

EXPLANATORY STATEMENT

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015

Issued by the authority of the Minister for Employment

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

*Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace)
Amendment Instrument 2015*

The *Fair Work (Building Industry) Act 2012* (the Act) provides that the Minister may issue one or more documents that together constitute a code of practice that is to be complied with by persons in respect of building work (subsection 27(1)). 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,

can be required to comply with the code of practice.

The *Building Code 2013* (the Building Code) is a code of practice made under subsection 27(1) of the Act. It sets out the Australian Government's expected standards of conduct for all building industry participants that seek to be, or are, involved in Commonwealth funded building work.

The *Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015* (the amending instrument) amends the Building Code to require a building contractor or building industry participant's work health safety and rehabilitation (WHS&R) management system to show the way in which drug and alcohol issues in the workplace will be managed to ensure that no person performing building work on site does so under the influence of alcohol or other drugs.

The amending instrument also requires that where building work is part of a project that meets certain financial thresholds, a management plan for WHS&R established by a principal contractor must include a fitness for work policy to manage alcohol and drugs in the workplace, including mandatory drug and alcohol testing, that applies to all persons engaged to perform building work on the project.

Details of the amending instrument are set out in Attachment A.

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

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

As required by subsection 27(4) of the Act, the Federal Safety Commissioner has been consulted in relation to occupational health and safety matters.

Industry stakeholders including Master Builders Australia and the Australian Industry Group, as well as key industry contractors, have also been consulted on the proposal to require building contractors and building industry participants to have an approach to managing drug and alcohol issues in the workplace.

A Regulation Impact Statement (RIS) was prepared for giving effect to these measures in the proposed Building and Construction Industry (Fair and Lawful Building Sites) Code 2015 (OBPR ID 19279). This RIS is included at Attachment C.

The amending instrument commences 28 days after the day on which it is registered on the Federal Register of Legislative Instruments.

Details of the *Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015*

Section 1 – Name

Section 1 provides that the title of the instrument is the *Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015* (the amending instrument).

Section 2 – Commencement

Section 2 provides that the amending instrument commences 28 days after the day on which it is registered on the Federal Register of Legislative Instruments. The new requirements will take effect in relation to building contractors and building industry participants from that time.

Section 3 – Authority

Section 3 specifies that the amending instrument is made under subsection 27(1) of the *Fair Work (Building Industry) Act 2012* (the Act).

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the amending instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1 – Building Code 2013

Item 1 – At the end of paragraph 20(1)(d)

Item 2 – At the end of subsection 20(1)

Subsection 20(1) of the *Building Code 2013* (the Building Code) requires building contractors and building industry participants to have a work health safety and rehabilitation (WHS&R) management system that:

- is fully documented and clearly communicated to people in the contractor's or participant's business; and
- systematically covers the ways in which people in the contractor's or participant's business are expected to work safely; and
- shows the ways in which the contractor or participant will ensure that other people work safely; and
- shows the way 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.

Items 1 and 2 insert an additional requirement in subsection 20(1) that a WHS&R management system must also show 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. This is to ensure that building contractors and building industry participants have an approach to managing drug and alcohol issues in the workplace.

Item 3 – At the end of subparagraph 20(2)(b)(ii)

Item 4 – At the end of subsection 20(2)

Item 5 – At the end of section 20

Item 6 – At the end of the instrument

Subsections 20(2) and 20(3) of the Building Code impose requirements on building contractors and building industry participants that are required to establish a management plan for WHS&R at a site as a principal contractor. Items 3 to 6 insert a new requirement that a management plan for WHS&R at a site must include a fitness for work policy to manage alcohol and other drugs in the workplace.

Items 3 and 4 insert a new requirement in subsection 20(2) that the principal contractor at a site must not pass the implementation and cost of drug and alcohol testing to its subcontractors. This is to ensure that the principal contractor retains ultimate responsibility for addressing drug and alcohol issues in the workplace.

Item 5 inserts new subsection 20(4), which provides that a management plan for WHS&R for building work of a type described in Schedule 2 must include a fitness for work policy to manage alcohol and other drugs in the workplace. The fitness for work policy must apply to all persons engaged to perform building work on a project and address the issues set out in Schedule 3.

Item 6 inserts new Schedules 2 and 3, which support new subsection 20(4).

New Schedule 2 sets out the type of building work for which a fitness for work policy is required. This includes building work described in items 1 to 8 of Schedule 1 for which:

- 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
- 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).

New Schedule 3 sets out the range of issues a fitness for work policy must address, including issues relating to drug and alcohol testing on building projects.

Statement of Compatibility with Human Rights

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

Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015

The *Building Code (Fitness for Work/Alcohol and Other Drugs in the Workplace) Amendment Instrument 2015* (the amending 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 Legislative Instrument

The *Fair Work (Building Industry) Act 2012* (the Act) provides that the Minister may issue one or more documents that together constitute a code of practice that is to be complied with by persons in respect of building work (subsection 27(1)). 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,

can be required to comply with the code of practice.

The *Building Code 2013* (the Building Code) is a code of practice made under subsection 27(1) of the Act. It sets out the Australian Government's expected standards of conduct for all building industry participants that seek to be, or are, involved in Commonwealth funded building work.

The amending instrument amends the Building Code to require a building contractor or building industry participant's work health safety and rehabilitation (WHS&R) management system to show the way in which drug and alcohol issues in the workplace will be managed to ensure that no person performing building work on site does so under the influence of alcohol or other drugs.

The amending instrument also requires that where building work is part of a project that meets certain financial thresholds, a management plan for WHS&R established by a principal contractor must include a fitness for work policy to manage alcohol and drugs in the workplace, including mandatory drug and alcohol testing, that applies to all persons engaged to perform building work on the project.

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 amending instrument engages the following rights:

- the right to just and favourable work conditions, including the right to safe and healthy working conditions in Article 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- the right to privacy and reputation under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

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,¹ 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 contracts for certain building work with persons who are accredited under the *Australian Government Building and Construction OHS Accreditation Scheme*.²

Item 2 of Schedule 1 to the amending instrument adds new paragraph 20(1)(e) to the Building Code, which promotes the right to safe and healthy working conditions by inserting a new requirement that a WHS&R management system must show the way in which drug and alcohol issues in the workplace will be managed to ensure that no person attending the site to perform building work does so under the influence of alcohol or other drugs.

Item 5 of Schedule 1 to the amending instrument also inserts new subsection 20(4), which provides that where building work is part of a project that meets certain financial thresholds, a management plan for WHS&R established by a principal contractor must include a fitness for work policy to manage alcohol and drugs in the workplace. The fitness for work policy must apply to all persons engaged to perform building work on the project and must address the issues set out in new Schedule 3, including mandatory drug and alcohol testing.

Drug and alcohol impairment presents serious health and safety risks in workplaces. An Australian Safety and Compensation Council report on this issue noted previous studies indicating that alcohol appeared to contribute to at least 4% of all working deaths, around 2% of working deaths appeared to be contributed to by illicit drugs and around 5% of working deaths occurred in part because of one or both of these groups of substances.³ This report also

¹ 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*.

² The *Australian Government Building and Construction OHS Accreditation Scheme* is established under section 43 of the Act.

³ Australian Safety and Compensation Council, *Work-Related Alcohol and Drug Use: A Fit for Work Issue*, 2007, page 14.

noted that construction workers were relatively more likely to both have used illicit drugs in the past 12 months and to have reported going to work under the influence of illicit drugs.⁴ The amending instrument 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, items 2 and 5 of the amending instrument insert new requirements that seek to ensure that there is an approach to managing drug and alcohol issues in the workplace that helps to ensure that no person attending the site to perform building work does so under the influence of alcohol or other drugs.

Industrial tribunals in Australia have accepted that, while random drug and alcohol testing can intrude on the privacy of an individual, it is justified on health and safety grounds.⁵ 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.

To the extent that drug and alcohol testing implemented in accordance with the amending instrument 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 for all workers.

Conclusion

The amending instrument 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. Eric Abetz

⁴ Australian Safety and Compensation Council, *Work-Related Alcohol and Drug Use: A Fit for Work Issue*, 2007, page 13.

⁵ See *Mr Raymond Briggs v AWH Pty Ltd* [2013] FWC 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).

Regulation Impact Statement

Building Code – Drug and Alcohol
Testing Provisions

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Background

In its election commitment to ‘Improve the Fair Work Laws’, the Australia Government committed to re-establishing the Australian Building and Construction Commission (ABCC) to restore and maintain the rule of law and improve productivity on Australia’s building sites and construction projects, whether on-shore or off-shore. The policy also included a commitment that a re-established ABCC would administer a National Code and Guidelines that is consistent with guidelines introduced by the State Governments of New South Wales, Queensland and the former Government of Victoria.

The guidelines issued by the State Governments of New South Wales, Queensland and the former Government of Victoria are based on the former Coalition Government’s 2005 and 2006 versions of the Australian Government Implementation Guidelines (Implementation Guidelines) for the National Code of Practice for the Construction Industry (the National Code).

The first set of Implementation Guidelines (developed in 1998) were designed to assist Commonwealth departments and agencies and building industry participants to implement the National Code, and to provide further advice and assistance on the operation of the National Code on Commonwealth projects. The Implementation Guidelines have been revised regularly since 1998, reflecting changes to the workplace relations policies of successive governments. The Guidelines were replaced in 2013 by a statutory building code issued under the *Fair Work (Building Industry) Act 2012*.

On 17 April 2014, the Government published an advance release of its proposed *Fair and Lawful Building Sites Code 2015* (Building Code). A further advance release was published on 28 November 2014 to address some industry concerns that had arisen due to practices that had developed during enterprise agreement negotiations, to avoid the requirements of the Code. The two advance releases are to enable industry to prepare for its formal making. The Building Code will not commence until it is formally made under section 34 of the Building and Construction Industry (Improving Productivity) Bill 2013 once that Bill is enacted.

Following further feedback from stakeholders, the Government proposes to make a minor change to the content of the Building Code’s Workplace Relations Management Plan (WRMP) requirements. The Government proposes to include in the Building Code’s WRMP requirements that principal contractors must have a comprehensive policy for managing drug and alcohol issues in the workplace which includes mandatory drug and alcohol testing. Such a change could also be made to the existing Building Code 2013.

Drug and alcohol testing in the building and construction industry is supported by major contractors including John Holland and Boral, and by key industry associations including Master Builders Australia and the Australian Industry Group.

This Regulation Impact Statement (RIS) considers three options. Although no RIS was prepared during the development of these options, there have, to date, been no major decision points during the policy development process. Notwithstanding this, the Department undertook industry consultation, problem analysis and considered the costs and benefits of the various options during the policy development process.

The problem

There have been numerous studies into the effect of alcohol and illicit drug use among the population and in the workforce that have shown the potential dangers for Australia's building and construction industry if the risks of work-related drug and alcohol use are not adequately managed.

In a 2013 Policy Talk paper written for the Australian Drug Foundation¹, workplace alcohol and other drug experts Ken Pidd and Ann Roche identified the full extent of the issue of alcohol and other drugs on Australian workplaces. They recognised that the annual cost of alcohol-related absenteeism alone is estimated to be up to \$1.2 billion, while alcohol and other drug use (not including tobacco) account for about \$5.2 billion in lost productivity and workplace injuries and deaths.

While the dollar cost to businesses across Australia is significant, there is 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 drugs².

In a 2000 study³ that examined the perceptions of alcohol as a problem in the Australian state railway workplace, Zinkiewicz et al. found that 13% of those sampled reported having seen an alcohol-related accident.

In a 2012 survey of Australian construction workers⁴, 11 per cent of construction workers said they had used cannabis within the previous 24 hours and that nearly 5 per cent of workers had used ecstasy or methamphetamine substances within the last 24 hours. One third of workers reported experiencing negative effects from their co-workers' drinking. The negative impacts involved safety and productivity issues.

A 2006 study by Bywood et al. (2006)⁵ revealed that in the construction industry, 24 per cent of workers had used an illicit drug in the previous 12 months. The same study found that 27 per cent of tradespeople were likely to have used an illicit drug in the previous 12 months.

The study also found that 2.5 per cent of the workforce reported going to work under the influence of illicit drugs, with the figure much higher in the younger age groups – 14 to 17 and 18 to 29 – at 4.5 per cent and 5.9 per cent respectively; and, in males at 3.5 per cent. Bywood et al. found that 4.2 per cent of construction workers were likely to attend work whilst under the influence of illicit drugs.

Consistent with the estimate of illicit drug use among the younger age groups, a 2006 study by Pidd et al. (2006)⁶ found that more than 40 per cent of apprentices surveyed from the building and construction trades reported cannabis and alcohol patterns that placed them at risk of potential harm. In addition, 19 per cent reported drinking alcohol and 6.7 per cent reported using cannabis during work hours.

Another study carried out by Banwell et al. (2006)⁷ explored the prevalence of alcohol and other drug problems among building workers in the Australian Capital Territory. High levels of cannabis and methamphetamine use were reported, and 19 per cent reported self-diagnosed alcohol problems.

A report⁸ by Safe Work Australia predecessor, the Australian Safety and Compensation Council, showed national and international data that revealed that construction workers were more likely to use

1 Reported in www.constructioninfocus.com.au, 17 December 2013, Reducing Risk: Alcohol and Other Drugs in the Construction Industry.

2 Ken Pidd and Ann Roche; Australian Drug Foundation – Policy Talk. 'Workplace alcohol and other drug programs - July 2013 - 'What is good practice?' www.adf.org.au/policy-advocacy/policytalk#sthash.Fq1ERYMG.dpuf

3 Zinkiewicz, L., Davey, J., Obst, P., Sheehan, M. (2000). Employee support for alcohol reduction intervention strategies in an Australian railway. *Drugs: Education, Prevention and Policy*, 7(1), 61-73.

4 Sustainable Built Environment National Research Centre, December 2012, 'Safety Impacts of Alcohol and Other Drugs in Construction', pp.4-5, 15.

5 Bywood, P, Pidd, K, Roche, A, 2006, 'Information & Data Sheet 5 – Illicit Drugs in the Australian Workforce: Prevalence and Patterns of Use', National Centre for Education and Training on Addiction (NCETA), Flinders University.

6 Pidd, K, Boeckmann, R, Morris, M 2006, 'Adolescents in transition: the role of workplace alcohol and other drug policies as a prevention strategy', *Drugs: Education, Prevention & Policy*, vol. 13(4), pp. 353-365.

7 Banwell, C, Dance, P, Quinn, C, Davies, R, & Hall, D 2006, 'Alcohol, other drug use, and gambling among Australian Capital Territory (ACT) workers in the building and related industries', *Drugs: Education, Prevention & Policy*, vol. 13(2), pp. 167-178.

8 Australian Safety and Compensation Council, March 2007, 'Work-related Alcohol and Drug Use: A Fit for Work Issue'

illicit drugs, and more likely to attend for work under the influence, compared to workers in other industries.

Informal evidence complements these studies and suggests 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. Indeed, an example provided by one industry stakeholder during consultations is an incident where a contractor tested his entire workforce after one of his employees went into a coma after using 'Ice'. The result was that of 62 workers employed by the contractor, 26 tested positive to 'a cocktail of drugs'.

Work-related alcohol and illicit drug use in the building and construction has significant negative impacts on workplace health, safety and productivity. The cost of a single workplace death has been valued at \$4.2 million⁹. According to the Australian Drug Foundation, the following statistics demonstrate the extent of the impact of drugs and alcohol in Australian workplaces:¹⁰

- alcohol and other drugs cost Australian workplaces an estimated \$6 billion per year in lost productivity;
- half of Australian workers drink at harmful levels, 13% use cannabis and 4% use amphetamines; and
- one in ten workers say they have experienced the negative effects associated with a co-worker's misuse of alcohol. The negative effects include reduced ability to do your job, involved in an accident or close call, worked extra hours to cover for a co-worker, and took at least one day off work.

A worker who is impaired by alcohol or drugs is not only a risk to themselves, but their co-workers, others at the workplace and bystanders. This is a real concern for a high risk industry like the construction industry where hazards such as the use of heavy machinery and mobile equipment, congested sites, and working from heights, can accentuate the adverse impact of alcohol and drugs.

A worker performing work impaired by drugs or alcohol can cause a range of problems including:

- death or serious injury to the worker, their colleagues or members of the public;
- substantial economic loss associated with fatalities and injuries through workers compensation and other forms of insurance;
- loss of productivity through poor performance;
- damage to plant and machinery;
- low morale, bad behaviour and poor discipline; and
- adverse effects on the company's image.

Illicit drugs include illegal drugs (cannabis, ecstasy, heroin, cocaine, hallucinogens, barbiturates), pharmaceutical drugs used for non-medical purposes (painkillers, tranquilisers, amphetamines, barbiturates, methadone, other opiates and steroids) and other substances used inappropriately (inhalants, ketamine and gamma-hydroxybutyrate (GHB)).

The use of illicit drugs may be associated with a range of factors affecting individuals' performance in the workplace. These factors relate to productivity, work relationships and health and safety of individuals. Productivity may be reduced by illness and absenteeism, compromised work quality, reduced work rate and increased risk of making mistakes. Poor concentration, impaired judgement and slowed/altered reaction times impact on the health and safety of all workers. Unpredictable actions, violent and abusive behaviour and criminal activity may also contribute to a breakdown in relationships with other workers.

Difficulties encountered by employers in their efforts to manage employees impaired by drugs and alcohol in the workplace is exacerbated by the inability of employers, employees and their respective representatives to agree on the most appropriate process and method of testing. Employers favour random testing that includes a combination of both oral and urine testing. The main construction

9 http://www.dpnc.gov.au/sites/default/files/publications/Value_of_Statistical_Life_guidance_note.pdf

10 http://www.druginfo.adf.org.au/attachments/article/1363/FS_Workplace_Feb2014.pdf

union, the Construction, Forestry, Mining and Energy Union (CFMEU) prefers blanket testing, but opposes urine testing.

The inability to reach agreement has resulted in a number of disputes heading to the Fair Work Commission (FWC) for resolution. In many cases, decisions by the FWC supporting employers' right to enforce drug and alcohol testing have been subject to appeal. In the most recent case¹¹ a Full Bench concluded that Port Kembla Coal Terminal was obliged to ensure, so far as was reasonably practicable, the health and safety of employees and contractors. This required it to eliminate, where possible, the risk that employees and contractors might be impaired by alcohol or drugs and pose a risk to safety. The Bench determined that "Port Kembla Coal Terminal is entitled to implement a system of random drug and alcohol testing to assist it in discharging its obligation".

The Full Bench concluded that although urine testing might give positive results for workers not actually impaired, expert evidence agreed that a random system that uses both oral and urine testing would enhance the deterrent value of the testing and that it would not be unjust or unreasonable for Port Kembla Coal Terminal to implement its proposed testing regime.

Notwithstanding the above decision, issues relating to the method and procedure of testing for alcohol and drugs continue to frustrate the introduction of a comprehensive and consistent testing regime for alcohol and drugs in relation to building projects funded by the Commonwealth.

¹¹ Construction, Forestry, Mining and Energy Union – Construction and General Division v Port Kembla Coal Terminal Limited (C2015/2695) (19 August 2015)

The need for government action

The Building and Construction industry is a critical industry for the Australian economy. This sector generates income of more than \$300 billion annually and employs over one million people.

As a major procurer of building and construction services, the Government is committed to using its purchasing power to drive improved workplace health and safety standards in this vital industry. The Government has achieved this through the 'Australian Government Building and Construction Workplace Health and Safety Accreditation Scheme'.

In Australia, restrictions of the use of alcohol and illicit drugs enforced by mandatory testing are now common for road, rail and maritime transport, mining and police. It is well recognised that for occupations that involve high risk, intervention is required by appropriate government bodies to ensure risks are appropriately managed. There is now a unique opportunity for government to further influence behaviour by introducing measures to reduce the effects of alcohol and illicit drugs on Australia's building and construction sites through its Building Code that will apply to Commonwealth funded building projects.

The safety and productivity benefits from the implementation of effective drug and alcohol management policies in the building and construction industry are significant, including a reduction in workplace injuries and absenteeism. It is anticipated that lower costs and reduced absenteeism should lead to more affordable delivery of vital infrastructure projects, providing greater value for money for the taxpayer. Fewer injuries should also lead to lower workers' compensation premiums.

Employers have a duty of care under state and territory work health and safety laws to ensure as far as reasonably practicable the safety of their workers. Workers have a responsibility to take reasonable care for their own health and safety at work and that their acts or omissions do not adversely affect the health and safety of others, and to co-operate with any reasonable policy or procedure of the employer relating to work health and safety.

Recognising their work health and safety responsibilities, some contractors, with the support of their industry representatives, have attempted to introduce drug and alcohol testing as a means of making their work sites safer.

Historically, building industry unions have opposed any form of drug and alcohol testing unless it is voluntary. Recently, the CFMEU altered its policy 'due to members' concerns of the safety risks involved in working with someone who is impaired as a result of addiction or substance abuse'¹².

The CFMEU more recently has agreed to support the concept that some form of drug and alcohol testing is necessary to manage work health and safety risks. However, fundamental disagreement between employers and the CFMEU remains over the procedure and method to be used:

- Employers and their representatives prefer a procedure in which testing is random and involves testing of around 10 per cent of the workforce. Employers also support a mixture of saliva and urine testing.
- The CFMEU prefers blanket testing of all personnel, including management, irrespective of their physical location at the time of testing. This would require the complete shutting down of building sites while the testing is carried out. The CFMEU policy supports saliva testing, but rejects the option of urine testing.

The government considers that the inclusion of mandatory, but random, drug and alcohol testing on Commonwealth-funded construction projects of defined value, through introducing requirements in the Building Code is seen as the most effective means to achieve a successful and cost effective outcome.

Mandating these requirements in the Building Code should also reduce the number of disputes about how a testing regime will operate.

¹² <http://www.cfmeu.asn.au/news/cfmeu-proposal-for-new-impairment-policy-includes-drug-and-alcohol-testing>; 26 March 2015.

Options considered

Mandatory drug and alcohol testing has been successfully introduced in industries such as mining, road transport, aviation, rail and electrical. Once mandated in these industries, employers, employees and their representatives have recognised that testing is necessary to enhance safety and have now accepted testing as a customary workplace practice.

In addition to the testing in these other industries, there are many drug and alcohol education programs run by work health and safety regulators, industry associations, unions, research foundations and educational institutions. These will continue to provide an important contribution to the overall understanding and management of the effects of drugs and alcohol in the workplace.

This regulation impact statement looks at three options:

Option 1 – Maintain the status quo, but encourage drug and alcohol testing in the workplace on a voluntary basis.

Option 2 – Reduce the risk of employees attending for, or carrying out work in the building and construction industry while impaired by the effects of drugs or alcohol by introducing drug and alcohol management policy provisions to the Workplace Relations Management Plan requirements of the Building Code. This option would require principal contractors to carry out random, but regular, drug and alcohol testing, using an objective method of testing which could include a combination of saliva and urine testing, as part of a comprehensive drug and alcohol management policy.

Option 3 – Reduce the risk of employees attending for, or carrying out work in the building and construction industry while impaired by the effects of drugs or alcohol by introducing drug and alcohol management policy provisions, which would include blanket saliva only testing, through the Workplace Relations Management Plan requirements of the Building Code. This option would require principal contractors to carry out blanket testing of the entire workforce on Commonwealth-funded building projects as part of a comprehensive drug and alcohol management policy.

The net benefits of the options considered

Option 1 would require no change to the advance release Building Code as currently drafted. The Government is intent on reducing the risk of building and construction industry workers attending for work while impaired by the effects of drugs and alcohol. By taking no regulatory action, achieving the Government's desired outcome would require employers, employees and their respective representatives to agree to introduce drug and alcohol management policies, including educational and testing programs, independent of government. History suggests that, due to the combative nature of the building and construction industry, employers, employees, and their respective representatives reaching agreement about how a drug and alcohol testing program would operate, including the process and method, is unlikely to occur and may result in protracted disputes that could impact safety and productivity.

Option 2 is the preferred option. This option provides an effective balance between the need to significantly improve safety on worksites while having a reasonable regulatory impost on employers who will administer the approach. This option would require a minor amendment to the Building Code's Workplace Relations Management Plan content requirements to introduce provisions that require principal contractors to have a comprehensive drug and alcohol management policy that includes an objective method of drug and alcohol testing, which could include a combination of saliva and urine testing. The preferred option would involve monthly testing of around 10 per cent of the employees engaged on Commonwealth-funded construction projects. This option would operate as follows:

- where there are 30 or fewer employees engaged on the site, three workers will be tested per month;
- where there are more than 30 and fewer than 100 employees engaged on the site, five workers would be tested per month; or
- where there are 100 or more employees engaged on the site, ten workers would be tested.

The option provides for around 10 per cent of the workforce to be subjected to testing every month, with the regularity of the testing acting as a deterrent. The net compliance cost of this option is approximately \$13,200. This option will also result in contractual costs of approximately \$1.889 million being for the cost of testing and lost labour. These costs are expected to be passed onto the taxpayer through the tendering process.

This option may also include some 'for cause' testing. 'For cause' testing would occur where a worker has previously tested positive to alcohol or drugs in the workplace, or where an employer suspects, on reasonable grounds (for example observed worker characteristics that would lead a reasonable person to conclude that an employee may be under the influence of alcohol or drugs).

Mandating these requirements on Commonwealth-funded building work through the Building Code will result in fewer disputes reaching the Fair Work Commission or other courts as they would be legislated.

Option 3 would involve blanket saliva only drug and alcohol testing of the entire workforce on Commonwealth-funded projects. This option would also require a minor amendment to the Building Code's Workplace Relations Management Plan content requirements.

Blanket testing forms part of an 'impairment' model preferred by the CFMEU. However, the CFMEU policy extends beyond projects funded by the Commonwealth, the costs of which would be borne by all employers in the industry. The CFMEU policy does not only relate to drug and alcohol testing. The CFMEU policy revolves around causes for impairment including fatigue, physical and mental health, job security, injury and illness, and drug and alcohol use.

Option 3 would represent a modified version of the CFMEU backed model. As the Building Code's jurisdiction only applies to Commonwealth-funded building work, this option would only be enforceable on projects which are directly or indirectly funded by the Commonwealth.

This option is not recommended because monthly or less regular testing would be prohibitively expensive and have a significant impact on productivity, particularly on projects where several hundred employees may be on site at any given time. Blanket testing would involve almost 50,000 tests to be carried out per month on Commonwealth-funded projects, at a cost of more than \$47 million per annum. Although this option would not cost employers directly, as the costs associated with the testing would be passed on through the tendering process, it would be considerably more expensive to the Government than the preferred option. Although the costs could be reduced by undertaking less regular testing, the risks associated with less regular testing, for example, three or four times per annum, could detract from the deterrent effect of the testing, particularly if workers know that there will be significant gaps between tests.

Consultation

The Department of Employment undertook extensive consultation with industry stakeholders as part of the 'RIS-like' process undertaken prior to the development of the advance release Building Code. Ongoing feedback from industry stakeholders has aided the further development of the Building Code, including in relation to drug and alcohol testing.

More specifically, the Department of Employment has consulted with Master Builders Australia National Office and the Master Builders Association Victoria in relation to drug and alcohol management strategies. The Department of Employment met with Master Builders Australia in early 2015 at its request to discuss options for introducing requirements in the Building Code for tenderers to have a policy for managing drug and alcohol issues in the workplace. The meeting followed representations to the Minister for Employment by Master Builders Australia in late 2014. Master Builders strongly favours the inclusion in the Building Code of requirements for a drug and alcohol management policy underpinned by random, but regular drug and alcohol testing.

Master Builders and its members favour random but regular drug and alcohol testing as it would provide an appropriate and cost effective deterrent to workers presenting for work under the influence of alcohol or drugs. It considers that this deterrence will be achieved by principal contractors testing for the presence of alcohol and a range of drugs on a random, but regular basis using saliva testing, and where appropriate, urine testing.

Master Builders supports the requirement for tenderers to prevent workers who return a positive test result from working until it is safe for them to do so and for tenderers to be required to outline the counselling and rehabilitation that may apply in the event of a positive test.

The Department of Employment has also consulted with the Australian Industry Group (AiG) about drug and alcohol testing in the building and construction industry. AiG has also expressed its support for the introduction of drug and alcohol testing in the construction and other industries through various media releases and its submission to the Parliamentary Joint Committee on Law Enforcement's inquiry into crystal methamphetamine (Ice). The Australian Industry Group supports the testing model proposed in this RIS, for similar reasons to those outlined above. Employers do not support the model of blanket testing proposed by the CFMEU as it considers that a requirement for regular, blanket testing would be unrealistic as it would be very costly and would cause significant delays on site with the site being shut down while testing is undertaken.

The Department of Employment has also consulted with key industry contractors including John Holland and Boral who indicated support for option 2.

The CFMEU's position in relation to drug and alcohol testing is well known and is contained in its proposal announced on 26 March 2015.

There is widespread support across the industry for a form of drug and alcohol testing. Unfortunately, consensus among employers, employees, and their respective representatives as to the most appropriate procedure and method has not been achieved.

Preferred Option

Option 2 is preferred. This option appropriately balances the deterrent effect with affordability. It provides for around 10 per cent of the workforce to be subjected to testing every month, while remaining affordable, albeit that the costs associated with the testing will be passed on to the Commonwealth. Option 2 allows for both saliva and urine testing.

Major building and construction industry contractors and key industry associations support the Government's proposal, and are confident that the benefits of robust drug and alcohol policies, including random testing, has the potential to reduce the incidence of workers presenting for work under the influence of alcohol or drugs. Importantly, it is anticipated that the proposal will result in an overall enhancement of the safety culture of the building and construction industry.

Drug and alcohol testing in the workplace has an established place in encouraging greater health and safety in the workplace. The International Labour Organisation first developed a Code of Practice on workplace drug and alcohol testing in 1996.

A 2014 Portuguese study of its railway transportation industry¹³, when comparing the various forms of testing, reveals that the application of alcohol and drug testing at the workplace, at random and unannounced reported substantially lower accident rates.

In Australia, mandatory testing is common and accepted practice in many high risk industries, including heavy vehicle road transport. The 1999 inquiry by the House of Representatives Standing Committee on Communication, Transport and Arts into managing fatigue in transport entitled *Beyond the Midnight Oil: An Inquiry into Managing Fatigue in Transport* recommended the following in respect of drugs in the road transport industry:

Transport industry drug free policy and mandatory workplace drug testing

The Minister for Transport and Regional Services, through the Australian Transport Council and in conjunction with industry, should develop and implement a drug free policy for the road transport industry, with all road transport companies being required to institute and administer mandatory drug testing in the workplace.

The Road Safety Remuneration Tribunal subsequently included a requirement for mandatory drug and alcohol testing across the heavy vehicle road transport sector in its *Road Transport and Distribution and Long Distance Operations Road Safety Remuneration Order 2014*.

Industrial courts and tribunals in Australia have accepted that while random testing is an intrusion on the privacy of the individual, it can be justified on health and safety grounds. The employer has a legitimate right (and indeed obligation) 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.¹⁴

Until recently, major building industry unions including the CFMEU have resisted any form of mandatory drug and alcohol testing. However, their position has now changed and the CFMEU is now calling for mandatory 'blanket' saliva only testing as part of a greater impairment policy.

Under workplace health and safety laws, employers are required to implement control measures, such as drug and alcohol strategies, to eliminate or reduce the risks of people being injured or harmed. The proposed model would assist employers to fulfil this duty.

The introduction of mandatory random drug and alcohol testing would further strengthen strategies to address drug and alcohol use in the industry and complement the range of general and industry specific guidelines issued by work health and safety regulators, employer and employee representative bodies.

In implementing the proposed mandatory, random regime to test for the presence of alcohol and drugs in workers, there is unlikely to be any discernible, distributional impact according to the size of the

¹³ Paulo H. Marques et al., *Safety Science*, vol. 68, October 2014; 'The effect of alcohol and drug testing at the workplace on individual's occupational accident risk'

¹⁴ See *Shell Refining (Australia) Pty Ltd, Clyde Refinery v Construction Forestry Mining and Energy Union* [2008] AIRC 510; *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and others* [2012] FWA 1809.

contractor. This is because the minimum number of workers that must be tested is based on the number of workers on a particular site, rather than the number of workers who are employed or engaged by a particular contractor. Further, even on relatively large projects (in terms of project value or scale), the number of workers on site at a particular time will vary according to the stage or phase at which the project is at. Thus, a small number of workers may be present on site when a large construction project is at a preliminary stage, with the numbers increasing during the execution stage of the construction work, and then reducing as the construction phase draws to a close.

An examination of Commonwealth-funded building projects indicates that a range of contractors, both large and small, are often involved in such projects, especially given the financial thresholds (of the Commonwealth contribution to the project) at which the requirement for mandatory drug and alcohol testing is triggered.

Alternative options

Maintaining the status quo is not considered to be an appropriate option as it would not address the concerns of contractors and their representatives. Pursuing an effective non-regulatory option will be difficult to achieve because of the diametrically opposed views of employers and employees and their respective representatives in regard to the procedure and method to be used.

Introducing blanket testing is also not considered to be the best option due to the high costs involved. While the CFMEU now supports the introduction of an impairment policy which includes testing to identify impairment due to the use, or abuse, of alcohol or other drugs, its preferred policy is for blanket (rather than random) testing. The CFMEU proposal includes shutting down production on site while everyone is tested. The CFMEU's proposed policy would be expected to impact substantially on productivity, particularly on large sites, and, due to the significant cost and loss of productivity while everyone is tested under the CFMEU proposal, it would make regular testing difficult and the least affordable option. The CFMEU proposal is not limited to Commonwealth-funded building and construction projects which would be expected to be funded by employers.

Regulatory Burden of the Preferred Option

This regulatory proposal will have a regulatory impact on business of \$13,200 per annum.

Option 2 – Random Testing

Regulatory Burden and Cost Offset (RBCO) Estimate Table

Average Annual Compliance Costs (from Business as usual)				
Costs (\$m)	Business	Community Organisations	Individuals	Total Cost
Total by sector	\$0.013	\$0	\$0	\$0.013
Cost offset (\$m)	Business	Community Organisations	Individuals	Total by source
Agency	\$0	\$0	\$0	\$0
Within portfolio	\$0	\$0	\$0	\$0
Outside portfolio	\$0	\$0	\$0	\$0
Total by sector	\$0.013	\$0	\$0	\$0.013
Proposal is cost neutral? <input type="checkbox"/> yes <input checked="" type="checkbox"/> no				
Proposal is deregulatory? <input type="checkbox"/> yes <input checked="" type="checkbox"/> no				
Balance of cost offsets \$0.00				

This proposal was offset against the Safety, Rehabilitation and Compensation Amendments (Improving the Comcare Scheme)

Regulatory Burden of the non-preferred options

Option 3 – Blanket Testing

Regulatory Burden and Cost Offset (RBCO) Estimate Table

Average Annual Compliance Costs (from Business as usual)				
Costs (\$m)	Business	Community Organisations	Individuals	Total Cost
Total by sector	\$0.013	\$0	\$0	\$0.013
Cost offset (\$m)	Business	Community Organisations	Individuals	Total by source
Agency	\$0	\$0	\$0	\$0
Within portfolio	\$0	\$0	\$0	\$0
Outside portfolio	\$0	\$0	\$0	\$0
Total by sector	\$0.013	\$0	\$0	\$0.013
Proposal is cost neutral? <input type="checkbox"/> yes <input checked="" type="checkbox"/> no				
Proposal is deregulatory? <input type="checkbox"/> yes <input checked="" type="checkbox"/> no				
Balance of cost offsets \$0.00				

Implementation and Evaluation

Implementation

The policy will be implemented by including a requirement in the final release of the Fair and Lawful Building Sites Code 2015 that provides that on projects where a Workplace Relations Management Plan is required, the principal contractor must have a fitness for duty policy aimed at reducing the incidence of workers presenting for work under the influence of, or affected by, alcohol or other drugs.

Compliance with the requirements of the drug and alcohol testing provisions of the Building Code will need to be demonstrated when projects are subject to normal site visits, inspections, and audits carried out by the Government's building industry regulator, the Australian Building and Construction Commission.

Evaluation

Commonwealth-funded construction activity has been subject to varying forms of regulation since 1998. Consistent with past practice, the effectiveness of the Building Code, when it is formally issued, will be subject to ongoing review and evaluation. As part of that process, as this is only one minor element of the Building Code, it is proposed that the effectiveness of drug and alcohol testing will be considered when reviewing the overall policy.