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Building and Construction Industry (Fair and Lawful Building Sites) Code 2014

Building and Construction Industry (Improving Productivity) Act 2014

I, Eric Abetz, Minister for Employment, issue the following code of practice under subsection 34(1) of the *Building and Construction Industry (Improving Productivity) Act 2014*.

Dated

Eric Abetz
Minister for Employment

ADVANCE RELEASE

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Part 1 Introductory

1 Name of code of practice

This code of practice is the Building and Construction Industry (Fair and Lawful Building Sites) Code 2014.

2 Commencement

This code of practice commences on the day that it is registered on the Federal Register of Legislative Instruments.

3 Definitions

(1) In this code of practice:

ABCC means the body referred to in subsection 29(2) of the Act.

above-entitlements payment means a payment or benefit above the amount or value of a payment or benefit required to be paid under a Commonwealth industrial instrument or industrial law (within the meaning of the FW Act).

Act means the *Building and Construction Industry (Improving Productivity) Act 2014*.

code covered entity has the meaning given by section 6.

Note 1: paragraph 34(3)(a) of the Act provides that the code may require a person to comply with it in respect to building work only if the person is a building contractor that is a constitutional corporation.

Note 2: paragraph 34(3)(b) of the Act provides that the code may require a person to comply with it only if the person is a building industry participant carrying out work in a Territory or Commonwealth place. The definition of ‘building industry participant’ includes building contractors.

commonwealth funded building work: see items 1–8 of Schedule 1.

department of finance means the Department whose Minister administers the *Public Governance, Performance and Accountability Act 2013*.

enterprise agreement has the same meaning as in the FW Act.

acquiring entity: see subsection 18(2).

funding entity: see section 4.

FW Act means the *Fair Work Act 2009*.

head contractor means the person with management or control of the building site.

individual flexibility arrangement has the same meaning as in the FW Act.

inspector means a person appointed as, or taken to be appointed as, an Australian Building and Construction Inspector under the Act.

subcontractor is not confined to an individual.

working day means a day other than a Sunday or a public holiday.

WRMP means a Workplace Relations Management Plan that is developed in accordance with this code of practice.

Note: some terms used in this code of practice have defined meanings in the Act. For the definitions of the following terms, see section 5 of the Act:

- ABC Commissioner
- building association
- building contractor
- building industry participant
- building work
- Commonwealth industrial instrument
- designated building law
- industrial action
- protected industrial action

(2) In this code of practice, an entity (the second entity) is a **related entity** of a code covered entity if the second entity is engaged in building work and is:

- (a) connected with the code covered entity by being a member of the entity; or
- (b) an associated entity (within the meaning of section 50AAA of the *Corporations Act 2001*) of the code covered entity.

Note: two entities will be associated if they are related bodies corporate.

- (3) In this code of practice, an ***exclusion sanction*** means a period during which a code covered entity is not permitted to tender for, or be awarded, Commonwealth funded building work. An exclusion sanction may:
- (a) be for any period that the ABC Commissioner is satisfied is appropriate, but no longer than 1 year in duration;
 - (b) be subject to conditions that apply the exclusion sanction only to a division of a business operating in a particular state or territory; and
 - (c) be extended to related entities if the ABC Commissioner is satisfied it is appropriate to do so.
- (4) In this code of practice, ***building work*** has the same meaning as in section 6 of the Act, but does not include:
- (a) work that is described in paragraphs 6(1)(e) and 6(1)(ea) of the Act;
 - (b) 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.

4 Funding entities

In this code of practice, each of the following is a ***funding entity***:

- (a) a non-corporate Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013*;
- (b) a corporate Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013* that is directed by the Minister for Finance to comply with this code of practice.

Part 2 Conduct

5 General

This code of practice has been developed to:

- (a) promote an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants; and
- (b) 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
- (c) establish an enforcement framework under which building industry participants may be excluded from tendering for, or being awarded, Commonwealth funded building work if they do not comply with this code of practice.

Note: the ABC Commissioner is responsible for monitoring compliance with this code of practice: see subsections 16 (a) and (b) of the Act.

6 Application of the code of practice

- (1) A building contractor or building industry participant that could be required to comply with this code of practice by section 34 of the Act becomes subject to this code of practice (a **code covered entity**) from the first time they submit an expression of interest or tender (howsoever described) for Commonwealth funded building work on or after the date this code of practice commences.

Related entities become code covered entities

- (2) A related entity of an entity (the **first entity**) becomes a code covered entity subject to this code of practice at the time the first entity becomes subject to the code of practice.

Code of practice applies to all new work

- (3) A code covered entity is subject to this code of practice in respect of all building work that is described in Schedule 1 for which an expression of interest or request for tender (howsoever described) was called on or after the date this code of practice commenced.

Note 1: see section 2 for commencement date.

Note 2: Commonwealth funded building work is a defined term, see section 3.

Note 3: related entity is a defined term, see section subsection 3(2).

Note 4: once a building contractor or building industry participant is subject to this code of practice, it and its related entities must comply with this code of practice on all new projects, including projects that are privately funded. However, some obligations in the code of practice only apply in respect of Commonwealth funded building work—see for example subsections 8(2)-(7) and Part 6.

6A Exemption for essential service providers

- (1) The ABC Commissioner may exempt a building contractor or building industry participant from this code of practice if the Commissioner is satisfied that:
 - (a) building work performed by the building contractor or building industry participant involves the provision of essential services related to supply of electricity, natural gas, water, waste water, or telecommunications; and
 - (b) granting an exemption would be appropriate having regard to the objective in subparagraph 5(a) of this code of practice.
- (2) An exemption must be issued in writing and may apply to building work performed by the building contractor or building industry participant for a period of time or may apply to a specified project.
- (3) If the building contractor or building industry participant is a code covered entity the effect of an exemption is that the entity is deemed to not be a code covered entity for the duration of the specified period or in relation to the specified project.
- (4) If the building contractor or building industry participant is not a code covered entity the effect of an exemption is that section 6 does not apply in relation to work covered by the exemption.

Part 3 Requirements to be complied with by code covered entities in respect of building work

7 General responsibilities of code covered entities

Code covered entities must:

- (a) comply with this code of practice; and
- (b) comply with any WRMP that applies to the building work; and
- (c) respond to requests for information made by the ABCC concerning matters relating to this code of practice.

8 Subcontractors and related bodies and entities

- (1) Subsections (2)–(7) apply in relation to Commonwealth funded building work only.
- (2) A code covered entity must ensure that any request for expressions of interest or requests for tender (howsoever described) for building work requires a person responding to the tender:
 - (a) to comply with this code of practice; and
 - (b) to meet the eligibility requirements set out in section 23 at the time of lodging the expression of interest or tender.
- (3) A code covered entity must not enter into an agreement in respect of building work with a subcontractor that could be required to comply with this code of practice by section 34 of the Act if:
 - (a) the subcontractor is subject to an exclusion sanction or is excluded from undertaking work funded by a state or territory government unless approval to do so is provided by the ABC Commissioner; or
 - (b) the subcontractor does not meet the requirements of section 11 of this code of practice.
- (4) A code covered entity must ensure that an agreement entered into in relation to building work with a subcontractor requires the subcontractor to act consistently with this code of practice in respect of the building work that is the subject of the agreement.

- (5) A code covered entity must ensure that subcontractors comply with this code of practice in respect of the building work that is the subject of the agreement.

Note: subsections (4) and (5) apply in respect of the conduct of all participants engaged in the relevant Commonwealth funded building work whether or not the subcontractor could be required to comply with this code of practice by s 34 of the Act. Note further, the prospective obligation in section 6 on subcontractors that could be required to comply with this code of practice by section 34 of the Act in respect of all future building work undertaken by that subcontractor.

- (6) A code covered entity must ensure as far as is reasonably practicable that subcontractors that are engaged by the code covered entity in respect of building work take remedial action to rectify non-compliant behaviour.
- (7) A code covered entity that is the head contractor in respect of building work at a particular site must ensure that all subcontractors on site comply with the WRMP that applies to the building work.
- (8) A code covered entity must ensure that each of its related entities that could be required to comply with this code of practice by section 34 of the Act comply with this code of practice in respect of building work.

9 Compliance with laws, decisions, directions and orders

- (1) A code covered entity must comply with all designated building laws that apply to the entity.

Examples

- 1 Commonwealth industrial instruments.
 - 2 Laws relating to payments to employees during periods of industrial action (strike pay).
 - 3 Laws relating to the right to enter premises where building work is performed and to have access to records.
- (2) A code covered entity must comply with the *Competition and Consumer Act 2010* to the extent that it applies to the entity in relation to tendering for, or undertaking, building work.
- (3) A code covered entity must comply with work health and safety laws to the extent that they apply to the entity in relation to building work, including strict compliance with procedures for the election of health and safety representatives and right of entry requirements.
- (4) A code covered entity must comply with its obligations under the *Migration Act 1958* and its subordinate legislation.

(5) A code covered entity must comply with all laws and other requirements that apply to the entity in relation to the security of payments that are due to persons in respect of building work.

(6) A code covered entity:

- (a) must comply with a compliance notice issued under section 99 of the Act;
- (b) must comply with a decision, direction or order made or given by a court or tribunal that applies to the entity in respect of building work; and
- (c) 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 the code covered entity in respect of building work.

Note: an infringement notice or provisional improvement notice issued by an inspector is not a decision, direction or order made or given by a court or tribunal.

(7) Subsections (5) and (6) do not apply if:

- (a) the period for payment, or for other compliance with the decision, direction or order, has not expired; or
- (b) the decision, direction or order is stayed or has been revoked.

10 Unregistered written agreements and other agreements

(1) A code covered entity must not bargain in relation to an agreement, make an agreement, or implement an agreement in respect of building work:

- (a) that deals with matters that would be not be permitted by section 11 to be included in the agreement if the agreement were an enterprise agreement; or
- (b) that provides for terms, conditions or benefits of employment of employees of the employer or the employer's subcontractors (which may include above-entitlements payments); or
- (c) that restricts or limits the form or type of engagement that may be used to engage subcontractors; and
- (d) that either:
 - (i) will not be registered, lodged or otherwise approved under the FW Act; or

- (ii) the code covered entity reasonably believes will not be registered, lodged or otherwise approved under the FW Act.
- (2) Subsection (1) does 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.

Example: an unregistered site agreement or project agreement between a head contractor and relevant union would be an unregistered written agreement.

11 Content of agreements and prohibited conduct, arrangements and practices

- (1) A code covered entity must not be covered by an enterprise agreement in respect of building work which includes clauses that:
 - (a) impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity;
 - (b) discriminate, or have the effect of discriminating against certain persons, classes of employees, or subcontractors; or
 - (c) are inconsistent with freedom of association requirements set out in section 13 of this code of practice.

Example 1: clauses that impose a requirement on the code covered entity or a subcontractor engaged by the code covered entity to employ a non-working shop steward or job delegate, or which result in the employment of a non-working shop steward or job delegate.

Example 2: clauses permitting officials, delegates or other representatives of a building association to undertake or administer induction processes. Note: Subsection (3) provides a non-exhaustive list of clauses that are not permitted to be included in enterprise agreements.

- (2) Subsections (1) and (3) apply in respect of enterprise agreements made after 24 April 2014.
- (2A) Subsections (1) and (3) apply in respect of enterprise agreements that were varied in accordance with section 207 of the FW Act.
- (3) Without limiting the generality of subsection (1), clauses are not permitted to be included in enterprise agreements that:
 - (a) 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;
 - (b) restrict the employment or engagement of persons by reference to the type of contractual arrangement that is, or may be, offered by the employer;

Example: an agreement or practice that prohibits or limits the employment of casual or daily hire employees.

- (c) require, or result in, discrimination between classes of employees because of the basis on which they are lawfully entitled to work in Australia;
- (d) 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 number of employees to be engaged, or type of employment offered to employees;
- (e) 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 engagement of subcontractors;
- (f) prescribe the terms and conditions on which subcontractors are engaged (including the terms and conditions of employees of a subcontractor);
- (g) prescribe the scope of work or tasks that may be performed by employees or subcontractors;
- (h) 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;

Example: an arrangement or practice whereby employees are selected for redundancy based on length of service alone.

- (i) prohibit the payment of a loaded rate of pay (whether or not expressed as an annual amount);

Example: an amount paid that nominally incorporates payment for ordinary time and other matters such as overtime and allowances in one loaded rate.

- (j) 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 the class of employees to which the individual employee belongs;

Example: a clause or practice that prevents an individual employee being selected to perform overtime unless other employees are similarly provided overtime.

- (k) provide for the monitoring of agreements by persons other than the employer and employees to whom the agreement applies;
- (l) include requirements to apply building association logos, mottos or indicia to company supplied property or equipment;

- (m) directly or indirectly require a person to encourage, or discourage, a person from becoming, or remaining, a member of a building association;
- (n) 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 for individual choice;
- (o) limit the ability of an employer to determine with its employees when and where work can be performed to meet operational requirements or limit an employer's ability to determine by whom such work is to be performed;
- (p) provide for the rights of an official of a building association to enter premises other than in strict compliance with Part 3-4 of the FW Act;
- (q) provide 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.

Note 1: this section does not authorise the taking of action that would constitute a contravention of the FW Act, and should be read in a manner that ensures consistency with that Act. For example, paragraph (d) does not override section 205 of the FW Act which provides that an enterprise agreement must include a consultation term that provides for consultation on major changes at the workplace.

Note 2: clauses of an enterprise agreement that are inconsistent with this section will impact on a code covered entity's eligibility to tender for or be awarded Commonwealth funded building work, see subsection 23(a) of this code of practice.

Note 3: subsection 15(1) contains additional requirements for enterprise agreement content in relation to dispute settlement terms.

Conduct by parties

- (4) A code covered entity must not engage in conduct, or implement a procedure or practice (howsoever described) in respect of building work which has, or is likely to have, any of the effects described in subsections (1) or (3) if the conduct, practice or procedure was contained in an enterprise agreement.

Example: a contractor must not attempt to circumvent the code by agreeing to run a redundancy process on the basis of a 'last on first off' rule or agree to set a schedule for rostered days off that does not allow for flexibility around operational requirements.

- (5) Subsection (4) does not apply if the conduct, practice, or arrangement is:
 - (a) expressly permitted or required by a Commonwealth industrial instrument;
 - or

- (b) necessarily linked to the code covered entity's compliance with, or conduct expressly permitted by, an industrial instrument.

Note: section 11 does not require, permit or authorise a code covered entity to fail to comply with an enterprise agreement. A failure to meet the requirements of section 11 by a code covered entity, however, renders the entity ineligible to tender for, or be awarded, Commonwealth funded work—see subsection 23(1)(a).

11A Attempts to avoid section 11 requirements

- (1) A code covered entity must not be covered by an agreement in respect of building work which includes clauses that:
 - (a) purport to remedy, or render ineffective, clauses in an enterprise agreement that are inconsistent with section 11, including clauses which:
 - (i) provide for clauses in the enterprise agreement to be read in a manner that is consistent with subsections 11(1) and (3); or
 - (ii) provide for clauses in the enterprise agreements to have no effect if they are inconsistent with subsection 11(1) or subsection 11(3); or
 - (b) require or provide for the application of terms and conditions contained in an enterprise agreement that does not cover and apply to the relevant employer and employees.

12 Above-entitlements payments and related matters

- (1) A code covered entity must not organise or take, or threaten to organise or take action with intent to coerce a contractor, subcontractor or consultant into making an above-entitlements payment in respect of building work.
- (2) A code covered entity must not exert undue influence or undue pressure on a contractor, subcontractor or consultant to make an above-entitlements payment in respect of building work.
- (3) A code covered entity, in respect of building work, must not:
 - (a) organise or take, or threaten to organise or take, action with intent to coerce a contractor, subcontractor or consultant into contributing to a particular fund or scheme, or supporting a particular product, service or arrangement; and
 - (b) apply, or attempt 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.

Example: a building contractor must not place undue pressure on a subcontractor to select a particular income protection insurance scheme or to make use of a particular training provider.

13 Freedom of association

- (1) A code covered entity must protect freedom of association in respect of building work by adopting and implementing policies and practices that:
 - (a) ensure that persons are:
 - (i) free to become, or not become, members of building associations; and
 - (ii) free to be represented, or not represented, by building associations; and
 - (iii) free to participate, or not participate, in lawful industrial activities; and
 - (iv) not discriminated against in respect of benefits in the workplace because they are, or are not, members of a building association.
- (2) Without limiting subsection (1), the code covered entity must ensure that:
 - (a) personal information is dealt with in accordance with the Privacy Act 1988 and the FW Act; and
 - (b) 'no ticket, no start' signs, or similar, are not displayed and such arrangements are not implemented; and
 - (c) signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities are not displayed; and
 - (d) 'show card' days do not occur; and
 - (e) there is:
 - (i) no discrimination against elected employee representatives; and
 - (ii) no disadvantage to elected employee representatives; and
 - (f) forms are not used to require:
 - (i) an employee to identify whether they are a member of a building association; or
 - (ii) a subcontractor to identify whether the contractor or its employees or subcontractors are a member of a building association; and

- (g) 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; and
- (h) individuals are not refused employment or engagement because they are, or are not, a member of a building association; and
- (i) the employment of employees or engagement of subcontractors is not terminated because they are, or are not, a member of a building association; and
- (j) 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 or any other conduct which implies that membership of a building association is anything other than an individual choice for each employee; and
- (k) reasonable requests from a workplace delegate to represent an employee of the code covered entity in relation to a grievance, a dispute or a discussion with a member of a building association are not refused; and
- (l) requirements are not imposed, or attempted to be imposed, on the code covered entity or a subcontractor engaged by the code covered entity to:
 - (i) employ a non-working shop steward or job delegate; or
 - (ii) hire an individual nominated by a building association; and
- (m) the code covered entity does not employ a non-working shop steward or job delegate; and
- (n) individuals are not required to pay a 'bargaining fee' (howsoever described) to a building association of which the individual is not a member, in respect of services provided by the association; and
- (o) employees must be provided a freedom of choice in deciding whether to be represented in grievance or dispute procedures (whether or not pursuant to an enterprise agreement), and, if so, by whom; and
- (p) officials, delegates, or other representatives of a building association do not undertake or administer induction processes.

14 Entry to premises where building work is performed

- (1) A code covered entity must, in relation to premises where building work is performed, strictly 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 work is performed.

Examples

- 1 The FW Act.
- 2 Work health and safety laws.

- (2) A code covered entity must, so far as is reasonably practicable, ensure that:

- (a) entry by an officer of a building association to premises where building work is performed must be for a purpose for which a right of entry could be exercised under Part 3-4 of the FW Act or a relevant work health and safety law; and

Example: a contractor could permit entry for the purposes of holding discussions with workers where the permit holder provides the requisite notice and complies with all requirements in the FW Act. However, inviting an officer of a building association to enter the site other than as could be permitted by the right of entry requirements would breach this code of practice.

- (b) when an officer of a building association seeks to enter premises, the officer must strictly comply with all applicable legislative requirements in Part 3-4 of the FW Act or a work health and safety law, including permit and notice requirements.

Note: *officer* is a defined term in the Act and includes officials and employees of a building association.

15 Dispute settlement

- (1) A code covered entity must:

- (a) 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 FW Act; and
- (b) if a dispute settlement term of an enterprise agreement in respect of building work provides for arbitration of a dispute or other binding outcome, the entity must ensure that the term requires any decision of the arbiter to be consistent with this code of practice.

- (2) Subsection (1) applies to enterprise agreements made after the date specified in subsection 11(2) of this code of practice.

16 Industrial impacts

- (1) A code covered entity must, in relation to Commonwealth funded building work:
 - (a) report actual or threatened industrial action (whether protected industrial action under section 8 of the Act or industrial action that is not protected) by employees of the code covered entity to the ABCC as soon as practicable, but no later than 24 hours, after becoming aware of the threat or action.
- (2) A code covered entity must, in relation to building work:
 - (a) report actual or threatened industrial action that is not protected action by employees of the code covered entity to the ABCC as soon as practicable, but no later than 24 hours, after becoming aware of the threat or action.
- (3) A code covered entity must, to the extent reasonably practicable, take steps to prevent or bring an end to industrial action that is not protected action taken by the employees of the entity.

Note: reasonably practical steps may include, depending on the circumstances, the taking of legal action in the Fair Work Commission or a court where remedies are available.

- (4) A code covered entity must, in relation to building work, report any request or demand by a building association, whether made directly or indirectly, 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* to the ABCC as soon as practicable, but no later than 24 hours, after the request or demand is made.

Note: subsection 9(2) requires code covered entities to comply with the *Competition and Consumer Act 2010*.

Part 4 Compliance, monitoring and enforcement arrangements

17 Notification

- (1) A code covered entity must notify the ABCC of a breach, or a suspected breach, of this code of practice as soon as practicable, but no later than 2 working days after becoming aware of the breach or suspected breach and advise the ABCC of the steps proposed to be taken to rectify the breach.
- (2) Where a notification under subsection (1) is made in relation to a breach of this code of practice, the code covered entity must notify the ABCC of the steps taken to rectify the breach within 14 days of providing the notification.

18 Consequences of breaching this code of practice

- (1) If the ABC Commissioner is satisfied that:
 - (a) a code covered entity has failed to comply with this code of practice; or
 - (b) a code covered entity has failed to comply with a compliance notice issued under section 99 of the Act in relation to this code of practice without a reasonable excuse,

the ABC Commissioner may:

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

Note: when considering whether to impose an exclusion sanction, the ABC Commissioner will consider factors such as whether the failure to comply with this code of practice was intentional, ongoing and/or subject to timely notification and voluntary rectification.

- (2) The ABC Commissioner may impose an exclusion sanction on an entity (the *acquiring entity*) that has acquired ownership or beneficial use of some or all of the assets (whether tangible or intangible) of a code covered entity (the *acquired code covered entity*) if the ABC Commissioner is satisfied that:
 - (a) the acquired code covered entity failed to comply with this code of practice; or
 - (b) the acquired code covered entity failed to comply with a compliance notice issued under section 99 of the Act in relation to this code of practice.

- (3) Subsection (2) applies if the first entity is a building industry participant or building contractor that could be required to comply with this code of practice by section 34 of the Act.

19 Decision to impose an exclusion sanction

- (1) If the ABC Commissioner proposes to impose an exclusion sanction under section 18, the ABC Commissioner must give a written notice to the code covered entity:
 - (a) informing the entity of the details of the alleged breach; and
 - (b) advising the code covered entity that they may, by a specified date (being not less than 21 days after giving the notice), make a submission to the ABC Commissioner in relation to the proposed sanction.
- (2) Where the ABC Commissioner proposes to impose an exclusion sanction on a related entity of the code covered entity, the ABC Commissioner must give the same information in subsection (1) to the related entity.
- (3) After the date specified in a notice under subsection (1), the ABC Commissioner must:
 - (a) if the code covered entity or a related entity has made a submission—consider that submission; and
 - (b) whether or not the code covered entity or a related entity has made a submission—decide whether to impose a sanction; and
 - (c) within 14 days after making that decision, give the code covered entity and any relevant related entity written notice of the decision, including the reasons for the decision.
- (4) An exclusion sanction imposed on a code covered entity takes effect on the date specified by the ABC Commissioner in the written notice of decision issued pursuant to paragraph (3)(c).
- (5) Where the ABCC proposes to impose an exclusion sanction on an acquiring entity in accordance with subsection 18(2), the ABC Commissioner must treat the acquiring entity as if it were a code covered entity for the purpose of this section.

20 Application for review by Minister

Application for review of exclusion sanction decision

- (1) A code covered entity or an acquiring entity that is subject to an exclusion sanction may apply to the Minister for review of a decision by the ABC Commissioner to impose an exclusion sanction.
- (2) The application must be made within 28 days after the date of the notice of the ABC Commissioner's decision, or such longer time as the Minister allows.
- (3) The application must:
 - (a) state the reasons why the application is being made; and
 - (b) provide any information or documents relating to those reasons.

Withdrawing an application

- (4) The code covered entity or acquiring entity may withdraw the application at any time before the review is completed.
- (5) The application may be withdrawn in writing or in another manner approved by the Minister.

21 Decision by Minister

- (1) If a code covered entity or an acquiring entity applies under section 20 for review of a decision by the ABC Commissioner, the Minister must review the decision and:
 - (a) affirm the decision; or
 - (b) vary the decision; or
 - (c) set the decision aside and substitute a new decision.
- (2) Subsection (1) does not apply if the application is withdrawn.
- (3) The Minister must give the person written notice of the Minister's decision under subsection (1).
- (4) The notice must set out:
 - (a) the terms of the decision made as a result of the review; and
 - (b) written reasons for that decision.

22 Determination of Compliance with Section 11

- (1) The ABCC may issue a determination that an enterprise agreement meets the requirements of section 11 of this code of practice.
- (2) The ABCC may provide preliminary advice on whether a proposed enterprise agreement, if made and approved in a certain form, would become an enterprise agreement that meets the requirements of section 11 of this code of practice.
- (3) A determination issued pursuant to subsection (1) is taken to be conclusive of the fact an enterprise agreement meets the requirements of section 11.

Part 5 Funding Entities

23 Key criteria for eligibility to tender for and be awarded Commonwealth funded building work

- (1) To be eligible to be awarded Commonwealth funded building work:
 - (a) a code covered entity and its related entities must meet the requirements of section 11 of this code of practice; and
 - (b) a code covered entity must not be subject to an exclusion sanction.

24 Expressions of interest and tenders

- (1) A funding entity must ensure that tender processes and calls for expressions of interest (howsoever described) in respect of building work are conducted in a manner consistent with this code of practice and must ensure that respondents are only permitted to participate in tender processes (howsoever described) where the respondent meets the eligibility requirements set out in section 23.
- (2) A funding entity must ensure that any request for expressions of interest or request for tender (howsoever described) for building work to be undertaken for, or on behalf of, the funding entity requires a respondent:
 - (a) to confirm that the respondent and any related entity will comply with this code of practice when undertaking the Commonwealth funded building work; and
 - (b) to confirm that the respondent, and any related entities, will comply with this code or practice from the time of lodging an expression of interest or tender response (if not already obliged to do so); and
 - (c) to confirm that it is eligible to perform Commonwealth funded building work at the time of lodging an expression of interest or tender.

Note 1: see section 23 which sets out eligibility requirements. Eligibility pursuant to that section includes a consideration of whether related entities meet the requirements of section 11.

Note 2: once a building contractor or building industry participant is subject to this code of practice (see section 6), it and its related entities, must comply with this code of practice on all new projects, including projects that are privately funded. However, some obligations in the code of practice only apply in respect of Commonwealth funded building work, see for example subsections 8(2)-(7) and Part 6.

25 Projects requiring a WRMP

- (1) Where building work is of a type described in Schedule 2, a funding entity must:

- (a) ensure the requirement to have a WRMP approved by the ABCC is included in all expressions of interest and tender documents;
- (b) 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
- (c) not award the tender to a respondent unless that respondent's WRMP has been approved by the ABCC.

Example: a funding entity must not enter into a period of exclusive negotiation with a respondent tenderer unless the respondent's WRMP has been approved by the ABCC.

Note: see Part 6 for requirements for approval by the ABCC.

- (2) As soon as practicable after a funding entity issues a request for expressions of interest or requests for tender (howsoever described) for building work, the funding entity must inform the ABCC.
- (3) As soon as practicable after receiving a notification under subsection 25(3) 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.

26 Contracts

- (1) A funding entity must not enter into a contract in respect of building work with a code covered entity that does not meet the eligibility requirements set out in section 23.

Note: see, in respect of subcontractors, paragraph 8(3)(b) which provides that a code covered entity performing Commonwealth funded building work must not enter into a contract with a subcontractor that either does not comply with section 11 of this code of practice or is subject to an exclusion sanction.

- (2) A funding entity must not enter 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.

Example: other than with the approval of the ABC Commissioner funding entities must apply exclusion sanctions (howsoever described) imposed on building contractors pursuant to state or territory government funded procurement policies in respect of Commonwealth funded projects.

- (3) 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 this code of practice when undertaking the work.

Example: a funding entity may be satisfied of future compliance if the person has a history of compliance with this code of practice or has provided sufficient undertakings that it will comply with this code of practice.

- (4) A funding entity must not enter into a contract in respect of building work with any code covered entity that:
 - (a) 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 competition and consumer law; and
 - (b) has not fully complied, or is not fully complying, with such a decision, direction or order.
- (5) Paragraphs (4)(a) and (b) do not apply if:
 - (a) the period for payment, or for other compliance with the decision, direction or order, has not expired; or
 - (b) the decision, direction or order is stayed or has been revoked.
- (6) A funding entity must not enter into a contract with a code covered entity for a project of the type described in Schedule 2 for which the funding entity is required to have a WRMP approved by the ABCC but for which the funding entity has not obtained that approval.

27 Notification of head contractor

- (1) Funding entities must 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. The notification must include:
 - (a) the name and contact details of the code covered entity; and
 - (b) a description of the work; and
 - (c) the location of the proposed work; and
 - (d) the cost of the project; and
 - (e) proposed project start and completion dates.

28 Notification by funding entities

- (1) Funding entities must:

- (a) notify the ABCC of all allegations of breaches of this code of practice as soon as practicable but no later than 7 days after the funding entity became aware of the alleged breach;
- (b) respond to requests for information concerning matters related to this code of practice made by the ABCC; and
- (c) respond to alleged breaches, with initial actions designed to encourage the voluntary modification or cessation of noncompliant behaviour.

29 Funding entity compliance

- (1) Where the ABC Commissioner considers a funding entity, or an official, is not complying with, or has not complied with, this code of practice (whether or not in relation to a particular project, tender or expression of interest), the ABC Commissioner may:

- (a) refer the matter; or
- (b) make a complaint,

to the Secretary of the Department of Finance for investigation or further action.

Note: funding entities and officials in funding entities must strictly comply with the requirements of this code of practice.

Part 6 Workplace Relations Management Plans

30 Requirement for a WRMP

- (1) This Part sets out the requirements for a WRMP to be approved within tender processes for projects of a type described in Schedule 2.

Note: section 26 provides that a funding entity must not enter into a contract with any person or entity that has been required to, but has not submitted a WRMP that has been approved by the ABCC.

31 Application for approval of a WRMP

- (1) Funding entities must apply to the ABCC to have a WRMP for a particular project approved.
- (2) An application to the ABCC for approval of a WRMP must be made in the manner and form required by the ABC Commissioner.
- (3) The proposed WRMP must be accompanied by any supporting evidence required by the ABCC.
- (4) If an application for approval of a WRMP by the ABCC 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.

Note: section 26 provides that a funding entity must not enter into a contract with a code covered entity if the entity is required to have a WRMP approved by the ABCC and has not obtained that approval.

32 Content of a WRMP

- (1) A proposed WRMP must demonstrate how the code covered entity proposes to comply with the requirements of this code of practice on a particular project by:
 - (a) explaining the systems, processes and procedures that the code covered entity has in place (or will put in place) to:
 - (i) clearly and effectively communicate how the requirements of this code of practice apply to all building industry participants on site, including subcontractors that are engaged by the code covered entity; and
 - (ii) promote a fair, lawful, efficient and productive workplace;
 - (iii) deliver the project on time and within budget; and

- (b) addressing any of the matters listed in Schedule 3 that the ABCC considers necessary.

Note: section 25 provides that as soon as practicable after receiving notification about an expression of interest 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.

33 Approval process of a WRMP

- (1) The ABCC must approve a proposed WRMP if satisfied that the proposed WRMP sufficiently:
 - (a) demonstrates how the code covered entity will comply with the requirements of this code of practice on the project to which the WRMP relates; and
 - (b) addresses the matters in Schedule 3 that the ABCC requires to be addressed in the WRMP for the particular project.
- (2) The ABCC must notify the funding entity about whether it approves or does not approve a proposed WRMP.
- (3) If the ABCC does not approve a proposed WRMP, the ABCC must give a written notice to the funding entity informing the funding entity of the reasons for not approving the code covered entity's WRMP.
- (4) A funding entity is not prevented from reapplying for approval of a code covered entity's WRMP.

34 Compliance with an approved WRMP

- (1) A head contractor must ensure that, so far as is reasonably practicable, all subcontractors comply with the WRMP on the project to which the WRMP relates.

Note: section 7 places a general obligation on all code covered entities to comply with relevant WRMPs. A failure by a subcontractor to comply with a WRMP may result in a breach of this code of practice by the head contractor. See also subsection 8(7).

- (2) A failure by a head contractor to comply with its WRMP is a breach of this code of practice.

Schedule 1 Building work to which code of practice applies

(subsection 6(3))

- 1 Building work that is being undertaken for, or on behalf of, a funding entity (irrespective of the value of a project).
- 2 Building work:
 - (a) that is indirectly funded by the Commonwealth by a grant or other program in circumstances in which funding for the building work is an explicit component of the grant or program; and
 - (b) for which:
 - (i) the value of the Commonwealth's contribution to the project that includes the building work is at least \$5,000,000 and represents at least 50% of the total construction project value; or
 - (ii) the Commonwealth's contribution to the project that includes the building work is at least \$10,000,000 (irrespective of its proportion of the total construction project value).
- 3 Building work:
 - (a) for which the Commonwealth provides assistance in advance of the commencement of construction; and
 - (b) which has an identified capital component; and
 - (c) for which:
 - (i) the value of the Commonwealth's contribution to the project that includes the building work is at least \$5,000,000 and represents at least 50% of the total construction project value; or
 - (ii) the Commonwealth's contribution to the project that includes the building work is at least \$10,000,000 (irrespective of its proportion of the total construction project value).
- 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.

5 A Build, Own, Operate ('BOO') project initiated by an agency of the Commonwealth for the delivery of functions or services of the Commonwealth.

6 Building work that involves a pre-commitment lease to which a funding entity is a party.

7 Building work that involves a Public Private Partnership ('PPP') for the delivery of functions or services of the Commonwealth.

Note: a PPP involves the creation of an asset through financing and ownership control by a private party and private sector delivery of related services that may normally have been provided by the Commonwealth. An agency of the Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user.

8 Building work that involves a Private Finance Initiative ('PFI') for the delivery of functions or services of the Commonwealth.

Note: a PFI involves the creation of an asset through financing and ownership control by a private party and private sector delivery of related services that may normally have been provided by the Commonwealth. An agency of the Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user.

9 Building work whose funding is not described in items 1 to 8 (***privately funded building work***).

Schedule 2 Building work for which a Workplace Relations Management Plan is required

(Part 6)

- 1 Commonwealth funded building work for which:
- (i) the value of the Commonwealth's contribution to the project that includes the building work is at least \$5,000,000 and represents at least 50% of the total construction project value; or
 - (ii) the Commonwealth's contribution to the project that includes the building work is at least \$10,000,000 (irrespective of its proportion of the total construction project value).

Schedule 3 Workplace Relations Management Plans

The ABCC may require WRMPs to address:

1 Workplace Arrangements and Compliance

- a) how workplace arrangements will be regulated and monitored on the project;
- b) the approach to ensuring compliance with statutory workplace rights including, but not limited to, applicable Commonwealth industrial instruments, freedom of association, freedom from unlawful coercion and undue influence and freedom from unlawful discrimination.

2 Productivity measures—measuring productivity

- a) the approaches that have been, or will be, adopted to develop and maintain a productive workforce, ensuring the optimal use of labour requirements (e.g. the approach to managing inclement weather and heat, rostered days off and how the head contractor will maintain the ability to determine when, where and by whom work will be performed on the project to meet operational requirements);
- b) how productivity will be objectively measured, monitored and recorded on the project.

3 Other parties and lines of communication

- a) the approach to relationship management with employees, subcontractors and officers, delegates and other representatives of building associations, including but not limited to the approach to, and process for, communicating with the workforce;
- b) outline the organisational structure and reporting lines that will be implemented on the project, and identifying the personnel that will be responsible for:
 - (i) monitoring and delivering labour productivity;
 - (ii) subcontractor management;
 - (iii) compliance with this code of practice;
 - (iv) grievance management.
- c) the approach to managing site access by third parties, including:
 - (i) how right of entry and the requirements of this code of practice will be monitored and implemented on the project (including by subcontractors);

- (ii) how unauthorised entry will be monitored and dealt with.

4 Workplace relations risk and past experience

- a) the identification of workplace relations risks in relation to the project and details of the proposed approaches to managing those risks;
- b) the management of subcontractors that are engaged by the code covered entity;
- c) the processes and procedures that will apply to dealing with and addressing:
 - (i) industrial action (including threatened industrial action); and
 - (ii) employee and workforce grievances.
- d) 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 2 years of the date of tender identifying:
 - (i) the estimated and actual completion costs and completion dates for the projects;
 - (ii) where there was a cost escalation or completion delay, a summary of the causes, factors or reasons for the cost escalation or delay; and
 - (iii) where workplace relations management issues caused or were a factor in the cost escalation or delay, an explanation of what steps have been, and will be, taken to prevent similar issues impacting on productivity, project costs or the completion schedule.

Note: The information in paragraph 4(d) will be required to be addressed in a WRMP for projects of significant value or importance.

5 Compliance with this Code of Practice

- a) how compliance with this code of practice (including compliance against the WRMP) will be monitored and promoted throughout the life of the project.

Example: Information about the requirements of this code of practice, how it will be implemented on site, and the importance of doing so should be communicated on site, for example, during site inductions.