

## EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment

Subject – *Building and Construction Industry (Improving Productivity) Act 2016*  
*Code for the Tendering and Performance of Building Work Amendment*  
*Instrument 2017*

The *Building and Construction Industry (Improving Productivity) Act 2016* (the BCI 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 (subsection 34(1)).

Section 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make an instrument of legislative character the power shall, unless the contrary intention appears, be construed as including a power to repeal, rescind, revoke, amend or vary any such instrument.

The *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code), issued under subsection 34(1) of the BCI Act, contains requirements in relation to enterprise agreement content that affect the eligibility of a building contractor or building industry participant to submit expressions of interest, tender for and be awarded Commonwealth funded building work. The 2016 Code commenced on 2 December 2016.

The 2016 Code currently provides that until 29 November 2018, the enterprise agreement content rules in sections 11, 11A and 15 do not apply in respect of an enterprise agreement made before 2 December 2016. This means that building contractors and building industry participants that are covered by an enterprise agreement made before 2 December 2016 that is not code compliant are eligible to submit expressions of interest, tender for and be awarded Commonwealth funded building work before 29 November 2018.

This reflected subsection 34(2E) of the BCI Act as it stood prior to the commencement of the *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (the Amendment Act). It provided that if a document issued under subsection 34(1) of the BCI Act includes requirements in relation to the content of building enterprise agreements, a building industry participant may, before 29 November 2018, submit expressions of interest, tender for and be awarded building work funded (whether directly or indirectly) by the Commonwealth or a Commonwealth authority even if a building enterprise agreement, made before the document is issued, that covers the building industry participant does not comply with any one or more of the requirements.

The Amendment Act amended subsection 34(2E) of the BCI Act to:

- bring forward the expiry of the transitional exemption to the end of 31 August 2017; and
- limit the scope of the transitional exemption to only enabling the submitting of expressions of interest or tenders.

The Amendment Act also provides that the amendments made to subsection 34(2E) of the BCI Act only apply in relation to expressions of interest or tenders submitted after those amendments commence.

The purpose of the *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (the Amendment Instrument) is to align the 2016 Code with new subsection 34(2E) of the BCI Act and to provide additional transitional exemptions to assist building contractors and building industry participants with the transition to compliance with the 2016 Code.

Details of the Amendment Instrument are set out at [Attachment A](#).

An advance release of the code of practice that was proposed to be made under subsection 34(1) of the BCI Act was made available on the Department of Employment'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 advance release since it was first published in April 2014.

Consultation on the Amendment Instrument was not undertaken as it does not substantially alter existing arrangements.

The Office of Best Practice Regulation has advised that no Regulation Impact Statement is required as the changes are minor in nature (OBPR reference number 21897).

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

The Amendment Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Instrument commences on the later of the start of the day after the instrument is registered on the Federal Register of Legislation and the commencement of the Amendment Act.

**Section 1 – Name**

1. This section provides that the name of this instrument is the *Code for the Performance and Tendering of Building Work Amendment Instrument 2017* (the Amendment Instrument).

**Section 2 – Commencement**

2. This section provides for the commencement of the Amendment Instrument.

**Section 3 – Authority**

3. This section provides that the Amendment Instrument is made under subsection 34(1) of the *Building and Construction Industry (Improving Productivity) Act 2016* (the BCI Act).

**Section 4 – Schedules**

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

**Schedule 1 – Amendments**

***Code for the Tendering and Performance of Building Work 2016***

**Item 1 – Subsection 11(2)**

5. Subsection 11(1) prohibits code covered entities from being covered by an enterprise agreement in respect of building work which includes certain clauses. Subsection 11(3) provides a non-exhaustive list of examples of clauses that are prohibited by subsection 11(1).
6. Sections 8, 24 and 26 of the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code) require code covered entities and funding entities seeking to engage a building contractor or building industry participant to undertake building work to make compliance with section 11 a condition of submitting and expression of interest or tender, and prohibit them from entering into agreements or contracts in respect of building work with a contractor or participant that does not comply with section 11.
7. Subsection 11(2) currently contains a transitional exemption from the requirements in subsections 11(1) and 11(3). It 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 2 December 2016.
8. Item 1 repeals and substitutes 11(2). New subsection 11(2) provides that subsections 11(1) and 11(3) are subject to Schedule 5.

**Item 2 – Subsections 11A(2) and 15(2)**

9. Subsection 11A(1) prohibits code covered entities from being covered by an enterprise agreement in respect of building work that contains clauses which purport to remedy, or render ineffective clauses which are inconsistent with section 11, or that requires or provides for the application of terms and conditions in an enterprise agreement that does not cover and apply to the relevant employer and employees.

10. Subsection 11A(2) currently 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 2 December 2016.
11. Subsection 15(1) 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 the *Fair Work Act 2009*. If the dispute settlement term provides for arbitration of a dispute or other binding outcome, the term must require any decision of the arbiter to be consistent with the code of practice.
12. Subsection 15(2) currently 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 2 December 2016.
13. Item 2 repeals and substitutes subsections 11A(2) and 15(2). New subsections 11A(2) and 15(2) provide that subsections 11A(1) and 15(1) respectively are subject to Schedule 5.

Item 3 – At the end of the instrument

14. Item 3 inserts a new Schedule 5. Item 1 of new Schedule 5 deals with the application of sections 11, 11A and 15.
15. Subitem 1(1) of new Schedule 5 provides that subsections 11(1) and 11(3), 11A(1) and 15(1) do not apply in relation to an enterprise agreement made before 2 December 2016 that covers a building contractor, building industry participant, or a related entity of a building contractor or building industry participant, to the extent that the requirements in those subsections must be met for the purposes of:
  - (a) the lodging of an expression of interest or tender by the contractor or participant before 1 September 2017; or
  - (b) the awarding, before 29 November 2018, of building work relating to an expression of interest or tender lodged by the contractor or participant in the period beginning on 2 December 2016 and ending at the commencement of the *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (the Amendment Act commencement); or
  - (c) the undertaking of building work referred to in paragraph (b); or
  - (d) the awarding, before 1 September 2017, of building work relating to an expression of interest or tender lodged by the contractor or participant after the Amendment Act commencement if the enterprise agreement does not apply to the contractor, participant or related entity in respect of that building work; or
  - (e) the undertaking of building work referred to in paragraph (d).
16. The effect of subitem 1(1) of new Schedule 5 is as follows:
  - A building contractor or building industry participant may lodge an expression of interest or tender for Commonwealth funded building work before 1 September 2017, even if the contractor, participant or a related entity is covered by an enterprise agreement in respect of building work, made before 2 December 2016, that does not comply with one or more of subsections 11(1) and (3), s11A(1) and 15(1) (paragraph 1(1)(a)).

- If a building contractor or building industry participant lodged an expression of interest or tender between 2 December 2016 and the Amendment Act commencement that contractor or participant may, before 29 November 2018, be awarded Commonwealth funded building work relating to that expression of interest or tender, even if the contractor, participant or a related entity is covered by an enterprise agreement in respect of building work, made before 2 December 2016, that does not comply with one or more of subsections 11(1) and (3), 11A(1) and 15(1) (paragraph 1(1)(b)).
  - Subsections 11(1) and (3), 11A(1) and 15(1) will not apply in relation to an enterprise agreement made before 2 December 2016 that covers the contractor, participant or related entity to the extent that those subsections must be met when the contractor or participant is undertaking the building work referred to in paragraph 1(1)(b) (paragraph 1(1)(c)).
  - If a building contractor or building industry participant lodges an expression of interest or tender for Commonwealth funded building work after the Amendment Act commencement that contractor or participant may, before 1 September 2017, be awarded that work even if the contractor, participant or a related entity are covered by an enterprise agreement that does not comply with one or more of subsections 11(1) and (3), 11A(1) and 15(1), provided that the enterprise agreement does not apply to the contractor, participant or related entity in respect of the building work that is the subject of the expression of interest or tender (paragraph 1(1)(d)).
  - This means that building contractors and building industry participants that are covered by multiple enterprise agreements (made before 2 December 2016) can be awarded building work during this period if they ensure that the particular enterprise agreement/s that will apply to the work that is the subject of the expression of interest or tender comply with the 2016 Code.
  - Subsections 11(1) and (3), 11A(1) and 15(1) will not apply in relation to an enterprise agreement made before 2 December 2016 that covers the contractor, participant, or related entity, but does not apply in relation to the particular work, to the extent that those subsections must be met when the contractor or participant is undertaking the building work referred to in paragraph 1(1)(d) (paragraph 1(1)(e)).
17. Subitem 1(2) of new Schedule 5 provides that subsections 11(1) and (3), 11A(1) and 15(1) do not apply in relation to an enterprise agreement that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant if:
- (a) the enterprise agreement was made before 2 December 2016 and applies to the contractor, participant or related entity in respect only of building work relating to an expression of interest or tender lodged by the contractor or participant before 2 December 2016; or
  - (b) the enterprise agreement was made before 25 April 2014 and that agreement has not been varied in accordance with section 207 of the *Fair Work Act 2009* (FW Act).

18. The effect of subitem 1(2) of Schedule 5 is as follows:
- A building contractor or building industry participant does not need to take action to ensure that enterprise agreements made before 2 December 2016 that cover that contractor, participant or related entity are compliant with the 2016 Code if those enterprise agreements only apply to building work that relates to an expression of interest or tender lodged before 2 December 2016 (i.e. building work to which the *Building Code 2013* applies or applied) (paragraph 1(2)(a)).
  - This means that building contractors and building industry participants do not need to make enterprise agreements made before 2 December 2016 compliant with the 2016 Code if those enterprise agreements will not apply to any building work for which an expression of interest or tender was lodged after the commencement of the 2016 Code (i.e. building work to which the 2016 Code applies).
  - A building contractor or building industry participant may lodge expressions of interest, tender for and be awarded Commonwealth funded building work even if the contractor, participant or a related entity is covered by an enterprise agreement made before 25 April 2014 that does not comply with the 2016 Code, provided that agreement has not been varied in accordance with section 207 of the FW Act (paragraph 1(2)(b)).
  - This means that building contractors and building industry participants do not need to make enterprise agreements made on or before 24 April 2014 (and not varied) compliant with the 2016 Code.
  - This reflects the intention, as stated in the advance release of the code of practice that was made available on the Department of Employment's website in April 2014 and updated in November 2014 that the enterprise agreement content rules would only apply to enterprise agreements that were made after 24 April 2014.
19. Other than as provided in item 1 of new Schedule 5, from 1 September 2017 onwards, a building contractor or building industry participant may only lodge expressions of interest, tender for and be awarded Commonwealth funded building work if any enterprise agreement in respect of building work that covers them, or a related entity, is code compliant.
20. For the avoidance of doubt, a building contractor or building industry participant that was awarded Commonwealth funded building work before the commencement of the Amendment Act is entitled to undertake, or continue to undertake, that work after the commencement of the Amendment Act.

**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 Amendment Instrument 2017***

The *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (the Amendment Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview**

The *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code), issued under subsection 34(1) of the *Building and Construction Industry (Improving Productivity) Act 2016* (the BCI Act), contains requirements in relation to enterprise agreement content that affect the eligibility of a building contractor or building industry participant to submit expressions of interest, tender for and be awarded Commonwealth funded building work. The 2016 Code commenced on 2 December 2016.

The human rights implications of the enterprise agreement content requirements are dealt with comprehensively in the Statement of Compatibility with Human Rights for the 2016 Code.<sup>1</sup>

The 2016 Code currently provides that until 29 November 2018, the enterprise agreement content rules in sections 11, 11A and 15 do not apply in respect of an enterprise agreement made before 2 December 2016. This means that building contractors and building industry participants that are covered by an enterprise agreement made before 2 December 2016 that is not code compliant are eligible to submit expressions of interest, tender for and be awarded Commonwealth funded building work before 29 November 2018.

This reflected subsection 34(2E) of the BCI Act as it stood prior to the commencement of the *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (the Amendment Act). It provided that if a document issued under subsection 34(1) of the BCI Act includes requirements in relation to the content of building enterprise agreements, a building industry participant may, before 29 November 2018, submit expressions of interest, tender for and be awarded building work funded (whether directly or indirectly) by the Commonwealth or a Commonwealth authority even if a building enterprise agreement, made before the document is issued, that covers the building industry participant does not comply with any one or more of the requirements.

The Amendment Act amended subsection 34(2E) of the BCI Act to:

- bring forward the expiry of the transitional exemption to the end of 31 August 2017; and
- limit the scope of the transitional exemption to only enabling the submitting of expressions of interest or tenders.

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<sup>1</sup> *Explanatory Statement to the Code for the Tendering and Performance of Building Work*  
<https://www.legislation.gov.au/Details/F2016L01859/Explanatory%20Statement/Text>

The Amendment Act also provides that the amendments made to subsection 34(2E) of the BCI Act only apply in relation to expressions of interest or tenders submitted after those amendments commence.

The purpose of the Amendment Instrument is to align the 2016 Code with new subsection 34(2E) of the BCI Act and to provide additional transitional exemptions to assist building contractors and building industry participants with the transition to compliance with the 2016 Code. It does not introduce any new enterprise agreement content requirements into the 2016 Code.

### **Human rights Implications**

The Amendment Instrument does not engage any of the applicable rights or freedoms.

### **Conclusion**

The amendments to the 2016 Code contained in the Amendment Instrument are 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* as they do not engage any of those rights or freedoms.

**Minister for Employment, Senator the Hon Michaelia Cash**