

EXPLANATORY STATEMENT

Code for the Tendering and Performance of Building Work 2016

Issued by the authority of the Minister for Employment

Subject - *Building and Construction Industry (Improving Productivity) Act 2016*

The *Building and Construction Industry (Improving Productivity) Act 2016* (the Act) enables the Minister for Employment to issue a code of practice that is to be complied with by persons in respect of building work (see subsection 34(1)). Subsection 34(3) of the Act provides that a person who is:

- a building contractor that is a constitutional corporation;
- a building industry participant and the work is to be carried out in a Territory or Commonwealth place; or
- the Commonwealth or a Commonwealth authority,

can be required to comply with that code of practice.

The Code for the Tendering and Performance of Building Work 2016 (the code of practice) reflects the Building Code 2013 – Supporting Guidelines (April 2016) that formerly set out the Commonwealth procurement obligations for Commonwealth funding entities in respect of building work subject to the *Building Code 2013*.

The code of practice sets out the Commonwealth Government's expected standards of conduct for all building industry participants that seek to be, or are, involved in Commonwealth funded building work.

A building contractor or building industry participant that could be required to comply with the code of practice under section 34 of the Act becomes subject to the code of practice in relation to all their future building work from the first time they submit an expression of interest or tender (howsoever described) for Commonwealth funded building work on or after the date the code of practice commences.

For the purposes of the code of practice, an entity that has done this is referred to as a 'code covered entity'.

The purpose of the code of practice is set out in section 5. It includes to:

- promote an improved workplace relations framework for building work and promote compliance with the code of practice, the Act and designated building laws and encourage the development of safe, healthy, fair, lawful and productive building sites for the benefit of all building industry participants; and
- assist industry stakeholders to understand the Commonwealth's expectations of, and requirements for, entities that choose to tender for Commonwealth funded building work, are awarded Commonwealth funded building work, or both.

The code of practice also establishes an enforcement framework under which those that choose to become code covered entities may be excluded from being awarded Commonwealth funded building work if they do not comply with, or meet the standards required by, the code of practice.

Exclusion from being awarded Commonwealth funded building work is the consequence of a failure to comply with the code of practice.

An overview of the contents of the code of practice is provided at [Attachment A](#).

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

The Department of Employment held a consultation session with industry stakeholders on 6 December 2013. Representatives from the major construction industry employer associations and employee associations were present at the meeting. An advance release of the code of practice was made available on the Department's website in April 2014 and a further advance release was made available in November 2014. The Department has provided extensive advice to key industry stakeholders, including both employer and employee associations, and construction industry employers in relation to the code of practice since the advance release was first published in April 2014.

The Office of Best Practice Regulation (OBPR) advised that a Regulation Impact Statement (RIS) is not required as the Department certified an independent review of the advance release of this code of practice as meeting the requirements of a RIS (OBPR reference number 16841). An outline of the independent assessment, as provided to the OPBR in the Department's certification letter, is at [Attachment C](#).

The OBPR advised that a RIS is not required for additions to this code of practice relating to provisions for drug and alcohol testing, which were not in either of the advance releases published during 2014. The drug and alcohol testing provisions are the same as those that existed in the *Building Code 2013* and were subject to a RIS in 2015 (OBPR reference number 19279). The RIS relating to drug and alcohol testing provisions in the *Building Code 2013* is at [Attachment D](#).

The code of practice is a legislative instrument for the purpose of the *Legislation Act 2003*.

The code of practice commences on the day that it is registered on the Federal Register of Legislation.

PART 1 – INTRODUCTORY

Section 1 - Name of code of practice

1. Section 1 provides that the name of the code of practice is the *Code for the Tendering and Performance of Building Work 2016* (the code of practice).

Section 2 - Commencement

2. Section 2 provides that the code of practice commences on the day that it is registered on the Federal Register of Legislation.

Section 3 - Definitions

3. Section 3 provides a list of definitions relevant to the code of practice. These include the terms ‘above-entitlements payment’, ‘head contractor’ and ‘subcontractor’. Various terms used in the code of practice have a defined meaning in the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act). For example the term ‘building employee’ is defined in the Act to include both those that are employed to perform building work and those that are engaged to undertake building work, such as an independent contractor. Other terms, including ‘industrial action’, ‘building association’ and ‘designated building law’ are also defined terms in the Act.
4. Subsection 3(2) defines ‘related entity’ for the purposes of the code of practice. Related entities of a code covered entity are themselves code covered entities and are obliged to comply with the code of practice. A failure by an entity to meet the requirements of the code of practice can result in its related entities being rendered ineligible to be awarded Commonwealth funded building work. Exclusion sanctions issued against a code covered entity may extend to any related entities.
5. An entity is a related entity of a code covered entity if the entity is:
 - engaged in building work; and
 - connected with the code covered entity by being a member of the entity, or is an associated entity of the code covered entity within the meaning of section 50AAA of the *Corporations Act 2001*.
6. The code of practice ensures that where a corporate group of companies choose to tender for and seek Commonwealth funded building work, each entity within that group that engages in building work must comply with, and meet the requirements of, the code of practice to be eligible to be awarded building work funded by the Commonwealth.
7. Related entities of a code covered entity become subject to the requirements of the code of practice when the code covered entity to which they are related first becomes subject

to the code of practice (see subsection 6(2)). A related entity may also be subject to exclusion sanctions under Part 4.

8. Subsection 3(3) defines ‘exclusion sanction’ for the purposes of Part 4 of the code of practice. An exclusion sanction means a period during which a code covered entity is not permitted to be awarded Commonwealth funded building work. The imposition of an exclusion sanction is the sanction available under the code of practice for a failure to comply with it. This reflects the opt-in nature of the scheme.
9. Subsection 3(3) defines the exclusion sanctions that may be imposed. The Minister may impose a sanction for a period not exceeding one year. The exclusion sanction may also be subject to conditions that apply the exclusion sanction only to a division of a business operating in a particular state or territory, and may be extended to related entities if the Minister is satisfied that it is appropriate to do so.
10. Whether a code covered entity is subject to an exclusion sanction is one element in considering whether that entity is eligible to be awarded Commonwealth funded building work. Even where no exclusion sanction applies to a code covered entity, it must meet the second element of eligibility, namely, that it and its related entities meet the requirements of section 11 of the code of practice. This is outlined in section 23 of the code of practice.
11. Subsection 3(4) provides that ‘building work’ has the same meaning as in section 6 of the Act, but does not include:
 - work that is described in paragraph 6(1)(e) of the Act; and
 - the off-site prefabrication of made-to-order components to form part of any building, structure or works unless that work is performed on an auxiliary or holding site that is separate from the primary construction site or sites.

Section 4 - Funding entities

12. Section 4 defines ‘funding entity’ for the purposes of the code of practice.
13. All non-corporate Commonwealth entities within the meaning of the *Public Governance, Performance and Accountability Act 2013* are subject to the code of practice. A corporate Commonwealth entity will be subject to the code of practice if it is directed by the Minister for Finance to comply with the code of practice.

PART 2 – CONDUCT

Section 5 - General

14. Section 5 explains that the code of practice has been developed to:
 - promote an improved workplace relations framework for building work and promote compliance with the code of practice, the Act and designated building laws and

encourage the development of safe, healthy, fair, lawful and productive building sites for the benefit of all building industry participants; and

- assist industry stakeholders to understand the Commonwealth's expectations of, and requirements for, entities that choose to tender for Commonwealth funded building work, are awarded Commonwealth funded building work, or both; and
 - increase efficiency and cost savings in the work performed by code covered entities by ensuring that they understand and comply with the code of practice, the Act and designated building laws; and
 - increase the likelihood of timely, predictable, and cost-efficient delivery of Commonwealth funded building work through the use of building contractors and building industry participants that consistently adhere to the code of practice, the Act and designated building laws; and
 - help funding entities to identify and work with building contractors and building industry participants with track records of compliance with the code of practice, the Act and designated building laws; and
 - reduce execution delays and costs in relation to Commonwealth funded building work by not engaging building contractors and building industry participants with track records of non-compliance with the code of practice, the Act and designated building laws; and
 - establish an enforcement framework under which building contractors and building industry participants may be excluded from tendering for, or being awarded, Commonwealth funded building work if they do not comply with the code of practice.
15. The code of practice has been developed to ensure that Commonwealth funded building work is productive, efficient, delivered on time and on budget, and that those who engage in taxpayer funded building work do so in a manner that is fair, lawful and promotes freedom of association.

Section 6 - Application of the code of practice

16. Section 6 sets out when a building contractor or building industry participant first becomes subject to the code of practice. This code of practice starts to apply to building contractors, building industry participants and particular building work in a similar way to previous Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry. The code of practice will apply to building work for which an expression of interest or tender (howsoever described) is submitted after the commencement of the code of practice.
17. Subsection 6(1) limits the application of the code of practice to persons within the Constitutional power of the Commonwealth. It also provides that, from the first time a building contractor or building industry participant (the 'code covered entity') submits an expression of interest or tender (howsoever described) for Commonwealth funded

building work on or after the date this code of practice commences, they will become subject to this code of practice. The code of practice applies on and from the submission of the expression of interest or tender even where the code covered entity is not successful in being awarded the building work.

18. Subsection 6(2) provides that related entities of a code covered entity (referred to as the 'first entity') become subject to the code of practice at the same time as the first entity. It ensures that a related entity is in the same position and subject to the same obligations as a code covered entity.
19. Subsection 6(3) sets out the building work in respect of which the code of practice applies. This includes all future building work of a type described in Schedule 1 of the code of practice (including a code covered entity's privately funded work) for which an expression of interest or request for tender (howsoever described) was called on or after the date this code of practice commenced.
20. Note, however, that some obligations in this code of practice apply only in respect of Commonwealth funded work and do not extend to privately funded work. See section 8 and Part 6.

Section 6A – Exemption for essential service providers

21. Subsection 6A(1) provides that the Australian Building and Construction Commissioner (ABC Commissioner) may exempt a building contractor or building industry participant from this code of practice if the Commissioner is satisfied that:
 - the building work being performed involves the provision of essential services related to supply of electricity, natural gas, water, waste water or telecommunications; and
 - that granting the exemption would be appropriate having regard to the objective in paragraph 5(a) of this code of practice.
22. Subsection 6A(2) provides that the exemption must be issued in writing and may apply either to building work performed by the building contractor or building industry participant for a period of time, or to a project specified in the exemption.
23. If the building contractor or building industry participant that is the subject of the exemption is already a code covered entity, the effect of the exemption is that the entity is deemed not to be a code covered entity for the duration of the period specified in the exemption or in relation to the specified project (subsection 6A(3)).
24. If the building contractor or building industry participant is not a code covered entity, the effect of the exemption is that section 6 of the code of practice does not apply in relation to work covered by the exemption (subsection 6A(4)). This would mean that the entity will not become a code covered entity as a result of having submitted an expression of interest or tender (howsoever described) for the building work in question.

PART 3 – REQUIREMENTS TO BE COMPLIED WITH BY CODE COVERED ENTITIES IN RESPECT OF BUILDING WORK

Section 7 - General responsibilities of code covered entities

25. Section 7 requires code covered entities to comply with the code of practice, comply with any Workplace Relations Management Plan (WRMP) that applies to the building work, and respond to requests made by the Australian Building and Construction Commission (ABCC) for information concerning matters relating to the code of practice.
26. The requirement to respond to requests for information concerning the code of practice is consistent with the power contained in section 35 of the Act that allows the ABC Commissioner to give a written notice to a code covered entity or funding entity directing the person to provide a written report to the ABC Commissioner about their compliance with the code of practice.
27. Code covered entities are also subject to section 77 of the Act which provides that an authorised officer (including an inspector) may require a person to produce a record or document to the officer, for example for the purposes of ascertaining whether the code of practice is being complied with by that person.

Section 8 - Subcontractors and related bodies and entities

28. Section 8 of the code of practice places a range of obligations on code covered entities in relation to Commonwealth funded building work concerning the engagement and management of subcontractors.
29. Subsections 8(2)-(7) apply only in respect of Commonwealth funded building work (see subsection 8(1)). The effect of this subsection is that the restriction on entering into an agreement in respect of building work with a subcontractor that does not meet the eligibility requirements of section 23 does not extend to privately funded projects.
30. Subsections 8(2)-(6) require code covered entities to take code compliance into consideration when engaging subcontractors in respect of building work and to take steps to require compliance by those subcontractors in relation to Commonwealth funded building work. In particular, subsections 8(2)-(3) provide that:
 - the code of practice must be complied with and the eligibility requirements set out in section 23 must be met at the expression of interest or tender stage (subsection 8(2));
 - code covered entities must not enter into agreements in respect of building work with a subcontractor that could be required to comply with the code of practice if the subcontractor:
 - does not meet the requirements of section 11 (which deals with content of agreements and prohibited conduct, arrangements and practices); or

- is subject to an exclusion sanction or is excluded from undertaking work funded by a state or territory government, unless the ABC Commissioner approves the engagement. In effect, exclusion sanctions imposed on entities by state or territory governments will be adopted and enforced by the Commonwealth unless the ABC Commissioner decides otherwise in relation to particular building work (subsection 8(3)).
- 31. Subsections 8(4) and (5) require code covered entities to ensure that all subcontractors comply with the code of practice in respect of the Commonwealth funded building work that is the subject of their agreement with the code covered entity. This requires all subcontractors engaged on a Commonwealth funded project to act in a manner consistent with the code of practice whether or not the subcontractor could be required to comply with the code of practice in their own right by section 34 of the Act. The obligation to act consistently with the code of practice on Commonwealth funded building work applies to subcontractors in two ways: Firstly, because of the code of practice itself (in respect of entities that are code covered entities) and secondly, through the agreement with the head contractor (which also applies to those subcontractors that could not be required to comply with the code of practice because of section 34).
- 32. If a code covered entity becomes aware that a subcontractor has engaged in conduct that is inconsistent with the code of practice in respect of building work, the code covered entity must ensure, as far as is reasonably practicable, that the subcontractor takes remedial action to rectify the non-compliant behaviour (subsection 8(6)). Note also the obligation in section 17 to notify the ABCC of a breach or suspected breach of the code of practice.
- 33. Subsection 8(7) requires that where a WRMP applies to a project, the code covered entity that is the head contractor in respect of building work must ensure that all subcontractors on site comply with the WRMP that applies to the building work. This applies to all subcontractors and would be enforced through the contract with the head contractor. Note that a failure by a head contractor to ensure, so far as is reasonably practicable, that subcontractors comply with an applicable WRMP would constitute a breach of the code of practice by the head contractor: see section 34.
- 34. Subsection 8(8) further requires code covered entities to ensure that all of their related entities that could be required to comply with the code of practice do in fact comply with the code of practice in respect of building work. Related entities also have an obligation to comply with the code of practice in their own right as they are code covered entities due to the operation of subsection 6(2). This obligation is not limited to Commonwealth funded building work.

Section 9 - Compliance with laws, decisions, directions and orders

35. Subsection 9(1) requires code covered entities to comply with the Act and all designated building laws. The term ‘designated building law’ is defined in section 5 of the Act to mean the *Independent Contractors Act 2006*, the *Fair Work Act 2009* (the Fair Work Act), the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* or a Commonwealth industrial instrument, such as an applicable award or enterprise agreement.
36. Subsection 9(2) requires code covered entities to comply with the *Competition and Consumer Act 2010* to the extent that it relates to tendering for or undertaking building work. For example a code covered entity must not breach the cartel and anti-competitive provisions of that Act.
37. Subsection 9(3) requires code covered entities to comply with work health and safety laws, including work health and safety training requirements and asbestos safety requirements, to the extent they apply to building work, including compliance with processes for electing health and safety representatives and right of entry for officials of registered organisations. This does not place new obligations on code covered entities, but rather, reinforces that code covered entities are required to strictly comply with existing obligations. These obligations may arise under Commonwealth, state or territory laws.
38. Subsection 9(4) provides that a code covered entity must comply with its obligations under the *Migration Act 1958* and its subordinate legislation. This may include obligations relating to the lawful engagement of persons or conditions on the sponsorship, engagement and employment of persons who hold visas granted under the *Migration Act 1958*.
39. Subsection 9(5) requires code covered entities to comply with a compliance notice issued by an inspector under section 99 of the Act and any applicable decisions, directions or orders made or given by a court or tribunal that apply to the entity in respect of building work. Code covered entities also must not enter into, participate in or facilitate an arrangement or practice which conflicts with a decision, direction or order made or given by a court or tribunal that applies to them in respect of building work.
40. Subsection 9(6) states that subsection 9(5) does not apply if the period for payment, or for other compliance with the decision, direction or order has not expired; or if the decision, direction or order is stayed or has been revoked.

Section 10 - Unregistered written agreements and other agreements

41. Paragraph 10(1)(a) prohibits code covered entities from bargaining in relation to an agreement, making an agreement, or implementing an agreement in respect of building work that deals with matters that would not be permitted by section 11 of the code of practice to be included in the agreement if the agreement were an enterprise agreement. This prohibition is directed at ‘side deals’ and other agreements or arrangements that may be made by code covered entities seeking to circumvent the prohibitions in

section 11. This prohibition applies where the agreement will not (or the code covered entity reasonably believes it will not) be registered, lodged or otherwise approved under the Fair Work Act (paragraph 10(1)(d)).

42. Paragraphs 10(1)(b)-(c) prohibit code covered entities from bargaining in relation to an agreement, or making or implementing an agreement, if that agreement provides for terms, conditions or benefits of employment of the employer's employees or the employer's subcontractors (which may include above entitlements payments), or that restricts or limits the form or type of engagement that may be used to engage subcontractors. This prohibition applies where the agreement will not (or the code covered entity reasonably believes it will not) be registered, lodged or otherwise approved under the Fair Work Act (paragraph 10(1)(d)). This prohibition is directed at 'project agreements' and other agreements that seek to impose terms and conditions on multiple employers at a building site. Terms and conditions of employment should be provided for in Commonwealth industrial instruments made within the framework that is provided by the Fair Work Act.
43. Paragraphs 10(1)(b)-(c) are not intended to prohibit agreements that deal with matters such as:
 - community, welfare or charitable activities; or
 - initiatives to promote the employment of women, Indigenous, mature age or other groups of workers disadvantaged in the labour market; or
 - workers' health and wellbeing initiatives (such as health checks, suicide prevention, screening for dust diseases, drug and alcohol awareness and treatment); or
 - programs to reduce bullying, sexual harassment or workplace discrimination; or
 - initiatives to encourage fair, cooperative and productive workplace relations across the industry; or
 - initiatives to promote the take-up and completion of apprenticeships, such as mentoring programs.
44. Paragraph 10(1)(d) does not prevent building industry participants preparing draft enterprise agreements during bargaining.
45. The prohibitions in section 10 do not apply to an agreement that is a common law agreement made between an employer and an individual employee or to an individual flexibility arrangement made under the Fair Work Act (subsection 10(2) of the code of practice). A common law agreement must be genuine in order to attract the exception in subsection 10(2). An agreement negotiated collectively between an employer and the employer's employees to, for example, give a general pay rise to employees through individual common law employment agreements while the employees are covered by an enterprise agreement would not be a genuine common law agreement.

Section 11 - Content of agreements and prohibited conduct, arrangements and practices

46. Section 11 prohibits code covered entities from being covered by an enterprise agreement in respect of building work which includes certain clauses, or from engaging in certain conduct.
47. In accordance with the opt-in nature of the scheme, the consequence of failing to meet the requirements of section 11 is that the code covered entity will be ineligible to be awarded Commonwealth funded building work (see section 23).
48. Subsection 11(2) provides that until 29 November 2018, subsections 11(1) and 11(3) do not apply to building contractors and building industry participants in respect of an enterprise agreement made before the code of practice commences.
49. Subsection 11(1) prohibits code covered entities from being covered by an enterprise agreement which includes certain clauses. Subsection 11(1) is broad and prohibits clauses that impose, or purport to impose, limits on the ability of a code covered entity to manage its business or to improve productivity; that discriminate, or have the effect of discriminating, against employees or subcontractors; or that are inconsistent with the freedom of association requirements contained in section 13 of the code of practice.
50. Subsection 11(3) provides specific examples of clauses that are prohibited by section 11. Subsection 11(3) does not limit the general application of subsection 11(1) in any way. That is, a clause of an enterprise agreement which is of a type not covered in subsection 11(3) but which purports to limit the right of a code covered entity to improve productivity is inconsistent with subsection 11(1) and, accordingly, an enterprise agreement containing such a clause would not meet the requirements of section 11. Clauses that attempt to negate or render ineffective the application of the code of practice are also inconsistent with subsection 11(1) (see section 11A).
51. The following paragraphs provide further explanation and examples of the requirements of subsection 11(3); the examples are not exhaustive.
52. Paragraph 11(3)(a) prohibits clauses that prescribe the number of employees or subcontractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time. For example, a clause that:
 - provides for a ratio of those that may be employed or engaged on a site or in a work area would be prohibited (whether that is a ratio of employees to subcontractors, permanent to casual employees, trades qualified persons to labourers, or apprentices to workforce). This does not prevent the inclusion of clauses in an enterprise agreement that encourage the employment of apprentices; or
 - provides that only a certain number or proportion of the workforce may be rostered on a certain shift, or are able to work at any one time or on any one task would be prohibited.
53. Paragraph 11(3)(b) prohibits clauses that restrict the employment or engagement of persons by reference to the type of contractual arrangement that is, or may be, offered

by the employer. This includes different types of employment such as casual or daily hire, or the engagement of subcontractors. This paragraph prohibits clauses that restrict the ability of employers to manage their businesses and to improve productivity. For example, a clause that:

- restricts the number of casual, part-time, full time or fixed term employees that may be employed by an employer would be prohibited (this includes clauses providing for goals to reduce or increase certain types of employment); or
 - restricts the number of subcontractors that can be engaged (whether or not individuals) or the work that can be undertaken by employees or subcontractors, would be prohibited.
54. Paragraph 11(3)(c) prohibits clauses requiring, or resulting in, discrimination between classes of workers because of the basis on which they are lawfully entitled to work in Australia. For example, a clause that prevents the employment of, or seeks to impose additional obligations on an employer before they can engage, workers holding a temporary work visa would be prohibited.
55. Paragraph 11(3)(d) prohibits clauses that require a code covered entity to consult with, or seek the approval of, a building association or an officer, delegate or other representative of the building association in relation to the source or the number of employees to be engaged, or type of employment offered to employees. For example, a clause that requires an employer to consult or seek the approval of a building association over the number of employees, their source or type of employment (for example casual or permanent) before engaging workers would be prohibited.
56. Paragraph 11(3)(e) prohibits clauses that require consultation with, or the approval of, a building association as a precondition to, or in relation to, the engagement of subcontractors. For example, a clause that provides that an employer must provide a list of subcontractors it proposes to engage or the work they will undertake to a delegate or representative of a building association prior to their engagement for discussion, consultation or approval is prohibited.
57. Paragraph 11(3)(f) prohibits clauses which prescribe the terms and conditions on which subcontractors (or the employees of subcontractors) are engaged. For example, a clause that provides that subcontractors cannot be engaged unless they apply wages and conditions at least at the same level as the enterprise agreement that applies to the head contractor would be prohibited. By way of further example, a clause that provides that where work is to be undertaken on a particular type of project, those covered by the agreement must make a new enterprise agreement for that project which reflects the head contractor's agreement on that project would be prohibited.
58. Paragraph 11(3)(g) prohibits clauses that prescribe the scope of work or tasks that may be performed by employees or subcontractors. For example, a clause that provides that:
- only full time employees can undertake scaffolding work or electrical wiring would be prohibited; or

- site supervisors and managers are prevented from undertaking certain tasks would be prohibited; or
 - subcontractors (which includes labour hire) may only be engaged to perform certain types of work would be prohibited.
59. Paragraph 11(3)(g) does not prevent clauses that deal with the safety or supervision of apprentices, qualifications to undertake tasks, or requirements relating to the supervision of tasks.
60. Paragraph 11(3)(h) prohibits clauses that limit or have the effect of limiting the right of an employer to make decisions about redundancy, demobilisation or redeployment of employees based on operational requirements. For example, a clause that:
- provides for ‘last-on first-off’ practices would be prohibited; or
 - provides no employee may be made redundant while subcontractors are performing work on site (whether or not work of a type that had been undertaken by employees at the site) would be prohibited; or
 - requires the approval of a building association or representative of a building association to the demobilisation, redeployment or redundancy of workers would be prohibited.
61. Paragraph 11(3)(h) does not limit consultation with employees in respect of redundancy, redeployment and demobilisation, however, requiring approval from employees or a building association to redundancy processes or decisions is prohibited.
62. Paragraph 11(3)(i) prohibits clauses that restrict an employer’s ability to pay a loaded rate of pay.
63. Paragraph 11(3)(j) prohibits clauses that require, or have the effect of requiring, the allocation of particular work to individual employees only if that allocation is extended to all other employees in that person’s class or group. For example, a clause that requires ‘one in all in’ for overtime would be prohibited.
64. Paragraph 11(3)(k) prohibits clauses that provide for the monitoring of agreements by persons other than the employer and employees to whom the agreement applies. For example, a clause that allows for the accessing of information or the making of inquiries relating to the employer’s compliance with the agreement would be prohibited. This role is more appropriately undertaken by regulatory bodies such as the ABCC or the Fair Work Ombudsman, with inspectors having long-established powers to both require the production of documents and to enter premises to inspect and copy relevant documents. This paragraph does not preclude the exercise of a right of entry pursuant to the right of entry provisions (whether to investigate a suspected contravention or to inspect records).
65. Paragraphs 11(3)(l)-(n) prohibit clauses that may undermine or interfere with freedom of association or imply that membership of a building association is anything other than

a matter of individual choice. These paragraphs seek to ensure that enterprise agreements do not contain content that is inconsistent with this general proposition.

66. Paragraph 11(3)(l) prohibits clauses that include requirements to apply building association logos, mottos or indicia to company supplied property or equipment. For example, clauses that require the presence of building association logos on clothing and equipment provided by an employer or the flying of a building association flag from a structure on site would be prohibited on the basis that these are inconsistent with the proposition that membership of building associations is a matter of individual choice. That is, such clauses result in practices that imply that membership of a building association is a mandatory part of employment with that employer, or to work on that particular site.
67. Paragraph 11(3)(m) prohibits clauses that directly or indirectly require a person to encourage, or discourage, a person from becoming, or remaining, a member of a building association.
68. Paragraph 11(3)(n) prohibits clauses that directly or indirectly require a person to indicate support, or lack of support, for persons being members of a building association or any other measure that suggests that membership is anything other than a matter of individual choice.
69. Paragraph 11(3)(o) prohibits clauses that limit the ability of an employer to determine with its employees when and where work can be performed to meet operational requirements or that limit an employer's ability to determine by whom such work is to be performed. This paragraph prohibits clauses in enterprise agreements that prevent an employer and employee agreeing to flexibility in undertaking work to meet operational requirements. This prohibition is aimed at restrictive clauses that constrain the ability of building contractors to manage and determine with employees work schedules in order to maximise productivity. For example, a clause that:
 - purports to require, or requires, consultation with, notification to, or approval of, a building association or representative of a building association for an employee to work a rostered day off would be prohibited; or
 - specifies certain rostered days off or other periods of time (such as certain weekends) during which work is prohibited or flexibility is not permitted (whether or not considered emergency work) would be prohibited; or
 - requires consultation with, or the agreement of, a building association or delegate of a building association to the implementation of a roster arrangement would be prohibited (whether or not it is expressed that agreement will not be unreasonably withheld).
70. Paragraph 11(3)(p) prohibits clauses that provide for the rights of an official of a building association to enter premises other than in compliance with Part 3-4 of the Fair Work Act.

71. Paragraph 11(3)(q) prohibits clauses providing for the establishment or maintenance of an area which is intended to be designated to be used by members, officers, delegates or other representatives of a building association in that capacity. For example, a clause that obliges an employer to create and maintain a ‘shed’ or other such area set aside for exclusive use by a building association and its members would be prohibited. It would not prohibit clauses that set aside areas for officials to carry out consultation with employees in accordance with relevant laws.
72. Subsection 11(4) deals with conduct and ensures that the requirements of the code of practice cannot be circumvented by parties engaging in conduct or implementing a practice or procedure (howsoever described) in respect of building work that, if it were included in, or provided for by, an enterprise agreement, would be prohibited by subsections 11(1) or 11(3). For example, it would be inconsistent with the code of practice for an employer to accede to demands that a redundancy process be conducted on a ‘last-on first-off’ basis where there was no such requirement to do so in an enterprise agreement.
73. Subsection 11(5) provides that subsection 11(4) does not apply if the conduct, practice or arrangement is expressly permitted or required by a Commonwealth industrial instrument or is necessarily linked to a person’s compliance with, or conduct permitted by, an industrial instrument.
74. The note to subsection 11(5) clarifies that a code covered entity cannot fail to comply with requirements of an enterprise agreement on the grounds that such compliance would contravene section 11 of the code of practice. Despite this, the note highlights that the consequence of a code covered entity’s failure to comply with the code of practice is that the entity will be ineligible to be awarded Commonwealth funded building work (see section 23). This reflects the fact that the code of practice is an ‘opt-in’ scheme that focuses on voluntary acceptance of the obligations imposed by the code of practice by entities wishing to tender for Commonwealth funded building work.

Section 11A - Attempts to avoid section 11 requirements

75. Paragraph 11A(1)(a) provides that code covered entities must not be covered by agreements that contain clauses which purport to remedy, or render ineffective clauses which are inconsistent with section 11. This provision is intended to ensure that the requirements of section 11 are not negated and that agreements are applied in a way that meets the requirements of the code.
76. Paragraph 11A(1)(b) provides that a code covered entity must not be covered by an agreement that provides for the application of terms and conditions in another enterprise agreement that does not cover and apply to the relevant employer and employees. This reflects the principle that the terms and conditions of employment applying to an employer and its employees should be agreed by that employer and its employees, rather than agreed by another employer and its employees. This principle also underpins paragraph 11(3)(f) and paragraph 11A(1)(b) provides clarity about the intent of paragraph 11(3)(f). For example, a clause in a subcontractor’s agreements which provides for the terms and conditions of a head contractor’s agreement to apply in lieu of its agreement is inconsistent with paragraphs 11A(1)(b) and 11(3)(f).

77. Subsection 11A(2) provides that until 29 November 2018, subsection 11A(1) does not apply to building contractors and building industry participants in respect of an enterprise agreement made before the code of practice commences.

Section 11B - Sham contracting

78. Section 11B prohibits a code covered entity from disguising an employment relationship as an independent contracting arrangement in order to avoid responsibility for entitlements due to employees.
79. Subsection 11B(1) provides that a code covered entity (the employer) must not engage, or propose to engage, an individual to perform building work under a contract for services where the true character of the engagement or proposed engagement is that of employment.
80. Subsection 11B(2) provides a code covered entity (the employer) must not enter into a contract with another person (the contractor) under which services in the nature of building work are to be provided to the employer, if:
- the services are to be performed by an individual (who is not the contractor); and the individual has any ownership in, or is an officer or trustee of, the contractor; and
 - if the contract were entered into with the individual, the contract would be a contract of employment.

Section 11C - Collusive practices

81. Section 11C prohibits a code covered entity from engaging in collusive tendering practices. Collusive tendering occurs when two or more tenderers cooperate to defeat the competitive tendering process in order to gain an unfair advantage. Subsection 11C(2) sets out a non-exhaustive list of practices that a code covered entity must not engage in when tendering for Commonwealth funded building work:
- a code covered entity must not enter into any agreement between tenderers as to who should be the successful tenderer;
 - a code covered entity is prohibited from being involved in any meetings of tenderers to discuss tenders before the submission of tenders if the client is not present;
 - the exchange of information between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderers is prohibited. For example, tenderer A provides tenderer B information about their bid on the condition that tenderer A secures a percentage of tenderer B's profits or is rewarded with work as a subcontractor if tenderer B is awarded the contract;
 - agreements between tenderers to fix prices or conditions of contract are prohibited. That is, any collaboration between tenderers on prices or conditions to be included in contracts without the consent of the client is prohibited;

- a code covered entity must not provide any assistance to any tenderer to submit a cover tender. A cover tender is a tender submitted as genuine yet has been deliberately priced in order to not win the contract; and
- any agreement between tenderers before submission of tenders to fix the rate of payment of building association fees, where the payment of such fees is conditional on the tenderer being awarded the contract.

82. Section 11C is not intended to prohibit proper practices or arrangements (however or wherever expressed), which are aimed at providing innovative or non-standard forms of procurement and delivery, such as joint ventures or alliance partnering.

Section 11D - Security of payment

83. All persons engaged to perform building work for a code covered entity should be paid for the performance of that work. Subsection 11D(1) reinforces this by requiring a code covered entity to:
- comply with all applicable laws and other requirements relating to the security of payments that are due to persons. This includes complying with determinations made under a state or territory based adjudication process; and
 - ensure that payments which are due and payable by the code covered entity are made in a timely manner and are not unreasonably withheld; and
 - have a documented dispute settlement process that details how disputes about payments to subcontractors will be resolved and must comply with that process; and
 - as far as practicable, ensure that disputes about payments are resolved in a reasonable, timely and cooperative way; and
 - comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code covered entity in relation to Commonwealth funded building work; and
 - report any disputed or delayed progress payment to the relevant funding entity as soon as practicable after the date on which the payment falls due.
84. Subsection 11D(2) prohibits a code covered entity from engaging in illegal or fraudulent phoenix activities for the purpose of avoiding any payment due to another building contractor or building industry participant or other creditor.
85. Generally, phoenix activity involves the ‘rebirthing’ of a failed company by registering a new company to takeover the failed or insolvent business of a predecessor company.
86. Illegal or fraudulent phoenix activities include where a failed company deliberately transfers assets to a second company before liquidating in order to avoid paying creditors, taxes and employee entitlements. When this occurs, the failed company is left

with no assets to pay debts owed, which can have a significant economic impact on the failed company's creditors and employees.

87. Signs that a new business is the result of phoenix activity can include:
- it has a similar trading name as the failed company;
 - it has the same business premises and/or phone number as the failed company; and
 - the owners and/or directors of the new business are the same or are family members of, or closely associated to, the owners of the failed company.
88. Subsection 11D(3) prohibits attempts by a code covered entity from taking action with the intention of preventing a person from exercising rights under security of payment laws.
89. It prohibits a code covered entity from organising or taking, or threatening to organise or take, action with intent to coerce a contractor, subcontractor or consultant to exercise or not exercise, or propose to exercise or not exercise, rights arising under state or territory laws relating to the security of payments that are due to them, or to exercise or propose to exercise such rights in a particular way (paragraph 11D(3)(a)).
90. A code covered entity is also prohibited from applying or attempting to apply undue influence or undue pressure on a contractor, subcontractor or consultant to exercise or not exercise, or propose to exercise or not exercise, rights arising under state or territory laws relating to the security of payments that are due to them, or to exercise or propose to exercise such rights in a particular way (paragraph 11D(3)(b)).

Section 11E - Disputed payments

91. Section 11E requires code covered entities to ensure that their documented dispute settlement process detailing how disputes about payments to subcontractors will be resolved includes a referral process to an independent adjudicator for determination if the dispute cannot be resolved between the parties, and must comply with that process and any determination. It also requires that as far as practicable, disputes about payments are resolved in a reasonable, timely and cooperative way.
92. It also requires code covered entities to comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code covered entity in relation to Commonwealth funded building work, and to report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due.

Section 11F Engagement of non-citizens or non-residents

93. Section 11F concerns the engagement of non-citizens or non-residents. Section 11F requires code covered entities to ensure that no person that is not an Australian citizen or Australian permanent resident (within the meaning of the *Migration Act 1958*) is employed to undertake building work for the code covered entity unless the position is

first advertised appropriately in Australia in such a way that a significant proportion of suitably qualified Australian citizens and Australian permanent residents would be likely to be informed about the position.

94. It also requires a code covered entity to demonstrate that no Australian citizen or Australian permanent resident is suitable for the position before engaging a non-citizen or non-resident. The note directs the reader to obligations under the *Migration Act 1958* in relation to the engagement of persons that are not Australian citizens or Australian permanent residents.

Section 12 - Above-entitlements payments and related matters

95. Section 12 prohibits code covered entities from engaging in conduct proscribed by subsections 12(1)-(2) for the purpose of forcing contractors, subcontractors or consultants to make an above-entitlements payment in respect of building work.
96. Subsection 12(3) further prohibits code covered entities in respect of building work from organising or taking, or threatening to organise or take, action with intent to coerce a contractor, subcontractor or consultant, or applying or attempting to apply, undue influence or undue pressure on a person to contribute to a particular fund or scheme, or to support a particular product, service or arrangement. For example, this includes particular income protection or other insurance products or training services provided by particular providers.

Section 13 - Freedom of association

97. Subsection 13(1) requires code covered entities to adopt and implement policies in respect of building work that protect freedom of association to ensure that persons are:
 - free to become, or not become, members of building associations;
 - free to be represented, or not represented, by building associations;
 - free to participate, or not participate, in lawful industrial activities; and
 - not discriminated against in respect of benefits in the workplace because they are, or are not, members of a building association.
98. Without limiting subsection 13(1), subsection 13(2) places a number of specific obligations on code covered entities in order to promote freedom of association. For example, code covered entities must ensure that:
 - personal information is dealt with appropriately. This includes a requirement that code covered entities must not provide the names and details of those that it proposes to engage or employ to third parties, other than in strict compliance with the *Privacy Act 1988* and the Fair Work Act (paragraph 13(2)(a)).
 - ‘no ticket, no start’ signs (or similar) are not displayed and such arrangements are not implemented (paragraph 13(2)(b)). This is to prohibit signs and practices that

imply that membership of a building association is a mandatory requirement to work on a particular site, or to gain employment with a particular employer. Similarly, 'show card' days are not to occur (paragraph 13(2)(d)).

- signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities are not displayed (paragraph 13(2)(c)).
- there is no discrimination against, or disadvantage to, elected employee representatives (paragraph 13(2)(e)).
- forms are not used that require an employee or subcontractor to identify whether or not they are, or are not, a member of a building association (paragraph 13(2)(f)).
- practices that are not authorised by law which require, directly or indirectly, a person to disclose whether or not they are a member of a building association are not engaged in (paragraph 13(2)(g)). This would include situations where events are run on-site that are restricted to members of an association, thereby indirectly requiring workers at the site to disclose whether they are a member of an association. This prohibition does not apply where the activity is authorised by law, such as the protected action ballot process set out in Division 8 of Part 3-3 of the Fair Work Act.
- individuals are not refused employment or engagement because they are, or are not, a member of a building association (paragraph 13(2)(h)).
- conduct that implies that membership of a building association is anything other than an individual choice for each employee is not permitted. In support of this, code covered entities are required to ensure that building association logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or which provision is made for by, the employer (paragraph 13(2)(j)). This is because such practices can result in an implication that membership of a building association is a mandatory requirement of employment with the particular employer or at a particular site. These practices are inconsistent with the proposition that membership of a building association is a matter for individual choice.
- requirements are not imposed, or attempted to be imposed, to employ a non-working shop steward or job delegate or to hire an individual nominated by a building association (paragraph 13(2)(l)).
- requirements are not imposed that a person pays a bargaining fee (howsoever described) to a building association of which he or she is not a member, in respect of services provided by it (paragraph 13(2)(n)).
- employees are free to decide whether to be represented in grievance or dispute procedures, and if so, by whom (paragraph 13(2)(o)).
- officials, delegates or other representatives of a building association do not undertake or administer induction processes (paragraph 13(2)(p)). The responsibility for undertaking induction processes rests with whoever has management of the site (i.e. head contractor or employer). It is a non-delegable duty and should not be

undertaken by other parties. This paragraph is also intended to prohibit 'secondary' inductions conducted by representatives of a building association.

99. The aim of section 13 of the code of practice is to ensure that workers have the right to choose to be, or not be, members of a building association and that that choice does not impact on their ability to work on a particular site.

Section 14 - Entry to premises where building work is performed

100. The effect of section 14 is that code covered entities must, in relation to premises where building work is performed, comply with applicable right of entry laws and allow entry to building sites by officials of a building association only pursuant to a properly exercised right of entry.
101. The code of practice recognises that legislative right of entry is a privilege that only a select class of persons can apply to access, namely, officials of building associations. Accordingly, the code of practice requires that officials use the right of entry processes as the means for lawful entry onto building sites.
102. This means that officers of building associations are able to access building sites only for a purpose for which a right of entry could be exercised (paragraph 14(2)(a)) and only where the right of entry procedures have been strictly complied with (paragraph 14(2)(b)).
103. Code covered entities are also precluded by section 14 from inviting persons onto site (for whatever purpose) where that person is a member of a class of persons that could apply for a right of entry permit. This applies whether or not such a person holds a current right of entry permit at the time of the entry. That is, section 14 extends to officials who do not hold a right of entry permit, or who have had their permit revoked or suspended. Because these officials belong to the limited class of persons that could apply for a right of entry permit, access to premises by these persons is to occur strictly in compliance with, and only through, the right of entry provisions.
104. The obligation on code covered entities is to ensure that entry in accordance with applicable right of entry laws is the only means of access so far as is reasonably practicable. Reasonably practicable actions in this context may include issuing policies and instructions to workers and subcontractors about when officials are permitted to enter a building site, ensuring that the site is secure from trespassers, having appropriate processes in place and taking appropriate action in response to unauthorised access, requiring unauthorised entrants to leave immediately, or calling police if a trespasser enters without providing notice and refuses to leave when asked and required to do so.

Section 15 - Dispute settlement

105. Paragraph 15(1)(a) requires code covered entities to ensure that an enterprise agreement that covers the entity in respect of building work includes a term for settling disputes in accordance with subsection 186(6) of the Fair Work Act. Subsection 186(6) provides that when considering an application to approve an enterprise agreement, the Fair Work Commission must be satisfied that the agreement provides a procedure that requires or

allows the Fair Work Commission, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes about any matters arising under the agreement or in relation to the National Employment Standards. This clause must also allow for the representation of employees covered by the agreement for the purposes of that procedure.

106. Paragraph 15(1)(b) also requires code covered entities to ensure that if a dispute settlement term of an enterprise agreement in respect of building work provides for arbitration of a dispute or other binding outcome (such as a binding recommendation), the term requires any decision of the arbiter to be consistent with the code of practice.
107. Subsection 15(2) provides that until 29 November 2018, subsection 15(1) does not apply to building contractors and building industry participants in respect of an enterprise agreement made before the code of practice commences.

Section 16 - Industrial impacts

108. Section 16 provides the obligations on a code covered entity in respect of industrial impacts.
109. Subsection 16(1) requires that all forms of industrial action taken by employees of a code covered entity (that is, whether or not it is protected industrial action), and threats to take action, are notified to the ABCC if the action relates to Commonwealth funded building work. Action relates to Commonwealth funded building work if the action involves undertaking, or not undertaking Commonwealth funded building work. Action would also relate to a Commonwealth funded building work if, for example, it affects delivery of goods to such a site or is taken with the intent to further an industrial agenda at a site where Commonwealth funded building work is undertaken. The obligation is to notify the ABCC as soon as practicable. What is considered as soon as practicable will depend on the particular circumstances, but the notification must occur no later than 24 hours after the code covered entity first became aware of the action or threatened action. In some circumstances, a notification within 24 hours may still be considered to have been made later than was practicable.
110. Subsection 16(2) applies to all building work. This subsection provides that a code covered entity must report actual or threatened industrial action that is not protected action by employees of the code covered entity to the ABCC. That is, in respect of privately funded projects industrial action that is protected does not need to be reported to the ABCC. The notification of industrial action that is not protected must be made as soon as practicable, but no later than, 24 hours after the code covered entity first become aware of the threat or action.
111. Subsection 16(3) requires code covered entities to take steps to prevent or bring an end to industrial action that is not protected action taken by the employees of the entity. Steps must be taken to the extent reasonably practicable. What is reasonably practicable in any situation will depend on a wide range of factors, but may include taking legal action in the Fair Work Commission or a court where remedies are available.

112. The requirement in subsection 16(3) that a code covered entity take reasonably practicable steps to prevent or bring to an end industrial action that is not protected action does not require that a code covered entity accede to a demand, claim or threat that is being advanced by industrial action that is not protected.
113. Subsection 16(4) provides that a code covered entity must, in relation to all building work, report to the ABCC any request or demand by a building association that the code covered entity engage in conduct that appears to be for the purposes of a secondary boycott within the meaning of the *Competition and Consumer Act 2010*. The report must be made as soon as practicable, but not later than 24 hours, after the relevant request or demand is made. A note to the subsection further highlights that subsection 9(2) of the code of practice requires code covered entities to comply with the *Competition and Consumer Act 2010*.
114. The prompt reporting of practices such as ‘black bans’ to the ABCC will enable an effective response to conduct that may be a secondary boycott in the building and construction industry.
115. A failure to notify pursuant to section 16 would constitute non-compliance with the code of practice and may result in an exclusion sanction being imposed on a code covered entity.

Section 16A - Fitness for work – alcohol or other drugs

116. Subsection 16A(1) provides that a code covered entity must ensure there is an approach to managing drug and alcohol issues in the workplace to help ensure that no person attending the site to perform building work does so under the influence of alcohol or other drugs listed in Schedule 4. This reflects the fact that the construction industry is a high risk industry where hazards such as the use of machinery and mobile equipment, congested sites and working from heights can accentuate the adverse impact of drugs and alcohol.
117. Subsection 16A(2) requires that a code covered entity that is a head contractor in respect of building work at a particular site must not pass the implementation and cost of any drug and alcohol testing to its subcontractors. This is to ensure that the head contractor maintains ultimate responsibility for addressing drug and alcohol issues in the workplace.

PART 4 – COMPLIANCE, MONITORING AND ENFORCEMENT ARRANGEMENTS

Section 17 - Notification

118. Subsection 17(1) requires code covered entities to notify the ABCC of a breach, or a suspected breach, of the code of practice as soon as practicable, but no later than two working days after the code covered entity becomes aware of the breach or suspected breach. For example, a code covered entity would be required to notify the ABCC if it became aware that entry to premises by an officer of a building association had occurred in a manner that was not compliant with section 14 of the code of practice or

if practices that had the effect of undermining the right to freedom of association had occurred on site.

119. Subsection 17(2) applies to notifications made under subsection 17(1). It requires code covered entities to notify the ABCC of the steps taken to rectify the breach within 14 days of providing the notification.

Section 18 - Consequences of breaching this code of practice

120. The consequence of failing to comply with the code of practice is that the code covered entity may be excluded from performing Commonwealth funded building work. This is consistent with the opt-in nature of the code of practice whereby building contractors and building industry participants choose to become code covered entities (as defined by section 6) in order to be eligible to undertake Commonwealth funded building work. Part 4 of the code of practice sets out the process for imposing sanctions.

121. Subsection 18(1) provides that where the ABC Commissioner is satisfied that a code covered entity has failed to:

- comply with the code of practice including, but not limited to, having failed to comply with work health and safety laws or the Fair Work Act in relation to the underpayment of an employee's wages or entitlements; or
- comply with a compliance notice issued under section 99 of the Act in relation to the code of practice without a reasonable excuse,

the ABC Commissioner may refer the matter to the Minister with recommendations, if any, that a sanction should be imposed.

122. Where a matter has been referred by the ABC Commissioner under subsection 18(1) (with the exception of a referral under subparagraph 18(1)(a)(i)) the Minister may, under subsection 18(1A):

- issue a formal warning to that entity that a further failure may result in the imposition of an exclusion sanction; or
- impose an exclusion sanction on the code covered entity.

123. Subsection 18(1B) provides that where a matter has been referred to the Minister under subparagraph 18(1)(a)(i), the Minister must impose an exclusion sanction on the code covered entity unless the Minister is satisfied that it would not be appropriate in the circumstances because of the nature of, or factors contributing to, the failure to comply. In those circumstances, the Minister may issue a formal warning to the code covered entity that a further failure may result in the imposition of an exclusion sanction.

124. 'Exclusion sanction' is a defined term in the code of practice (see section 3). Sanctions may be imposed on a related entity where appropriate and may be imposed for a period of up to 12 months.

125. Consistent with the Minister's power to impose exclusion sanctions, subsection 18(2) allows the Minister to apply an exclusion sanction imposed on a code covered entity to another entity (the acquiring entity) that acquires ownership or beneficial use of some or all of the assets (whether tangible or intangible) of the code covered entity. The purpose of this subsection is to prevent circumvention of the sanction regime. In determining whether to extend the application of an exclusion sanction it may be relevant to consider the extent of the assets involved.
126. Exclusion sanctions that are applied, or formal warnings that are applied, may be published by the Minister.

Section 19 - Decision to impose an exclusion sanction

127. Section 19 sets out the process by which the Minister may impose an exclusion sanction on a code covered entity.
128. Subsection 19(1) provides that if the Minister proposes to impose an exclusion sanction under section 18, the Minister must give a written notice to the code covered entity in question that informs the entity of the details of the alleged breach and advises them that they may, by a specified date not less than 21 days after the giving of the notice, make a submission in relation to the proposed sanction. This ensures that code covered entities are afforded procedural fairness in relation to the Minister's decision to impose an exclusion sanction.
129. After the date specified in the notice under subsection 19(1), the Minister must decide whether to impose the exclusion sanction. If the relevant code covered entity has made a submission, the Minister must consider the contents of that submission. Paragraph 19(3)(b) requires the Minister to decide whether to impose a sanction, whether or not the code covered entity (or related entity) has made a submission. Paragraph 19(3)(c) requires the Minister to give the code covered entity written notice of the decision, including reasons for the decision, within 14 days of making the decision.
130. Subsection 19(4) provides that an exclusion sanction takes effect on the date specified by the Minister in the written notice of decision that is issued pursuant to paragraph 19(3)(c).
131. Subsection 19(5) clarifies that where the Minister proposes to impose an exclusion sanction on an acquiring entity in accordance with subsection 18(2), the Minister must treat the acquiring entity as if it were a code covered entity for the purpose of this section. This ensures that acquiring entities are treated in the same manner as code covered entities.
132. Before imposing an exclusion sanction on a code covered entity, the Minister must advise the Finance Minister, as he or she has oversight of Commonwealth procurement policy (subsection 19(6)).

Section 22 - Determination of Compliance with Section 11

133. Section 11 of the code of practice prohibits a code covered entity from being covered by an enterprise agreement which contains certain clauses. Meeting the requirements of section 11 is a key criterion for eligibility to be awarded Commonwealth funded building work (see section 23). To assist code covered entities and Commonwealth funding entities, subsection 22(1) provides the ABCC with the ability to determine that an enterprise agreement meets the requirements of section 11.
134. In relation to a proposed enterprise agreement, the ABCC may provide preliminary advice on whether the proposed enterprise agreement (if made and approved in a certain form) would become an enterprise agreement that is compliant with section 11.
135. Subsection 22(3) provides that a determination made under subsection 22(1) relating to an existing enterprise agreement is taken to be conclusive of the compliance of the enterprise agreement with the requirements of section 11.

PART 5 – FUNDING ENTITIES

Section 23 - Key criteria for eligibility to be awarded Commonwealth funded building work

136. Section 23 provides that to be eligible to be awarded Commonwealth funded building work, a code covered entity must meet two eligibility criteria. The first is that it, and its related entities, must meet the requirements of section 11 of the code of practice. The second is that the code covered entity must not be subject to an exclusion sanction.

Section 24 - Expressions of interest and tenders

137. Subsection 24(1) provides that funding entities must ensure that tender processes and calls for expressions of interest (howsoever described) in respect of Commonwealth funded building work are conducted in a manner consistent with this code of practice. Further, funding entities must ensure that respondents are only permitted to participate in tender processes where the respondent meets the eligibility requirements set out in section 23.
138. Subsection 24(2) requires funding entities to ensure that any request for expressions of interest or request for tender (howsoever described) for Commonwealth funded building work includes conditions for participation that require tender respondents to confirm that:
 - the respondent and any related entity will comply with the code of practice when undertaking the Commonwealth funded building work;
 - the respondent and any related entities will, if not already obliged to do so, comply with the code of practice from the time of lodging an expression of interest or tender response (that is, an acknowledgement that by submitting the expression of interest or tender, the entities have become code covered entities); and

- they are eligible to perform Commonwealth funded building work at the time of lodging an expression of interest or tender. This refers to the two eligibility criteria in section 23.

139. Funding entities must also ensure any request for expressions of interest or request for tender (howsoever described) for Commonwealth funded building work requires a respondent to:

- demonstrate a positive commitment to the provision of appropriate training and skill development for their workforce. Such commitment may be evidenced by compliance with any state or territory government building training policies and supporting the delivery of nationally endorsed building and construction competencies;
- include details of the number of current apprentice and trainee employees and the number and classes of persons that hold visas under the *Migration Act 1958* that are engaged by the respondent, and that are intended to be engaged by the respondent to undertake the Commonwealth funded building work; and
- advise whether, in the preceding three year period, the respondent has:
 - had an adverse decision, direction or order made by a court or tribunal for a breach of a designated building law, work health and safety law or the *Migration Act 1958*;
 - been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) including by any related entity to a building contractor or building industry participant;
 - owed any unsatisfied judgement debts (including such debts owed by any related entity) to a building contractor or building industry participant.

Section 25 - Projects requiring a WRMP

140. Section 25 sets out requirements for funding entities relating to WRMPs.

141. Where building work is of a type described in Schedule 2 of the code of practice, subsection 25(1) requires funding entities to:

- ensure the requirement to have a WRMP approved by the ABCC is included in all expressions of interest and tender documents;
- provide to the ABCC the WRMP of each of the respondents the funding entity proposes to shortlist, or has shortlisted, as part of the tender evaluation process; and
- not award the tender to a respondent unless that respondent's WRMP has been approved by the ABCC.

142. It is intended that funding entities will first short list respondents before submitting the WRMP of contractors that have been shortlisted.
143. Subsection 25(2) requires funding entities to inform the ABCC as soon as is practicable after issuing a request for expressions of interest or request for tender (howsoever described). As soon as practicable after receiving this notification, the ABCC must inform the funding entity about whether the ABCC requires any of the matters outlined in Schedule 3 to be addressed in the proposed WRMP for the project (subsection 25(3)). Further requirements for the content of WRMPs are provided in section 32 of the code of practice.

Section 25A - Information to be provided by preferred tenderer

144. Before a contract is entered into in respect of Commonwealth funded building work, section 25A requires a funding entity to ensure the preferred tenderer provides the following information:
- the extent to which domestically sourced and manufacturing 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.
145. A preferred tenderer may include a respondent considered to be the successful tenderer but who has not yet been offered the opportunity to enter into a contract in respect of Commonwealth funded building work.

Section 26 - Contracts

146. Section 26 sets out a number of requirements for funding entities when those entities are proposing to enter into a contract in respect of building work with code covered entities. A number of these requirements were previously contained in supporting guidelines with which funding entities were required to comply.
147. Subsection 26(1) prohibits funding entities from entering into a contract with a code covered entity that does not meet the eligibility requirements set out in section 23.
148. Subsection 26(2) further prohibits a funding entity from entering into a contract in respect of building work with a code covered entity that is excluded from performing

work funded by a state or territory government unless approval to do so is provided by the ABC Commissioner.

149. Subsection 26(3) provides that a funding entity must only enter into a contract in respect of building work with a code covered entity if the funding entity is satisfied that the code covered entity will comply with the code of practice when undertaking the work in question. A note to subsection 26(3) clarifies that a funding entity could be satisfied of future compliance if the person has a history of compliance or if appropriate undertakings are obtained that the relevant entity will comply, and if relevant, has complied with the code of practice.
150. Where the funding entity undertakes further consideration in satisfying itself as part of a tender process, that further consideration would be required to be fair, apply the rules of procedural fairness if a decision was to negatively affect a code covered entity and otherwise comply with any rules of the particular tender. This may include consulting with the ABCC.
151. Subsection 26(4) prohibits a funding entity from entering into a contract in respect of building work with any code covered entity that:
 - has had an adverse decision, direction or order made by a court or tribunal for a breach of the Act, a designated building law, work health and safety law or competition and consumer law; and
 - has not fully complied, or is not fully complying, with such a decision, direction or order.
152. Funding entities are not prohibited from entering into a contract with a code covered entity in the circumstances provided for in subsection 26(4) where the period for payment, or for other compliance with the decision, direction or order has not expired, or where the decision, direction or order is stayed or has been revoked (subsection 26(5)).
153. Subsection 26(6) prohibits a funding entity from entering into a contract with a code covered entity for a project of the type described in Schedule 2 if the funding entity is required to have a WRMP approved by the ABCC but has not obtained that approval.
154. Paragraph 26(7)(a) provides that a funding entity must only enter into a contract in respect of building work with a code covered entity that will require its subcontractors to advise, prior to entering into a contract with them, whether the subcontractor has, within the preceding 3 year period:
 - had an adverse decision direction or order made by a court or tribunal for a breach of a designated building law, work health and safety law or the *Migration Act 1958*; or
 - been required to pay any amounts under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) or owed any unsatisfied judgement debts (including by any related entity) to a building contractor or building industry participant.

155. The code covered entity must also agree to require its subcontractors to update that advice every six months for the duration of the contract between the code covered entity and the subcontractor (paragraph 26(7)(b)).
156. Subsection 26(8) provides that a funding entity must only enter into a contract in respect of building work with a code covered entity that only uses products in building work that comply with the relevant Australian standards published by, or on behalf of, Standards Australia.

Section 27 - Notification of head contractor

157. Section 27 requires funding entities to notify the ABCC when a tender process is completed and a code covered entity has been awarded a contract to undertake Commonwealth funded building work. This notification must include a range of specified information related to both the code covered entity and the nature of the proposed work.

Section 28 - Notification by funding entities

158. Section 28 requires funding entities to notify the ABCC of all allegations of breaches of the code of practice as soon as practicable but no later than seven days after the funding entity becomes aware of the alleged breach. Furthermore, funding entities are required to respond to alleged breaches, with initial action designed to encourage voluntary modification or cessation of non-compliant behaviour. Funding entities must also respond to requests for information from the ABCC concerning matters related to the code of practice.

Section 29 - Funding entity compliance

159. Section 29 allows the ABC Commissioner to refer a matter or make a complaint to the Secretary of the Department of Finance for investigation or further action if the ABC Commissioner considers that a funding entity, or an official, is not complying with, or has not complied with, the code of practice. A note to section 29 confirms that funding entities and officials within funding entities must strictly comply with the requirements of this code of practice.
160. The Secretary of the Department of Finance may then refer the matter to the accountable authority of the funding entity, or the responsible Minister or both for further action.

PART 6 – WORKPLACE RELATIONS MANAGEMENT PLANS

Section 30 - Requirement for a WRMP

161. Section 30 explains that Part 6 of the code of practice sets out the requirements for WRMPs to be approved within tender processes for projects of a type described within Schedule 2.

162. This obligation applies only to Commonwealth funded building work that meets one of the funding thresholds in Schedule 2.

Section 31 - Application for approval of a WRMP

163. Section 31 requires funding entities to apply to the ABCC to have a WRMP for a particular project approved.

164. Such an application must be made in the manner and form required by the ABC Commissioner and must be accompanied by any supporting evidence required by the ABCC. If an application does not contain sufficient information to enable the ABCC to make a decision whether or not to approve the proposed WRMP, the ABCC may ask the funding entity to obtain and provide additional information to allow it to make such a decision.

Section 32 - Content of a WRMP

165. Section 32 sets out the key matters that must be contained in a WRMP in order for it to be approved by the ABCC. A WRMP for a project is intended to be a practical document outlining how the requirements of this code of practice will be implemented in the particular circumstances of the project to which the WRMP relates.

166. Paragraph 32(1)(a) requires a WRMP to detail the systems, processes and procedures that the code covered entity has in place (or will have in place) to (among other things) promote a fair, lawful, efficient and productive workplace.

167. Paragraph 32(1)(b) requires a WRMP to also address any of the matters listed in Schedule 3 of the code of practice that the ABCC considers necessary. The note indicates that section 25 sets out the requirement for funding entities to notify the ABCC of proposed building work and the ABCC's obligation to inform the funding entity about whether it requires any of the matters listed in Schedule 3 to be addressed in the proposed WRMP.

168. Subsection 32(2) requires a WRMP to 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 a project and addresses the matters set out in Schedule 4; and
- details of the processes that are or will be put in place to ensure that all applicable laws and other requirements relating to the security of payments that are due to persons in respect of building work will be adhered to throughout the life of the project. This requirement will safeguard subcontractors and their employees in relation to payments owed for carrying out building work on projects of a type described in Schedule 2.

Section 33 - Approval process of a WRMP

169. Section 33 sets out the process by which the ABCC will consider and approve proposed WRMPs that are provided to it by funding entities.
170. Subsection 33(1) requires the ABCC to approve a proposed WRMP if it is satisfied that the WRMP sufficiently:
- demonstrates how the code covered entity will comply with the requirements of the code of practice on the project to which the WRMP relates;
 - addresses any relevant matters contained in Schedule 3; and
 - addresses the matters set out in subsection 32(2).
171. When considering whether a WRMP demonstrates how the code covered entity will comply with the requirements of the code of practice, it is expected that the ABCC will make a determination based on both the methods for ensuring compliance that are disclosed in the WRMP and whether those methods are appropriately adapted and likely to be effective in relation to the specific building project to which the WRMP relates.
172. Once the ABCC has made a decision regarding a proposed WRMP, it must notify the funding entity of its decision. If the ABCC does not approve a proposed WRMP it must give a written notice to the funding entity informing it of the reasons for not approving the WRMP.
173. This notice will provide the funding entity with the information necessary to allow for a revised WRMP to be submitted by the funding entity for consideration by the ABCC. Subsection 33(4) expressly allows for such a reapplication.

Section 34 - Compliance with an approved WRMP

174. Section 34 requires a head contractor to ensure that, so far as is reasonably practicable, all subcontractors comply with the WRMP on the project to which the WRMP relates.
175. Subsection 34(2) provides that a failure by a head contractor to comply with its WRMP is a breach of the code of practice.

SCHEDULE 1 – BUILDING WORK TO WHICH CODE OF PRACTICE APPLIES

176. Schedule 1 supports section 6 of the code of practice, which sets out when a building contractor or building industry participant will become a code covered entity. It is also central to the definition of ‘Commonwealth funded building work’ in section 3 (through items 1 – 8 of this Schedule). 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 the funding for the building work is an explicit component of the grant program, and for which the value of the Commonwealth's contribution is at least \$5 million and represents at least 50 per cent of the total construction value or where the Commonwealth's contribution is at least \$10 million. The latter option applies irrespective of the proportion the Commonwealth's funding represents 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 per cent of the total construction value or the Commonwealth's contribution is at least \$10 million. The latter option applies irrespective of the proportion the Commonwealth's funding represents 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. A note to the item provides a description of the concept of PPP.
- **Item 8:** Building work that involves a Private Finance Initiative ('PFI') for the delivery of functions or services of the Commonwealth. A note to the item provides a description of the concept of PFI.
- **Item 9:** Building work for which the funding is not described in items 1 to 8. This encompasses any privately funded building work that the building contractor or building industry participant engages in.

SCHEDULE 2 – BUILDING WORK FOR WHICH A WORKPLACE RELATIONS MANAGEMENT PLAN IS REQUIRED

177. Schedule 2 supports Part 6 of the code of practice, which sets out the requirements relating to WRMPs.
178. Item 1 of Schedule 2 requires a WRMP in relation to Commonwealth funded building work for which:
 - the value of the Commonwealth's contribution to the project that includes the building work is at least \$5 million and represents at least 50 per cent of the total construction project value; or

- the Commonwealth's contribution to the project that includes the building work is at least \$10 million (irrespective of its proportion of the total construction project value).

179. These thresholds ensure that the requirements relating to WRMPs apply to appropriate projects.

SCHEDULE 3 – WORKPLACE RELATIONS MANAGEMENT PLANS

180. Schedule 3 supports the operation of Part 6 of the code of practice. Whilst the fundamental requirements that must be met by all WRMPs are outlined in paragraph 32(1)(a) and subsection 32(2), paragraph 32(1)(b) provides for the ABCC to require that further detail be provided by code covered entities in a WRMP for a particular project. These additional matters are broadly described in Schedule 3.
181. Section 25(3) of the code of practice provides that the ABCC must, as soon as practicable after receiving notification about a project, inform the funding entity about whether it requires any of the matters outlined in Schedule 3 to be addressed in the proposed WRMP for the project. This assessment will be undertaken by the ABCC on a case-by-case basis taking into account the particular circumstances of the project.
182. Subitems 1(a)-(b) of Schedule 3 relate to workplace arrangements and compliance monitoring processes that will be applied during the course of the project.
183. Subitem 1(a) provides that the ABCC may require a WRMP to address what processes and practices will be implemented on the project to regulate and monitor workplace arrangements. This is for the project and accordingly applies in respect of the head contractor's workforce and those of subcontractors.
184. Subitem 1(b) provides that the ABCC may require the WRMP to outline the approaches that will be adopted to ensure compliance with statutory workplace rights on the project. This would need to cover the range of matters listed in item 1(b), including what processes will be implemented to ensure that Commonwealth industrial instruments are complied with, that underpayments (and similar) do not occur, and that freedom of association is respected and promoted on site (see further the requirements in respect of freedom of association in section 13 of this code of practice).
185. Subitems 2(a)-(b) relate to how the productivity of the workforce and the project will be achieved and maintained and how productivity will be measured, monitored and recorded over the life of the project. This information would be expected to demonstrate how the code covered entity proposes to achieve the Commonwealth's productivity and efficiency objectives.
186. Subitem 2(a) provides that the ABCC may require the WRMP to outline the approaches that have been, or will be, adopted to develop and maintain a productive workforce and ensure the optimal use of labour requirements. This information would be expected to clearly set out the initiatives that will be adopted by the code covered entity to ensure that barriers to improved productivity are identified and either avoided or where necessary overcome in a timely manner. Information that may be required under this

item includes outlining what practical steps the code covered entity will take to ensure that it retains the ability to utilise its workforce and resources to meet the operational requirements on the project

187. Subitem 2(b) provides that the ABCC may require a WRMP to address how productivity will be objectively measured, monitored and recorded on the project. This applies to all aspects of the project, including subcontractors, and will allow the code covered entity, the funding entity and the ABCC, to accurately monitor productivity on the project. It would be expected that the WRMP would identify the key performance indicators that are relevant to the labour productivity initiatives that are identified as part of the WRMP and indicate how they will be collected and reported. The adequateness of the resources dedicated to the measurement and the monitoring and recording of productivity on the project would also be expected to be addressed, including the identification of the parties responsible for both undertaking these tasks and ensuring that any findings are acted upon in a timely and effective manner. If included in a WRMP this item would be directed to ensuring that processes are in place to objectively determine and record productivity on Commonwealth funded building work.
188. Subitems 3(a)-(c) relate to how the code covered entity will manage relationships with other parties that may be involved in the project. Ensuring that effective and appropriately tailored communication strategies are considered and prepared in advance of a project's commencement is an important element of ensuring the requirements of this code of practice are met by all on the project.
189. Subitem 3(a) provides that the ABCC may require the WRMP to outline approaches to relationship management with a range of other parties involved in the project, such as employees, subcontractors and representatives of building associations. This information should include the approach to, and processes for, communicating with these parties.
190. Subitem 3(b) provides that the ABCC may require the WRMP to outline the organisational structure and reporting lines that will be implemented on the project and identify the personnel that will be responsible for certain important functions as listed. If no individuals have yet been identified for the functions in question, the WRMP is expected to identify the existence of the role and outline the functions that the person who assumes that role will undertake.
191. Subitem 3(c) provides that the ABCC may require the WRMP to outline the approaches that will be adopted to managing site access by third parties. This information should outline how all relevant persons on site will be made familiar with the right of entry provisions that will apply to the project, including steps that should be taken to ensure that access to site occurs only in strict compliance with section 14 of this code of practice. Depending on the particular project, this may also require an assessment of security and access requirements on site. It would be expected that the WRMP would provide information on what the code covered entity will do to monitor the right of entry requirements, how any unauthorised entry will be monitored and dealt with and the processes for complying with the notification requirements of the code of practice where there has been a breach or suspected breach (for example, where there has been an unauthorised entry to the project).

192. Subitems 4(a)-(d) relate to the identification, management and mitigation of workplace relations risks on the project, which may include providing details of past experiences to demonstrate a head contractor's ability to manage these risks.
193. Subitem 4(a) provides that the ABCC may require the WRMP to address how workplace relations risks will be identified and the proposed approaches to managing those risks. This information would be expected to demonstrate that the code covered entity understands the industrial relations environment in which it will operate, and that it has strategies in place that will enable it to deal with risks that may impact upon its ability to deliver the project on time and within budget. The strategies contained in the WRMP should reflect the unique characteristics of the project to which the WRMP relates. Subitem 4(b) provides that the ABCC may require the WRMP to address the management of subcontractors that are engaged by the code covered entity. This may require information on how the code covered entity will select and manage subcontractors, and how the requirements imposed by section 8 of this code of practice will be met.
194. Paragraph 4(c)(i) provides that the ABCC may require the WRMP to address the processes and procedures that will apply to dealing with and addressing actual or threatened industrial action. The code covered entity would be expected to provide information on how it will address both protected industrial action and industrial action that is not protected. The WRMP would also be expected to address how the prohibition against the payment of strike pay will be complied with by all parties on the project.
195. Paragraph 4(c)(ii) provides that the ABCC may require the WRMP to address the processes and procedures that will apply to dealing with, and addressing, employee and workforce grievances. This would be expected to include information on the steps that will be taken to both monitor and record the nature and frequency of grievances amongst both employees and subcontractors and how this data will be used by the code covered entity to proactively address issues and, where applicable, prevent grievances arising in the future. The code covered entity would also be expected to demonstrate how the freedom of association requirements in relation to grievance processes will be complied with (see sections 13 and 15).
196. Subitem 4(d) provides that the ABCC may require the WRMP to provide information on the head contractor's past experience and track record of delivering projects on time and on budget. This may include a requirement to provide a summary of current and completed projects in Australia within two years of the date of tender. This information will play an important role in allowing the ABCC to fully assess the appropriateness of the measures proposed in the WRMP in light of the head contractor's past performance and to identify whether the factors that led to past delays or cost overruns have been addressed such that they are not likely to impact on the project to which the WRMP relates. A note to subitem 4(d) provides that these further details will be required where the ABCC considers the project is of significant value or importance.
197. Subitem 5(a) provides that the ABCC may require the WRMP to outline how compliance with the code of practice will be monitored and promoted throughout the life of the project. This may include communication methods that will be adopted by the code covered entity to ensure that all parties on site are aware of the requirements of

the code of practice and the importance of ensuring compliance with it. This could include providing information on how site induction processes will be used to reinforce the principles of freedom of association, what ongoing education and training will be provided to both employees and subcontractors on compliance with this code of practice, and how respective obligations will be reinforced in relevant documents.

SCHEDULE 4 – FITNESS FOR WORK/ALCOHOL AND OTHER DRUGS IN THE WORKPLACE

198. Schedule 4 sets out the range of issues a fitness for work policy must address, including issues relating to drug and alcohol testing on building projects.
199. Item 1 provides that a fitness for work policy must outline how those on site will be required to comply with the relevant policy, such as through contractual or other enforceable means. This will ensure that the requirements contained in the fitness for work policy relating to drug and alcohol testing are effectively implemented by all parties.
200. Item 2 provides that a fitness for work policy must address the use of an objective medical testing method or methods to detect the presence of drugs or alcohol in a worker's system and outline the detection method or methods to be used on the project.
201. Item 3 provides that a fitness for work policy must provide that designated substances are tested for, including alcohol, opiates and amphetamines.
202. Item 4 provides that a fitness for work policy must provide that a person who returns a positive result for any of the substances listed in item 3 will be deemed not to be fit for work. This will ensure that persons who pose a risk to health and safety due to drug or alcohol consumption are not allowed to work on site.
203. Item 5 provides that a fitness for work policy must outline how a person who returns a positive result will be prevented from performing work until they can prove they are fit to return to work, and other processes that will apply in the event of a positive result or a deemed positive result. A deemed positive result arises where a person fails to submit to a test.
204. Item 6 provides that a fitness for work policy must outline arrangements for the periodic testing of the workforce (including both construction workers and site office workers).
205. Item 7 provides that a fitness for work policy must outline procedures for the random selection of personnel for testing if the entire workforce is not to be tested at the same time.
206. Item 8 provides that a fitness for work policy must contain procedures for targeted testing of higher risk activities, voluntary testing and for-cause testing. This recognises that the health and safety risks posed by drug and alcohol impairment are significantly heightened for workers undertaking high risk activities.

207. Item 9 provides that a fitness for work policy must outline how workers who attend for work affected by drugs or alcohol will be counselled and assisted, apart from any disciplinary process that might apply. For example, the employer may refer the employee for assessment, treatment, counselling or rehabilitation where appropriate.

Statement of Compatibility with Human Rights

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

Code for the Tendering and Performance of Building Work 2016

The *Code for the Tendering and Performance of Building Work 2016* (the code of practice) 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 *Building and Construction Industry (Improving Productivity) Act 2016* (the Act) enables the Minister for Employment to issue a code of practice in respect of building work (subsection 34(1)). The following persons can be required to comply with that code of practice (subsection 34(3)):

- a building contractor that is a constitutional corporation;
- a building industry participant and the current work is to be carried out in a Territory or Commonwealth place; or
- the Commonwealth or a corporate Commonwealth entity.

The code of practice 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.

Compliance with the code of practice is entirely voluntary. The only consequence of failure to comply with the code of practice is ineligibility to be awarded Commonwealth funded building work.

The Act and the code of practice are part of a single framework. The discussion about relevant rights set out below refers to, and should be read in the context of, the statement of compatibility with human rights for the Building and Construction Industry (Improving Productivity) Bill 2013 (the Bill), which is available at <https://www.comlaw.gov.au/Details/C2013B00209/Explanatory%20Memorandum/Text>, and the additional information provided to the Parliamentary Joint Committee on Human Rights (the Committee) in response to the requests for further information contained in the Committee's first report on the Act.¹

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.

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

The code of practice engages the following rights:

- 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 code of practice only applies to persons in respect of building work.

The statement of compatibility with human rights for the Act and the Australian Government's response to the Committee's first report² 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.”³

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

² Parliamentary Joint Committee on Human Rights, *Second Report of the 44th Parliament*, tabled on 11 February 2014.

³ *Royal Commission into the Building and Construction Industry* (2003), Volume 1, page 6.

purchasing power.⁴ The Royal Commission strongly supported the operation of ‘implementation guidelines’ that would set out 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.⁵

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.*⁶

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.*⁷

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.*⁸

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

⁴ Royal Commission into the Building and Construction Industry (2003), Volume 7, page 49

⁵ Royal Commission into the Building and Construction Industry (2003), Volume 7, page 81

⁶ Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) Volume 5, Chapter 8, paragraph 1.

⁷ Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) Volume 5, Chapter 8 paragraph 83

⁸ 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.

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.

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 13(1) of the code of practice provides that code covered entities must protect freedom of association in respect of building work by adopting and implementing policies and procedures that ensure that persons are:

- free to become, or not become, members of building associations;
- free to be represented, or not represented, by building associations;
- free to participate, or not participate, in lawful industrial activities; and
- not discriminated against in respect of benefits in the workplace because they are, or are not, members of a building association.

Subsection 13(2) provides a non-exhaustive list of actions or practices that would compromise a person's right to freedom of association that a code covered entity must ensure do not occur.

Paragraph 11(1)(c) enhances the code of practice's protection of the right to freedom of association in the building and construction industry by providing that code covered entities must not be covered by an enterprise agreement that includes clauses that are inconsistent with the freedom of association requirements set out in section 13.

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

Freedom of association – right of entry

Subsection 14(1) of the code of practice requires code covered entities to comply with all laws of the Commonwealth and each relevant state and territory to which the entity is subject that give a right of entry permit holder a right to enter premises where building work is performed.

The code of practice does not impose any additional restrictions on right of entry for officers of building associations, rather it places an obligation on code covered entities to comply with existing right of entry requirements and to ensure, so far as is reasonably practicable, that officers of building associations seeking to enter their building sites also comply with these existing requirements.

This measure is reasonable, necessary and proportionate in light of evidence that the right of entry is being abused in this industry to disrupt work and cause economic loss to businesses. For example, since 2005 the building industry regulator has commenced 60 proceedings in relation to right of entry permits and breaches of right of entry laws by officials of building associations.

In *Director of the Fair Work Building Industry Inspectorate v McDonald* [2013] FCA 1431, the CFMEU, its official Joseph McDonald and the CFMEU Western Australia, were penalised a total \$193,600 for their role in unlawful industrial action at Citic Pacific's Sino Iron Ore Pilbara site. This matter involved entry to the building site by Mr McDonald whereupon:

Mr McDonald was asked by Mr John Lange, an employee of the Chamber of Commerce and Industry of WA who was engaged by Citic to provide industrial relations support on the site, to leave the site because he did not hold a right of entry permit, to which Mr McDonald responded to Mr Lange to "Fuck off".

Mr Lange addressed the group of Karridale employees and told them that what was occurring could be unlawful industrial action. Mr Lange again asked Mr McDonald to leave the site because he didn't have a right of entry permit, to which Mr McDonald replied that "I haven't had one for seven years and that hasn't fucking stopped me".⁹

More recently, in three separate judgements handed down on 22 April 2016, White J found the CFMEU and a number of its officials engaged in unlawful activity when exercising entry rights across a number of Adelaide construction sites between 2013 and 2014:

- In *Director of the Fair Work Building Industry Inspectorate v O'Connor* [2016] FCA 415 White J penalised the CFMEU a total of \$308,000 and its officials a total of \$32,250 for breaches of right of entry laws including entry onto sites without providing notice, refusing to produce entry permits and failing to hold discussions with employees in places agreed with the head contractor.
- In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2016] FCA 414 the CFMEU was penalised a total of \$48,000 and its officials \$6,200 for breaches of right of entry laws. White J found

CFMEU South Australia branch secretary Aaron Cartledge directed CFMEU organiser Luke Stephenson not to provide written notice of his entry onto the South Australian Health and Medical Research Institute construction site.

- In *Director of the Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union [2016] FCA 413* White J penalised the CFMEU a total of \$371,000 and its officials a total of \$33,000 for breaches of right of entry laws across four Lend Lease sites. This included entry onto sites without notice, an organiser behaving in an aggressive and threatening manner and an official ignoring a request by Lend Lease to stay outside an exclusion zone for his own safety.

In the first and third judgements, White J also handed down penalties against the CFMEU and its officials for engaging in coercive activity.

Behaviour such as this is indicative of the widespread lack of respect for the rule of law in the building and construction industry, and demonstrates the need for the Government to use its purchasing power to encourage all building industry participants to observe applicable workplace relations laws.

Freedom of association – collective bargaining

Sections 11 and 11A of the code of practice impose certain enterprise agreement content restrictions on code covered entities.

Subsection 11(1) of the code of practice provides that a code covered entity must not be covered by an enterprise agreement in respect of building work that contains clauses that:

- impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity;
- discriminate, or have the effect of discriminating against certain persons, classes of employee, or subcontractors; or
- are inconsistent with freedom of association requirements set out in section 13 of the code of practice.

Subsection 11(3) sets out a non-exhaustive list of matters that are not permitted to be included in an enterprise agreement for the purposes of subsection 11(1).

Paragraph 11A(1)(a) supports these requirements by providing that code covered entities must not be covered by enterprise agreements containing clauses that purport to remedy or render ineffective other clauses that are inconsistent with section 11. This measure is intended to ensure that the requirements in section 11 are not negated by the inclusion of ‘reading down’ clauses.

To the extent that collective bargaining may be limited by section 11 and paragraph 11A(a), the limitation is reasonable, necessary and proportionate in pursuit of the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their businesses efficiently or restrict productivity improvements in the building and construction industry more generally.

Paragraph 11A(1)(b) promotes collective bargaining. It provides that a code covered entity must not be covered by an enterprise agreement that contains clauses that require or provide for the application of terms and conditions in an enterprise agreement that does not cover and apply to the relevant employer and employees. This measure is intended to ensure that the terms and conditions of employment that apply to an employer and its employees are those that are negotiated and agreed by that employer and its employees, not terms and conditions determined by external parties.

Freedom of association – unregistered written agreements and other agreements

Subsection 10(1) of the code of practice prohibits code covered entities from bargaining in relation to, making or implementing an agreement that will not be registered, lodged or otherwise approved under the Fair Work Act and that:

- deals with matters that would be prohibited by section 11 or 11A if the agreement was an enterprise agreement;
- provides for terms and conditions of employment for the entity's employees or subcontractors; or
- restricts or limits the engagement of subcontractors.

The Explanatory Statement makes it clear that section 10 would 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 seek to circumvent the prohibitions in sections 11 and 11A, or 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 code of practice promotes collective bargaining because it requires terms and conditions of employment to be dealt with in enterprise agreements made under the Fair Work Act and discourages the use of agreements outside 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.

Subsection 13(2) engages the right to freedom of expression by requiring code covered entities 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 that seek to vilify or harass employees who participate in, or do not participate in, industrial activities are not displayed;
- building association logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or which provision is made for by, the employer; and
- any other conduct which implies that membership of a building association is anything other than an individual choice for each employee is not engaged in.

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 implying that employees who are not members of a building association cannot work on the building site or, where such employees are present, seek to intimidate, harass or vilify such employees. A requirement to ensure that such signs are not displayed is therefore an appropriate measure in support of the right to freedom of association.

The right to freedom of association can also be infringed by the presence of building association logos, mottos or indicia on clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity. The presence of such signage on clothing or equipment that is supplied by a code covered entity carries a strong implication that membership of the building association in question is being actively encouraged or endorsed by the relevant employer and is against the principle that employees should be free to choose whether to become or not become a member of a building association. This prohibition only applies to clothing, property or equipment that is supplied by, or which provision is made for by, the code covered entity. Section 13 would not prevent these items from being applied to clothing, property or equipment that was supplied by other individuals at the site or by the relevant building 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,¹⁰ the Australian Government already uses its

¹⁰ 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*.

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 Work Health and Safety Accreditation Scheme¹¹.

Subsection 9(3) of the code of practice promotes the right to safe and healthy working conditions by requiring code covered entities to comply with applicable work health and safety laws.

Sections 16A, 32, 33 and Schedule 4 of the code of practice further promote the right to safe and healthy working conditions by requiring code covered entities to have an approach to managing drug and alcohol issues in the workplace. Drug and alcohol impairment presents serious health and safety risks in workplaces. The Regulation Impact Statement (RIS) identified a number of studies into the effects of alcohol and illicit drugs in the workplace. Combined with informal evidence, these studies 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 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 drugs¹².

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'.

It further outlined how work-related alcohol and illicit drug use in the building and construction industry has significant negative impacts on workplace health, safety and productivity. The code of practice 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 code of practice requires code covered entities to have an approach to managing drug and alcohol issues in the workplace to help ensure that no person attending the site to perform building work does so under the influence of alcohol or other drugs.

Subsection 32(2) provides that a proposed WRMP must include a fitness for work policy to manage alcohol and drugs in the workplace. The policy must apply to all persons engaged to perform building work on the site and address matters set out in Schedule 4, including mandatory drug and alcohol testing.

¹¹ Established under section 43 of the Act.

¹² Ken Pidd and Ann Roche; Australian Drug Foundation – *Policy Talk. 'Workplace alcohol and other drug programs - July 2013 - 'What is good practice?'*

Industrial tribunals in Australia have accepted that, while random drug and alcohol testing is an intrusion on the privacy of an individual, it can be justified on health and safety grounds.¹³ 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 drug and alcohol requirements in the code of practice do not prescribe a particular drug and alcohol testing policy that is to apply to all workplaces. Rather, the code of practice 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, Schedule 4 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.¹⁴ 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 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.

¹³ 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).

¹⁴ 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*

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 code of practice 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 code of practice also promotes the right to privacy by requiring code covered entities to ensure that personal information is dealt with in accordance with the *Privacy Act 1988* (paragraph 13(2)(a)).

Conclusion

The code of practice 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

Extract from the Department of Employment's certification letter outlining the independent assessment of the code of practice

Election commitment

Prior to the 2013 federal election, the government committed to developing a building code and guidelines that would be consistent with guidelines issued by the state governments of New South Wales, Victoria and Queensland. This commitment is part of the Government's greater plans for Australia's building and construction industry which includes the re-establishment of the Australian Building and Construction Commission as the specialist workplace relations regulator for the industry. To ensure the quickest possible implementation of this commitment, the government established the '*Coalition Task Force on Re-establishing the ABCC*' (the ABCC Task Force).

The ABCC Task Force undertook a review and consultation process prior to the 2013 election which assessed the ongoing issues in relation to the industry. The ABCC Task Force met with key industry stakeholders and reported to key decision makers including the now Prime Minister.

To meet the Government's election commitment, the Department has developed a draft building code that meets the Government's election commitment and which will be formally issued under section 34 of the Building and Construction (Improving Productivity) Bill 2013 (the Bill) once it is enacted. To assist industry to prepare for its introduction, the Government published an advance release Fair and Lawful Building Code 2014 (Building Code) on 17 April 2014.

The Government intends to shortly publish a further advance release Building Code. This advance release takes account of issues raised by stakeholders since April 2014.

Addressing the RIS questions

The Department considers that the process undertaken by the ABCC Task Force and the Department itself in developing the Building Code addresses the seven RIS questions set out in the Guide.

- Questions 1 & 2 – The '*Coalition Policy to Improve the Fair Work Laws*' describes the policy problem and the need for Government action.

The ABCC Task Force examined the policy problem and response in detail prior to the 2013 election, including through broad consultation with industry and unions and reported to the now Prime Minister.

The policy problem and the Government's intended response were extensively canvassed by the Coalition amongst stakeholders and in public prior to the election.

The election commitment essentially involves reinstating a building code that existed under the previous Coalition Government. Accordingly, the policy problem and intended solution have been well understood and debated publicly and directly with stakeholders over many years, showing there is already a good understanding by stakeholders and decision makers about the policy problem and the proposed regulatory response to be implemented.

In the lead up to the 2013 election, the Coalition released in excess of 15 media releases outlining the workplace relations problems encountered in the industry; proposed to disallow the former Government's *Building Code 2013*; and its intention to release a stronger building code was discussed in a range of media articles.

Current Minister for Employment, Senator the Hon Eric Abetz, reiterated the ongoing problems faced by the industry and the proposal to re-establish the ABCC while addressing a number of workplace relations conferences and other forums held by associations such as the Law Institute of Victoria, Master Builders Association and the Australian Mines and Metals Association.

- Questions 3, 4 & 6 require consideration of options to best address the policy problem and the need for Government action.

In accordance with the Guide, a RIS covering matters which were the subject of an election commitment will not be required to consider a range of policy options. Only the specific election commitment need be the subject of the regulatory impact assessment, with focus on the commitment and the manner in which the commitment should be implemented.

The processes described under questions 1 and 2 above ensured the implementation details for the announced option were progressed in consultation with stakeholders, with consideration by the Minister of iterative changes to the draft Building Code to respond to issues that were identified. One key implementation issue was whether the Building Code should be in the form of a legislative instrument or administrative guidelines.

The Government considered repealing the existing Building Code 2013, a legislative instrument, and replacing it with administrative guidelines similar to the 2006 version introduced by the Coalition during its previous term in office. However, to minimise risks that action taken by funding entities to enforce the requirements of the Building Code would amount to adverse action under the *Fair Work Act 2009*, the Government determined that its preferred option was to issue a legislative building code made under section 34 of the Bill once enacted.

- Question 5 asks who will be consulted about the election commitment and how will they be consulted.

As indicated above, both the Government and the ABCC Task Force debated the Government's proposed regulatory response both publicly and directly in the lead up to the 2013 election.

The Department has also undertaken comprehensive consultation with industry and government stakeholders. For example, on 30 October 2013 the Department convened a formal consultation meeting with industry stakeholders, comprising unions and employer associations, to discuss the Government's proposed regulatory response to the industry's problems at which detailed proposed provisions for inclusion in a new Building Code were circulated for discussion.

On 9 December 2013, a further consultation meeting of stakeholders, including state government representatives, was convened by the Department. A draft building code was circulated for discussion. During this meeting, the Department also sought views on transitional issues, the requirement that certain contractors submit a Workplace Relations Management Plan for approval (the only regulatory burden over existing arrangements), and compliance and monitoring arrangements. While unions did not support the proposal for a new Building Code, they provided technical feedback on the operation of the proposed Building Code. Following this meeting, the draft Building Code was amended to take into consideration feedback by stakeholders and was provided to the Minister for approval – pending passage of the Bill – in March 2014.

As the election commitment was to release a Building Code that is consistent with existing state codes (in New South Wales, Victoria and Queensland) the consultation and analysis undertaken prior to implementation in those jurisdictions is also relevant. The Victorian Government, for example, undertook a public consultation and submission process.

- Question 7 asks how the regulatory option will be implemented and evaluated.

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.

Estimation of the regulatory burden

The regulatory proposal will require short-listed head contractors to submit a Workplace Relations Management Plan to a re-established ABCC detailing how the requirements of the Building Code will be implemented on the project to which it relates. This is the only additional requirement over the existing arrangements.

The increased regulatory burden is offset by the removal of the existing requirement for all contractors who undertake work on Commonwealth-funded construction projects to establish a fully documented Workplace Health, Safety and Rehabilitation Management System that covers the ways in which people are expected to work safely on tasks undertaken by the contractor.

Regulatory Burden and Cost Offset (RBCO) Estimate Table

Average Annual Compliance Costs (from Business as usual)

Costs (\$million)	Business	Community Organisations	Individuals	Total Cost
Total by sector	(\$1.048)	\$0	\$0	(\$1.048)

Cost offset (\$million)	Business	Community Organisations	Individuals	Total by source
Agency	\$0	\$0	\$0	\$0

Are all new costs offset?

Yes, costs are offset No, costs are not offset Deregulatory—no offsets required

Total (Change in costs – Cost offset) (\$million) = (\$1.048)

Regulation Impact Statement

Building Code – Drug and Alcohol Testing Provisions

Table of Contents

Background	2
The problem	3
The need for government action	6
Options considered.....	7
The benefits of the options considered	7
Consultation	9
Preferred Option.....	10
Alternative options.....	11
Costs and net benefit of preferred option.....	12
Costs and net benefits of alternative options	13
Implementation and Evaluation	13
<i>Implementation</i>	13
<i>Evaluation</i>	13

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 Foundation¹⁵, 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 drugs¹⁶.

In a 2000 study¹⁷ 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 workers¹⁸, [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)¹⁹ 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)²⁰ 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)²¹ 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.

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

16 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

17 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.

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

19 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.

20 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.

21 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.

A report²² 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 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 million²³. According to the Australian Drug Foundation, the following statistics demonstrate the extent of the impact of drugs and alcohol in Australian workplaces:²⁴

- 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

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

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

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

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 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 case²⁵ 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.

²⁵ 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’²⁶.

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.

²⁶ <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 industry²⁷, 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.²⁸

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.

²⁷ 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'

²⁸ 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.

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 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)				
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.