

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
(Infrastructure Exemptions) 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) is issued under subsection 34(1) of the BCI Act. A building contractor or building industry participant that could be required to comply with the 2016 Code under section 34 of the BCI Act becomes subject to the 2016 Code from the first time they submit an expression of interest or tender (howsoever described) for Commonwealth funded building work on or after the commencement of the 2016 Code (section 6). The 2016 Code commenced on 2 December 2016.

Section 6A of the 2016 Code currently permits the Australian Building and Construction Commissioner (the ABC Commissioner) to exempt a building contractor or building industry participant from the 2016 Code if the ABC Commissioner is satisfied that building work performed by the contractor or participant involves the provision of certain essential services, and that granting the exemption would be appropriate having regard to the objective in paragraph 5(a) of the 2016 Code.

The *Code for the Tendering and Performance of Building Work Amendment (Infrastructure Exemptions) Instrument 2017* (the Amendment Instrument) inserts new section 6B which requires the ABC Commissioner, on an application by a building contractor or building industry participant, to grant an exemption from the 2016 Code (an infrastructure exemption) if he or she is satisfied that the principal business of the contractor or participant involves performing work for the provision of certain essential services, and the principal building work of the contractor or participant involves performing work for the provision of essential services infrastructure.

Details of the Amendment Instrument are set out in Attachment A.

The Australian Building and Construction Commission was consulted on the Amendment Instrument.

The Office of Best Practice Regulation (OBPR) has advised that no Regulation Impact Statement is required as the changes are minor in nature (OBPR reference number 22666).

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 day after it is registered on the Federal Register of Legislation.

ATTACHMENT A

Section 1 – Name

1. This section provides that the name of this instrument is the *Code for the Tendering and Performance of Building Work Amendment (Infrastructure Exemptions) 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 section 34 of the *Building and Construction Industry (Improving Productivity) Act 2016*.

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 the Amendment Instrument has effect according to its terms.

Schedule 1 – Amendments

Code for the Tendering and Performance of Building Work 2016

Item 1 – Subsection 3(1)

5. Item 1 inserts new definitions that are relevant to new section 6B.

Item 2 – After section 6A

6. Item 2 inserts new section 6B, which requires the Australian Building and Construction Commissioner (the ABC Commissioner) to exempt certain building contractors or building industry participants involved in essential services provision from the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code). This exemption is referred to as an infrastructure exemption.
7. Subsection 6B(1) enables a building contractor or building industry participant to apply to the ABC Commissioner for an infrastructure exemption.
8. Subsection 6B(2) requires the ABC Commissioner to grant an infrastructure exemption if the Commissioner is satisfied that:
 - the principal business of the building contractor or building industry participant involves performing work for the provision of essential services related to supply of electricity, natural gas, water, waste water, or telecommunications; and
 - the principal building work of the building contractor or building industry participant involves performing work for the provision of essential services infrastructure.

9. Subsection 6B(5) defines essential services infrastructure to mean systems or networks to which consumers can connect for supply of electricity, natural gas, water, waste water, or telecommunications. Those systems or networks must also be important for the life, the personal safety or health, or the welfare, of the population or a significant part of it, or make a significant contribution to the Australian economy or an important part of it.
10. An infrastructure exemption must be issued in writing and applies for the period specified in the exemption or, if no period is specified, until the exemption is revoked (subsection 6B(3)).
11. The ABC Commissioner must revoke an infrastructure exemption (including an exemption issued for a specified period) if the Commissioner is satisfied that paragraph 6B(2)(a) or (b) no longer applies in relation to the building contractor or building industry participant (subsection 6B(4)).
12. The revocation of an infrastructure exemption under subsection 6B(4) does not prevent a building contractor or building industry participant from applying for an exemption under section 6A of the 2016 Code.
13. Subsections 6B(6) and (7) explain the effect of an infrastructure exemption.
14. If the building contractor or building industry participant is already a code covered entity, the effect of an infrastructure exemption is that the entity is deemed to not be a code covered entity while the exemption applies (subsection 6B(6)).
15. If a building contractor or building industry participant is not a code covered entity, the effect of an infrastructure exemption is that section 6 does not apply while the infrastructure exemption applies (subsection 6B(7)). This means that the building contractor or building industry participant will not become a code covered entity as a result of submitting an expression of interest or tender (howsoever described) for Commonwealth funded building work while the infrastructure exemption applies.

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 (Infrastructure Exemptions) Instrument 2017

The *Code for the Tendering and Performance of Building Work Amendment (Infrastructure Exemptions) 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*, commenced on 2 December 2016.

Section 6A of the 2016 Code currently permits the Australian Building and Construction Commissioner (the ABC Commissioner) to exempt a building contractor or building industry participant from the 2016 Code if the ABC Commissioner is satisfied that building work performed by the contractor or participant involves the provision of certain essential services, and that granting the exemption would be appropriate having regard to the objective in paragraph 5(a) of the 2016 Code.

The Amendment Instrument inserts new section 6B which requires the ABC Commissioner, on an application by a building contractor or building industry participant, to grant an exemption from the 2016 Code (an infrastructure exemption) if he or she is satisfied that the principal business of the contractor or participant involves performing work for the provision of certain essential services, and the principal building work of the contractor or participant involves performing work for the provision of essential services infrastructure.

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