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Building & Construction Industry (Improving Productivity) Act 2016

The Building & Construction Industry (Improving Productivity) [Act](#) 2016 along with the Building & Construction Industry (Consequential & Transitional Provisions) [Act](#) 2016 passed through the Senate on 30 November 2016 and received Royal Assent on 1 December 2016.

This is the legislation to re-establish the Australian Building & Construction Commission (ABCC).

According to the Act's commencement provisions, it was due to take effect the day after Royal Assent (2 December 2016). The new [Code](#) for the Tendering and Performance of Building Work 2016 took effect on 2 December 2016 although there are transitional periods for current enterprise agreements to become code-compliant which were put in place via cross-bench amendments to the legislation before it passed through the Senate.

Overview of the legislation

The Act repeals and replaces the Fair Work (Building Industry) Act and re-establishes the ABCC, also extending the regulator's jurisdictional and industry sector application.

The Act creates, in relation to industrial action and picketing, a new set of workplace relations rules applying only to participants in the building and construction industry.

It also provides for penalties for unlawful industrial action by building industry participants that are significantly higher than those under the Fair Work Act.

The Act reinstates the former powers of the ABCC along with the former provisions of the Building & Construction Industry Improvement Act (BCII Act), with some modifications.

In particular, the Act restores those parts of the BCII Act that provided for:

- higher penalties for unlawful conduct by building industry participants;
- stronger prosecutorial powers for the inspectorate and its director;
- a broader definition of building work;
- greater scope for injunctions to stop unlawful industrial action; and
- stronger anti-coercion measures;

Brand new provisions in the Act provide for:

- its regulation to extend to offshore construction projects and the transport of building goods;
- strict rules around unlawful picketing; and
- a reverse onus of proof applied to some coercive and unlawful activities, although a reverse onus will not apply to workers who allege they have taken industrial action due to an imminent risk to health or safety.

The legislation repeals and replaces the Fair Work (Building Industry) Act 2012 and regulates various aspects of building industry conduct that were formerly regulated by the Fair Work Act 2009.

Key provisions of the Act

Broader definition of 'building work'

The legislation extends the law's operation from the building industry into the transport, supply and resources sectors, both within Australia and offshore in Australia's exclusive economic zone (EEZ) or in waters above the continental shelf, as long as there is a relevant connection to "building work".

Coverage of the Act's provisions is determined by reference to the definition of "building work" together with its geographical application.

Building work is defined under s(6) of the Act, with s6(1)(a) including the "construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land, whether or not the buildings, structures or works are permanent".

Building work under s6(1)(c) includes the installation in any building, structure or works of fittings forming part of land including heating, lighting, air conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems.

Section (6)(1)(e) of the Act incorporates within the definition of building work the transporting or supplying directly to building sites of goods that will be used in building work (including to any resources platform).

“Building work” does not include drilling for, or the extraction of, oil or natural gas or the extraction of minerals.

If an activity fits within the definition of “building work” and “forms part of land” (either onshore or offshore) it will be covered by the legislation and the regulator’s powers from the Act’s commencement.

Extension of geographical boundaries

Sections 5, 10, 11 and 12 of the Act extend its geographical application to:

- Australia’s EEZ and waters above the continental shelf (including resources platforms and ships in the EEZ of those waters); and
- Christmas Island and Cocos (Keeling) Islands.

This extends the legislation to any resources platform in the EEZ or above the continental shelf that fits the definition of building work, or any ship in the EEZ or waters above the continental shelf that is travelling to and / or from an Australian port that is transporting or supplying goods to be used in “building work”.

Compulsory information-gathering powers

In the same way as the former legislation did, the new legislation requires the Australian Building & Construction Commissioner to apply to a presidential member of the Administrative Appeals Tribunal (AAT) before issuing an examination notice (a notice to a building industry participant to attend an interview or provide information to inform its investigations).

Under the Bill as originally drafted, the Commissioner could have issued the notice without AAT approval but that was changed following a successful cross-Bench amendment in the Senate.

Schedule 2 of the Transitional [Act](#) also extends the powers to obtain information in the new Act to alleged contraventions that occurred before the commencement of the new legislation.

In effect, the new regulator, subject to specific requirements, can issue a notice to attend or provide information as part of its investigations, even if those investigations began prior to the new Act passing into law.

Unlawful industrial action

Industrial action that is deemed unlawful industrial action under the Act (clause 46) will attract “Grade A” civil penalties of up to \$36,000 for individuals and up to \$180,000 for bodies corporate (based on \$180 per penalty unit).

In comparison, maximum penalties under the Fair Work Act for unlawful industrial action are \$10,800 for individuals and \$54,000 for bodies corporate.

Unlawful picketing

Under previous legislation, there were no specific prohibitions on picketing in the building and construction industry.

The Act creates a new offence of engaging in or organising an unlawful picket which is punishable by penalties of up to \$36,000 for individuals and \$180,000 for bodies corporate.

Under the Act, courts would have to consider the motivation of the participants or organisers of any picket line.

As well as prohibiting unlawful pickets, s48 of the Act allows a person to apply to a relevant court for an injunction to prevent an unlawful picket from occurring or to stop an unlawful picket that is under way.

Prosecution of settled matters

[Section 73](#) of the former Fair Work (Building Industry) Act prevented the building industry regulator from continuing or instituting court proceedings for matters that had been settled between the parties. The new Act does not include such a clause and so would not prevent prosecutions by the regulator even where parties (union and employer) have reached a settlement.

This means the Commissioner will be able to pursue civil or criminal charges in circumstances where civil liability has been settled between the parties.

In addition, s20 of Schedule 2 of the Transitional Act allows the Commissioner to participate in or institute a proceeding for a matter that was settled before the new Act commenced. In effect, this is a retrospective prosecutorial provision.

Reverse onus of proof

Section 57 of the Act reverses the onus of proof, placing it on the defendant in proceedings over the Act's civil remedy provisions, with some exceptions. Offences to which a reverse onus of proof appears to apply include:

- Unlawful industrial action (however, a successful cross-bench amendment removes the reverse onus of proof on employees who allege they took industrial action based on a reasonable concern about an imminent risk to their health or safety).
- Unlawful picketing.
- Coercion relating to the allocation of duties to a particular person, for instance, to engage or not engage an independent contractor.
- Coercion relating to superannuation.
- Coercion of persons to make, vary and terminate enterprise agreements.

In relation to breaches of the civil penalty provisions, including unlawful picketing, it will be assumed that the relevant action was taken by the defendant with the relevant intent unless the defendant proves otherwise.

Project agreements

Section 59 of the Act makes an industrial agreement unenforceable to the extent that it seeks to secure standard employment conditions across a particular building site or sites where employees are employed by different enterprises.

Successful amendments to the legislation

Amendments made to the Act prior to its passage through the Senate include:

Transitional arrangements for current EAs

A successful amendment by Senator Derryn Hinch ([8026](#)) provides transitional arrangements for current enterprise agreements.

While any new enterprise agreements made after the new [Code](#) took effect on 2 December 2016 must be code-compliant in order for companies to tender for federal government building work, this amendment allows a grace period of two years for existing enterprise agreements that may not be code-compliant.

The amendment states that until 29 November 2018, a building industry participant can tender for federal government building work even if their enterprise agreement does not comply with the code.

Security of payments

A successful Nick Xenophon Team [amendment](#) (8010) worked on with Senator Derryn Hinch, establishes under s32A of the Act a Security of Payments Working Group. The working group will be made up of employee, employer and contractor representatives and will be required to meet at least four times a year. It will monitor the impact that the ABCC has on the conduct and practices of building industry participants in relation to security of payments legislation.

Reverse onus of proof

A successful [amendment](#) (7990) put forward by cross-bench Senators Leyonhjelm, Hinch and Xenophon removed s7 of the legislation's proposed reverse onus of proof on employees who allege they are taking industrial action based on a reasonable concern about an imminent risk to their health or safety.

Building materials

A successful Xenophon [amendment](#) (8020) inserted a new provision under the functions of the Federal Safety Commissioner at s38 of the Act to audit compliance with National Construction Code performance requirements in relation to building materials.

Provision of information by tenderers

A successful amendment by Senators Hinch, Lambie and Culleton ([8021](#)) requires under s34 of the Act a preferred tenderer for Commonwealth building work to provide information including the extent to which domestically sourced and manufactured materials will be used to undertake the building work, and whether building materials used comply with the Australian Standards.

Impartiality

A successful amendment by Senators Hinch and Xenophon ([8011](#)) will hold the ABC Commissioner to more rigorous standards of accountability and transparency along with a requirement to represent all building participants with impartiality. The amendment includes reporting requirements and is aimed at increasing transparency and accountability, and requires more detailed annual reporting.

Continued AAT oversight of compulsory powers

A successful amendment by Senators Hinch and Xenophon ([7954](#)) amended the legislation to continue to require Administrative Appeals Tribunal (AAT) oversight of the compulsory interview powers and will continue to require the permission of an AAT presidential member before a compulsory examination notice is issued. This is intended to address concerns in relation to the regulator's use of the coercive powers. It also clarifies that those called to appear at compulsory examinations or provide evidence have the right to be represented by a lawyer.

Unsuccessful amendments to the legislation

Local steel

An unsuccessful Greens [amendment](#) (7984) would have required the Building Code to include provisions ensuring that no less than 90% of the steel used in a particular building work was manufactured in a furnace located in Australia.

New building code now in effect

Employment Minister Michaelia Cash issued a new Code for the Tendering and Performance of Building Work 2016 on 2 December 2016. The new code is now in effect and for the most part replaces the Building [Code](#) 2013 that was previously in effect.

According to the Minister's 2 December 2016 media release:

"The Code will apply to all new tenders for Commonwealth-funded building work and all building contractors who tender will need to comply with the Code's conduct requirements on building sites from today onwards."

This includes ensuring compliance with right of entry laws for union officials, freedom of association provisions protecting workers' rights to join or not join a union, and work health and safety and security of payment laws, "or risk losing access to Commonwealth-funded building work", the Minister said.

"New enterprise agreements made from today must comply with the new Code in order to be eligible to be awarded Commonwealth-funded work."

"Building contractors covered by enterprise agreements made before today now have until 29 November 2018 to ensure their agreements are Code compliant. Enterprise agreements are made at the time that employees vote to approve the agreement."

Obligations in the Building [Code](#) 2013 continue to apply to Commonwealth-funded building work for which expressions of interest or tenders were issued prior to the commencement of the new code on 2 December 2016.

A final version of the Act as passed through both houses of parliament is available [here](#).

The new 2016 code is available [here](#).

For further information and advice, please contact your local AMMA office.