature and do not substantially alter existing arrangements in relation to the particular building work to which the old Code applied immediately before the transition time.

The Office of Best Practice Regulation has advised that a regulatory impact statement is not required (OBPR ID: 13944).

Part 1 – Preliminary

Section 1 – Name

1. Section 1 provides that the name of the instrument is the *Building and Construction Industry (Consequential and Transitional Provisions) Rules 2016* (the Rules).

Section 2 – Commencement

2. Section 2 provides that the Rules commence on the day after the instrument is registered.

Section 3 – Authority

3. Section 3 specifies that the Rules are made under item 26 of Schedule 2 to the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (the Act).

Section 4 – Definitions

4. Section 4 sets out the defined terms used in the Rules. These defined terms are consistent with those used in the Act.

Part 2 – Building Code

Section 5 – Continuation of old Building Code

5. Section 5 applies in relation to particular building work (within the meaning of the *Fair Work (Building Industry) Act 2012* (the old Act)) to which the *Building Code 2013* (the old Code) applied immediately before the transition time (subsection 5(1)). The transition time is defined as the commencement of section 3 of the *Building and Construction Industry (Improving Productivity) Act 2016* (the new Act), which is the day after the new Act receives the Royal Assent.
6. That is, it applies in relation to building work for which a building contractor or building industry participant submitted an expression of interest or tender before the transition time. The crucial event for determining whether section 5 applies to particular building work is the act of *submitting* an expression of interest or tender for that work. It is irrelevant whether the relevant contract had been entered into or the actual building work had commenced by the transition time.
7. Section 5 does not apply to any building work for which an expression of interest or tender was submitted after the transition time. This is so irrespective of whether the request for expressions of interest or request for tender was made before or after the transition time.
8. Paragraph 5(2)(a) provides that the new Act applies as if the old Code, as in force immediately before the transition time, were a document issued under section 34 of the new Act in relation to the building work described in subsection 5(1).
9. Paragraph 5(2)(a) ensures that the obligations in the old Code continue to apply in relation to the particular building work to which the old Code applied immediately before the transition time. This means that building contractors and building industry participants must continue to comply with the old Code when performing that building work until that work is completed.
10. As the old Code is deemed to be a document issued under section 34 of the new Act, the ABC Commissioner and other inspectors can perform their functions and exercise their powers under the new Act in relation to it. For example, an inspector can exercise compliance powers to

ascertain whether the obligations in the old Code are being, or have been, complied with in relation to the building work to which section 5 applies.

11. Paragraph 5(2)(b) provides that if a funding entity (within the meaning of the old Code) intends, after the transition time, to enter into a contract with a preferred tenderer in relation to building work that is described in subsection 5(1), the new Act applies as if the document (the old Code) referred to in paragraph 5(2)(a):
 - were a document relating to procurement matters; and
 - included the requirement referred to in subsection 34(2A) of the Act.
12. Subsection 34(2A) of the new Act provides that a document issued under section 34(1) relating to procurement matters must require a funding entity to ensure that the preferred tenderer for building work provides the following information:
 - 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.
13. Paragraph 5(2)(b) applies if an expression of interest or tender for particular Commonwealth funded building work was submitted before the transition time, but the relevant contract had not been entered into before the transition time. In this situation, the old Code, which is deemed to be a document issued under section 34 of the new Act (see paragraph 5(2)(a)), is taken to be a document relating to procurement matters and to include the requirement referred to in subsection 34(2A) of the new Act.
14. The practical effect of paragraph 5(2)(b) is that a funding entity that proposes to enter into a contract *after* the transition time that relates to building work for which the relevant expression of interest or tender was submitted *before* the transition time, must require its preferred tenderer to provide the information referred to in subsection 34(2A) of the new Act prior to entering into that contract.
15. Subsection 5(2) operates subject to subsections 5(3) and (4).
16. For the avoidance of doubt, subsection 5(3) provides the old Code does not apply in relation to building work if the *Code for the Tendering and Performance of Building Work 2016* (the new Code) applies in relation to that work. The new Code will apply to all Commonwealth funded building work (as defined in the new Act) for which an expression of interest or tender is submitted after the transition time. Once a building contractor or building industry participant is subject to the new Code, it will also apply in relation to new private building work they undertake (see subsection 6(3) of the new Code).
17. Subsection 5(4) provides that paragraph 5(2)(a) does not apply for the purposes of section 35 of the new Act, which allows the ABC Commissioner to require certain persons to report on their

compliance with the code of practice issued under section 34. This means that the ABC Commissioner cannot issue a notice under section 35 requiring a building contractor or building industry participant to report on their compliance with the old Code in relation to the particular building work to which it applies.

18. Instead, as is made clear by the note to subsection 5(4), where the old Code continues to apply because of paragraph 5(2)(a), reporting on compliance is dealt with under section 22 of the old Code. That section requires a building contractor or building industry participant to notify the ABC Commissioner of a breach or suspected breach of the old Code within 21 days after becoming aware of the breach or suspected breach.
19. Subsection 5(5) provides that a reference in the old Code to the 'Director' or the 'Director of the Fair Work Building Industry Inspectorate' is taken to be a reference to the 'ABC Commissioner' (within the meaning of the new Act), and a reference to an 'Inspector' in the old Code is taken to be a reference to an 'inspector' (within the meaning of the new Act). This is to ensure that the old Code operates effectively with the new Act.

Statement of Compatibility with Human Rights

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

Building and Construction Industry (Consequential and Transitional Provisions) Rules 2016

The *Building and Construction Industry (Consequential and Transitional Provisions) Rules 2016* (the Rules) are 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 Legislative Instrument

The *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* (the Act) deals with consequential and transitional matters relating to the transition from the institutions, functions and powers created by the *Fair Work (Building Industry) Act 2012* (the old Act) to the new regime created under the *Building and Construction Industry (Improving Productivity) Act 2016* (the new Act).

Item 26 of Schedule 2 to the Act enables the Minister to make rules prescribing matters required or permitted by the Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The rules may also prescribe matters of a transitional nature (including prescribing any saving or application provisions) relating to the repeals or amendments made by the Act, or the enactment of the new Act.

Subsection 33(3A) of the *Acts Interpretation Act 1901* provides that a power to make an instrument of legislative character (including rules) with respect to particular matters shall be construed as including a power to make such an instrument with respect to a particular class or particular classes of those matters.

Item 1 of Schedule 1 to the Act repeals the old Act. The effect of this repeal is that the *Building Code 2013* (the old Code), which was made under section 27 of the old Act, will cease to operate on the day on which section 3 of the new Act commences (the transition time).

The purpose of the *Building and Construction Industry (Consequential and Transitional Provisions) Rules 2016* (the Rules) is to ensure that the obligations contained in the old Code continue to apply to the particular building work to which the old Code applied immediately before the transition time. That is, building work for which a building contractor or building industry participant submitted an expression of interest or tender before the transition time, whether or not the relevant contract had been entered into or the actual building work had commenced.

This is necessary because the *Code for the Tendering and Performance of Building Work 2016* that is proposed to be made under section 34 of the new Act (the new Code), will only apply prospectively. That is, it will only apply in relation to building work for which an expression of interest or tender is submitted after its commencement.

Without the Rules, building work to which the old Code applied would no longer be subject to any code of practice.

Human Rights Implications

The definition of ‘human rights’ in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the core seven United Nations human rights treaties.

The Rules engage the following rights by preserving the old Code as if it is a document issued under section 34 of the new Act:

- the right to equality and non-discrimination under Subarticle 2(1) and Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Subarticle 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the right to freedom of association contained in Article 22 of the ICCPR and Article 8 of the ICESCR;
- the right to freedom of expression contained in Subarticle 19(2) of the ICCPR;
- the right to just and favourable work conditions, including the right to safe and healthy working conditions in Article 7 of the ICESCR; and
- the right to privacy and reputation under Article 17 of the ICCPR.

Right to equality and non-discrimination

Both the ICCPR (Subarticle 2(1)) and the ICESCR (Subarticle 2(2)) require States Parties to the covenants to guarantee that the rights set out in these covenants are exercised without discrimination of any kind, including on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 of the ICCPR provides that States Parties must ensure that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

Consistent with the scope of the code making power in section 34 of the Act, the obligations in the old Code, as continued by the Rules, only apply to persons in respect of building work.

The statement of compatibility with human rights for the new Act and the Australian Government's response to the Parliamentary Joint Committee on Human Rights' (the Committee) first report¹ provide a detailed explanation of why the Government considers that the distinctiveness of the building and construction industry justifies separate regulation of participants in this industry. The key points are summarised below, along with more recent evidence that demonstrates the need for separate regulation of the building and construction industry.

The first national review of the conduct and practices in the building and construction industry was conducted by the Royal Commission into the Building and Construction Industry (the Cole Royal Commission) led by the Hon. Terence Cole QC. Its report, issued in February 2003, found that the industry was characterised by unlawful conduct and concluded that:

*"These findings demonstrate an industry which departs from the standards of commercial and industrial conduct exhibited in the rest of the Australian economy. They mark the industry as singular."*²

In considering how to best address this conduct, the Cole Royal Commission noted that governments can influence the behaviour of participants in this industry through their purchasing power.³ The Royal Commission strongly supported the operation of 'implementation guidelines' that would set out

¹ Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, tabled on 11 February 2014

² *Royal Commission into the Building and Construction Industry* (2003), Volume 1, page 6

³ *Royal Commission into the Building and Construction Industry* (2003), Volume 7, page 49

the Commonwealth's expectations of building contractors and building industry participants who wished to undertake work on projects that were directly or indirectly funded by the Commonwealth.⁴

The need for separate regulation of Australia's building and construction industry has more recently been reinforced in the final report of the Royal Commission into Trade Union Governance and Corruption (the Heydon Royal Commission), released by Commissioner Heydon in December 2015.

In relation to unions with coverage of workers in the building and construction industry, in particular the Construction, Forestry, Mining and Energy Union (CFMEU), Commissioner Heydon summarised:

*The conduct that has emerged discloses systematic corruption and unlawful conduct, including corrupt payments, physical and verbal violence threats, intimidation, abuse of right of entry permits, secondary boycotts...and contempt of court.*⁵

In considering the need for a separate regulator, Commissioner Heydon concluded:

*The sustained and entrenched disregard for both industrial and criminal laws shown by the country's largest construction union further supports the need [for a separate building industry regulator to enforce the law within the sector]. Given the high level of unlawful activity within the building and construction sector it is desirable to have a regulator tasked solely with enforcing the law within that sector.*⁶

Volumes 3 and 4 of the final report also contained a number of case studies associated with the CFMEU. The report stated that these case studies 'only reinforce' conclusions made in the Interim Report, released in December 2014:

*The evidence in relation to the CFMEU case studies indicates that a number of CFMEU officials seek to conduct their affairs with a deliberate disregard for the rule of law.*⁷

The conduct of the CFMEU has also been criticised in recent court and tribunal decisions. For example, in *Director Fair Work Building Industry Inspectorate v Myles & Ors* [2014] FCCA 1429, at paragraph 45, Burnett J said:

There is ample evidence of significant contravention by the CFMEU and its ideological fellow travellers. The CFMEU, as a holistic organisation, has an extensive history of contraventions dating back to at least 1999. The only reasonable conclusion to be drawn is that the organisation either does not understand or does not care for the legal restrictions on industrial activity imposed by the legislature and the courts.

In *Director, Fair Work Building Industry Inspectorate v Myles & Anor* [2016] FCCA 772 at paragraph 43 Jarrett J said:

At least insofar as the CFMEU is concerned, it and those who control it, seemingly consider that, when the circumstances suit the ends of that organisation, threats, coercion and unlawful action are the preferable alternative to compliance with the industrial laws of this country.

⁴ Royal Commission into the Building and Construction Industry (2003), Volume 7, page 81

⁵ Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) Volume 5, Chapter 8, paragraph 1

⁶ Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) Volume 5, Chapter 8 paragraph 83

⁷ Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) Volume 5, Chapter 8 paragraph 6 citing Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Volume 2, Chapter 8.1, p 1008

Using the Commonwealth's purchasing power to address unlawful and inappropriate conduct in this particular industry is a reasonable, necessary and proportionate measure in pursuit of the dual legitimate goals of ensuring that all building industry participants observe applicable workplace relations laws and safeguarding freedom of association.

Right to freedom of association

The right to freedom of association is set out in Article 22 of the ICCPR. This article provides that everyone shall have the right to freedom of association with others, including the right to form and join trade unions. Article 8 of the ICESCR also requires States Parties to undertake to ensure the right of everyone to form trade unions and join the trade union of his or her choice, and the right of trade unions to operate freely.

Freedom of association – generally

Subsection 15(1) of the old Code provides that a building contractor or building industry participant must protect freedom of association by adopting policies that are consistent with applicable laws and ensure that persons are:

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

Subsection 15(2) provides a non-exhaustive list of actions or practices that would compromise a person's right to freedom of association that a building contractor or building industry participant must ensure do not occur, such as using forms to require an employee to identify his or her union status or refusing individuals employment based on their union status.

These measures protect a person's choice to become or not become a member of, and be represented by, an industrial association. The Rules therefore promote the right to freedom of association.

Freedom of association – right of entry

Section 16 of the old Code requires a building contractor or building industry participant to comply with all laws of the Commonwealth and each relevant state and territory to which the contractor or participant is subject to that give a right of entry permit holder a right to enter premises where building work is performed and where the permit holder seeks to exercise that right.

The old Code does not impose any additional restrictions on right of entry for officers of building associations; rather it reinforces existing legislative requirements.

Freedom of association – unregistered written agreements and other agreements

Section 10(1) of the old Code prohibits a building contractor or building industry participant from bargaining in relation to, or making, an agreement that provides for terms, conditions or benefits of employment of the employer's employees that will not (or the contractor or participant reasonably believes will not) be certified, registered, lodged or otherwise approved under a designated building law.

Subsection 10(3) makes it clear that the prohibition will not prevent bargaining for, making or implementing unregistered agreements about things like community activities, programs to reduce bullying and other similar initiatives.

This measure is directed at ‘side deals’ and other agreements or arrangements that are made with the purpose of securing standard employment conditions for groups of building employees that have separate and diverse enterprise agreements.

Section 10 of the old Code promotes collective bargaining because it requires terms and conditions of employment to be dealt with in enterprise agreements made under the *Fair Work Act 2009* and discourages the use of agreements outside of this framework. This ensures transparency and guarantees oversight by the independent Fair Work Commission of agreements containing terms and conditions of employment.

Right to Freedom of expression

Subarticle 19(2) of the ICCPR protects individuals’ freedom of expression in any medium, including written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It protects not only the ability to impart information or ideas but also the ability to receive them. Subarticle 19(3) permits freedom of expression to be restricted where provided for by law and necessary for respect of the rights or reputations of others or for the protection of national security, public order or public health or morals.

Section 15 engages the right to freedom of expression by requiring a building contractor or building industry participant to ensure that a range of activities that offend the principle of freedom of association are not engaged in. This includes ensuring that:

- ‘no ticket, no start’ signs, or signs are not displayed; and
- ‘show card’ days do not occur.

The intimidation of employees to join or not join a building association is clearly an unacceptable infringement on their right to freedom of association. This intimidation can take the form of signs or ‘show card’ days, implying that employees who are not members of a building association cannot work on the building site. A requirement to ensure that such actions are prohibited is therefore an appropriate measure in support of the right to freedom of association.

To the extent that the right to freedom of expression is limited, the limitation is reasonable, necessary and proportionate in the pursuit of the legitimate policy objective of protecting the rights and freedoms of employees in the building and construction industry to choose to become, or not become, a member of a building association and ensuring that this choice does not impact on an employee’s ability to work on a particular site.

Right to just and favourable work conditions, including the right to safe and healthy working conditions

Article 7 of the ICESCR requires recognition of the right of everyone to the enjoyment of just and favourable working conditions, including safe and healthy working conditions.

The right to safe and healthy working conditions in Australia is primarily underpinned by work health and safety legislation at the Commonwealth, state and territory levels that applies to all workers regardless of industry. In recognition of the particularly high-risk nature of work in the building and construction industry,⁸ the Australian Government already uses its purchasing power to promote the right to safe and healthy working conditions by requiring Commonwealth entities to only enter into

⁸ The high-risk nature of work in the building and construction industry has been recognised by its inclusion as a priority industry in Safe Work Australia’s *Australian Work Health and Safety Strategy 2012-2022*.

contracts for certain building work with persons who are accredited under the Work Health and Safety Accreditation Scheme.⁹

Subsection 20(1) of the old Code promotes the right to safe and healthy working conditions by requiring building contractors and building industry participants to have a work health safety and rehabilitation (WHS&R) management system in place that:

- is fully documented and clearly communicated to people in the contractor or participant's business;
- systematically covers the way in which people in the contractor's or participant's business are expected to work safely;
- shows the way in which the contractor or participant will ensure that other people work safely;
- 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; and
- shows the way in which drug and alcohol issues in the workplace will be managed to help ensure that no person attending the site to perform building work does so under the influence of alcohol or other drugs.

Subsection 20(2) requires building contractors and building industry participants that are required to establish a management plan for WHS&R at a site as a principal contractor to prepare the plan before work commences and ensure the plan complies with the law and is comprehensive and site-specific. The plan must meet the minimum requirements listed in subsection 20(3).

For building work of a type described in Schedule 2, the WHS&R management plan must also include a fitness for work policy to manage alcohol and other drugs in the workplace that applies to all persons engaged to perform building work on the project and addresses the issues set out in Schedule 3, including mandatory drug and alcohol testing (subsection 20(4)).

Drug and alcohol impairment presents serious health and safety risks in workplaces. The Regulation Impact Statement (RIS) to the *Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015* identified a number of studies into the effects of alcohol and illicit drugs in the workplace and combined with informal evidence suggested that the problem of workers in the building and construction industry attending for work under the influence of, or affected by alcohol and other illicit drugs, is worsening.

It outlined that while the dollar cost to businesses across Australia is significant, there is also a substantial human cost. Alcohol use is estimated to be responsible for approximately 5 per cent of workplace deaths and up to 11 per cent of workplace injuries. Further, there is the human toll on families and relationships impacted by alcohol and other drugs.¹⁰

The RIS also identified an example provided by one industry stakeholder during consultations about an incident that occurred where a contractor tested his entire workforce after one of his employees went into a coma after using the drug 'Ice'. The result was that of 62 workers employed by the contractor, 26 tested positive to 'a cocktail of drugs'.

⁹ Established under section 43 of the *Building and Construction Industry (Improving Productivity) Act 2016*.

¹⁰ Ken Pidd and Ann Roche; Australian Drug Foundation – *Policy Talk. 'Workplace alcohol and other drug programs - July 2013 - 'What is good practice?'*

It further outlined how work-related alcohol and illicit drug use in the building and construction has significant negative impacts on workplace health, safety and productivity.

The old Code promotes the right to safe and healthy working conditions in the building and construction industry.

Right to privacy and reputation

The right to privacy in Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation.

As noted above, the old Code requires that where the Commonwealth's funding contribution to a project is above certain thresholds, principal contractors must include in their WHS&R management plan a fitness for work policy to manage alcohol and other drugs in the workplace that applies to all persons engaged to perform building work on the project and addresses the issues set out in Schedule 3, including mandatory drug and alcohol testing.

Industrial tribunals in Australia have accepted that, while random drug and alcohol testing can intrude on the privacy of an individual, it can be justified on health and safety grounds.¹¹ It is legitimate to seek to eliminate the risk that employees might come to work impaired by alcohol or drugs such that they could pose a risk to health and safety.

The old Code does not prescribe a particular drug and alcohol testing policy that is to apply to all workplaces. Rather, it provides a framework that sets the minimum requirements for a fitness for work policy that is no more restrictive than is necessary to achieve the legitimate objectives of pursuing drug and alcohol free workplaces and improving safety on building and construction sites. For example, the old Code does not require a drug and alcohol policy to prescribe blanket testing of the entire workplace. Rather, it requires principal contractors to carry out periodic objective medical testing of around 10 per cent of the workforce.

How a fitness for work policy is developed and implemented in a particular workplace is a matter for that workplace subject to principal contractors meeting their obligations under relevant laws, including work health and safety and privacy laws. The requirement for objective medical testing could be met by providing in the policy that testing would be carried out in accordance with relevant Australian Standards.¹² These standards provide safeguards that protect a person's privacy including 'chain of custody' procedures for the sensitive and secure collection, storage, handling, dispatch and retention/destruction of testing samples and records.

Under work health and safety laws, employers have a duty to consult with workers on work health and safety matters. For example, under sections 47 to 49 of the *Work Health and Safety Act 2011*, employers have a duty to consult with workers on hazards and risks (in this case, the risk being work being performed under the influence of alcohol or other drugs), how to manage risks, and when making decisions about procedures. This process also provides an opportunity for workers to consider whether their privacy issues are adequately protected in the formation of the fitness for work policy.

The existing Australian Privacy Principles, set out in the *Privacy Act 1988* (the Privacy Act), also provides important safeguards to protect the privacy of individuals who are subject to drug and alcohol testing in accordance with a principal contractor's fitness for work policy. The Australian

¹¹ See *Mr Raymond Briggs v AWH Pty Ltd* [2013] FWCFB 3316, paragraph 3 (cited recently in *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited* [2015] FWC 2384 and *The Maritime Union of Australia v DP World Brisbane Pty Ltd and others* [2014] FWC 1523)

¹² AS 4760:2006 – Procedures for specimen collection and the detection and quantitation of drugs in oral fluid; AS/NZS 4308:2008 – Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine; and AS 3547-1997 – Breath alcohol testing devices for personal use

Privacy Principles establish a range of obligations in relation to the handling, use and disclosure of personal information that is held by organisations. These include restrictions on the use or disclosure of personal information about an individual for a secondary purpose without the consent of the individual, requirements relating to the quality and security of personal information and access to personal information by the individual to whom it relates. Sensitive information, which includes health information and genetic information about an individual, is given an even higher level of protection by the Australian Privacy Principles. This includes additional restrictions on the disclosure of this information.

Given the high-risk nature of the building and construction industry, it is in the public interest that principal contractors are required to develop a drug and alcohol testing policy in order to effectively detect and manage harm in the workplace.

To the extent that drug and alcohol testing implemented in accordance with the old code may limit a person's right to privacy, the limitation is reasonable, necessary and proportionate in pursuit of the legitimate policy objective of protecting the right to safe and healthy working conditions. This is particularly so in light of the existing safeguards to protect the right to privacy in the Privacy Act, work health and safety legislation and the relevant Australian Standards for testing for alcohol and other drugs.

The old Code also promotes the right to privacy by requiring a building contractor or building industry participant to ensure that personal information is dealt with in accordance with the Privacy Act (paragraph 15(2)(a)).

Conclusion

The Rules, in preserving the obligations under the old code as if it is a document issued under section 34 of the new Act, is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that it may limit human rights and freedoms, those limitations are reasonable, necessary and proportionate in the pursuit of legitimate objectives.

Minister for Employment, Senator the Hon Michaelia Cash