

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Employment and Workplace Relations

Subject – *Building and Construction Industry (Improving Productivity) Act 2016*  
*Code for the Tendering and Performance of Building Work Amendment*  
*Instrument 2022*

The *Building and Construction Industry (Improving Productivity) Act 2016* (the BCIIIP Act) requires the Minister for Employment and Workplace Relations to issue a code of practice in relation to procurement matters relating to building work (subsections 34(1) and 34(2)(a)). This code of practice must include the mandatory matters specified in section 34; for example, requiring building products to comply with Australian Standards (s 34(2B)).

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 Building Code 2016) is issued under subsection 34(1) of the BCIIIP Act. The Building Code 2016 was made by the former Minister for Employment and commenced on 2 December 2016.

The Building Code 2016 currently imposes restrictions in a range of areas, including the ability of parties to agree to certain clauses being included in enterprise agreements. Many of these restrictions have the practical effect that certain building and construction workers do not have the same rights as other workers.

Prior to the 2022 federal election, the Government committed to abolishing the Australian Building and Construction Commission, and repealing the BCIIIP Act and Building Code 2016. In doing so, the Government is focused on providing a balanced and consistent workplace relations framework with an effective compliance regime which provides procedural and substantive fairness to all parties in the construction industry.

Until the BCIIIP Act is repealed, it is not possible to repeal the Building Code 2016. As an interim measure, the *Code for the Tendering and Performance of Building Work Amendment Instrument 2022* (the Amendment Instrument) amends and streamlines the Building Code 2016 to remove the majority of the requirements it currently imposes, leaving only those that section 34 of the BCIIIP Act requires and certain transitional measures. It also removes the ABC Commissioner's role under the Building Code 2016 in relation to granting exemptions and recommending exclusion sanctions. This is a swift and measured step towards the Government's election commitment of repealing the Building Code 2016 and abolishing the ABCC, to the extent possible under the BCIIIP Act until that Act is repealed. Further, removing most of the obligations on building contractors and building industry participants will remove unnecessary regulation.

The Amendment Instrument retains the ability for essential services providers and essential services infrastructure providers to be exempted from the Building Code 2016, and maintains existing exemptions that have been granted. The Amendment Instrument also provides that exclusion sanctions currently in force continue in effect. There is currently one exclusion sanction in force, which was imposed by the former Minister for Industrial Relations following the fatality of an apprentice.

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

Central agencies and key funding entities including the Department of Finance, the Department of Defence and the Department of Infrastructure, Transport, Regional Development, Communications and the Arts were consulted on the Amendment Instrument. This level of consultation is appropriate given that the key obligations that remain under the Building Code 2016 are imposed on funding entities, and the remaining obligations are required by section 34 of the BCIP Act. The repeal of the Building Code 2016 has been a long-standing commitment of the Government.

The Office of Best Practice Regulation (OBPR) has advised that no Regulation Impact Statement is required as the changes are minor in nature (OBPR22-02641).

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 Instrument 2022* (the Amendment Instrument).

### **Section 2 – Commencement**

2. This section provides for the commencement of the Amendment Instrument. The amendment instrument will commence on the day after it is registered.

### **Section 3 – Authority**

3. This section provides that the Amendment Instrument is made under section 34(1) of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP 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 the Amendment Instrument has effect according to its terms.

### **Schedule 1 – Amendments**

#### ***Code for the Tendering and Performance of Building Work 2016 (Building Code 2016)***

##### **Item 1 – Subsection 3(1)**

5. Subsection 3(1) provides a list of definitions relevant to the Building Code 2016. This item repeals a number of those definitions. These definitions are no longer required as a result of the repeal or amendment of provisions that use those terms.

##### **Item 2 – Subsection 3(1) (note)**

6. This item repeals the note under subsection 3(1). This note currently explains that the listed terms used in the Building Code 2016 have meanings defined in the BCIIP Act. This note is no longer required as a result of the repeal or amendment of provisions that use the listed terms.

##### **Item 3 – Section 5**

7. This item repeals section 5. Section 5 currently outlines the rationale for the development of the Building Code 2016. The Amendment Instrument changes the contents of the Building Code such that this section 5 is no longer required.

##### **Item 4 – Section 6 (note 4)**

8. This item repeals the second sentence of note 4 to section 6. Section 6 outlines when a building contractor or building industry participant first becomes subject to the Building Code 2016. Note 4 explains that once a building contractor or building industry participant is subject to the Building Code 2016, it and its related entities must comply with the code of practice. The second sentence of note 4 currently explains that some of the obligations only apply in respect of Commonwealth funded building work, such as those in s 8(2) – (7) and Part 6. This explanation is no longer needed because the remaining obligation imposed on a building contractor or building industry participant (section 11F) applies in respect of all building work rather than just Commonwealth funded building work.

#### Item 5 – Subsection 6A(1)

9. This item replaces ‘ABC Commissioner’ with ‘Minister’ in subsection 6A(1). Subsection 6A(1) currently provides that the Australian Building and Construction Commissioner (ABC Commissioner) may exempt a building contractor or building participant from the Building Code 2016 if satisfied certain conditions are met.

#### Item 6 – paragraph 6A(1)(b)

10. This item replaces the reference in paragraph 6A(1)(b) to the objective in subparagraph 5(a) to provide that one of the conditions which the Minister is to be satisfied of to exempt essential service providers is that it is appropriate in the circumstances. This is necessary because section 5 is to be repealed.

#### Items 7 to 9 - Subsection 6B(1), Subsection 6B(2), Subsection 6B(4)

11. These items replace references to ‘ABC Commissioner’ with ‘Minister’ in section 6B. Subsection 6B(1) currently enables a building contractor or building industry participant to apply to the ABC Commissioner for an infrastructure exemption. Subsection 6B(2) currently requires the ABC Commissioner to grant an infrastructure exemption if satisfied certain conditions are met. Subsection 6B(4) currently requires the ABC Commissioner to revoke an infrastructure exemption if satisfied that the conditions required to issue an exemption no longer apply.
12. Instead of applying to the ABC Commissioner for an exemption, building contractors or building industry participants will now make an application to the Minister. The Minister will now have the role of granting an infrastructure exemption.

#### Items 10 and 11 - Sections 7 to 11E, Sections 12 to 16A

13. These items repeal all of Part 3 except for section 11F. Part 3 contains requirements which are to be complied with by code covered entities in respect of building work. Many of these requirements duplicate existing laws, while others, such as the restrictions on enterprise agreements (section 11) and freedom of association (section 13), have the effect of imposing additional requirements on building and construction workers compared to those in other industries.
14. The remaining provision under Part 3, section 11F, concerns the engagement of non-citizens and non-residents. Section 34(2D) of the BCIIIP Act requires that the Building Code include such a provision.

#### Item 12 - Part 4

15. This item repeals Part 4, which covers compliance, monitoring and enforcement arrangements. The BCIIIP Act includes provisions relating to regulation of the Building Code which are sufficient to ensure compliance with the interim code.
16. The Amendment Instrument also includes transitional provisions to maintain any exclusion sanctions on foot prior to the Amendment Instrument coming into force, as outlined further below.

Items 13 to 15 – Sections 23 to 25, Sections 26(1) to (7), Sections 27 to 29

17. These items repeal all of the requirements for funding entities under Part 5 other than provisions that are required by the BCIP Act. These required provisions are section 25A (which sets out particular information to be provided by the preferred tenderer, as required by s 34(2A) of the BCIP Act) and subsection 26(8) (which ensures a funding entity require building industry participants to only use products that comply with the relevant Australian Standards, as required by s 34(2B) of the BCIP Act)).

Item 17 – Part 6

18. This item repeals current Part 6, which provides for Workplace Relations Management Plans (WRMPs). These plans set out how a tenderer will comply with the Building Code 2016. This is essentially superfluous as almost all of the obligations on tenderers are being removed.
19. This item inserts a new Part 6, which provides for application and transitional provisions.
20. New Part 6 includes section 30. New subsection 30(1) preserves any exemptions given by the ABC Commissioner for essential services providers and essential services infrastructure under sections 6A or 6B prior to the Amendment Instrument's commencement. These exemptions are to be treated as if they were granted by the Minister under the amended sections 6A or 6B. New subsection 30(2) similarly preserves any pending applications for exemption made under subsection 6B(1). Pending applications are to be treated as if they were applications made to the Minister under amended subsection 6B(1).
21. New Part 6 also inserts section 31, which is a transitional provision relating to exclusion sanctions. New subsection 31(1) and 31(2) ensures that any exclusion sanction on foot prior to the Amendment Instrument's commencement continues in force.
22. New subsections 31(3) to 31(5) preserve the effects of an exclusion sanction that continues in force by virtue of subsection 31(2):
  - a code covered entity must not enter into an agreement with a subcontractor if the subcontractor is subject to an exclusion sanction, unless the Minister provides approval to do so (new subsection 31(3); previously covered by repealed paragraph 8(3)(a));
  - a code covered entity is not eligible to be awarded Commonwealth funded building work while it is subject to an exclusion sanction (new subsection 31(4); previously covered by repealed paragraph s 23(1)(b)); and
  - a funding entity must not enter into a contract in respect of Commonwealth funded building work with a code covered entity while the code covered entity is subject to an exclusion sanction (new subsection 31(5); previously covered by repealed subsection s 26(1)).

Item 17 – Schedules 2 to 5

23. This item repeals Schedules 2 to 5. The Schedules are no longer required as they concern provisions of the Building Code 2016 that are being repealed. Specifically, Schedules 2, 3 and 4 concern WRMPs, and are no longer necessary because the requirement to submit WRMPs is being removed and Schedule 5 addresses the application of sections 11, 11A and 15 which are being repealed.

## **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 2022***

The *Code for the Tendering and Performance of Building Work Amendment Instrument 2022* (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 of Legislative Instrument**

The *Code for the Tendering and Performance of Building Work Amendment Instrument 2022* (the Amendment Instrument) amends and streamlines the *Code for the Tendering and Performance of Building Work 2016* (the Building Code 2016) to remove the majority of the requirements it currently imposes, leaving only those that section 34 of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act) requires be included.

### **Human Rights Implications**

The definition of ‘human rights’ in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the core seven United Nations human rights treaties.

The code of practice engages the following rights:

- the right to equality and non-discrimination under Article 2(1) and Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 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 Article 19(2) of the ICCPR; and
- the right to just and favourable work conditions, including the right to safe and healthy working conditions in Article 7 of the ICESCR.

### **Right to equality and non-discrimination**

Both the ICCPR (Article 2(1)) and the ICESCR (Article 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 further 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.

The Amendment Instrument also removes clauses that prohibit discrimination in enterprise agreements, policies and practices (ss 11(1)(b), 11(3)(c) and 13). While this engages the right to equality and non-discrimination, protections against discrimination are sufficiently safeguarded by existing anti-discrimination laws and the *Fair Work Act 2009* (Fair Work Act).

The Building Code 2016 separately regulates participants in the building and construction industry. The requirements it imposes on code covered entities have the effect that building

and construction workers do not have the same rights as workers in other industries. Removing as many of these restrictions as possible (noting the limitations on this imposed by section 34 of the BCIP Act) will ensure that workers are treated equally, which will assist in promoting the right to equality and non-discrimination.

#### Right to freedom of association and right to just and favourable conditions of work

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. The right to freedom of association includes the right to collectively bargain without unreasonable and disproportionate interference from the state.

Article 7 of the ICESCR protects the right to just and favourable conditions of work. This includes the right of all workers to adequate and fair remuneration and safe working conditions. Further, Article 8 of the ICESCR requires States Parties to undertake to ensure the right of everyone to form trade unions and join the trade union of their choice, and the right of trade unions to operate freely.

The Amendment Instrument repeals section 11 of the Building Code 2016. Section 11 restricts the content of enterprise agreements that a code covered entity may be covered by. A code covered entity that doesn't meet the requirements of section 11 is ineligible to be awarded Commonwealth funded building work (s 23), and could be subject to an exclusion sanction (ss 18-19). These consequences could disincentivise building contractors from agreeing to include certain provisions in enterprise agreements. This would interfere with the outcome of the bargaining process by restricting the scope of negotiations, thus limiting the right to collectively bargain.

Additionally, as the restrictions in section 11 limit the inclusion of clauses relating to how work is performed and the terms and conditions of employees, this section also potentially limits the right to just and favourable conditions of work. Repealing section 11 will remove these restrictions, and thus promote the right to freedom of association and right to just and favourable conditions of work.

Section 13(1) of the Building Code engages the right to freedom of association by requiring a code covered entity to adopt and implement policies and practices, including those that allow a person to:

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

The Amendment Instrument repeals section 13, thus engaging the right to freedom of association. The Fair Work Act includes provisions that protect the right to freedom of association, meaning there will continue to be sufficient safeguards protecting this right while unnecessary duplication is removed.

The Amendment Instrument also repeals subsection 9(3), which requires code covered entities to comply with applicable work health and safety laws, and sections 16A, which relates to fitness for work. While removing these provisions engages the right to safe and healthy working conditions, it does not substantially alter existing arrangements, noting that code covered entities are already required to comply with work health and safety legislation



at the Commonwealth, state and territory levels, and that these laws also deal with fitness for work. As such, the right to just and favourable conditions of work will remain sufficiently safeguarded.

### Right to freedom of expression

Article 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. Article 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.

Currently, section 13(2) of the Building Code 2016 places limits on the right to freedom of expression by requiring code covered entities to ensure that a range of activities are not engaged in. This includes ensuring 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. Repealing section 13(2) of the Building Code 2016 will remove these limitations on the freedom of expression, and, in doing so, promote this right.

### **Conclusion**

The Amendment Instrument is compatible with human rights because it promotes the protection of human rights including the right to equality and non-discrimination, right to freedom of association, right to just and favourable conditions of work, and right to freedom of expression. To the extent it may limit the right to freedom of association and right to just and favourable work conditions, those rights are sufficiently safeguarded by other legislation.

**Minister for Employment and Workplace Relations, the Hon Tony Burke MP**