



CODES, CUT-OFFS AND CURTAINS: MAJOR DEVELOPMENTS IN INDUSTRIAL RELATIONS IN THE BUILDING AND CONSTRUCTION INDUSTRY IN 2017

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DECEMBER 2017

Building and construction industry industrial relations have experienced tumultuous events this year. Employers have witnessed the first anniversary of the commencement of the *Code for the Tendering and Performance of Building Work 2016 (Code 2016)*, the revival of the industry regulator, the Australian Building and Construction Commission (ABCC), and numerous pitched battles between the ABCC and major unions within the industry, particularly the Construction Forestry Mining and Energy Union (CFMEU).

THE FIRST 12 MONTHS OF CODE 2016

Code 2016 commenced operation on 2 December 2016, capturing employers who submitted an expression of interest or tender for a wide range of Federal Government funded building work after that date. The release and enforcement of Code 2016 has been the most significant outcome of the successful passage of the *Building Industry (Improving Productivity) Act 2016 (Cth) (Building Act)* through the Commonwealth parliament in November 2016.

The most significant development regarding Code 2016 over the last 12 months was the amendment made in February 2017 to dramatically reduce the grace period during which employers with enterprise agreements containing terms that contravened the prohibited content provisions of Code 2016 could still tender for Federal Government funded work, from two years to nine months. As a consequence of these amendments, employers covered by non-compliant enterprise agreements have

been rendered ineligible to tender for and be awarded building work to which Code 2016 applies since 1 September 2017.

INDUSTRY RESPONSE TO PROHIBITED CONTENT PROVISIONS OF CODE 2016

Following the amendments to the Code that reduced the grace period, employers faced the difficult task of negotiating with the CFMEU and other major unions to secure new enterprise agreements that complied with the prohibited content provisions in Code 2016.

The dispute with the ABCC and employers over the enforcement of the prohibited content provisions of Code 2016 resulted in multiple national days of action instigated by the CFMEU. However, following the failure of a Labor party-led motion in the Senate to disallow Code 2016 on 9 August 2017, the CFMEU was forced to begin bargaining for Code 2016 compliant enterprise agreements. Probuild was the first national employer to secure variations to its existing enterprise agreement that enabled it to achieve Code 2016 compliance by late August 2017. The Probuild variations came under considerable fire from the Turnbull government, who alleged the CFMEU was holding the industry to ransom by demanding significant increases in wages and entitlements in exchange for surrendering a range of “union-friendly” clauses. However, the approach taken by Probuild has been followed by a number of other major employers within the industry, including Laing O’Rourke and Boral.

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THE ABCC RAMPS UP ENFORCEMENT ACTIVITIES

Following the commencement of the Building Act and Code 2016, the ABCC has substantially increased its enforcement activities throughout the industry in 2017. During 2 December 2016 to 30 June 2017, the ABCC:

- managed 118 open investigations into allegations against building industry participants, the most common of which included allegations of coercion, unlawful industrial action and right of entry breaches;
- responded to 3,898 enquiries, over 65% of which related to Code 2016 and its predecessor, the Building Code 2013 (**Code 2013**);
- finalised 30 audits and 160 site inspections for compliance with Code 2016; and
- finalised 17 legal proceedings, resulting in more than \$1.2 million in civil penalties imposed against various unions and officials.¹

On the advice of the then Australian Building and Construction Commissioner, Mr Nigel Hadgkiss, the Minister for Employment also imposed the first ever exclusion sanction issued under any of the historical versions of the building code, rendering a national (Tier 2) builder ineligible to tender for work to which Code 2016 applied for a 3 month period spanning 1 April to 30 June 2017. In the seven months to 30 June 2017, the ABCC also issued show cause notices to four other building industry participants, which could result in the imposition of further exclusion sanctions in the near future.

Whilst the ABCC enjoyed its share of success in 2017, it also received a black eye with the abrupt resignation of Mr Hadgkiss on 12 September 2017, one day after admitting in legal proceedings brought against him by the CFMEU that he had breached the *Fair Work Act 2009* (Cth) by releasing misleading educational material on the website of the ABCC's predecessor, Fair Work Building and Construction.

ISSUES TO WATCH OUT FOR IN 2018

Based on the compliance activities undertaken by the ABCC during 2017, employers in the building industry should be mindful of the following issues going into 2018:

- Understanding how Code 2013 and Code 2016 interact and an employer's obligations under both;

- Ensuring all staff on site understand the scope of a permit holder's right of entry powers in light of the recent decision of *Powell v ABCC & VWA, M87/2017*; *Victorian Workcover Authority v ABCC and Michael Powell, M89/2017*;
- Understanding the scope of the ABCC's powers to require cooperation with investigations and compliance audits;
- Options for terminating, varying and replacing enterprise agreements that do not comply with Code 2016.

¹ ABCC Annual Report

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