
Industrial relations can play an important role in contributing to the strength of the Australian economy. Potential reform to, or changes within, the Australian industrial relations system should be measured against three criteria: driving jobs and wages growth, boosting productivity and strengthening the economy, while ensuring protection of employees’ rights.

Importantly, an effective industrial relations system should strive to achieve the best overall balance, having regard to the needs of both employees and employers, including those engaged in small business.

The Prime Minister has asked the Attorney-General, in his capacity as Minister for Industrial Relations, to take a fresh look at the industrial relations system to identify how it is operating and where there are impediments to shared gains for employers and employees.

Request for public submissions

This paper provides information on the Code for the Tendering and Performance of Building Work 2016 (Building Code 2016) and seeks views (by way of written submissions) on its operation and potential areas where it could be strengthened to ensure it remains fit for purpose. The Building Code 2016 is updated by the Commonwealth Government from time to time and while this paper directs submissions to specific questions, submissions may provide any information and make suggestions relevant to the topic of this paper.

Submissions can be made to IRconsultation@ag.gov.au.

The closing date for submissions is 3 April 2020.

Submissions will be made public (by being published on the Attorney-General’s Department website) unless an express statement is included in the submission requesting confidentiality. If you request that your submission remain confidential, you are encouraged to consider whether the whole submission is confidential or whether some parts of the submission may be made public.

The Building Code 2016 is available on the Federal Register of Legislation.
Background

The Australian Government remains focused on ensuring the building and construction industry is fair, safe, efficient and productive.

The Government, through the Building Code 2016, is committed to ensuring its purchasing power is applied in a way that requires best practice industrial relations on building and construction sites. The Building Code 2016 sets higher standards of conduct and compliance for businesses that wish to undertake Commonwealth funded building and construction work.

The Building Code 2016 aims to promote better, safer, and more productive building and construction workplaces. It requires businesses to comply with industrial laws including work health and safety (WHS) laws and security of payments legislation, which aim to ensure workers are safe, contractors get paid and the rule of law is upheld.

The need to maintain a strong Building Code 2016, which is regularly updated to reflect changes to, and emerging challenges in, the maintenance of high standards in the building and construction industry, is clear. Breaches of industrial relations laws continue to be an issue for the building and construction industry, as highlighted by three Royal Commissions and a multitude of decisions of the Federal Court and Federal Circuit Court. This, in turn, has a severe cost impact on Australian businesses and Australian taxpayers. Since 2003, more than $21.7 million in penalties\(^1\) have been awarded against employers, unions and individuals in cases brought by the Australian Building and Construction Commission (ABCC) and its predecessor agencies. Analysis by Master Builders Australia estimates that union militancy drives up the cost of vital infrastructure like schools and hospitals by up to 30 per cent.\(^2\)

The building codes (2013 and 2016) cover over $140 billion of building and construction projects.\(^3\) With the Government committing $100 billion to infrastructure projects over the decade from 2019-20, the Building Code 2016 provides an important incentive for businesses to comply with its requirements.

The Government seeks evidence-based feedback on the effectiveness of the Building Code 2016 to ensure it remains fit for purpose and identify options to better support the building and construction industry.

This paper explores key themes within the building and construction industry, which focus on:

- boosting productivity and reducing unnecessary red tape;
- creating better workplaces and more jobs; and

\(^1\) As at 14 February 2020.

\(^2\) See Master Builders Australia Media Release 2019 Federal Election.

\(^3\) As at 14 February 2020.
Part I: Boosting productivity and reducing red tape

The Government is focused on strengthening the Australian economy to create the jobs, services and infrastructure Australians need. As the fourth largest contributor to Gross Domestic Product (GDP) and third largest employing industry with over 1.1 million people employed, the building and construction industry is a major driver of the economy, and record infrastructure spending is a major part of the Government’s economic agenda.

The Government is committed to ensuring the right policy settings are in place for the building and construction industry that boost productivity and reduce red tape.

Boosting productivity

Boosting productivity is fundamental to strengthening our economy. Supporting businesses to be more productive means more jobs can be created and wages can grow. This also means that essential infrastructure, such as roads, schools and hospitals can be delivered more efficiently, providing improved living standards, better health and education for our communities.

The building and construction industry is key to achieving these objectives. The Government is keen to ensure businesses are productive and able to adapt to shifting challenges inherent in the building and construction industry, such as industrial disputes and the availability of, and access to, labour to get the job done.

Current approach to boosting productivity

The Building Code 2016 aims to encourage businesses to be productive by providing them with the flexibility to manage and grow their business as efficiently as possible, while complying with industrial laws. This is achieved by prohibiting certain content in enterprise agreements that limits the ability of a code covered entity to manage their business. For example, the Building Code 2016 prohibits clauses in enterprise agreements that:

- impose or purport to impose limits on the right of a code covered entity to manage its business or to improve productivity;
- require consultation or approval from building and construction associations in relation to the source or number of employees to be engaged, or type of employment;
- prescribe the scope of work or tasks that may be performed by employees or subcontractors.

Issues

The impact of industrial disputes in the building and construction industry can have ramifications across the entire economy. Industrial disputes can occur at any time, invariably leading to a reduction in business productivity during periods of disputation and project delays. One example is labour productivity – which remains a key issue for the building and construction industry. Another issue is the rate of industrial disputation (i.e. working days lost per 1000 employees).

While the rate of industrial disputation has reduced during the period of operation of the ABCC and the Building Code 2016, ABS data indicates the rate of industrial disputes:

- in the five years before the Office of the Australian Building and Construction Commissioner (the original ABCC) was established in 2005, was about five times the ‘all industries average’ (56.1 compared to 10.5)
- during the operation of the original ABCC, from 2005 to 2012, dropped to twice the ‘all industries average’ (9.7 compared to 4.3)
- after the abolition of the ABCC, from 2012 to 2016 (Fair Work Building and Construction period), rose to almost five times the ‘all industries average’ (14.1 compared to 2.9)
- under the operation of the current ABCC, from January 2017 to September 2019, dropped to about three times the ‘all industries average’ (8.0 compared to 2.5).

Despite the decreases in industrial disputes under the ABCC and the Building Code 2016, disputation remains an issue for the building and construction industry. In the September quarter 2019, the building and construction industry had the third highest rate of industrial disputes at 1.9 working days per thousand employees, after the ‘Transport, postal and warehousing industry’ (5.7) and ‘Other manufacturing’ (4.7).\(^5\)

Productivity can be enhanced through further reductions in industrial disputes and the facilitation of more cooperative, less adversarial workplaces.

Similarly, access to labour remains a key issue within the building and construction industry. Businesses need timely and flexible access to skilled and experienced workers to tackle the complex and often time-critical requirements of major infrastructure projects. These issues make it harder for businesses to plan, tender for and deliver building and construction projects. Ultimately, these issues increase the cost of building and construction projects – which impacts on businesses, workers and taxpayers.

**Reform options**

The Government welcomes feedback on how business productivity on Commonwealth funded building and construction projects can be boosted through enhancements to the enterprise agreement and related conduct requirements under the Building Code 2016. Additionally, the Government welcomes any views concerning barriers to timely and flexible access to the right workers that, if addressed, may help to improve productivity in the building and construction industry.

**Discussion questions**

1. Should provisions of the Building Code 2016 be broadened, strengthened or enhanced to better facilitate increased business growth and productivity? If so, how?
2. Are there other matters that should be prohibited from enterprise agreements that are not currently prohibited? Please provide details.
3. Are the Building Code 2016’s enterprise agreement requirements promoting cooperative and productive workplaces? How could they be improved?
4. Could the Building Code 2016 be used to prevent multiple secondary/environmental boycott demands and behaviour? If so, how?

Reducing red tape

The Government is committed to reducing unnecessary red tape and making it easier for Australians to engage with government services, and the building codes are fundamentally regulatory instruments. While recognising that regulation is necessary to ensure programs meet their objectives, it is important that regulation is also effective, enabling businesses and workers to get on with the job.

Given the building and construction industry has the highest proportion of small businesses in Australia\(^6\), with around 99 per cent of all businesses operating in the sector classified as small businesses\(^7\), it’s important the Government gets these settings right.

Current approach to engagement with government

Businesses engaging in Commonwealth funded building and construction work may engage with multiple Government programs and agencies. For example, the ABCC administers the Building Code 2016 and undertakes significant engagement with stakeholders, including responding to 3,379 Building Code 2016 enquiries in 2018-19. However, head contractors may also engage with the Work Health and Safety (WHS) Accreditation Scheme, which is administered by the Federal Safety Commissioner (FSC); or with state and territory jurisdictions in respect to security of payment laws or other regulatory matters.

Issues – engagement

Some businesses may be required to engage with the ABCC and the FSC, or state and territory regulators to obtain information and comply with requirements for Commonwealth funded building and construction work. This potentially adds additional layers of engagement and cost for some businesses, particularly smaller businesses, which may not have access to the resources that larger businesses may have.

Reform options – engagement

Engagement with agencies could be strengthened. While agencies such as the ABCC and FSC have comprehensive engagement strategies which use technology to improve engagement timeframes, there may be an opportunity for enhanced engagement approaches with relevant agencies – to make it easier for businesses to better understand and comply with industrial laws generally, but also the requirements of the Building Code 2016 and the WHS Accreditation Scheme specifically.

Discussion questions – engagement

5. Could the Government better support small business in the building and construction industry to engage with its programs and agencies and assist them to comply with legislative requirements? If so, how?

6. Do you have any specific examples you could provide where there will be duplication for business as a result of adhering to requirements in the Building Code 2016?

7. Are there specific examples of state or territory procurement requirements, codes or principles that make it difficult for businesses to understand how they can comply with those requirements without then contravening the Building Code 2016? How could these issues be addressed?

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\(^7\) ABS (2019), *Counts of Australian Businesses, including Entries and Exits, Jun 2014 to Jun 2018, released 21 February 2019 (ABS Cat. No. 8165.0)*.
Current approach to reporting

The Building Code 2016 places a range of reporting requirements on businesses, including:

- reporting a breach, or a suspected breach, of the Building Code 2016 as soon as practicable, but no later than two working days after becoming aware of it;
- reporting actual or threatened industrial action and secondary boycott demands as soon as practicable, but no later than 24 hours;
- security of payment requirements such as reporting disputed or delayed progress payments to subcontractors as soon as practicable after the date the payment is due; and
- producing a Workplace Relations Management Plan (WRMP) for Commonwealth funded building and construction work above certain financial thresholds. WRMPs set out, among other things, how a code covered entity proposes to comply with the requirements of the Building Code 2016 on a particular project.

In 2018-19, the ABCC received a significant number of reports, including 614 security of payment enquiries and notifications, assessed 1766 enterprise agreements and 618 WRMPs for compliance with the Building Code 2016.

Issues – reporting

Business may be required to make several reports or notifications to the ABCC in addition to resolving issues that underpin the report (e.g. a delayed payment). In this regard, complying with all of the reporting requirements under the Building Code 2016 may be more difficult for smaller businesses, which have less resources to deal with reporting requirements. Additionally, some issues (e.g. disputed payments) may be resolved close to or prior to a business notifying the ABCC.

Reform options – reporting

While the ABCC has created efficiencies for business by reducing timeframes and streamlining requirements for compliance, such as an improved WRMP form, which reduces the time a business must spend to develop a compliant WRMP, there may be an opportunity to further simplify reporting requirements under the Building Code 2016. This would provide further certainty and clarity for businesses about reporting requirements – ensuring arrangements remain necessary for compliance with the Building Code 2016.

Discussion questions – reporting

8. Should reporting requirements under the Building Code 2016 be simplified? If so, how?
9. Should there be more effective requirements for small businesses in complying with the reporting requirements of the Building Code 2016? If so, what should these requirements be?
10. Are the requirements for, and processes to create, WRMPs appropriate? If not, how should they change?
11. Are the requirements under the Building Code 2016 for security of payment obligations appropriate? If not, how should they change?
12. Do you have any specific examples you could provide of duplication in reporting requirements?
Part II: Creating better workplaces and more jobs

The Government is keen to ensure workplaces in the building and construction industry, including those in which Commonwealth funded building and construction work is performed, are the best that they can be. The Building Code 2016 supports the achievement of this objective by promoting better industrial relations arrangements for building and construction work and encouraging safe, healthy, fair and lawful building and construction sites.

Safe and healthy workplaces

The Government expects the highest levels of safety on building and construction sites and uses its purchasing power to drive better safety outcomes on Commonwealth funded building and construction projects.

Current approach

The Building Code 2016 requires businesses to comply with WHS laws regarding building and construction work. If a business does not comply with WHS laws, the Minister may exclude the business from tendering for or undertaking Commonwealth funded building and construction work for up to 12 months (i.e. an exclusion sanction).

Additionally, the Government, through the Building Code 2016, imposes a zero tolerance approach to drugs and alcohol on building and construction sites. Businesses are required to ensure people are fit to perform work and not under the influence of drugs or alcohol.

Issues

While serious safety incidents in the building and construction industry have been trending downwards during the last two decades – a trend that has continued since the re-establishment of the ABCC and introduction of the Building Code 2016 – injuries and fatalities remain a key concern and focus of the Government.

For example, the building and construction industry remains one of Safe Work Australia’s (SWA’s) priority industries. Recent SWA data\(^8\) indicates the number of building and construction worker deaths in 2018 was 24 compared with 30 in 2017. The fatality rate in 2018 dropped to 2 per 100,000 workers, compared with 2.7 in 2017 (see Figure 1).

Figure 1. Fatalities in the building and construction industry – 2003 to 2018

While the decrease in fatalities is welcome, every death on a building and construction site is a tragedy, and the Government notes that the building and construction industry has the fourth highest fatality rate out of 19 other industry groupings (e.g. mining and manufacturing).

An additional safety issue, which affects over four million Australians, is mental health. The building and construction industry is not immune from the impact of mental health issues, with the building and construction industry responsible for an increasing number of reports of mental health conditions. Additionally, the Productivity Commission found there is ‘uncertainty and confusion’ for many employers with dealing with psychological health and safety issues.

Reform options
The Government takes seriously safety on building and construction sites. The Government welcomes feedback on whether there is a need to enhance the exclusion sanction arrangements for breaches of WHS laws under the Building Code 2016, to better support the deterrence of safety issues on Commonwealth funded building and construction projects. Additionally, without duplicating Commonwealth, state and territory activities to address WHS issues, there may be scope to enhance the Building Code 2016 to better support employers to deal with safety issues at building and construction workplaces.

Discussion questions
13. Could the Building Code 2016 better support improved safety outcomes in the building and construction industry? If so, how?
14. Could the Building Code 2016 better support the way businesses and their workers approach safety issues at building and construction workplaces? If so, how?

9 Equal fourth in fatality rates with the ‘electricity, gas, water and waste’ industry grouping.
Fair workplaces
The Government values fair workplaces and applies policies beyond the Building Code 2016 to enhance employment opportunities and encourage a diverse workforce.

Current approach
The Government’s existing measures, which enhance employment and encourage diversity, include the workplace gender equality policy, which requires businesses with more than 100 employees to report on the profile of their workforce.

Additionally, the Indigenous Procurement Policy (IPP) is a key example of the Government influencing investment and employment opportunities, in this case, for Indigenous business by providing a target for purchasing goods and services from Indigenous enterprises, directing some Commonwealth contracts to Indigenous businesses and setting minimum Indigenous participation requirements.

These arrangements work alongside state and territory procurement policies and contractual arrangements, some of which place targets and requirements on contractors to encourage investment and employment opportunities.

Issues
Some cohorts are underrepresented in the building and construction industry. For example, the building and construction industry workforce is mainly comprised of men. Women represent around 12.4 per cent of people employed in the building and construction industry.10 In terms of apprentices, the National Centre for Vocational Education Research has estimated the number of building and construction trades apprentices in training has grown by 17.4 per cent from 2015 – 2019.11 The Government remains committed to continuing a healthy growth of apprentices in the building and construction industry.

Additionally, regional and rural locations may present geographical challenges for employers and workers seeking to be involved in Commonwealth funded building and construction work.

Reform options
The Building Code 2016 could be enhanced to better encourage employment opportunities and diversity, particularly on Commonwealth funded building and construction sites. There may be scope to consider approaches which encourage employers to better provide employment opportunities for cohorts within the building and construction workforce, and greater support for regional employment.

Discussion questions
15. Does the Building Code 2016 have any unintended consequences in limiting particular cohorts from accessing building and construction work or employment opportunities?
16. Should the Building Code 2016 be amended to better boost employment opportunities in the building and construction industry for women, young and mature age workers, and apprentices, and ensure greater opportunities for Indigenous and regional employment? If so, how?

10 ABS (2019), Labour Force, Australia, Detailed, Quarterly, Nov 2019, released 23 December 2019 (ABS Cat. 6291.0.55.003), Pivot Table - EQ06 - Employed persons by Industry group of main job (ANZSIC), Sex, State and Territory.
A lawful building and construction industry

The Government is committed to upholding the rule of law in the building and construction industry. This includes zero tolerance for systemic unlawful behaviour including bullying, threats, intimidation and the denial of legal entitlements to businesses and workers.

Current approach

The Building Code 2016 imposes expected standards of conduct on businesses to ensure compliance with the law, positively influence behaviour and to facilitate cultural change in the building and construction industry. Businesses risk being excluded from tendering for or being awarded Commonwealth funded building and construction work for failing to comply with the Building Code 2016.

A key component of achieving these objectives are provisions in the Building Code 2016 which require businesses to comply with industrial laws such as security of payments laws, which deal with subcontractor payment and the Building and Construction Industry (Improving Productivity) Act 2016, which introduced higher penalties for certain unlawful conduct (e.g. coercion) in the building and construction industry. Additionally, businesses must protect or respect certain rights of persons, such as ensuring people are free to become, or not become, members of building and construction associations without fear of intimidation or discrimination.

A practical example is the requirement for businesses to ensure that building and construction association logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or which provision is made for by, the employer. Logos, mottos and indicia that may be prohibited include a building and construction association’s name on flags or building and construction association stickers on personal protective equipment, such as hard hats. These requirements aim to ensure full freedom of association is respected.

Other examples include a prohibition on signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities; and refusing to employ or engage individuals because they are, or are not, a member of a building and construction association.

Additionally, the ABCC enforces compliance with the Fair Work Act 2009 regarding the underpayment of employee’ wages and entitlements. Since December 2016, the ABCC has recovered around $1.7 million for employees. The ABCC undertakes a combination of proactive and reactive audits and investigations. In 2018-19, of the $823,724 in wages and entitlements recovered by the ABCC, $722,211 was a result of proactive audit activity. Reactive investigations accounted for $101,512. Therefore, the vast majority of the money recovered by the ABCC in 2018-19 was because of proactive action taken by the ABCC.

Issues

Australians expect workplaces to be positive and lawful environments. The building and construction industry is no exception. In addition to concerns about underpayment of entitlements by employers, the building and construction industry continues to be plagued by a particularly stubborn variety of unlawful conduct over many years. This includes behaviour such as intimidation, bullying, harassment and coercion, which ultimately impacts on the ability of building and construction industry participants to get the job done. For example, since 2003, a staggering 3,226 contraventions of building and construction industrial laws have been found by the courts in cases brought by the ABCC and its predecessor agencies. These contraventions have resulted in more than $21.7 million in penalties being awarded by the Courts.
Currently the ABCC has 38 matters\(^\text{12}\) before the courts for alleged contraventions of building and construction industrial laws. This demonstrates strong action is being taken against unlawful conduct in the building and construction industry, however lawlessness remains an issue for the building and construction industry.

**Reform options**

The Government welcomes views on whether, and to what extent, the Building Code 2016 could be enhanced to better encourage lawful behaviour on Commonwealth funded building and construction projects and the building and construction industry more broadly. This could include focusing on additional conduct or targeting unlawful behaviour more effectively.

**Discussion questions**

17. Are there examples of conduct or behaviour that the Building Code 2016 could target more effectively? Please provide details.
18. Are the exclusion sanction arrangements appropriate and effective? If not, why not?
19. Has the Building Code 2016 been an effective tool for influencing behaviour in the building and construction industry? In what way?
20. Are there better ways to encourage lawful behaviour in the building and construction industry (e.g. further education)?
21. Could the Building Code 2016 be used as an additional tool to deter underpayments in the building and construction industry? If so, how?

\(^{12}\) As at 14 February 2020.
Part III: Ensuring the smooth operation of the Building Code 2016

Clarity and consistency

The Government recognises the importance of ensuring the requirements of the Building Code 2016 are clear to all building and construction industry participants. The Government welcomes feedback on whether specific provisions of the Building Code 2016 require further clarification. The Government is keen to understand if these provisions have made it difficult for or discouraged businesses and other stakeholders from engaging in Commonwealth funded building and construction work.

Discussion questions

22. Are there aspects of the Building Code 2016 which are ambiguous, difficult to apply or redundant? If so, why and how should they be amended?

23. Are there any examples of potential inconsistency between the Building Code 2016 and other frameworks? How should these potential inconsistencies be addressed and why?