

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Jobs and Industrial Relations

Subject – *Building and Construction Industry (Improving Productivity) Act 2016*
Code for the Tendering and Performance of Building Work Amendment
(Exemptions) Instrument 2019

Subsection 34(1) of the *Building and Construction Industry (Improving Productivity) Act 2016* (the Act) enables the Minister for Jobs and Industrial Relations to, by legislative instrument, issue a code of practice that is to be complied with by persons in respect of building work.

Section 33(3) of the *Acts Interpretation Act 1909* provides that where an Act confers a power to make an instrument of a 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 Building Code 2016), made under subsection 34(1) of the Act, sets out the Commonwealth Government's expected standards of conduct for building industry participants that seek to be, or are involved in, Commonwealth funded building work. The Building Code 2016 commenced on 2 December 2016.

In addition to obligations placed on building industry participants, the Building Code 2016 places obligations on funding entities (currently only non-corporate Commonwealth entities) in relation to certain directly and indirectly Commonwealth funded building and construction projects. Compliance with these obligations by non-corporate Commonwealth entities that are intelligence or security agencies has the potential to prejudice Australia's national security by revealing the Commonwealth's interest in certain sensitive building and construction projects. For example, such agencies are required to include statements about the application of the Building Code 2016 in requests for expressions of interest or tender, particular contract clauses and reporting requirements.

The *Code for the Tendering and Performance of Building Work Amendment (Exemptions) Instrument 2019* (the Amendment Instrument) addresses the possibility that compliance with the Building Code 2016 may prejudice Australia's national security. The Amendment Instrument amends the definition of 'Commonwealth funded building work' in the Building Code 2016, and makes other consequential amendments, so that the obligations on funding entities do not apply in relation to building work which forms part of a project to support the operations of an intelligence or security agency where the Minister responsible for the intelligence or security agency has determined in writing that disclosing the connection of the Commonwealth with the work or project would prejudice security.

A written determination by the Minister responsible for the intelligence or security agency that disclosing the connection of the Commonwealth with the work or project would prejudice security will not be a legislative instrument.

Determinations will not be required to be made publicly available or be subject to merits review, as this would reveal the Commonwealth's interest in the project and defeat the objective of the Amendment Instrument, which is to protect the Commonwealth's national security interests by ensuring sensitive building works are not identifiable as being Commonwealth funded. However, the Inspector General of Intelligence and Security has the power to inquire into compliance by an intelligence or security agency with Commonwealth laws, including the Building Code 2016.

Building work that is excluded from the definition of 'Commonwealth funded building work' will be treated as 'privately funded building work' for the purposes of the Building Code 2016 (as defined in item 9 of Schedule 1 to the Building Code 2016). As such, existing code covered entities will still be required to comply with the Building Code 2016 when undertaking that work, just as they would be when undertaking other privately funded building work. The exclusion of projects from the definition of 'Commonwealth funded building work' will only impact the funding entity's obligations in relation to that work.

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

Consultation

The Australian Building and Construction Commission and Department of Defence were consulted on the development of the Amendment Instrument. This level of consultation is appropriate given the measures only affect obligations on Commonwealth entities, not obligations on building contractors or building industry participants more generally.

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 25071).

A Statement of Compatibility with Human Rights (the Statement) 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.

The Hon Kelly O'Dwyer MP, Minister for Jobs and Industrial Relations

Details of the Code for the Tendering and Performance of Building Work Amendment (Exemption) Instrument 2019

Part 1—Preliminary

Section 1 – Name

Section 1 provides that the name of the instrument is the *Code for the Tendering and Performance of Building Work Amendment (Exemption) Instrument 2019* (the Amendment Instrument).

Section 2 – Commencement

Section 2 provides that the Amendment Instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

Section 3 specifies that the Amendment Instrument is made under the *Building and Construction Industry (Improving Productivity) Act 2016*.

Section 4 – Schedules

Section 4 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) (definition of *commonwealth funded building work*)

Item 1 repeals the definition of ‘Commonwealth funded building work’ in section 3(1) and it replaces it with a new definition which provides that ‘Commonwealth funded building work’ means building work described in any of items 1 to 8 of Schedule 1, other than building work to which item 10 of that Schedule applies.

This item is consequential on the insertion of new item 10 into Schedule 1 to the Building Code 2016 by item 5.

Item 2 – Subsection 3(1)

Item 2 inserts new definitions of ‘intelligence or security agency’ and ‘security’ in subsection 3(1). The definitions have the same meaning as in s 85ZL of the *Crimes Act 1914* and the *Australian Security Intelligence Organisation Act 1979* respectively.

This item is consequential on the insertion of new item 10 into Schedule 1 to the Building Code 2016 by item 5.

Item 3 – Subsection 6(3)

Item 3 amends subsection 6(3) to replace the reference to ‘Schedule 1’ with a reference to ‘items 1 to 9 of Schedule 1’. This reflects the insertion of new item 10 into Schedule 1 to the Building Code 2016 by item 5.

Item 4 – Subsections 26(1), (2), (3), (4), (7) and (8)

Item 4 amends subsections 26(1), (2), (3), (4), (7) and (8) to replace the references to ‘building work with’ with references to ‘Commonwealth funded building work with’.

Section 26 contains obligations that must be complied with by funding entities when directly entering into contracts in respect of building work with code covered entities.

Item 4 replaces the relevant references to ‘building work’ with ‘Commonwealth funded building work’ to ensure that the obligations in section 26 do not apply in relation to building work described in item 1 of Schedule 1 to the Building Code 2016 to which new item 10 of Schedule 1 to the Building Code 2016 applies.

Replacing these references ensures that the contracting obligations on funding entities in section 26 do not apply to contracts in respect of Commonwealth building work if a Minister responsible for an intelligence or security agency has determined in writing that disclosing the connection of the Commonwealth with the building work or project would prejudice security.

Item 5 – Item 9 of Schedule 1

Item 5 repeals item 9 of schedule 1 to the Building Code 2016 and replaces it with new items 9 and 10.

New item 9 provides for building work, described as *privately funded building work*, which either:

- does not come within the descriptions contained in items 1 to 8, or
- comes within the descriptions contained in items 1 to 8 but to which item 10 also applies.

The effect of new item 9 of Schedule 1 is that building work that is excluded from the definition of ‘Commonwealth funded building work’ under new item 10 will be treated as ‘privately funded building work’ for the purposes of the Building Code 2016. As such, existing code covered entities will still be required to comply with the Building Code 2016 when undertaking that work, just as they would be when undertaking other privately funded building work.

New item 10 of Schedule 1 applies to building work which meets the following criteria:

- the building work forms part of a project to support the operations of an intelligence or security agency; and
- the Minister, who administers the provision of the Act under which the agency exists or the Department that the agency forms part of, has determined in writing that disclosing the connection of the Commonwealth with the work would prejudice security.

The effect of new item 10 of Schedule 1, along with the consequential amendments in items 1 and 2 of the Amendment Instrument, is that building work that would otherwise fall within any of items 1 to 8 of Schedule 1 to the Building Code 2016 will not be Commonwealth funded building work if a determination referred to in item 10 has been made. This, taken with the amendments made by item 4, means funding entities will not have obligations under the Building Code 2016 in relation to that building work.

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 (Exemptions) Instrument 2019

The *Code for the Tendering and Performance of Building Work Amendment (Exemptions) Instrument 2019* (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 Building Code 2016) is made under s 34(1) of the *Building and Construction Industry (Improving Productivity) Act 2016*. The Building Code 2016 places a number of obligations on funding entities (currently only non-corporate Commonwealth entities) in relation to certain directly and indirectly Commonwealth funded building and construction projects.

Obligations on funding entities under the Building Code 2016 include making certain statements about the application of the Building Code 2016 to projects in funding agreements, requests for expressions of interest or tender and resulting contracts. Where the funding entity is a security or intelligence agency, the presence of such statements may reveal the Commonwealth's involvement in a sensitive building and construction project and this is potentially prejudicial to Australia's national security.

The Amendment Instrument amends the Building Code 2016 so that the obligations on funding entities do not apply to building work which forms part of a project to support the operations of an intelligence or security agency where the Minister responsible for the intelligence or security agency has determined in writing that disclosing the connection of the Commonwealth with the work or project would prejudice security. This is achieved by providing a mechanism for the relevant Commonwealth Minister to exempt certain building work from the definition of 'Commonwealth funded building work' in section 3 of the Building Code 2016 and making other consequential amendments.

The objective of the Amendment Instrument is to protect the Commonwealth's national security interests by ensuring sensitive building and construction work is not identifiable as being Commonwealth funded.

Determinations will not be required to be made publicly available or be subject to merits review, as this would reveal the Commonwealth's interest in the project and defeat the objective of the Amendment Instrument, which is to protect the Commonwealth's national security interests by ensuring sensitive building works are not identifiable as being Commonwealth funded. However, the Inspector General of Intelligence and Security has the power to inquire into compliance by an intelligence or security agency with Commonwealth laws, including the Building Code 2016.

Human rights implications

The Amendment Instrument does not engage any of the applicable rights or freedoms. Specifically, the Amendment Instrument does not alter the application of work health and safety laws or workplace relations laws that would otherwise apply to the building work.

Further, building work which is excluded from the definition of ‘Commonwealth funded building work’ on security grounds will be considered ‘privately funded building work’ (as defined in item 9 of Schedule 1 to the Building Code 2016). As such, while obligations on funding entities under the Building Code 2016 will not apply, existing code covered entities will still be required to comply with the Building Code 2016 when undertaking that work, just as they would be when performing other privately funded building work.

Conclusion

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* as it does not engage any of those rights or freedoms.