DECISION

Fair Work Act 2009
s.185—Enterprise agreement

CPB Contractors Pty Ltd
(AG2024/3182)

CPB CONTRACTORS PTY LTD CROSS RIVER RAIL - RAIL INTEGRATION AND SYSTEMS (RIS) ENTERPRISE AGREEMENT 2024-2028

Building, metal and civil construction industries

DEPUTY PRESIDENT MASSON MELBOURNE, 11 OCTOBER 2024

Application for approval of the CPB Contractors Pty Ltd Cross River Rail - Rail Integration and Systems (RIS) Enterprise Agreement 2024-2028

[1] An application has been made for approval of an enterprise agreement known as the *CPB Contractors Pty Ltd Cross River Rail - Rail Integration and Systems (RIS) Enterprise Agreement 2024-2028* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act). It has been made by CPB Contractors Pty Ltd (the Applicant). The Agreement is a single enterprise agreement.

[2] The copy of the Agreement filed with the application was signed by Mr Michael McCann (the Alliance Manager) on behalf of the Applicant and by Mr Matthew Papworth on behalf of employees. Mr Papworth who is the HR Manager for the Applicant also signed the Form F17B on behalf of the Applicant. This raises a concern as to whether the Agreement has been signed in accordance with s 185(2)(a) of the Act and in accordance with 2.06A(2)(a)(ii) of the Fair Work Regulations 2009 (the Regulations) and specifically whether Mr Papworth in signing the Agreement was a 'representative of the employees covered by the agreement' as required. The Applicant filed material going to the circumstances of the project that the Agreement would cover if approved, and that employees were as a result of those circumstances reluctant to sign the Agreement, explaining why Mr Papworth signed the Agreement on their behalf.

[3] I am satisfied that the signature requirements of the Act and Regulations are not met by reason of Mr Papworth having signed the Agreement on behalf of employees and as such the application has not been validly made. However, in the circumstances of this case, I have determined pursuant to s 586(b) of the Act to exercise my discretion to 'waive the irregularity in the form and manner' in which the application was made. Such an approach is consistent with the majority decision in the Full Bench authority of *CFMMEU v Griffiths Cranes Pty Ltd* (2019 [FWCFB] 1717). Having exercised that discretion, the application is deemed to have been validly made.

[4] The title of the Agreement in the Notice of Employee Representational Rights was different to the title clause in the proposed Agreement. However, I am satisfied that in all of the circumstances and having regard to *Huntsman Chemical Company Australia Pty Limited T/A RMAX Rigid Cellular Plastics & Others*[1], this constitutes a minor procedural or technical error for the purpose of s.188(5). Further, I am satisfied that the employees covered by the Agreement were not likely to be disadvantaged by the error.

[5] I note that clause 7.2(e)(ii) is inconsistent with the National Employment Standards. Given the National Employment Standards precedence clause at clause 2.7 of the agreement, I am satisfied that the more beneficial entitlements of the NES will prevail.

[6] I am satisfied that each of the requirements of ss.186, 187 and 188 as are relevant to this application for approval have been met.

[7] The Australian Workers' Union and the Construction, Forestry and Maritime Employees Union being bargaining representatives for the Agreement, have given notice under s.183 of the Act that it wants the Agreement to cover it. In accordance with s.201(2) I note that the Agreement covers the organisation.

[8] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 18 October 2024. The nominal expiry date of the Agreement is 10 October 2024.



DEPUTY PRESIDENT

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<AE526370 PR780143>

[1] [2019] FWCFB 318.

CORRECTION TO DECISION

Fair Work Act 2009
s.185—Enterprise agreement

CPB Contractors Pty Ltd
(AG2024/3182)

CPB CONTRACTORS PTY LTD CROSS RIVER RAIL - RAIL INTEGRATION AND SYSTEMS (RIS) ENTERPRISE AGREEMENT 2024-2028

Building, metal and civil construction industries

DEPUTY PRESIDENT MASSON MELBOURNE, 22 OCTOBER 2024

Application for approval of the CPB Contractors Pty Ltd Cross River Rail - Rail Integration and Systems (RIS) Enterprise Agreement 2024-2028 – correction to nominal expiry date.

The decision issued by the Fair Work Commission on 11 October 2024 [[2024] FWCA 3573] is corrected pursuant to s 602 of the *Fair Work Act 2009* as follows:

[1] By deleting paragraph [8] and replacing it with the following:

> [8] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 18 October 2024. The nominal expiry date of the Agreement is 10 October 2028.

DEPUTY PRESIDENT

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CPB CONTRACTORS PTY LTD -

CROSS RIVER RAIL – RAIL INTEGRATION AND SYSTEMS (RIS)

ENTERPRISE AGREEMENT 2024-2028

4

Table of Contents

PART 1 DEFINITIONS 5

PART 2 APPLICATION OF AGREEMENT 7

2.1 Title 7

2.2 Parties Bound 7

2.3 Rescinds and Replaces 7

2.4 Scope & Application 7

2.5 Date and Period of Operation 8

2.6 Objectives of Agreement 8

2.7 Relationship to Other Awards and Agreements 9

2.8 No Extra Claims 9

PART 3 CONDITIONS OF EMPLOYMENT 10

3.1 Continuous Operations 10

3.2 Individual Flexibility Arrangement 10

3.3 Consultation 11

3.4 Change to Regular Roster or Ordinary Hours of Work 12

3.5 Contract of Employment 13

3.6 Probation Period 14

3.7 Termination of Employment 14

3.8 Notice of Absence 15

3.9 Standing Down of Employees 15

3.10 Dispute Prevention and Settlement Procedure 16

3.11 Counselling & Disciplinary Procedure 16

3.12 Consultative Committee 18

3.13 Anti-Discrimination, Equal Employment Opportunity and Sexual Harassment 18

PART 4 WORKPLACE HEALTH AND SAFETY 19

4.1 Safety Commitment 19

4.2 Project Inductions 19

4.3 Induction Training 19

4.4 Health & Safety Committee 20

4.5 Fitness for Duty 20

4.6 Safety Incident Procedure 21

4.7 PPE 22

4.8 Inclement Weather 23

4.9 Learning and Development 25

4.10 Traineeships 25

PART 5 CLASSIFICATION STRUCTURES, RATES OF PAY, ALLOWANCES AND OTHER ENTITLEMENTS DEFINITIONS 27

5.1 Classification Structures and Rates of Pay 27

5

5.2 Higher Duties 27
5.3 Daily Fare and Travel Allowance 27
5.4 Productivity Payment. 28
5.5 People First Payment 28
5.6 Leading Hand Allowance 28
5.7 First Aid Allowance 29
5.8 Overtime Meal Allowance 29
5.9 Tradesperson Allowance 29
5.10 Superannuation 29
5.11 Redundancy 30
PART 6 HOURS OF WORK, OVERTIME and RDO'S 31
6.1 Hours of Work 31
6.2 Day Workers 31
6.3 Shift Workers 32
6.4 Recall 34
6.5 Rest period after Overtime 34
6.6 Cancellation of Weekend Overtime 34
6.7 Work Throughs 35
6.8 Rostered Days Off 35
PART 7 LEAVE ENTITLEMENTS 37
7.1 Annual Leave 37
7.2 Personal/Carer's Leave 37
7.3 Compassionate Leave 39
7.4 Parental Leave 39
7.5 Jury Service 39
7.6 Long Service Leave 39
7.7 Requests for Flexible Working Arrangements 39
7.8 Community Service Leave 40
7.9 Family & Domestic Violence Leave 40
7.10 Taking Paid Leave 40
7.11 Public Holidays 41
PART 8 ADMINISTRATION 42
8.1 Income Protection 42
8.2 Payment of Wages 42
8.3 Employee Representative 42
8.4 Employee Representative Facilities 43
8.5 Compliance with Statutory Requirements 43
8.6 Severability 43

6

8.7 Employee Awareness 44
8.8 Immigration Compliance 44
PART 9 SIGNATORIES **45**
Appendix A CLASSIFICATION STRUCTURE **46**
Appendix B BASE RATES OF PAY **48**
Appendix C ALLOWANCES & CONTRIBUTIONS **49**
Appendix D APPRENTICES **50**

7

PART 1 DEFINITIONS

In this Agreement the following definitions will apply:

"Afternoon Shift" means a shift starting at or after 12.00pm and before 8.00pm, unless agreed by the parties, on any days of the week.

"Agreement" means CPB Contractors Pty Ltd – Cross River Rail - Rail, Integration and Systems (RIS) Enterprise Agreement 2024-2028.

"Award" means the Building and Construction General On-Site Award 2020 (MA000020).

"All Purpose Rate" means the rate provided at Appendices A and B of this Agreement, plus any applicable all-purpose allowance as prescribed within this Agreement for ordinary hours.

"Authorised Paid Leave" shall mean where leave is authorised and paid for by the Employer.

"Base Rate" means the Employees base hourly rate of pay as set out at Appendices A and/or B of this Agreement.

"Broken Shift" means as prescribed at clause 6.3.6.

"Certificate" means any certificate provided by a recognised Registered Training Organisation provider that outlines competencies obtained.

"Client" means an organisation to whom CPB Contractors is contracted to provide services.

"Consultative Committee" means the committee established in accordance with this Agreement.

"Continuous Shift Worker" means an Employee engaged to work in a system of consecutive shifts throughout the 24 hours of each day, and works at least six (6) consecutive days without interruption (except during breakdown or meal breaks or due to unavoidable causes beyond the control of the Employer) and who is regularly rostered to work those shifts.

"Day Shift" means a shift starting on or after 6.00am and before 12.00pm on any days of the week, as agreed by the parties. A Day Shift may commence prior to 6.00am for reasons including, but not limited to, an earlier commencement of shift during daylight saving.

"Day Worker" means an employee engaged to commence work at or after 6.00am and before 10.00am, Monday to Friday. A Day Worker may commence work prior 6.00am for reasons including, but not limited to, an earlier commencement of work during daylight savings. For the avoidance of doubt, a Day Worker is not a Shift Worker.

"Employee" means a person employed by the Employer who performs work covered by the scope of this Agreement and is engaged in one of the Classifications at Appendix A.

"Employer" means CPB Contractors Pty Ltd (ABN 98 000 893 667).

"FW Act" means the *Fair Work Act 2009* (Cth), as amended from time to time.

"FWC" means Fair Work Commission.

"Health and Safety Committee" means a committee established in accordance with the WH&S Act, or otherwise applicable OHS/WHS legislation.

"National Employment Standards" (NES) are minimum standards applying to employment conditions.

"Night Shift" means a shift starting at or after 8.00pm and before 6.00am, unless agreed between the

parties, on any days of the week.

"Ordinary Hours" means the ordinary hours that the Employee is required to work, being 8 hours per day, Monday to Friday inclusive, and which will average 36 hours per week worked over a 4- week cycle. However, ordinary daily hours and/or shifts may be worked outside the span of hours contained herein (see clause 6.1b).

"Ordinary Time Earnings" is the amount of money an employee is paid for ordinary hours of work.

"Party" and "Parties" means as prescribed at clause 2.2 as the context may require.

"Project" means the Rail, Integration and Systems (RIS) package of works being undertaken by the Employer as part of the Unity Alliance that delivers the supply and installation of supporting rail systems and the integration of the Cross River Rail into Queensland Rail's train network.

"Shift Worker" means an Employee engaged to work continuously for five or more shifts on either Day Shift, Night Shift or Afternoon Shift.

"WHS Act" means the *Work Health and Safety Act 2011* (QLD), *The Work Health and Safety Regulation 2011* (QLD), Rail Safety National Law (Queensland) Act 2017 or otherwise applicable WHS legislation.

"WHS" means Work, Health and Safety.

PART 2 APPLICATION OF AGREEMENT

2.1 Title

This Agreement will be known as the CPB Contractors Pty Ltd Cross River Rail - Rail Integration and Systems (RIS) Enterprise Agreement 2024-2028 **("the Agreement").**

2.2 Parties Bound

In accordance with Section 182(3) of the Fair Work Act, the Agreement covers each of the following parties:

a) CPB Contractors Pty Ltd, ABN: 98 000 893 667 **("the Employer");** and

b) All persons who are Employees as defined by this Agreement.

2.3 Rescinds and Replaces

This Agreement rescinds and replaces the Enterprise Agreement known as CPB Contractors Pty Ltd Cross River Rail – Civil and Surface Works Greenfields Agreement 2019-2023.

2.4 Scope & Application

This Agreement regulates wholly and exclusively the terms and conditions of employment of the Employees of the Employer falling within the scope and application of the Agreement. This Agreement shall apply to all works performed by the Employees of the Employer on the Cross River Rail – Rail, Integration and Systems (RIS) Project in the State of Queensland who are engaged in the classifications set out in Appendix A.

This Agreement will NOT apply to the following:

a) All works covered by the CPB Contractors Pty Ltd – Cross River Rail – Tunnel, Stations and Development (TSD) Agreement;

b) All work conducted on the Project relating to utilities;

c) Supervisory or managerial personnel, engineers, technicians and surveyors;

d) Security personnel;

e) Traffic controllers;

f) Deliveries and removal of goods, material and equipment to and from the Project;

g) Work on off-site infrastructure whether associated with the Project or not;

h) The offsite manufacturing or fabrication of goods, materials and equipment;

i) Queensland Rail employees and associates;

j) Offsite manufacturing or fabrications of material or supplies, including but not limited to all work performed at manufacturing facilities such as pre-cast concrete segments, structural steel, reinforcement cages, batch plants, other precast products and reinforcement fabrications;

k) Site office/amenities/crib maintenance & servicing personnel (e.g. cleaning, waste removal, repairs);

l) Persons undertaking the installation of temporary buildings and related services; and

m) Warranty defects liability, repairs and/or maintenance work performed by or on behalf of the manufacturers and/or distributors of goods, material or equipment provided to the Project.

2.5 Date and Period of Operation

This Agreement commences seven days after approval by the Fair Work Commission and will nominally expire four years after its approval date.

2.6 Objectives of Agreement

The provisions of this Agreement establish the relevant and necessary arrangements that are required for the successful and safe completion of the Project on time and within budget forecasts.

The fundamental objective of this Agreement is to create a framework consistent with the intent of the parties to each of the following goals:

a) Establishing effective consultative and communication processes - The parties are committed to maintaining a high standard of communication and consultation;

b) Positive Workplace Culture - The parties recognise the importance of a positive workplace culture to achieving Project objectives. In particular the parties are committed to a culture of co-operation, communication, mutual respect and shared goals;

c) Employee Development Legacy - The parties recognise the value of structured learning and development to Project and industry success and to the job opportunities of all Employees *and* will accordingly co-ordinate, deliver and participate in such development. This will also be in support of the Employer's Skills & Employment priorities including:

   i. Maximising equitable employment, training and career development opportunities for all our communities - benefiting local people and valuing diversity in our workforce;

   ii. Building skills today for the workforce of tomorrow - inspiring and providing opportunities for young people to pursue and develop careers in construction and engineering, capturing future talent and ensuring a sustainable workforce for the future;

   iii. Developing our skills base - growing our capability and industry competitiveness through developing our workforce, delivering an enduring Queensland skills legacy.

d) To avoid industrial action by following at all times the agreed disputes resolution procedure, so as to maintain a dispute-free work site culture;

e) To encourage affirmative participation, the Employer will, where possible, strive to increase its employment of Indigenous and/or Torres Strait Islanders, Women and Apprentices; and

f) Legal & other Government and Client Requirements - The parties recognise the importance of adhering to all local, state and federal statutory requirements including, but not limited to:

   i. the Fair Work Act,

   ii. and legislative, Government and Client obligations as amended from time to time.

2.7 Relationship to Other Awards and Agreements

a) The relevant Award for purposes of applying the better off overall test to this Agreement is the Building and Construction General On-Site Award 2020.

b) This Agreement will be read in conjunction with the NES. Where this Agreement includes terms that have the same effect as terms of the NES, or terms that are ancillary or supplementary to the NES, the Agreement terms operate subject to the same qualifications, limitations and exclusions as the relevant NES entitlement unless otherwise specified.

c) Where the Agreement gives an Employee an entitlement that is the same as an entitlement under the NES:

   i. Those terms operate in parallel with the Employee's NES Entitlement, but not so as to give the Employee a double benefit; and

   ii. The provisions of the NES relating to the NES entitlement apply, as a minimum standard, to this Agreement entitlement.

2.8 No Extra Claims

The Parties covered by this Agreement intend and agree that this Agreement prescribes comprehensive terms and conditions of employment that are to apply for the duration of this Agreement.

It is a condition of this Agreement that the Parties Bound by this Agreement undertake not to:

a) Pursue any claims for additional benefits or obligations (whether or not known at the time the Parties entered into this Agreement). This includes but is not limited to any claims in excess of the provisions of this Agreement and/or claims relating to changes arising from award variations or decisions of a statutory body; and

b) Take industrial action in support of extra claims, award or over award, for the duration of this Agreement. For the avoidance of doubt, Employees and/or a union will not engage in industrial action for the purpose of advancing any claims whatsoever, including any claims in excess of the provisions of this Agreement, or against the Employer in respect of the employment of Employees.

PART 3 CONDITIONS OF EMPLOYMENT

3.1 Continuous Operations

The Parties recognise that the construction activities on the Project present unique operational requirements that may require operations to continue without interruption.

Specifically the Parties agree that continuous operations (twenty four hours a day, seven days a week) and work flow be maintained on the Project, including but not limited to the following area of activity;

a) Critical concrete pours;

b) Operations involving traffic safety management;

c) Spoil removal and spoil haulage activities to stockpiles;

d) Pumping and dewatering activities;

e) Work required to stabilise any excavation against collapse;

f) Any activity that may affect the operating integrity of plant that supports the areas of continuous operations listed above;

g) All work on or associated with the rail corridor; and

h) In such cases, appropriate safe staffing of equipment will be required.

The parties agree that continuous operations in these areas referred to above will include continuing to operate in periods of inclement weather, provided that WHS requirements of this Agreement and relevant legislation are met.

Notwithstanding anything contained in this clause, the Employer will endeavour to establish roster(s) that promote a work-life balance culture and assist in limiting the causes of fatigue in the workplace.

3.2 Individual Flexibility Arrangement

a) The Employer and an Employee covered by this Agreement may agree to make an individual flexibility arrangement to vary the effect of the terms of the Agreement in relations to 1 or more of the following matters:

   i. Single day annual leave absences up to 12 per year;

   ii. Increase to parental leave; and

   iii. Increase to compassionate Leave;

b) Where the arrangement meets the genuine needs of the Employer and the Employee in relation to 1 or more of the matters mentioned in paragraph a) above; and

c) The arrangement is genuinely agreed to by the Employer and Employee.

3.2.1 The Employer will ensure that the terms of the individual flexibility arrangement:

a) are about permitted matters under Section 172 of the Fair Work Act 2009; and

b) are not unlawful terms under Section 194 of the Fair Work Act 2009; and

c) result in the employee being better off overall than the employee would be if no arrangement was made.

13

3.2.2 The Employer must ensure that the individual flexibility agreement:

a) is in writing; and

b) includes the name of the Employer and Employee; and is signed by the Employer and Employee or a parent or guardian of the Employee if the Employee is under 18 years of age, and

c) Includes details of:

i. the terms of the enterprise agreement that will be varied by the arrangement; and

ii. how the arrangement will vary the effect of the terms; and

iii. how the Employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

d) states the day on which the arrangement commences.

3.2.3 The Employer must give the Employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

3.2.4 An individual flexibility agreement must not require the approval or consent of a person other than the Employer or Employee.

3.2.5 The Employer or Employee may terminate the individual flexibility arrangement:

i. by giving no less than 28 days written notice to the other party to the arrangement; or

ii. if the Employer and Employee agree in writing - at any time.

3.3 Consultation

This clause applies where the Employer:

a) has made a definite decision to introduce a major change to production, program, organisation, structure, or technology in relation to its enterprise and the change is likely to have a significant effect on the Employees (see clauses 3.4.1 to 3.4.6 below); or

b) proposes to introduce a change to the regular roster or ordinary hours of work of Employees (see clause 3.4 below).

3.3.1 The Employer must notify the affected Employees of the decision to introduce the major change 14 days prior to the major change taking effect.

3.3.2 The affected Employees may appoint a representative for the purposes of the procedure in this clause.

3.3.3 If the affected Employees appoint a representative for the purposes of consultation, and the Employees advise the Employer of the identity of the representative, the Employer must recognise the representative.

3.3.4 As soon as practicable after making its decision, the Employer must:

a) discuss with the affected Employees:

i. the introduction of the change;

ii. the effect the change is likely to have on the Employees; and

iii. measures the Employer is taking to avert or mitigate the adverse effect of the change on the Employees; and

b) for the purposes of the discussion provide, in writing, to the affected Employees;

i. all relevant information about the change including the nature of the change proposed; and

ii. information about the expected effects of the change on the Employees; and

iii. any other matters likely to affect the Employees.

3.3.5 The Employer is not required to disclose confidential or commercially sensitive information to the affected Employees.

3.3.6 The Employer must give prompt and genuine consideration to matters raised about the major change by the affected Employees.

If a term of this Agreement provides for a major change to production, program, organisation, structure or technology in relation to the Project, the requirements set out in clauses 3.3.2, 3.3.3 and 3.3.4 are taken not to apply.

3.3.7 In this term, a major change is likely to have a significant effect on Employees if it results in:

a) the termination of the employment of the Employees; or

b) major change to the composition, operation or size of the Employer's workforce or to the skills required of their Employees;

c) the elimination or diminution of job opportunities (including the opportunities for promotion or tenure); or

d) the alteration of hours of work; or

e) the need to retrain Employees; or

f) the need to relocate Employees to another workplace; or

g) the restructuring of jobs.

Significant effects include potential termination of Employees. For avoidance of doubt, this does not limit or have the effect of limiting the right of the Employer to make decisions about redundancy, demobilisation or redeployment of Employees based on operational requirements.

3.4 Change to Regular Roster or Ordinary Hours of Work

The Employer must notify the affected Employees of the proposed change to the regular roster or ordinary hours of work of those Employees 14 days prior to the change taking effect.

The affected Employees may appoint a representative for the purposes of the procedures in this term.

If the affected Employees appoint a representative for the purposes of consultation, and the Employees advise the Employer of the identity of the representative, the Employer must recognise the representative.

As soon as practicable after proposing to introduce the change, the Employer must:

a) Discuss with the affected Employees the introduction of the change;

b) For the purposes of the discussion - provide to the affected Employees:

i. All relevant information about the change, including the nature of the change;

ii. Information about what the Employer reasonably believes will be the effects of the change on the affected Employees; and

iii. Information about any other matters that the Employer reasonably believes

are likely to affect the Employees; and

c) Invite the affected Employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).

However, the Employer is not required to disclose confidential or commercially sensitive information to the affected Employees.

The Employer must give prompt and genuine consideration to matters raised about the change by the affected Employees.

3.5 Contract of Employment

a) Employees will be employed on a full-time, part-time, or casual basis.

b) At the time of their engagement, the Employer will inform each Employee of the terms of their engagement.

c) Part-time employment will be by Agreement between the Employer and the Employee. A part-time Employee will be an Employee who works fewer than 36 ordinary hours per week, and has reasonably predictable hours of work. For each ordinary hour worked, a part-time Employee will be paid no less than the Base Rate for the relevant classification, and pro-rata entitlements for those hours. The Employer will inform a part-time Employee of the ordinary hours of work and the starting and finishing times. Any hours worked by the part time employee in addition to the agreed ordinary hours will be paid at the appropriate overtime rate.

d) Before commencing a period of part-time employment, the Employer and an Employee will agree in writing:

   i. That the Employee may work part-time;

   ii. The hours to be worked by the Employee, the days upon which the hours will be worked, and commencing times for the work (work performed outside of the agreed hours will be paid at applicable overtime rates);

   iii. The classification in Appendix A as relevant that applies to the work to be performed; and

   iv. The period of part-time employment.

e) The terms of a part-time agreement may be varied, in writing, by consent. A copy of the agreement and any variation to it will be provided to the Employee by the Employer.

f) A casual Employee is an Employee employed on an occasional basis and whose work pattern is not regular or systematic. When a person is engaged for casual employment the Employee will be informed in writing that the Employee is to be engaged as a casual, the job to be performed, the classification level and the relevant rate of pay.

g) A casual Employee will be entitled to all the applicable rates and conditions of employment prescribed in this Agreement except annual leave, paid personal/carer's leave, paid compassionate leave, redundancy and termination benefits or notice periods as contained in clause 3.7 of this Agreement.

h) On each occasion a casual Employee is required to attend work, the Employee will be entitled to payment for a minimum of 7.2 hours' work, plus the relevant travel allowance as provided for in clause 5.3 of this Agreement, as applicable.

i) An all-purpose casual loading of 25% will be paid. The casual loading is paid in lieu

of annual leave, personal leave, other paid leave and public holidays not worked, as contained in this agreement. In calculating overtime payments for a casual Employee, the following will apply: base rate then 25% loading and then the relevant overtime rate/loading.

j) A casual employee, other than an irregular casual employee, who has been engaged for a sequence of periods of employment for 6 weeks may elect to convert to full time employment. The employer must not unreasonably refuse. The employer must give written notice to the employee within 4 weeks of the employee reaching the 6 weeks qualifying period of the terms of this clause.

k) A Full-time Employee is an Employee engaged for a minimum average of 36 ordinary hours per week plus any reasonable additional hours as required by the Employer.

3.6 Probation Period

a) The Employee's employment with the Employer will be subject to a three (3) months probationary period commencing from the date of commencement of employment. During which time, the suitability for the position will be assessed.

b) An Employee's employment may be terminated at any time during the probationary period by either party giving one week's notice of termination or at the Employer's sole discretion, payment in lieu of such notice.

3.7 Termination of Employment

a) Employment may be terminated by an Employee providing one week's notice or the Employer by giving the following notice:

Employee's Period of Continuous Service with the Employer	Actual Period of Notice required to be Provided
Not more than 1 year	1 weeks' notice
More than 1 year but not more than 3 years	2 weeks' notice
More than 3 years but not more than 5 years	3 weeks' notice
More than 5 years	4 weeks' notice

b) In addition to the notice set out above, an Employee over 45 years old at the time notice of termination is given who has completed at least two (2) years of continuous service with the Employer, will be entitled to an additional one (1) weeks' notice.

c) The employer does not need to give notice of termination to Employees who are engaged for a specified task(s), or on a casual basis.

d) Following the giving of notice of termination by either party, the Employer may, at its absolute discretion, elect to pay the Employee an amount equal to the full rate of pay, due to the Employee for the remainder of the notice period as an alternative to requiring the Employee to work out the notice period.

e) Where an Employee resigns without giving the required one week's notice, or gives notice but leaves before the end of the notice period, the Employer may deduct payment for the notice period (or that part of the notice period not worked), from any money owed by the Employer.

f) Employees will only be entitled to payment up to and including their last day of

attended work if the Employee has abandoned their employment.

g) Notwithstanding the notice provisions of this clause, the Employer retains the right to summarily terminate an Employee's employment without notice or pay in lieu of the notice for serious misconduct, in which case an Employee will only be entitled to be paid for the time worked up to dismissal.

h) For the purpose of this Agreement, serious misconduct includes, but is not limited to, any serious or persistent breach of this Agreement or the Employer's policies, dishonesty, fraud, theft, breach of serious safety procedures/policy/protocols, willful damage to Employer property, harming or threatening co-workers, breach of the Employer's alcohol and other drugs in the workplace policy, workplace smoking policy, gross negligence, unauthorised or prolonged absenteeism, or breach of the confidentiality requirements or other Employee obligations of this Agreement.

3.8 Notice of Absence

a) Employees have a responsibility to notify the Employer of any absences from work. Unless a provision of this Agreement or the FW Act states otherwise, an Employee who fails to attend work without a reasonable explanation, will not be paid for the actual time of such non-attendance.

b) This clause 3.8 applies where the Employer is unaware of the reasons for an Employee's absence or believes an Employee no longer wishes to work for the Employer. For the avoidance of doubt, the Employer will not take action against an Employee who is entitled to be on leave or absent under the NES or this Agreement.

c) If an Employee fails to attend work the Employer will attempt to contact the Employee. If the Employer is able to contact the Employee, the Employer will require the Employee to provide substantive justification for their absence. The Employer reserves the right to take disciplinary action where this explanation is not satisfactory.

d) Where the Employer is unable to communicate with an Employee, after having attempted to use all available methods to contact the Employee and provide them with an opportunity to give an explanation to the Employer for their absenteeism, the matter will be dealt with pursuant to clause 3.7.

3.9 Standing Down of Employees

a) Despite anything elsewhere contained in this Agreement, the Employer, in accordance with the FW Act, will have the right to stand down and not pay an Employee for any day (or part of a day) the Employee cannot be usefully employed because of industrial action.

b) Nothing in this clause will be taken to mean that payment, including leave payments, will be made for time engaged in industrial action.

c) If an Employee cannot do work due to any cause for which the Employer cannot reasonably be held responsible (for example geological conditions, breakdown of machinery or equipment for which the Employer cannot reasonably be held responsible) the Employer may take the following steps:

i. The Employer will consult with affected Employees regarding the possibility of stand down, and

ii. The Employer will take all reasonable steps to explore all possible options to ensure work continues.

Once steps i and ii have been taken, the Employer has the right to stand down the Employee without pay.

3.10 Dispute Prevention and Settlement Procedure

a) A major objective of this Agreement is to eliminate lost time and/or production arising out of disputes or grievances. Any dispute in relation to a work related, industrial matter or any matters arising out of the operation of the Agreement, incidental to the operation of the Agreement, the NES, including subsections 65(5) or 76(4) of the FW Act shall be dealt with according to the following procedure:

i. The circumstances that existed prior to the dispute or grievance or claim prevail, and work must continue as normal without detriment to any of the Parties.

ii. All Employees have the right to appoint an employee representative (which may be a Party to this Agreement, the Employee Representative elected under clause 8.3 of this Agreement or anyone else of the Employee's choice) in relation to a dispute. It is the express priority of all Parties to attempt to settle a dispute at the workplace level at first Instance.

iii. The Employer may appoint a representative of its choice in relation to a dispute.

iv. In the event of any work-related grievance arising between the Employer and an Employee or Employees, the matter shall be dealt with in the following manner:

A. The matter shall be first submitted by the Employee/s or their representative, to the site supervisor or the other appropriate site representative of the Employer and if not settled, to a more senior representative of the Employer.

B. Alternatively, the Employer may submit an issue to the Employee/s who may seek the assistance and involvement of a representative.

C. If still not resolved, there may be discussions between the employee/sand their representative and senior representative of the Employer.

D. Should the matter remain unresolved, and all of the steps of this procedure have been exhausted the matter may be referred by either Party to this dispute to the FWC. The FWC may exercise conciliation in the first instance and if the conciliation is unsuccessful the FWC may exercise arbitration powers.

b) This procedure shall be followed in good faith without unreasonable delay.

3.11 Counselling & Disciplinary Procedure

a) This procedure is to be followed for all disciplinary cases of unsatisfactory performance (includes absenteeism) or conduct, or for breach of procedures including, but not limited to safety, environmental, sexual harassment and workplace bullying.

b) At the request of the Employee, the Employee may choose to be represented at any stage of the counselling and disciplinary process by an employee representative of their choice.

c) While in most cases each step of the procedure will be followed in sequential order, in certain cases serious breaches of procedures may result in an Employee

being dealt with immediately under Step 2 or Step 3 of this procedure.

d) This clause 3.11 does not take away the right of the Employer to dismiss an Employee without notice for serious misconduct (refer to clause 3.7(g) and (h)) or the right of an Employee to seek advice from his/her nominated representative at any stage of the procedure below.

3.11.1 Step 1 - Verbal Warning/Counselling

Where the Employer has a first concern regarding the performance, attendance and/or conduct of an Employee, the following procedure will apply:

a) An explanation of the concern and the performance and/or conduct expectations of the Employer will be given;

b) The Employee will be given an opportunity to provide an explanation;

c) The Employer will consider this explanation and any relevant facts;

d) If the Employer considers that the Employee's explanation is not reasonable, the Employee will be reminded of this procedure and that this is the first warning. At that time the Employer will inform the Employee that failure to correct the performance and/or conduct, or any other problems with the Employee's Performance or conduct may lead to further warnings; and

e) The Employee under counselling will be made aware of the standards of improvement in performance and/or conduct that are to be made.

3.11.2 Step 2 - Written Warning/ Improved Performance

If the Employee fails to meet agreed standards of improvement in accordance with Step 1, or if the Employer has a second concern about the performance, attendance and/or conduct of the Employee regarding reasonable standards or performance and/or conduct, this step (2) will be taken:

a) The Employer will explain its concern with the standards of performance and/or conduct of the Employee;

b) The Employee will be given an opportunity to provide an explanation;

c) The Employer will consider this explanation and any relevant facts;

d) If the Employer considers that the Employee's explanation is not reasonable, a written warning is to be given referring to the first warning (at Step 1) and the opportunity previously given for improvement. The written warning will inform the Employee that it is a final warning and that failure to meet the stated standards of improvement or any further instances or poor performance and/or conduct will lead to dismissal without further warning; and

e) The written warning will also provide feedback to the Employee on how to improve his/her performance and/or conduct.

3.11.3 Step 3 - Final Warning

If the Employee continues to not meet the standards in terms of performance and or the Employer's code of conduct, the Employee will be issued with a Final Warning. The written warning will inform the Employee that it is a final warning and that failure to meet the stated standards of improvement or any further instances or poor performance and/or conduct will lead to dismissal without further warning.

3.11.4 Step 4 - Dismissal

If the Employee has failed to meet reasonable agreed standards of improvement in relation to his/her performance, attendance and/or conduct, or if the Employer has a third concern about the performance, attendance and/or conduct of the Employee regarding reasonable standards of performance and/or conduct, the following process will be taken:

a) The Employer will explain its concern with the Employee's performance and/or conduct;

b) The Employer will give the Employee an opportunity to provide an explanation;

c) The Employer will consider the explanation and any relevant facts; and

d) If the Employer considers that the Employee's explanation is not reasonable, notice of dismissal may be given by the Employer.

3.12 Consultative Committee

a) The Parties to this Agreement agree that effective consultation processes are essential for continuous workplace reform and that Employees will be appropriately consulted in respect of issues that impact on their employment conditions.

b) The Parties agree that a Consultative Committee will be established on the Project, and will normally comprise of equal numbers of management and employee representatives.

c) The Project Consultative Committee will deal with issues referred to them in relation to this Agreement. A meeting program for the Project Consultative Committee will be developed at the commencement of the Project.

d) The consultative committee will meet monthly or as agreed by the members of the committee. The chairperson will be responsible for issuing agendas and taking minutes.

e) The consultative committee's primary charter is to ensure good communication between the Parties concerning relevant issues that may affect the Project and the Employees, provided that the Employer is not required to disclose confidential or commercially sensitive information to relevant Employees.

f) Separate to the consultative committee process, clause 3.3 will apply and the Employer must consult with the Employees about major workplace changes that are likely to have a significant effect on the Employees.

g) The Employer will provide appropriate training to ensure that Project Consultative Committee members can participate in the consultative process.

3.13 Anti-Discrimination, Equal Employment Opportunity and Sexual Harassment

a) The Employer is committed to complying with its obligations under anti-discrimination legislation and preventing unlawful discrimination and harassment within the workplace.

b) The Parties to this Agreement have an obligation to comply with sex discrimination and anti-discrimination legislation. The Employer expects all Employees to comply with its policies and procedures including those dealing with harassment and discrimination in the workplace and the Project Work Rules.

c) Any breach of the Employer discrimination and harassment policies will be treated by the Employer as a very serious matter and depending on the circumstances, may result in dismissal.

PART 4 WORKPLACE HEALTH AND SAFETY

4.1 Safety Commitment

a) The Parties will comply with all the obligations arising under the prevailing and relevant Acts, Regulations, Code of Practice and the Employer's policies and procedures.

b) The Employer has a legal obligation to exercise due diligence to ensure that the business complies with all Workplace Health and Safety laws and regulations. This includes making sure that the business has and uses appropriate resources and processes to eliminate or minimise the risks of working with silica and silica containing products and other airborne toxic substances.

c) All Employees are required to contribute positively to Project safety, including raising concerns regarding safety with the Employer.

d) No Employee will be required to work in any unsafe area or situation. An employee or employees may cease, or refuse to carry out, work if they have a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.

4.2 Project Inductions

a) At the commencement of their first working day on the Project, all Employees will attend a Project Induction that includes Project safety procedures. The inductions will be presented by an Employer representative.

b) The Employer will not allow any Employee engaged on the Project to commence work until they have demonstrated, to the Employer's satisfaction, a clear understanding of the issues raised during inductions.

c) Employees are required to provide a copy of their Construction Induction Certificate (e.g. White Card), before commencement, as evidence of general industry safety induction before undertaking the Project Induction.

4.3 Induction Training

All Employees will receive an induction on or before their commencement on the Project that details issues including:

a) Project Overview;

b) Project Enterprise Agreement including; Parties, Scope and Application of the Agreement, DPSP, general terms and conditions of employment;

c) Relevant Workplace Health and Safety, Quality and Environmental Procedures and expectations;

d) Code of conduct and workplace behaviour expectations;

e) Project/Site layout;

f) Respectful interface with community and road users; and

g) Work procedures.

On the successful completion of the Project Induction training program, Employees will be issued with an identification card which they must carry at all times.

4.4 Health & Safety Committee

The Employer will establish a Health & Safety Committee on the Project as appropriate in accordance with the *Work Health and Safety Act 2011* and corresponding Regulations. All Health and Safety Committee members will undertake an agreed silica awareness course and airborne toxic substance awareness courses as appropriate.

4.4.1 Health and Safety Representatives

a) The Employer and its Employees will comply with Part 5 of the WHS Act - Consultation, representation and participation in relation to the establishment of a health and safety committee;

b) When requested, Health and Safety representatives and deputies will be elected In accordance with Part 5 Division 3 of the WHS Act 2011, for a determined and agreed work group of which the Employee is a member.

c) Parties covered by this Agreement recognise the important role of Health & Safety representatives. The HSRs have a key role in the early intervention in health and safety Issues under this Agreement.

d) A health & safety representative will be allowed reasonable paid time during working hours to attend to occupational health and safety matters affecting employees they represent.

4.5 Fitness for Duty

a) The parties to this Agreement are committed to providing a safe, healthy and productive work environment. As part of this ongoing commitment, Employees will be required to participate in tests for alcohol and other drugs as required during their deployment on site.

b) For safety reasons Employees will need to be clean shaven while performing any work requiring a dust mask.

4.5.1 Alcohol and Other Drugs

a) The Parties to this Agreement are committed to creating and maintaining an environment where people recognise the health and safety risks of misusing alcohol and/or drugs in the workplace and community.

b) The Parties will comply with the requirements prescribed in applicable legislation, policies and procedures of the Employer, and site safety rules, in relation to alcohol and other drugs. These requirements will include, for example, alcohol and other drugs testing of Employees.

c) Employees who fail to comply with these requirements in relation to alcohol and other drugs (which may, depending on the circumstances, constitute serious misconduct), will be subject to disciplinary action in accordance with clause 3.11 of this Agreement.

d) Employees bound by this Agreement who require assistance and support with alcohol and/or other drugs issues, will have access to the Employer's employee assistance program or any other similar support service.

4.5.2 Non-Smoking

a) In the interests of work health and safety, smoking areas will be identified. Where an area is not designated it will be automatically a non-smoking area. Employees will be required to comply with the Project's smoke-free workplace policy.

b) Employees found smoking in non-smoking areas will be subject to disciplinary action in accordance with clause 3.11 of this Agreement.

4.6 Safety Incident Procedure

a) No Employee will be required to work in any unsafe area or situation an employee or employees may cease, or refuse to carry out work if they have a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.

b) This procedure will be in accordance with the WHS Act and corresponding Regulations. Parties will make all reasonable efforts to achieve a timely, final and effective resolution of the unsafe situation in accordance with this procedure.

c) Where an Employee becomes aware of an unsafe situation, the Employee must rectify the situation, if it is within their competence, is safe to do so and report the matter to management.

d) If a safety problem has been identified in a particular work area, the Work Area Health & Safety Representative will inspect the area with a management representative(s) and they will determine the appropriate action to be taken.

e) In the event Employees cease work due to a reasonable concern of an imminent risk to their health and safety will hold themselves available to be transferred elsewhere on the Project.

f) Work will cease only in areas immediately affected by a reasonable concern as to the existence of an imminent risk to health and safety.

g) Work in other areas will continue without interruption, and all Employees will remain available on site to carry out work in areas not immediately affected and/or to carry out rectification works.

h) Priority is to be given to safety rectification.

i) Should a safety dispute arise over whether one or more work areas are safe or not, the following procedure will apply:

i. Where the situation cannot be rectified, immediate inspection of the affected area(s) will be carried out by Project Management and the Health & Safety representative(s);

ii. As safety rectification work is agreed for any area, all Employees will immediately commence such rectification work;

iii. Upon verification that such rectification has been completed, normal work will resume progressively in any area;

iv. Employees will not leave the Project site unless directed to do so by the Employer, relevant Government authority or Emergency Services officials such as Police, Fire or Ambulance officers

j) For the sake of clarity, WHS policies and procedures are not incorporated in this Agreement and can be amended by the Employer as required, for example in the event of the WHS Act and Regulations being replaced or amended.

4.7 PPE

4.7.1 Mandatory Equipment

a) Employees will be provided, on commencement of employment, with a safety helmet, safety gloves and eye protection/safety glasses that meet Australian Standards.

b) The safety helmet and other items of personal protective equipment provided must be worn at all times as instructed during the site induction process. Helmets must not be painted, drilled or modified in any way, including any other paraphernalia not approved by the Employer.

c) Employees will be required to wear such clothing or equipment at all times as directed and/or required by the Employer. Any breach of this provision will give rise to disciplinary action. Disciplinary action taken under this clause may include verbal or written warnings and/or termination of employment.

d) Safety footwear will be supplied upon the commencement of employment. Damaged and/or worn PPE will be replaced on a fair wear and tear basis, provided they are produced to the Employer for inspection.

4.7.2 Job Related Equipment

a) The Employer will provide all necessary safety protective clothing, equipment and materials for use on specific work tasks as follows:

i. Hearing protection e.g. ear plugs/muffs;

ii. Factor 30+ protective sunscreen;

iii. Eye protection, including, as approved by the Employer, prescription safety glasses or safety glasses that fit over prescription glasses, that meets Australian Standard;

iv. Safety gloves, that meets Australian Standard;

v. Safety boots (replaced as a result of fair wear and tear);

vi. Gumboots; (as required)

vii. Dust masks;

viii. Wet weather jacket; (as required)

ix. Safety vests;

x. Long trousers;

xi. Long Sleeve shirt.

4.7.3 Clothing

The Employer will provide Employees with the following items of clothing to be worn while at work, which will be replaced as a result of fair wear and tear, provided they are produced to the Employer for inspection.

A set of clothing will consist of:

a) Five pairs of long trousers; and

b) Five high visibility long sleeve shirts.

c) All Employees engaged on the Project between 1 May and 30 September will be issued with one (1) high visibility winter jacket or agreed equivalent. Winter jackets will be replaced on a fair wear and tear basis, provided it is produced to the Company for inspection.

The type of jacket issued to Employees will be determined by the nature of work performed to ensure that the jacket is not unsafe for the work performed by each Employee.

4.8 Inclement Weather

a) Inclement weather means the existence of rain or abnormal climatic conditions (whether they be those of hail, snow, extreme cold, high wind, severe dust storm, extreme high temperature or the like or any combination thereof) by virtue of which it is either not reasonable or not safe for Employees exposed thereto to continue working whilst the same prevail.

b) The Employer and Employees will develop and implement procedures to ensure that productive work continues whenever and wherever it is safe and reasonable to do so.In the case of inclement weather arising from high temperature, the parties acknowledge that the Employer's "Heat Management Plan" (as amended from time to time) is an appropriate, evidence-based and peer-reviewed policy which will be used to manage heat-related issues on the Project. For the avoidance of doubt, the Employer's "Heat Management Plan" is not incorporated by reference into this Agreement.

c) In order to improve this area of lost productivity the following will apply to all Employees:

   i. Employees may be transferred to an area or site not affected by inclement weather if useful work is available in that area or site, that work is within the scope of the Employees skill, competence and training, and the Employer provides, where necessary, transport;

   ii. The Employer and Employees agree to adopt measures that involve a reasonable approach as to what constitutes inclement weather;

   iii. The Employer and Employees agree to the use of non-productive time arising from inclement weather for structured, relevant and meaningful training, skills enhancement and learning applications. Where this cannot be achieved, Employees will not unnecessarily be kept on site;

   iv. Non-productive time arising from inclement weather can be used for monthly Project briefings;

   v. Non-productive time arising from inclement weather can also be used for safe work procedure briefings and discussion of major work activities.

vi. The Employer and Employees acknowledge that in the case of operators of plant with enclosed cabins, work will continue, subject to compliance with safe working procedures;

vii. The Employer and Employees are committed to an early resumption of work following any cessation of work which may arise from inclement weather;

viii. The practice of 'one out all out' for inclement weather will not occur. Should a portion of the Project be affected by inclement weather, all other Employees not so affected will continue working in accordance with the appropriate Agreement provisions, regardless that some Employees may be entitled to cease work due to inclement weather;

ix. All Employees must be available to clean up and dewater relevant work areas as directed by the Employer and/or the Health & Safety Committee following inclement weather, regardless of classification.

d) Where it is determined that an Employee is not able to perform any work because of Inclement Weather, a full-time and part-time Employee shall be entitled to payment by the Employer for ordinary time lost through inclement weather and the effects of inclement weather for up to 32 hours in each calendar month (non- cumulative). This payment is subject to the Employee remaining on site in readiness to work.

e) After four (4) hours after the cessation of work from inclement weather the Employer may release employees for the remainder of the day, if information indicates that inclement weather will continue.

f) Where the maximum of 32 hours pay in any 4 week period is reached and an Employee cannot resume work because of Inclement Weather, the Employer may stand down the Employee without pay until such time that the Employee is able to resume work, provided that the Employee may access accrued annual leave or accrued RDOs during the stand down period.

g) Critical Work in Rain -the Employer and Employees understand and accept that there may be occasions where certain critical work must be performed in the rain. Critical work includes but is not limited to: completion and protection of concrete pours, supply of material to site, spoil operations, critical shutdown activities, emergency work, any work required to ensure safety or environmental legal compliance.

h) Where an Employee is required by the Employer to perform critical work in inclement weather, the following will apply:

i. Such work will be conducted subject to appropriate safety procedures being in place;

ii. Employees will be provided with wet weather gear, as appropriate;

iii. Employees will be provided with safety equipment and respite to minimise the impact of work in the rain;

iv. On completion of work in the rain and where it is expected that rain will cease in a timeframe where meaningful work can be undertaken:

v. Employees may be provided with additional dry clothing to allow ordinary work to continue; or

vi. With the approval of the relevant area Superintendent, Employees who carry out critical work in the rain and who get wet as a result may be allowed to go home when critical work is completed.

vii. Such critical work performed in inclement weather will be paid at the rate of double the Employee's Base Rate.

i) Employees who are sent home with the approval of the Superintendent within their

ordinary time hours, will be paid the balance of their ordinary hours at their ordinary rate of pay. Employees who are sent home with the approval of the relevant area Superintendent after completing their ordinary hours but prior to the end of their normal rostered shift will be paid for actual hours worked.

4.9 Learning and Development

a) The Employer will provide structured training, development and assessment for new entrants to the industry to offset skills shortages and ensure career progression opportunities are available, e.g. progression from new entrant to unskilled to semi-skilled to skilled, including developing individuals and teams in support of Project employment priorities.

b) The Employer will provide skills enhancement for Employees via a range of methods including but not limited to coaching, mentoring, exposure and competency based training model.

c) Training will be relevant and delivered in a suitable forum including Toolbox meetings and structured training programs. Where possible, training will result in a Nationally Recognised Statement of Attainment.

d) This Learning and Development program will provide Employees with industry wide recognised portable skills which will facilitate the development of their career path,

e) In line with the Employer's commitment to providing each employee with quality training to assist them in the performance of their functions on the Project, the Employer may schedule mandatory training for employees in accordance with this clause.

f) Employees required to attend training will be paid for the time spent training at the employee's Base Rate. Such training will be conducted during ordinary hours.

4.10 Traineeships

a) As part of its commitment to the long term future of the industry, the Employer may engage Trainees. Trainees will be engaged in either a Certificate II traineeship or a Certificate III traineeship.

b) A Certificate II traineeship will consist of no less than 16 modules.

c) A Certificate III traineeship will consist of no less than 24 modules.

d) Trainees will be classified in the same manner as Employees in accordance with the classification structure in this Agreement and will be paid in accordance with the following table.

Traineeship	Level of Completion	Rate of Pay
Certificate II	Less than 12 months	75% of the relevant Base Rate
	12 months or more and satisfactory completion of required units of competency	85% of the relevant Base Rate
	On completion	Relevant Base Rate CW3
Certificate III	Less than 12 months	75% of the relevant Base Rate
	12 months but less than 24 months and satisfactory completion of required units of competency	85% of the relevant Base Rate
	24 months or more and satisfactory completion of required units of competency	95% of the relevant Base Rate
	On completion	Relevant Base Rate CW5

28

e) Where the Trainee was employed by the Employer immediately prior to entering into the traineeship, the Trainee will not suffer a reduction in pay by virtue of entering into a traineeship.

f) Trainees may undergo recognition of prior to learning (RPL) in order to satisfy competency requirements. Where this is the case, the Trainee will be deemed to have completed the relevant unit of competency on or after the date upon which the Registered Training Organisation (RTO) deems the module to have been satisfied. A Trainee who is deemed to have completed units of competency by virtue of RPL will have the term of their traineeship reduced accordingly.

PART 5 CLASSIFICATION STRUCTURES, RATES OF PAY, ALLOWANCES AND OTHER ENTITLEMENTS DEFINITIONS

5.1 Classification Structures and Rates of Pay

a) At the commencement of employment, each Employee will be appointed by the Employer to a classification level based on skills, qualification and experience and in consideration of the substance of duties required to be carried out at the time of the Project. The skill-based classification structure is set out in Appendices A.

b) Employees will be required to perform such duties as are within the limits of the Employee's skill, competence and training, including work that is incidental or peripheral to the Employee's main function.

c) The Base Rates for each classification level are prescribed at Appendices A or B. The Base Rates and allowances in this Agreement are in compensation for, amongst other things, all disabilities and/or special skills and/or special rates associated with, or likely to be associated with the Project.

d) Apprentices engaged by the Employer will be paid in accordance with Appendix D.

e) The Base Rates under this Agreement will be adjusted only in accordance with Appendices A or B. All wage increases during the life of the Agreement will be made in accordance with Appendices A or B and will take effect from the first full pay period after the effective date.

5.2 Higher Duties

a) Where an Employee on any day is required and has agreed to perform duties of a higher Base Rate of pay than the Employee's ordinary classification, the Employee will be paid at the higher hourly Base Rate for the work so performed.

b) The Employee will be paid the higher hourly Base Rate for the entire day or shift if the Employee is required to work at that Base Rate for more than two hours. Otherwise, the Employee will be paid the higher Base Rate for the time so worked.

c) Following the completion of activities under the higher classification, the Employee will revert to the Base Rate that is applicable to their classification prior to undertaking the higher duties.

d) Notwithstanding the above, Employees who are being trained to operate plant or equipment which would otherwise attract a higher Base Rate, will not be paid at the higher Base Rate until they are assessed as being competent, and there is a position available at the classification that attracts the higher Base Rate. This clause will be utilised by the Employer for the purposes of bona fide training, and will not be used by the Employer to simply avoid payment to Employees at a classification which attracts a higher Base Rate. Any dispute arising in relation to this issue will be dealt with in accordance with clause 3.10.

5.3 Daily Fare and Travel Allowance

a) A daily fare and travel allowance of $50.00 will be paid to each Employee for each day or shift the Employee reports to work and actually worked (including all RDO's).

b) This allowance will be a flat amount and not included in the calculation of overtime, leave or any other loadings.

c) This travel allowance will be in compensation for, amongst other things, any travelling time or expenses including but not limited to parking fees incurred by Employees travelling to and from the Project, mobilisation and location. No other payments for travelling to and from work will be payable to any Employee.

d) Employees who are provided a work vehicle by the Employer to take home each night are not eligible for the daily travel allowance.

e) For clarity, an employee is not entitled to be paid this allowance in respect of any unworked Public Holidays, or when they are on any other type of leave of absence (whether paid or unpaid).

5.4 Productivity Payment

a) An Employee will receive a productivity payment of $9.64 for each productive hour worked, to provide incentive and in recognition of improved productivity performance during the operation of this Agreement.

b) For the avoidance of doubt, this allowance will be in lieu of any special rates or allowances included in any award or other industrial instrument other than for those provided for in this Agreement.

c) This productivity payment is a flat payment and will not be included in the calculation of overtime, leave or any shift or other loadings.

d) This productivity payment is not payable when Employees leave site due to inclement weather, or are on any type of leave, whether paid or not paid (e.g. annual leave, personal leave, jury duty, leave without pay, community service leave, parental leave or compassionate leave), or have been suspended with pay, or are absent for any other reason, including public holidays, absence due to a work-related injury, or are engaged in any form of industrial action.

5.5 People First Payment

The Project's success is built by our people. That is why we put our people first.

The people first payment is to better recognise and reward the Employees.

Each Employee covered by this Agreement will receive a payment of $55.00 per week or part thereof of service (including Authorised Paid Leave) on the Project which will be paid to Employees when the service on the Project comes to an end.

The payment will form part of the Employee's final termination pay at the conclusion of their service on the Project in recognition of their contribution to the Project's success.

5.6 Leading Hand Allowance

a) An Employee appointed by the Employer to be in charge of other Employees will be paid in accordance with Appendix C. With specific responsibility of directing and/or supervising the work of other Employees. The Leading Hand allowance will be a flat amount and will not be included in the calculation of overtime, leave or any shift or other loadings.

b) The numbers of workers assigned to each leading hand may increase or decrease according to the nature and type of tasks being performed.

5.7 First Aid Allowance

a) An Employee who is qualified to provide first aid and is appointed by the Employer to be a first aider will be paid a first aid allowance whilst the Employee maintains a current First Aid certificate.

b) The first aid allowance will be a flat amount and fixed for the life of the Agreement and will not be included in the calculation of overtime, leave or any shift or other loadings.

5.8 Overtime Meal Allowance

a) If an Employee is required to work more than two hours overtime after their ordinary hours of work, Monday to Friday, a payment of $24.51for meals will be made.

b) In the circumstances where an Employee is required to work more than eight hours overtime on either Saturday or Sunday, a payment of $24.51 in lieu will be made.

c) This meal allowance will be a flat rate amount and will not be included in the calculation of overtime, leave or any shift or other loadings.

5.9 Tradesperson Allowance

a) An Employee engaged as a Tradesperson as prescribed at Appendix A of this Agreement will receive an allowance of $1.81 per hour actually worked; this allowance will be classified as all-purpose. This allowance is inclusive of the tool allowance in Appendix C.

5.10 Superannuation

a) The Employer will make superannuation contributions in accordance with the requirement under the *Superannuation Guarantee and Administration Act 1992* (Cth) into a superannuation fund nominated by the Employee calculated on *Ordinary Time Earnings* (OTE). The minimum employer contribution will be $255 per week or the minimum statutory contribution rate (currently 11.5% of OTE) and will remain for the duration of this Agreement unless amended by legislation.

b) Where an Employee does not nominate a superannuation fund, the Employer will make superannuation contributions into the Employee's stapled superannuation fund or the Company's default superannuation fund which offers a MySuper product, is an exempt public sector scheme or is a fund of which the relevant Employee is a defined benefit member.

c) Employees can elect to "salary sacrifice" for additional superannuation contributions provided that:

i. the arrangement complies with the relevant legislation and Employer policy as amended from time to time;

ii. the Employee notifies the Employer of his or her election to salary sacrifice in writing prior to the wages and/or allowable entitlements being earned or accrued by the Employee;

iii. the superannuation fund is a complying superannuation fund; and

iv. the amount to be paid into the superannuation fund plus any balance of wage

and/or allowable entitlements is equivalent to what the Employee would have been entitled to as wages and/or allowable entitlements under this Agreement.

d) Where an Employee elects the option of salary sacrificing some of their wages, there must be a signed agreement between the Employee and the Employer. This option must remain for a period of not less than six months, unless exceptional circumstances apply.

e) All superannuation contributions will be paid according to applicable fund requirements.

5.11 Redundancy

a) The Employer will make redundancy contributions for Employees covered by this Agreement into a redundancy pay scheme determined by the Employer which is an Approved Worker Entitlement Fund under the *Fringe Benefits Tax Assessment Act 1986 (Cth).*

b) Contributions will be made on a pro rata basis for any partial week worked. An employee will accrue at the daily rate of $35 for each day worked during the week (limited to Monday - Friday).

c) Where an employee takes an unauthorised absence, the employee will not accrue redundancy entitlements for that day.

d) The Employer contribution to this Fund will be as per the following table:

Operative date	**Contribution per week per Employee**
Date of approval of the Agreement by the Fair Work Commission.	$175.00

e) The contributions will be paid monthly in accordance with the requirements of thethe applicable redundancy pay scheme.

f) The payments under this clause are inclusive of any statutory entitlements an Employee may have to severance or redundancy payments.

PART 6 HOURS OF WORK, OVERTIME and RDO'S

6.1 Hours of Work

a) Subject to (b) the ordinary hours of work for Day Workers will be 8 hours per day, Monday to Friday between the hours of 6.00am and 6.00pm and will average 36 hours per week over a 4-week period, employees may also be required to work reasonable additional overtime hours.

b) In the majority of circumstances, the ordinary hours referred to in clause 6.1(a) will be worked between Monday to Friday, however in recognition of the nature of the Project, there may be a requirement for Day Workers to work ordinary hours outside the span of hours contained in clause 6.1(a). In these circumstances, it will be available to the Employer and affected Employees to agree to work an alternative arrangement of hours of work that provide an average of 36 hours a week over a nominated cycle. Weekends may be included in a nominated cycle. Ordinary hours worked on weekends will be paid at the appropriate penalty rate prescribed in this Agreement.

c) Start and finish location(s) and time(s) will be designed to support production and maximise equipment operating hours and maintenance time. These may be altered by the Employer to suit the needs of the Project, following consultation with the Employees affected or by the giving of 48 hours written notice by the Employer to the affected Employees concerned or by a lesser period in the case of an emergency.

d) Employees will be required to work reasonable weekend and non-weekend overtime when requested, as determined by the Employer, to meet the needs of the Employer's contractual requirements for completion of work on the Project.

e) Tool Box and Pre-Start meetings will generally be held prior to the commencement of each shift. Employees will be ready for work at the commencement of the Tool Box or Pre-Start and meetings will be paid at the Employee's Base Rate and forms part of the Employees ordinary hours.

6.2 Day Workers

Day Work is where an Employee is rostered to work ordinary hours of work between the hours of 6.00am and 6.00pm Monday to Friday. Day Workers may also be rostered to work ordinary hours of work on a weekend where agreed under clause 6.1(b).

6.2.1 Weekdays

a) Day Workers will be paid their relevant Base Rate and relevant allowances for the ordinary hours worked on a weekday.

b) Overtime will be paid at double the Base Rate.

6.2.2 Saturday

a) Day Workers will be paid double the Base Rate for overtime worked on a Saturday

b) A Day Worker required to work on a Saturday will be paid a minimum of four hours' work at the appropriate rates.

6.2.3 Sunday

a) All ordinary and overtime hours worked by Day Workers on a Sunday will be

paid at double the Base Rate.

b) A Day Worker required to work on a Sunday will be paid a minimum of four hours' work at the appropriate rate.

6.2.4 Meal and Rest Breaks

a) For each shift or day where a minimum of 8 ordinary hours are worked, Day Workers will take an unpaid 30-minute meal break within 6 hours of commencement. For Day Workers, this meal break is not counted as time worked.

b) There will be one daily paid rest break of 20 minutes' duration to be taken at a time that suits the operational requirements of the Project.

c) Day Workers will take a 30-minute paid meal break in excess of 8 hours worked after commencement on a Saturday and Sunday.

d) Day Workers will receive a paid 20-minute break after the conclusion of 2 hours overtime following ordinary hours provided the Employee is to continue overtime. The Employee is further entitled to paid 20-minute breaks at the conclusion of every 4 hours overtime.

e) Day Workers will receive a paid 20-minute break after the first 4 hours of overtime work on the weekend. If the overtime continues beyond a further four hours after taking of the break, the employee will receive an additional paid 20-minute break.

f) The times of taking the breaks will be agreed between the Employer and majority of Employees affected.

6.2.5 Deferment and Staggering of Meal or Rest breaks

a) It may be necessary for the Employer to defer a meal or rest break to enable the completion of the task at hand in a timely manner. The deferment for the meal or rest break by up to one hour will be permissible. If a meal break is deferred for more than an hour, the Employee will be paid double the Base Rate for the duration of the deferment which is in excess of one hour and until the completion of the meal break.

b) Meal or rest breaks may be staggered between individual Employees to allow operations to continue without interruption.

6.3 Shift Workers

6.3.1 Weekdays

a) Shift Workers will be paid the following rates for ordinary hours worked on a weekday:

i. Day Shift - Base Rate;

ii. Afternoon Shift - Base Rate plus 50% of the Base Rate; and

iii. Night Shift - Base Rate plus 50% of the Base Rate.

iv. All time worked in excess of an Employee's ordinary hours, Monday to Friday, will be paid at double the relevant Base Rate. Where an Employee is engaged on shift work and the shift roster includes a regular overtime shift (weekdays or weekends), attendance at the additional shift is considered mandatory.

b) The ordinary hours of both afternoon and night shift will be 8 hours daily inclusive of meal breaks.

6.3.2 Weekends

a) All hours worked by Shift Workers on weekends will be paid at double the relevant Base Rate (subject to clauses (b) and (c) below).

b) An Afternoon Shift commencing at or after 6.00pm on a Sunday and a Night Shift commencing at or after 10.00pm on a Sunday will be paid as a weekday Afternoon or Night Shift and not as weekend.

c) Where a Shift Worker is working under a 5 day shift pattern from Monday to Friday, and the 5th shift in that pattern is an Afternoon Shift or Night Shift that commences on the Friday but ends on the Saturday, the Shift Worker will be paid for that 5th shift as a weekday Afternoon Shift or Night Shift, and not as a weekend.

d) Under no circumstances will an Employee be entitled to shift loading pursuant to this clause and overtime rates at the same time. For clarity, an Employee will receive either the relevant shift loading, or the overtime rate prescribed in this Agreement, but not both.

6.3.3 Meal and Rest Breaks

a) Unless otherwise agreed between a section or sections of Employees, Shift Workers will take a 30-minute meal break at no later than six: hours after the commencement of each shift. For Shift Workers, the meal break will be counted as time worked when on shift work.

b) There will be one daily paid rest break of 20 minutes' duration to be taken at a time that suits the operational requirements of the Project. The times of taking the breaks will be agreed between the Employer and the majority of Employees affected.

6.3.4 Deferment and Staggering of Meal or Rest Breaks

a) It may be necessary for the Employer to defer a meal or rest break to enable the completion of the task at hand in a timely manner. The deferment of the meal or rest break by up to one hour will be permissible. If a meal break is deferred for more than one hour, the Employee will be paid double the relevant ordinary Base Rate for the duration of the deferment which is in excess of one hour until the completion of the meal break.

b) Meal or rest breaks may be staggered between individual Employees to allow operations to continue without interruption.

6.3.5 Notice

The Employer will give relevant Employees at least 48 hours' notice that they will need to commence shift work. Except in the case of emergencies or where there is a machinery breakdown, Employees will be given 48 hours' notice of variation to their shift roster.

6.3.6 Broken Shifts

a) Where an Employee receives less than 48 hours' notice and the shift continues for less than 5 consecutive days, the Employee is considered to be working a broken shift.

b) In the case of broken shifts (a shift that departs from the Employee's established

shift roster) (i.e. does not fall within the definition of Shift Work in this Agreement - see Definition of “Shift Worker"), the Employee will receive the overtime rate for Day Workers on weekdays as prescribed at clause 6.2.1(b) for the duration of the broken shifts.

6.4 Recall

a) An Employee recalled to work overtime after leaving the Project (whether notified before or after leaving the Project) will be paid for a minimum of 4 hours' work at the appropriate rate for each time the Employee is recalled.

b) Except in the case of unforeseen circumstances arising, an Employee so recalled will not be required to work the full 4 hours if the jobs the Employee was recalled to perform is completed within a shorter period.

c) Employees will receive the appropriate overtime rate including an entitlement to an additional payment for Daily Fares and Travel allowance for that day.

6.5 Rest period after Overtime

a) An Employee who works so much Overtime between the termination of their ordinary work on one day and the commencement of their ordinary work on the next day and has not had at least 10 consecutive hours off duty between these times will, subject to this clause, be released after completion of such overtime until the Employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

b) If, on the instructions of the Employer, the Employee resumes or continues work without having had 10 consecutive hours off duty, the Employee will be paid double time until he/or she is released from duty for a ten-hour rest period.

c) The provisions of this clause will apply in the case of Employees on shift work who rotate from one shift to another as if 8 hours were substituted for ten hours if overtime is worked:

i. For the purpose of changing shift rosters; or

ii. Where a shift worker does not report for duty and a day worker or shift worker is required to replace such shift worker; or

iii. Where a shift is worked by arrangement between the Employer and Employee.

d) Except as provided for in this clause, the Employer may require any Employee to work reasonable overtime.

6.6 Cancellation of Weekend Overtime

a) In circumstances, including but not limited to, plant failure, actual or forecast inclement weather, or cancelled material delivery, the Employer may cancel planned weekend overtime. The Employer will endeavour to notify affected Employees of weekend overtime cancellation by lunchtime on Fridays. However, the Employer reserves the right, in exceptional circumstances, to notify Employees of weekend overtime cancellation by no later than normal finishing time on Fridays. This will include posting of the notice of cancellation of weekend overtime on the noticeboard.

b) Equally, Employees through circumstances may find themselves unable to fulfil their commitment to attend the Project for planned weekend overtime. Such Employees will notify the Employer before the planned finishing time on Friday,

with reasonable consideration given to exceptional circumstances of any late notification.

6.7 Work Throughs

a) Work throughs under this clause (6.7) are where Employees are directed by the Employer at the commencement of their shift/work day to maintain operations to keep equipment and/or plant running to facilitate work flows, and as such, are unable to take their normal scheduled meal breaks, at their crib room/amenities.

b) Work crews, when directed by the Employer, will work through normal scheduled meal breaks, provided that each of these Employees are entitled to pause for a reasonable time to refresh themselves. A reasonable break for the purposes of this clause will be generally a minimum of 20 minutes duration and taken when appropriate, at the location of the work operation.

c) In recognition of this work pattern, when Employees are required to maintain operations under this clause, they will receive an additional one (1) hour's pay, accruing every four (4) hour block after the normal meal break time, paid at double time. This payment is in lieu of the normal scheduled meal breaks and ability to take such a break at their crib room/amenities. This will not apply where Employees have their meal breaks rescheduled in accordance with this Agreement.

6.8 Rostered Days Off

a) For each ordinary day or shift worked, 0.8 of an hour's pay will accrue towards payment for a Rostered Day Off ("RDO").

b) It is the intention of this Agreement that there will be 6 scheduled RDOs observed for each year of this Agreement. Requirements of the Project and the program will determine the work roster and/or shift roster. There will be requirements to adjust RDOs (including any scheduled RDOs) during the life of the Project to meet the needs and program of the Project.

c) In the event that there is a requirement for work to be carried out on scheduled RDOs the Employer will, in advance of this requirement, notify, consult and reach agreement with effected Employees to perform this work. Agreement to perform this work will not be unreasonably withheld by an affected Employee.

d) To allow greater continuity of operation, the Employer and Employees may also agree to move or bank RDOs when such entitlement is due.

e) The Employer is committed to encouraging all Employees to take their accrued RDOs on a regular basis during the Project to maintain a satisfactory work/life balance.

f) It is the Employer's intention to have regular communication regarding the Project and the scheduling of RDOs.

g) Where an Employee does not have sufficient RDO hours accrued at the time of a scheduled RDO, the Employee may elect to take annual leave or some other form of leave.

h) The following is agreed in respect of RDOs:

   i. If an RDO is moved or banked, the Employer will not be required to pay overtime rates for any RDO worked in these circumstances;

   ii. Where the Employee terminates employment before any moved or

banked RDO is taken, the moved or banked RDO will be paid at the Employee's relevant and applicable Base Rate at the time of termination;

iii. RDOs do not accrue while Employees are on unpaid or unauthorised leave or while taking RDOs;

iv. Payment on an RDO will include the daily fares and travel.

i) The Employee will have the flexibility to request the Employer to:

i. Use accrued/banked RDOs for days off; or

ii. Pay out up to 50% of accrued RDOs at ordinary rates of pay.

PART 7 LEAVE ENTITLEMENTS

7.1 Annual Leave

a) An Employee will accrue paid annual leave at the rate of 4 weeks (for each 12-month period of continuous service). Annual leave is paid based on 36 hours per week at the Base Rate paid to the Employee immediately prior to the leave plus a loading of 17.5% (plus Leading Hand allowance if applicable). For the period, if any, that an Employee is engaged as a Shift Worker for the purposes of the National Employment Standards as defined by this Agreement, they will be entitled to a pro-rata accrual of 5 weeks (maximum) of annual leave per annum.

b} An Employee who would have received shift loadings prescribed by this Agreement had they not been on Annual Leave, will forgo the Annual Leave loading and will be entitled to the higher shift loadings.

c) The loading prescribed in 7.1(a) or (b), will apply to accrued but untaken annual leave on termination.

d) The period of annual leave will be exclusive of any public holiday that occurs during the period.

e) The Employer may direct Employees to take accrued annual leave on one month's notice, the Employer will generally close down the Project for one or more weeks over the Christmas - New Year period and in these cases, Employees will generally be required to ensure that they have sufficient Annual Leave remaining to enable them to take leave for the period of the shutdown. In the event that they do not have Annual Leave or RDO accruals, the Employee may be required to take Leave Without Pay for such period or a combination of Annual Leave, RDO and Leave Without Pay.

f) Unless otherwise agreed, one month's notice of the start of annual leave will be given by Employees. Annual leave may be taken in any combination of days or weeks agreed between the Employer and the Employee.

g) An Employee going on leave will be paid their wages in accordance with the normal pay cycle unless alternative arrangements have been agreed to with the Employer before the leave is taken.

h) Where an Employee has exhausted Annual Leave entitlements, leave without pay may be considered by the Employer and approval of such leave will be at the Employer's sole discretion. The Employee must make a formal request in writing providing a valid reason for such a request. If leave without pay is granted to the Employee, the Employee will not accrue any entitlements for the duration of leave without pay.

i) Accrued annual leave is paid out on termination of employment.

j) This clause 7.1 will be read and be interpreted in conjunction with the definition of “shiftworker” in clause 38 of the Building and Construction General On-Site Award 2020 for the purposes of the NES. If there is any inconsistency between this clause and NES, the more beneficial provision to an Employee prevails.

7.2 Personal/Carer's Leave

a) Employees will be entitled to accrue ten (10) days paid personal/carer's leave (including sick leave) per annum, based on the Employee's base rate of pay, in accordance with the FW Act. 40

b) Paid personal/carer's leave accrues progressively during the year.

c) An Employee will not be entitled to be paid personal/carer's leave for more ordinary hours than the Employee would have worked on the day.

d) Sick Leave is not paid while an employee is receiving Workers' Compensation.

e) Personal/carer's leave will be paid at the Employee's Base Rate for ordinary hours that the Employee would have worked on that day. To be paid personal/carer's leave, the employee must meet the following requirements:

i. Have accrued personal/carer's leave;

ii. Notify their Supervisor of the absence as soon as possible and no later than four hours from the Employee's start time If the Employee fails to notify their Supervisor as soon as practicable (and not later than four hours from the Employee's start time), without good cause, this will constitute unauthorised unpaid leave. Such occurrence may commence counselling in accordance with the procedure set out in clause 3.11.

iii. Advise the Employer how long the absence on personal leave is likely to be;

iv. Produce evidence to the Employer of the illness or injury or the need to use personal leave, provided that where an Employee is absent on personal leave for two consecutive days or more or on more than two single day absences in any year, evidence satisfactory to the Employer will mean a medical certificate from a registered Health Practitioner or Statutory Declaration stating the nature of the illness and the period the Employee will be unable to work.

f) Personal/carer's leave will accumulate from year to year.

g) Accrued, but untaken, personal/carer's leave is paid out on redundancy or at the completion of the Project. Where an Employee is terminated in accordance with clause 3.7 (f) and (g), payment for unused personal/carer's leave will not occur.

h) An Employee will be granted paid personal/carer's leave up to the limit of their accrued entitlement.

i) On each occasion that an Employee takes carer's leave, the Employee must provide the Employer with a medical certificate from a registered Health Practitioner or complete a Statutory Declaration stating that the Employee, or an immediate family or household member for whom the Employee was caring, was or is unwell and that the Employee was unable to attend for work on that occasion. This requirement may be modified at the Employer's sole discretion. In the case of an unexpected emergency, proof may be required in a form determined by the Employer.

7.2.1 Unpaid Carer's Leave

a) Employees are entitled to a period of up to two (2) days unpaid carer's leave for each occasion that an immediate family member or other member of the Employee's household requires care and support because of an illness, injury or unexpected emergency and the Employee has exhausted all of their paid personal/carer's leave. The Employer will consider an individual Employee's circumstances in respect of requests for any further unpaid carer's leave.

b) The Employee will provide notice to the Employer as soon as reasonably practicable. The Employer may require an employee to provide to the Employer in accordance with the National Employment Standards

documentary evidence confirming the need to take such leave.

7.2.2 Absenteeism

If an Employee is taking personal/carer's leave such that there is an indication of a pattern of regular and/or excessive absenteeism, the Employer may commence counselling in accordance with the procedure set out in clause 3.11.

7.3 Compassionate Leave

a) Employees will be entitled to Compassionate Leave in accordance with the FW Act.

b) An Employee will be entitled to a period of two (2) days paid Compassionate Leave for each occasion when a member of the Employee's immediate family or a member of the Employee's immediate household contracts or develops a personal illness that poses a serious threat to his/her life; or sustains a personal injury that poses a serious threat to his/her life; or dies.

c) The Employee will provide notice to the Employer as soon as reasonably practicable.

d) The Employer may require an Employee to provide to the Employer, in accordance with the FW Act documentary evidence confirming the need to take such leave.

e) The Employer, at its sole discretion, may grant up to ten working days of unpaid Leave in accordance with this clause.

7.4 Parental Leave

Employees will be entitled to Parental Leave in accordance with applicable legislation (e.g., the FW Act, and the *Paid Parental Leave Act 2010* (Cth)).

7.5 Jury Service

a) An Employee called for jury service during ordinary hours will be reimbursed by the Employer by an amount equal to the difference between the amount paid by the Court and the amount of Base Rate earnings the Employee would have received for the ordinary hours expended at the Court, for a maximum of 10 days. For the avoidance of doubt, entitlement and eligibility for payment for jury duty service will be strictly in accordance with the prevailing legislation.

b) The Employee will notify the Employer as soon as practicable, of the date upon which the Employee is required to attend for jury service.

c) The Employee will provide the Employer with proof of attendance, duration of attendance and amount received.

7.6 Long Service Leave

The Employer will register each Employee in the QLeave scheme for the duration of the Employees period of employment on the Project.

7.7 Requests for Flexible Working Arrangements

An Employee, who is an Employee who has worked with the Employer for at least 12 months, and falls within one of the categories of Employees who can request flexible working arrangements, in accordance with the provisions of the FW Act, may submit a request to the Employer for a change in working arrangements, in accordance with

these provisions, as amended from time to time.

7.8 Community Service Leave

Employees will be entitled to Community Service Leave in accordance with the FW Act.

7.9 Family & Domestic Violence Leave

a) Family and domestic violence means violent, threatening or other abusive behaviour by a family member of an Employee that seeks to coerce or control the Employee and that causes them harm or to be fearful. Family member means:

   i. Employee; or

   ii. a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the Employee; or

   iii. a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

   iv. a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the Employee. Any reference to a spouse or de facto partner in the definition of family member includes a former spouse or de facto partner.

b) An Employee is entitled to 10 days' paid leave to deal with family and domestic violence, as follows:

   i. the leave is available in full at the start of each 12 month period of the Employee's employment; and

   ii. the leave does not accumulate from year to year; and

   iii. is available in full to part-time and casual Employees.

c) A period of leave to deal with family and domestic violence may be less than a day by agreement between the Employee and the Employer.

d) The Employer and Employee may agree that the Employee can take additional unpaid leave to deal with family and domestic violence should the Employee exceed the 1O days.

7.10 Taking Paid Leave

An Employee may take paid leave to deal with family and domestic violence if the Employee:

a) is experiencing family and domestic violence; and

b) needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

Note: The reasons for which an Employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

7.11 Public Holidays

a) All Employees will be entitled to the following Public Holidays without deduction of ordinary time earnings:

i. New Year's Day;

ii. Australia Day;

iii. Good Friday;

iv. Easter Saturday;

v. Easter Sunday

vi. Easter Monday;

vii. Anzac Day;

viii. Labour Day;

ix. Exhibition Holiday;

x. King's Birthday;

xi. Christmas Day;

xii. Boxing Day; or

xiii. Any other day, or part day, declared or prescribed by or under a law of the State of Queensland as a Public Holiday, other than a day or part-day or a kind of day or part-day that is excluded by the Fair Work Regulations 2009 (Cth) from counting as a Public Holiday.

b) A Day Worker required to work on a Public Holiday nominated herein will be paid at the rate of double time and a half of their Base Rate for all time so worked. For clarity, the double time and a half payment is in lieu of any applicable shift loadings.

c) A Shift Worker on Afternoon Shift or Night Shift rostered to work on a Public Holiday nominated herein will be paid at the rate of double time and a half of their Base Rate for all time so worked. For clarity, the double time and a half payment is in lieu of any applicable shift loadings.

d) Shift Worker(s) (excluding casuals) will be paid their ordinary time earnings for a Public Holiday they are rostered to work but are not required to work. This also includes payment for Public Holiday's that fall on a day that the Employee is not rostered to work. This clause 7.11(d) will only apply when the Public Holiday(s), as provided for in clause 7.11(a), which falls on any day between Monday and Friday.

e) Employees required to work on a Public Holiday will be afforded a minimum of 4 hours' work, or be paid as such.

f) It will be available for the Employer and a majority of the affected Employees to substitute a nominated Public Holiday for another day and the prescriptions of this clause 7.11 will apply to the substituted day.

PART 8 ADMINISTRATION

8.1 Income Protection

The Employer will continue to maintain income protection insurance with the current provider (sickness and injury) for Employees covered by this Agreement, or another provider agreed between the parties. The cost to the Employer shall not exceed $187.96 per person per month initially and then shall increase by no more than the base rate escalation percentage amounts from the dates applicable to increases to the Base Rate.

8.2 Payment of Wages

a) Payment will be by direct electronic funds transfer to the Employee's nominated financial institution account(s).

b) Employees are required to nominate to the Employer the account(s) at a bank or other financial institution at the time of engagement.

c) The pay week will be from Monday to Sunday, with wages being transferred to the Employees nominated financial institution on the following Thursday.

d) Where a payment falls on a public holiday, the Employer will make the payment in respect of Employees on the following working day.

e) All wage increases during the life of this Agreement will be made in accordance with Appendices A or B and will take effect from the first full pay period after the effective date.

f) Any overpayment of wages made to the Employee in error by the Employer will, by written agreement with the Employee, be deducted over a negotiated period (but not longer than six (6) weeks) and must be repaid while the Employee is employed by the Employer.

g) Employees will not unreasonably withhold consent for reimbursement of overpayment of wages.

8.3 Employee Representative

a) All parties to this Agreement acknowledge that employees have the right to representation by employee representatives in employment matters. The Company will not interfere in the selection of an employee representatives. Employee representatives have the right to be treated fairly and to perform their role without any discrimination in their employment.

b) The Employer acknowledges that Employees may choose to elect an employee as a representative(s) (who may or may not be a Union delegate). Such elected representative(s) will be allowed reasonable time during working hours to submit to the Employer matters affecting the Employees they represent. The Employee representative is required to perform productive work when not representing other Employees on the Project (that is, an Employee representative will not be a non-working shop steward). The Parties acknowledge that the benefits given under clause 8.3 and 8.4 apply only to the Employee representative appointed under this clause.

c) Employee representative(s) will, subject to approval by their Supervisor will be provided with reasonable time off with pay to:

i. Attend any court or industrial tribunal proceedings and associated meetings that relate to this Agreement;

ii. Consult with other Employees in relation to any matter arising out of this Agreement or in connection with their employment with the Employer. To avoid doubt, this clause 8.3 is not intended to confer rights on Employee representative(s) to perform similar functions of union officials, for the purpose of union officials avoiding right of entry requirements; and

iii. The Employee representative will be entitled to 5 days training leave per calendar year.

8.4 Employee Representative Facilities

a) The Employer shall allow an Employee representative appointed under clause 8.3 reasonable access to office resources when acting in the capacity of the Employee representative, for example:

I. A telephone;

ii. Access to a computer;

iii. A table and chairs;

iv. A filing cabinet;

v. Air conditioning/heating;

vi. Access to stationery and other administrative facilities, including use of email, (if available on site), following consultation between the Employee Representative and Site Management.

b) These resources will be available during working hours.

8.5 Compliance with Statutory Requirements

The Parties shall adhere to the requirements of all applicable Acts of Parliament of the Commonwealth and State and therefore comply with the relevant requirements of all those ordinances, regulations, by-laws, orders and proclamations made or Issued under any applicable Act.

8.6 Severability

a) It is the Intention of those covered by this Agreement that the Agreement contains only permitted matters under the FW Act.

b) The severance of any term of this Agreement that is in whole, or in part, of no effect by virtue of the operation of s.253 of the FW Act will not be taken affect the binding force and effect of the remainder of the Agreement.

c) To the extent it is possible, all terms should be interpreted in a manner that would make them permitted matters.

8.7 Employee Awareness

Employees will be provided with a copy of this Agreement in their letter of offer and copies will be available on the Project.

8.8 Immigration Compliance

a) The Employer recognises its obligations in respect of compliance with applicable Australian immigration laws.

b) Prospective Employees may be required to complete an authority which authorises the Employer to obtain from the Department of Immigration and Citizenship, details of their immigration status.

c) No person, other than an Australian Citizen or Permanent Resident, will be employed by the Employer unless it is verified that they have the Right to Work in Australia.

PART 9 SIGNATORIES

Signed for and on behalf of the employer CPB Contractors Pty Ltd pursuant to section 126 of the *Corporations Act 2001* (Cth):

I am employed by CPB Contractors Pty Ltd, and I am authorised by CPB Contractors Pty Ltd to sign this agreement on its behalf as an authorised employer representative.

By:

Name Michael McCann

Address 520 Wickham St, Fortitude Valley, QLD 4006

Position Alliance Manager

On 20/08/2024

Date *Signature*

In the presence of

Natalie Jensen

Name *Signature*

Signed by a representative of the employees covered by the agreement in accordance with regulation 2.06A of the *Fair Work Regulations 2009*:

By:

Name Matthew Papworth

Address: 271 Gilchrist Avenue, Herston QLD 4006

Position HR Manager

On 20/08/2024

Date *Signature*

In the presence of

GRACE DUNN

Name *Signature*

Appendix A CLASSIFICATION STRUCTURE

Civil Worker Classifications

The Civil Worker (CW) classifications will apply to Employees performing work of the nature of Civil Construction who are engaged in the classifications set out below, and are employed to perform the works set out in clause 2.3 of this Agreement.

Determination of Classification for individual Employees:

1. The appropriate classification level will be determined by the primary role in which a person is engaged to perform by the Employer, regardless of that person's level of skill.
2. This means that the appropriate classification level for an individual will be determined on a task rather than skill basis.
3. Individual classification levels will only change where the primary task for which the individual is engaged changes.

	Indicative Classification	**From the first full pay period after Agreement approved Base Rate per hour**
CW1	New Entrant (an entry level with less than 12 months experience) General Labourer Stores Assistant	50.57
CW2	Skilled General Labourer Earthworks Trim Grade Checker Heavy Plant Spotter Concrete Gang Concrete Float Hand Paving Stringliner Store-person Yardperson Chainman	52.53
CW3	Elevated Work Platform Operator With Ticket Hoist Driver Concrete Finisher Form Setter Road Roller Operator under 12T Heavy Mobile Plant Operator (0-5T) Ticketed Dogman Steel fixer Ticketed Forklift Driver Ticketed Rigger/Scaffolder Telehandler (Up to 4.5T) Hiab Operator	54.73
CW4	Concrete Line Pump Operator Road Roller Operator 12T and over Concrete Finisher Concrete Paving Spreader Non-certified Tradesperson	57.46
CW5	Trade Qualified Tradesperson Crane Operator (5-20T) Operators of: Tractor up to but not exceeding 48kw (65bhp), Skid Steer Excavator up to but not exceeding 48kw (65bhp)	60.11

	Indicative Classification	From the first full pay period after Agreement approved Base Rate per hour
	Dumper/Water Cart not exceeding 40T, Mobile Concrete Pump Boom, Forklift not exceeding 48kw, Shotcrete Placing Machine, Paver Gantry Crane Operator	
CW6	Heavy Mobile Plant Operator (>20T-60T) Operators of: Tractor 48kw up to but not exceeding 370kw, Loader-Front End and Overhead from 48kw up to but not exceeding 370kw including:960, 966, 980, Dry Batch Plant, Pug Mill, Skid Steer Tractor from 48kw, Forklift from 48kw but not exceeding 220kw, Excavator not exceeding 3cubic metres, Dumper/Water Cart over 40T but not exceeding 100T, Dozer D8 without GPS, Compactor 825 without GPS, Graders 140,143,14,16 without GPS	62.84
CW7	Heavy Mobile Plant Operator (>60-100T) Operators of: Tractor from 370kw up to but not exceeding 450kw including Scraper 651/ Dozer DION, Trimmer, Excavator from 3 cubic metres, Loader-Front End and Overhead from 370kw up to but not exceeding 450kw, Wet batch Plant, Scraper 651, Compactor 825 with GPS, Graders 140,143,14,16 with GPS, Dozer 08 with GPS	65.57
CW8	Heavy Mobile Plant Operator (>100T) Operators of: Tractor from 450kw including Dozer 011, 010-48kw, 475, Grader with Final Trim, Scraper 637	68.32

Appendix B BASE RATES OF PAY

The Base Rates of pay for each classification will be as prescribed in Appendix A, escalate from the first full pay period after the indicated escalation date as follows.

Classification	Commencement of Agreement	1/07/2025	1/07/2026	1/07/2027
	rate per hour	rate per hour	rate per hour	rate per hour
CW1	50.57	53.10	55.75	58.54
CW2	52.53	55.16	57.92	60.81
CW3	54.73	57.46	60.34	63.35
CW4	57.46	60.33	63.35	66.52
CW5	60.11	63.12	66.27	69.59
CW6	62.84	65.98	69.28	72.74
CW7	65.57	68.85	72.29	75.91
CW8	68.32	71.73	75.32	79.09

Appendix C ALLOWANCES & CONTRIBUTIONS

Flat or AU Purpose	Allowance Contribution	Amount
Flat	**Daily Fares and Travelling Allowance**	$50.00
Flat	**Productivity Allowance (per hour worked)**	$9.64*
Flat	**People First Payment**	$55/week
Flat	**Leading Hand Allowance (per hour flat)**	
	· In charge of 2-5 persons	$1.99*
	· In charge of 6-10 persons	$2.53*
	· In charge of 11 plus persons	$3.36*
Flat	**First Aid Allowance (per day)**	
	· Senior First Aid	$4.15
	· Occupational First Aid	$6.55
Flat	**Overtime Meal Allowance**	$24.51*
All Purpose	Tradesperson Allowance	$1.81*p/hr
Flat		
N/A	**Shift Penalties**	
	Day Shift	Base Rate
	Afternoon Shift	Base Rate + 50%
	Night Shift	Base Rate + 50%
Flat	**Redundancy Contribution (per week)**	$175.00
N/A	**Superannuation (per week)**	11.5% or min $255 p/wk
Flat	**Income protection**	Employer cost $187.96 p/mth
	*To be increased by the corresponding wage escalation percentage per annum on first pay period after 1 July each year. As per the table below.	

Escalated allowances	Commencement of Agreement	1/07/2025	1/07/2026	1/07/2027
Productivity (per hour worked)	$9.64	$10.12	$10.63	$11.16
Leading hand 2-5 (per hour flat)	$1.99	$2.09	$2.19	$2.30
Leading Hand 6-10 (per hour flat)	$2.53	$2.66	$2.79	$2.93
Leading Hand 11+ (per hour flat)	$3.36	$3.53	$3.71	$3.89
Overtime Meal	$24.51	$25.73	$27.02	$28.37
Tradesperson (per hour)	$1.81	$1.90	$1.99	$2.09
Income Protection (per month)	$187.96	$197.36	$207.23	$217.59

Appendix D APPRENTICES

Apprentices engaged directly by the Employer will be paid the following Rates of Pay:

Level	Percentage of Relevant Wage Rate of CW5
First Year of Apprenticeship	55%
Second Year of Apprenticeship	65%
Third Year of Apprenticeship	80%
Fourth Year of Apprenticeship	90%

Adult Apprentice Rates of Pay:

An Adult Apprentice is a person of 21 years of age or over at the time of entering into a contract of training in a specified trade.

Level	Percentage of Relevant Wage Rate of CW5
First Year of Apprenticeship	80%
Second Year of Apprenticeship	85%
Third Year of Apprenticeship	90%
Fourth Year of Apprenticeship	95%

Apprentices will have an entitlement to the following Allowances and contributions:

Productivity Allowance: The Employer will pay Fifty Percent (50%) Productivity Allowance prescribed at clause 5.4 for the first year of the apprenticeship. The Employer will pay one hundred Percent (100%) Productivity Allowance for the second and subsequent years of the employee's apprenticeship.

Daily Fares and Travelling Allowance: The Employer will pay the full daily fares and travelling allowances prescribed at clause 5.3.

Superannuation: The Employer will make Superannuation contribution as prescribed at Clause 5.10.

CORRECTION TO DECISION

Fair Work Act 2009
s.185—Enterprise agreement

CPB Contractors Pty Ltd
(AG2024/3182)

CPB CONTRACTORS PTY LTD CROSS RIVER RAIL - RAIL INTEGRATION AND SYSTEMS (RIS) ENTERPRISE AGREEMENT 2024-2028

Building, metal and civil construction industries

DEPUTY PRESIDENT MASSON MELBOURNE, 22 OCTOBER 2024

Application for approval of the CPB Contractors Pty Ltd Cross River Rail - Rail Integration and Systems (RIS) Enterprise Agreement 2024-2028 – correction to nominal expiry date.

The decision issued by the Fair Work Commission on 11 October 2024 [[2024] FWCA 3573] is corrected pursuant to s 602 of the *Fair Work Act 2009* as follows:

[1] By deleting paragraph [8] and replacing it with the following:

> [8] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 18 October 2024. The nominal expiry date of the Agreement is 10 October 2028.



DEPUTY PRESIDENT

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<AE526370 PR780181>

DECISION

Fair Work Act 2009
s.185—Enterprise agreement

CPB Contractors Pty Ltd
(AG2024/5202)

CPB CONTRACTORS PTY LTD CROSS RIVER RAIL – TSD (STATION BUILDINGS WORKS STAGE) ENTERPRISE AGREEMENT 2024 – 2028

Building, metal and civil construction industries

DEPUTY PRESIDENT MASSON MELBOURNE, 31 JANUARY 2025

Application for approval of the CPB Contractors Pty Ltd Cross River Rail – TSD (Station Buildings Works Stage) Enterprise Agreement 2024 – 2028

[1] An application has been made for approval of an enterprise agreement known as the *CPB Contractors Pty Ltd Cross River Rail – TSD (Station Buildings Works Stage) Enterprise Agreement 2024 – 2028* (the Agreement). The application was made pursuant to s.185 of the *Fair Work Act 2009* (the Act). It has been made by CPB Contractors Pty Ltd. The Agreement is a single enterprise agreement.

[2] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Amending Act) made a number of changes to enterprise agreement approval processes in Part 2-4 of the Fair Work Act, that commenced operation on 6 June 2023. The *notification time* for the Agreement under s.173(2) was 7 December 2023 and the Agreement was *made* on 13 December 2024. Accordingly, both the *genuine agreement* and the *better off overall test* requirements are those applying on and from 6 June 2023.

[3] I am satisfied that each of the requirements of ss.186, 187 and 188 as are relevant to this application for approval have been met.

[4] I note that several clauses are inconsistent with the National Employment Standards (NES). Given the NES precedence clause at clause 2.7 of the Agreement, I am satisfied that the more beneficial entitlements of the NES will prevail.

[5] The Construction, Forestry and Maritime Employees Union and the Australian Workers' Union, being bargaining representatives for the Agreement, have given notice under s.183 of the Act that they want the Agreement to cover them. In accordance with s.201(2) I note that the Agreement covers these organisations.

[6] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 7 February 2025. The nominal expiry date of the Agreement is 30 January 2029.



DEPUTY PRESIDENT

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<AE527861 PR783878>

CPB CONTRACTORS PTY LTD - CROSS RIVER RAIL – TSD (STATION BUILDINGS WORKS STAGE) ENTERPRISE AGREEMENT 2024 – 2028

Table of Contents

PART 1 DEFINITIONS 5
PART 2 APPLICATION OF AGREEMENT 7
2.1 Title 7
2.2 Parties Bound 7
2.3 Rescinds and Replaces 7
2.4 Scope & Application 7
2.5 Date and Period of Operation 8
2.6 Objectives of Agreement 8
2.7 Relationship to Other Awards and Agreements 9
2.8 No Extra Claims 9
PART 3 CONDITIONS OF EMPLOYMENT 10
3.1 Continuous Operations 10
3.2 Individual Flexibility Arrangement 10
3.3 Consultation 11
3.4 Change to Regular Roster or Ordinary Hours of Work 13
3.5 Contract of Employment 13
3.6 Probation Period 15
3.7 Termination of Employment 15
3.8 Notice of Absence 16
3.9 Standing Down of Employees 16
3.10 Dispute Prevention and Settlement Procedure 16
3.11 Counselling & Disciplinary Procedure 17
3.12 Consultative Committee 19
3.13 Anti-Discrimination, Equal Employment Opportunity and Sexual Harassment 19
3.14 Labour Hire Protocol 19
PART 4 WORKPLACE HEALTH AND SAFETY 21
4.1 Safety Commitment 21
4.2 Project Inductions 21
4.3 Induction Training 21
4.4 Health & Safety Committee 22
4.5 Fitness for Duty 22
4.6 Safety Incident Procedure 23
4.7 PPE 24
4.8 Inclement Weather 25
4.9 Learning and Development 27
4.10 Traineeships 27

PART 5 CLASSIFICATION STRUCTURES, RATES OF PAY, ALLOWANCES AND OTHER ENTITLEMENTS DEFINITIONS 29

5.1 Classification Structures and Rates of Pay 29
5.2 Higher Duties 29
5.3 Daily Fare and Travel Allowance 29
5.4 Productivity Payment 30
5.5 People First Payment 30
5.6 Leading Hand Allowance 30
5.7 First Aid Allowance 31
5.8 Overtime Meal Allowance 31
5.9 Tradesperson Allowance 31
5.10 Superannuation 31
5.11 Redundancy 32

PART 6 HOURS OF WORK, OVERTIME and RDO'S 33

6.1 Hours of Work 33
6.2 Day Workers 33
6.3 Shift Workers 34
6.4 Recall 36
6.5 Rest period after Overtime 36
6.6 Cancellation of Weekend Overtime 36
6.7 Work Throughs 37
6.8 Rostered Days Off 37

PART 7 LEAVE ENTITLEMENTS 39

7.1 Annual Leave 39
7.2 Personal/Carer's Leave 40
7.3 Compassionate Leave 41
7.4 Parental Leave 41
7.5 Jury Service 41
7.6 Long Service Leave 41
7.7 Requests for Flexible Working Arrangements 42
7.8 Community Service Leave 42
7.9 Family & Domestic Violence Leave 42
7.10 Taking Paid Leave 42
7.11 Public Holidays 43

PART 8 ADMINISTRATION 44

8.1 Income Protection 44
8.2 Payment of Wages 44
8.3 Employee Representative 44

8.4 Employee Representative Facilities 45
8.5 Compliance with Statutory Requirements 45
8.6 Severability 45
8.7 Employee Awareness 45
8.8 Immigration Compliance 46
PART 9 SIGNATORIES 47
***Appendix A* CLASSIFICATION STRUCTURE 48**
***Appendix B* BASE RATES OF PAY 50**
***Appendix C* ALLOWANCES & CONTRIBUTIONS 51**
***Appendix D* APPRENTICES 52**

PART 1 DEFINITIONS

In this Agreement the following definitions will apply:

"Afternoon Shift" means a shift starting at or after 12.00pm and before 8.00pm, unless agreed by the parties, on any days of the week.

"Agreement" means CPB Contractors Pty Ltd – Cross River Rail – TSD (Station Buildings Works Stage) Enterprise Agreement 2024 – 2028.

"Award" means the Building and Construction General On-Site Award 2020 (MA000020).

"All Purpose" means the rate provided at Appendices A and B of this Agreement, plus any applicable all-purpose allowance as prescribed within this Agreement for ordinary hours.

"Authorised Paid Leave" shall mean where leave is authorised and paid for by the Employer.

"Base Rate" means the Employees base hourly rate of pay as set out at Appendices A and/or B of this Agreement.

"Broken Shift" means as prescribed at clause 6.3.6.

"CBGU JV" means the joint venture between CPB, UGL, BAM, and Ghella for the purpose of undertaking the TSD package of works on the Project on behalf of Pulse Partnerships Pty Ltd.

"Certificate" means any certificate provided by a recognised Registered Training Organisation provider that outlines competencies obtained.

"Consultative Committee" means the committee established in accordance with this Agreement.

"CPB" means CPB Contractors Pty Ltd, ACN 000 893 667.

"Day Shift" means a shift starting on or after 6.00am and before 12.00pm on any days of the week, as agreed by the parties. A Day Shift may commence prior to 6.00am for reasons including, but not limited to, an earlier commencement of shift during daylight saving.

"Day Worker" means an employee engaged to commence work at or after 6.00am and before 10.00am, Monday to Friday. A Day Worker may commence work prior to 6.00am for reasons including, but not limited to, an earlier commencement of work during daylight savings. For the avoidance of doubt, a Day Worker is not a Shift Worker.

"Employee" means a person employed by the Employer who performs work covered by the scope of this Agreement and is engaged in one of the Classifications at Appendix A.

"Employer" means CPB.

"FW Act" means the *Fair Work Act 2009* (Cth), as amended from time to time.

"FWC" means Fair Work Commission.

"Health and Safety Committee" means a committee established in accordance with the WH&S Act, or otherwise applicable OHS/WHS legislation.

"National Employment Standards" (NES) are minimum standards applying to employment conditions.

"Night Shift" means a shift starting at or after 8.00pm and before 6.00am, unless agreed between the parties, on any days of the week.

"**Ordinary Hours**" means the ordinary hours that the Employee is required to work, being 8 hours per day, Monday to Friday inclusive, and which will average 36 hours per week worked over a 4-week cycle. However, ordinary daily hours and/or shifts may be worked outside the span of hours contained herein (see clause 6.1b))

"**Ordinary Time Earnings**" is the amount of money an employee is paid for ordinary hours of work

"Party" and "Parties" means as prescribed at clause 2.2 as the context may require.

"Project" means the TSD package of works being undertaken by the Employer as part of the CBGU JV on behalf of Pulse Partnerships Pty Ltd in respect of the construction of a 10.2 kilometre rail line from Dutton Park to Bowen Hills in Queensland, which includes 5.9 kilometres of twin tunnels under the Brisbane River and the Brisbane CBD, and associated works.

"Shift Worker" means an Employee engaged to work continuously for five or more shifts on either Day Shift, Night Shift or Afternoon Shift.

"WHS Act" means the *Work Health and Safety Act 2011* (QLD), *The Work Health and Safety Regulation 2011* (QLD), Rail Safety National Law (Queensland) Act 2017) or otherwise applicable WHS legislation.

"WHS" means Work, Health and Safety.

PART 2 APPLICATION OF AGREEMENT

2.1 Title

This Agreement will be known as the CPB Contractors Pty Ltd Cross River Rail – TSD (Station Buildings Works Stage) Enterprise Agreement 2024 – 2028 **("the Agreement").**

2.2 Parties Bound

In accordance with Section 182(3) of the Fair Work Act, the Agreement covers each of the following parties:

a) CPB Contractors Pty Ltd, ABN: 98 000 893 667 (**"the Employer"**); and

b) All persons who are Employees as defined by this Agreement.

2.3 Rescinds and Replaces

This Agreement rescinds and replaces the Enterprise Agreements known as CPB Contractors Pty Ltd Cross River Rail - Tunnel and Shaft Greenfields Agreement 2019-2023 and, to the extent that it applies, the CPB Contractors Pty Ltd Cross River Rail – Civil and Surface Works Greenfields Agreement 2019-2023.

2.4 Scope & Application

This Agreement regulates wholly and exclusively the terms and conditions of employment of the employees of the Employer falling within the scope and application of the Agreement. This Agreement shall apply to surface civil and structural works, station and insitu structures and permanent building structures within the station buildings that is occurring on a CRR TSD Project Site under the control of the CBGU JV.

This Agreement will NOT apply to:

a) All works covered by the CPB Contractors Pty Ltd Cross River Rail - Rail Integration and Systems (RIS) Enterprise Agreement 2024-2028;

b) All work conducted on the Project relating to utilities;

c) Supervisory or managerial personnel, engineers, technicians and surveyors;

d) Tunnelling work involving road headers, tunnel boring machines or other excavation means;

e) Tunnel and Cavern inverts;

f) Security personnel;

g) Traffic controllers;

h) Deliveries and removal of goods, material and equipment to and from the Project;

i) Work on off-site infrastructure whether associated with the Project or not;

j) The offsite manufacturing or fabrication of goods, materials and equipment;

k) Queensland Rail employees and associates;

l) Offsite manufacturing or fabrications of material or supplies, including but not limited to all work performed at manufacturing facilities such as pre-cast concrete segments, structural steel, reinforcement cages, batch plants, other precast products and reinforcement fabrications;

m) Site office/amenities/crib maintenance & servicing personnel (e.g. cleaning, waste removal, repairs);

n) Persons undertaking the installation of temporary buildings and related services; and

o) Warranty defects liability, repairs and/or maintenance work performed by or on behalf of the manufactures and/or distributors of goods, material or equipment provided to the Project.

2.5 Date and Period of Operation

This Agreement commences seven days after approval by the Fair Work Commission and will nominally expire four years after its approval date.

2.6 Objectives of Agreement

The parties agree that key objectives of this Agreement are to provide terms and conditions of employment commensurate with the challenges associated with working in the construction industry and which promote safe working conditions, a functional work/life balance and a comfortable standard of living, whilst also providing a framework that seeks to maximise productivity, minimise lost time through genuine communication, consultation, collaboration and a sensible and practical application of terms contained in this Agreement.

2.6A First Nations People

2.6A.1 The parties recognise there is a significant population of First Nations People within Queensland. The Employer will use reasonable, non-discriminatory and lawful endeavours to employ a minimum of 5% of its total workforce who identify as First Nations People.

2.6A.2 The Employer will ensure that cultural awareness forms part of the induction process to ensure that all workers are made aware of the history and the spiritual connection that traditional owners have with each area where work takes place.

2.6A.3 First Nations Employees will be entitled to cultural and ceremonial leave as per clause 2.6A.5 below.

2.6A.4 The parties acknowledge that cultural ceremonies have been arranged on each site with the relevant traditional custodians of the land on which the Project is being built.

2.6A.5 The Employer will also implement policies that ensure:

a) access to personal leave for participation in cultural and ceremonial activities;

b) skill and career development opportunities for First Nation Employees;

c) the development, retention and promotion of First Nation Employees.

2.6B Women in the Industry

2.6B.1 The parties respect equal employment opportunities and it is recognised the demographic of the construction industry could be more diverse. To that end, the parties support the promotion of women into the industry and shall discuss means to achieve this objective,

including ways to encourage and assist women to seek and maintain employment in the construction industry.

2.6B.2 At a minimum, female toilets with sanitary bins shall be provided at all workplaces. In determining the location of the amenities, the Employer must consider the most appropriate balance of privacy, safety and security. This will be done under consultation with the safety committee.

2.6B.3 The parties recognise the right of women to feel safe at work. Sexual harassment, intimidation, ostracism, or any other unacceptable behaviour will not be tolerated. Any such behaviour will be thoroughly investigated. Breaches of this clause will involve disciplinary action up to and including termination of employment.

2.7 Relationship to Other Awards and Agreements

a) The relevant Award for purposes of applying the better off overall test to this Agreement is the Building and Construction General On-Site Award 2020.

b) This Agreement will be read in conjunction with the NES. Where this Agreement includes terms that have the same effect as terms of the NES, or terms that are ancillary or supplementary to the NES, the Agreement terms operate subject to the same qualifications, limitations and exclusions as the relevant NES entitlement unless otherwise specified.

c) Where the Agreement gives an Employee an entitlement that is the same as an entitlement under the NES:

   i. Those terms operate in parallel with the Employee's NES Entitlement, but not so as to give the Employee a double benefit; and

   ii. The provisions of the NES relating to the NES entitlement apply, as a minimum standard, to this Agreement entitlement.

2.8 No Extra Claims

The Parties covered by this Agreement intend and agree that this Agreement prescribes comprehensive terms and conditions of employment that are to apply for the duration of this Agreement.

It is a condition of this Agreement that the Parties Bound by this Agreement undertake not to:

a) Pursue any claims for additional benefits or obligations (whether or not known at the time the Parties entered into this Agreement). This includes but is not limited to any claims in excess of the provisions of this Agreement and/or claims relating to changes arising from award variations or decisions of a statutory body; and

b) Take industrial action in support of extra claims, award or over award, for the duration of this Agreement. For the avoidance of doubt, Employees and/or a union will not engage in industrial action for the purpose of advancing any claims whatsoever, including any claims in excess of the provisions of this Agreement, or against the Employer in respect of the employment of Employees.

PART 3 CONDITIONS OF EMPLOYMENT

3.1 Continuous Operations

The Parties recognise that the construction activities on the Project present unique operational requirements that may require operations to continue without interruption.

Specifically, the Parties agree that continuous operations (twenty four hours a day, seven days a week) and work flow be maintained on the Project, including but not limited to the following area of activity;

a) Critical concrete pours;

b) Precinct logistics and material handling;

c) Track fitout works and track fitout logistics;

d) High risk activities to minimise interface with day-to-day activities e.g., precast installation, canopy erection, heavy lift plant and equipment;

e) Mobilisation and demobilisation of heavy plant and equipment;

f) Delivery of equipment and material that require traffic permits;

g) Attendance for execution of critical works activities;

h) Operations involving traffic safety management;

i) Spoil removal and spoil haulage activities to stockpiles;

j) Pumping and dewatering activities;

k) Work required to stabilise any excavation against collapse;

l) Any activity that may affect the operating integrity of plant that supports the areas of continuous operations listed above; and

m) In such cases, appropriate safe staffing of equipment will be required.

The parties agree that continuous operations in these areas referred to above will include continuing to operate in periods of inclement weather, provided that WHS requirements of this Agreement and relevant legislation are met.

Notwithstanding anything contained in this clause, the Employer will endeavour to establish roster(s) that promote a work-life balance culture and assist in limiting the causes of fatigue in the workplace.

3.2 Individual Flexibility Arrangement

a) The Employer and an Employee covered by this Agreement may agree to make an individual flexibility arrangement to vary the effect of the terms of the Agreement in relations to 1 or more of the following matters:

   i. Single day annual leave absences up to 12 per year;

   ii. Increase to parental leave; and

   iii. Increase to compassionate Leave.

b) The arrangement meets the genuine needs of the Employer and the Employee in relation to 1 or more of the matters mentioned in paragraph a) above; and

c) The arrangement is genuinely agreed to by the Employer and Employee.

3.2.1 The Employer will ensure that the terms of the individual flexibility arrangement:

a) are about permitted matters under Section 172 of the Fair Work Act 2009; and

b) are not unlawful terms under Section 194 of the Fair Work Act 2009; and

c) result in the employee being better off overall than the employee would be if no arrangement was made.

3.2.2 The Employer must ensure that the individual flexibility agreement:

a) is in writing; and

b) includes the name of the Employer and Employee; and is signed by the Employer and Employee or a parent or guardian of the Employee if the Employee is under 18 years of age, and

c) includes details of:

i. the terms of the enterprise agreement that will be varied by the arrangement; and

ii. how the arrangement will vary the effect of the terms; and

iii. how the Employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and

d) states the day on which the arrangement commences.

3.2.3 The Employer must give the Employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.

3.2.4 An individual flexibility agreement must not require the approval or consent of a person other than the Employer or Employee.

3.2.5 The Employer or Employee may terminate the individual flexibility arrangement:

i. by giving no more than 28 days written notice to the other party to the arrangement; or

ii. if the Employer and Employee agree in writing – at any time.

3.3 Consultation

This clause applies where the Employer:

a) has made a definite decision to introduce a major change to production, program, organisation, structure, or technology in relation to its enterprise and the change is likely to have a significant effect on the Employees (see clauses 3.3.1 to 3.3.9 below); or

b) proposes to introduce a change to the regular roster or ordinary hours of work of Employees (see clause 3.4 below).

3.3.1 The Employer must notify the affected Employees of the decision to introduce the major change 14 days prior to the major change taking effect.

3.3.2 The affected Employees may appoint a representative for the purposes of the procedure in this clause.

3.3.3 If the affected Employees appoint a representative for the purposes of consultation, and the Employees advise the Employer of the identity of the representative, the Employer must recognise the representative.

3.3.4 As soon as practicable after making its decision, the Employer must:

a) discuss with the affected Employees:

i. the introduction of the change;

ii. the effect the change is likely to have on the Employees; and

iii. measures the Employer is taking to avert or mitigate the adverse effect of the change on the Employees; and

b) for the purposes of the discussion provide, in writing, to the affected Employees:

i. all relevant information about the change including the nature of the change proposed; and

ii. information about the expected effects of the change on the Employees; and

iii. any other matters likely to affect the Employees.

3.3.5 The Employer is not required to disclose confidential or commercially sensitive information to the affected Employees.

3.3.6 The Employer must give prompt and genuine consideration to matters raised about the major change by the affected Employees.

3.3.7 If a term of this Agreement provides for a major change to production, program, organisation, structure or technology in relation to the Project, the requirements set out in clauses 3.3.2, 3.3.3 and 3.3.4 are taken not to apply.

3.3.8 In this term, a major change is likely to have a significant effect on Employees if it results in:

a) the termination of the employment of the Employees; or

b) major change to the composition, operation or size of the Employer's workforce or to the skills required of their Employees;

c) the elimination or diminution of job opportunities (including the opportunities for promotion or tenure); or

d) the alteration of hours of work; or

e) the need to retrain Employees; or

f) the need to relocate Employees to another workplace; or

g) the restructuring of jobs.

3.3.9 Significant effects include potential termination of Employees. For avoidance of doubt, this does not limit or have the effect of limiting the right of the Employer to make decisions about redundancy, demobilisation or redeployment of Employees based on operational requirements.

3.4 Change to Regular Roster or Ordinary Hours of Work

The Employer must notify the affected Employees of the proposed change to the regular roster or ordinary hours of work of those Employees 14 days prior to the change taking effect.

The affected Employees may appoint a representative for the purposes of the procedures in this term.

If the affected Employees appoint a representative for the purposes of consultation, and the Employees advise the Employer of the identity of the representative, the Employer must recognise the representative.

As soon as practicable after proposing to introduce the change, the Employer must:

a) Discuss with the affected Employees the introduction of the change;

b) For the purposes of the discussion - provide to the affected Employees:

i. All relevant information about the change, including the nature of the change;

ii. Information about what the Employer reasonably believes will be the effects of the change on the affected Employees; and

iii. Information about any other matters that the Employer reasonably believes are likely to affect the Employees; and

c) Invite the affected Employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities).

However, the Employer is not required to disclose confidential or commercially sensitive information to the affected Employees.

The Employer must give prompt and genuine consideration to matters raised about the change by the affected Employees.

3.5 Contract of Employment

a) Employees will be employed on a full-time, part-time, or casual basis.

b) At the time of their engagement, the Employer will inform each Employee of the terms of their engagement.

c) Part-time employment will be by Agreement between the Employer and the Employee. A part-time Employee will be an Employee who works fewer than 36 ordinary hours per week, and has reasonably predictable hours of work. For each ordinary hour worked, a part-time Employee will be paid no less than the Base Rate for the relevant classification, and pro-rata entitlements for those hours. The Employer will inform a part-time Employee of the ordinary hours of work and the

starting and finishing times. Any hours worked by the part time employee in addition to the agreed ordinary hours will be paid at the appropriate overtime rate.

d) Before commencing a period of part-time employment, the Employer and an Employee will agree in writing:

i. That the Employee may work part-time;

ii. The hours to be worked by the Employee, the days upon which the hours will be worked, and commencing times for the work (work performed outside of the agreed hours will be paid at applicable overtime rates);

iii. The classification in Appendix A as relevant that applies to the work to be performed; and

iv. The period of part-time employment.

e) The terms of a part-time agreement may be varied, in writing, by consent. A copy of the agreement and any variation to it will be provided to the Employee by the Employer.

f) A person is a casual Employee of the Employer if:

i. An offer of employment is made on the basis that the Employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person;

ii. The person accepts the offer on that basis; and

iii. The person is an Employee as a result of that acceptance.

g) A casual Employee will be entitled to all the applicable rates and conditions of employment prescribed in this Agreement except annual leave, paid personal/carer's leave, paid compassionate leave, redundancy and termination benefits or notice periods as contained in clause 3.7 of this Agreement.

h) On each occasion a casual Employee is required to attend work, the Employee will be entitled to payment for a minimum of 7.2 hours' work, plus the relevant travel allowance as provided for in clause 5.3 of this Agreement, as applicable.

i) An all-purpose casual loading of 25% will be paid. The casual loading is paid in lieu of annual leave, personal leave, other paid leave and public holidays not worked, as contained in this Agreement. In calculating overtime payments for a casual Employee, the following will apply: base rate then 25% loading and then the relevant overtime rate/loading.

j) A casual employee, other than an irregular casual employee, who has been engaged for a sequence of periods of employment for 6 weeks may elect to convert to full time employment. The employer must not unreasonably refuse. The employer must give written notice to the employee within 4 weeks of the employee reaching the 6 weeks qualifying period of the terms of this clause.

k) A Full-time Employee is an Employee engaged for a minimum average of 36 ordinary hours per week plus any reasonable additional hours as required by the Employer.

3.6 Probation Period

a) The Employee's employment with the Employer will be subject to a three (3) months probationary period commencing from the date of commencement of employment. During which time, the suitability for the position will be assessed.

b) An Employee's employment may be terminated at any time during the probationary period by either party giving one week's notice of termination or at the Employer's sole discretion, payment in lieu of such notice.

3.7 Termination of Employment

Employment may be terminated by an Employee providing one week's notice or the Employer by giving the following notice:

Employee's Period of Continuous Service with the Employer	**Actual Period of Notice required to be Provided**
Not more than 1 year	1 weeks' notice
More than 1 year but not more than 3 years	2 weeks' notice
More than 3 years but not more than 5 years	3 weeks' notice
More than 5 years	4 weeks' notice

a) In addition to the notice set out above, an Employee over 45 years old at the time notice of termination is given who has completed at least two (2) years of continuous service with the Employer, will be entitled to an additional one (1) weeks' notice.

b) The employer does not need to give notice of termination to Employees who are engaged for a specified task(s), or on a casual basis.

c) Following the giving of notice of termination by either party, the Employer may, at its absolute discretion, elect to pay the Employee an amount equal to the full rate of pay, due to the Employee for the remainder of the notice period as an alternative to requiring the Employee to work out the notice period.

d) Where an Employee resigns without giving the required one week's notice, or gives notice but leaves before the end of the notice period, the Employer may deduct payment for the notice period (or that part of the notice period not worked), from any money owed by the Employer.

e) Employees will only be entitled to payment up to and including their last day of attended work if the Employee has abandoned their employment.

f) Notwithstanding the notice provisions of this clause, the Employer retains the right to summarily terminate an Employee's employment without notice or pay in lieu of the notice for serious misconduct, in which case an Employee will only be entitled to be paid for the time worked up to dismissal.

g) For the purpose of this Agreement, serious misconduct includes, but is not limited to, any serious or persistent breach of this Agreement or the Employer's policies, dishonesty, fraud, theft, breach of serious safety procedures/policy/protocols, wilful damage to Employer property, harming or threatening co-workers, breach of the Employer's alcohol and other drugs in the workplace policy, workplace smoking policy, gross negligence, unauthorised or prolonged absenteeism, or breach of the confidentiality requirements or other Employee obligations of this Agreement.

3.8 Notice of Absence

a) Employees have a responsibility to notify the Employer of any absences from work. Unless a provision of this Agreement or the FW Act states otherwise, an Employee who fails to attend work without a reasonable explanation, will not be paid for the actual time of such non-attendance.

b) This clause 3.8 applies where the Employer is unaware of the reasons for an Employee's absence or believes an Employee no longer wishes to work for the Employer. For the avoidance of doubt, the Employer will not take action against an Employee who is entitled to be on leave or absent under the NES or this Agreement.

c) If an Employee fails to attend work the Employer will attempt to contact the Employee. If the Employer is able to contact the Employee, the Employer will require the Employee to provide substantive justification for their absence. The Employer reserves the right to take disciplinary action where this explanation is not satisfactory.

d) Where the Employer is unable to communicate with an Employee, after having attempted to use all available methods to contact the Employee and provide them with an opportunity to give an explanation to the Employer for their absenteeism, the matter will be dealt with pursuant to clause 3.7.

3.9 Standing Down of Employees

a) Despite anything elsewhere contained in this Agreement, the Employer, in accordance with the FW Act, will have the right to stand down and not pay an Employee for any day (or part of a day) the Employee cannot be usefully employed because of industrial action.

b) Nothing in this clause will be taken to mean that payment, including leave payments, will be made for time engaged in industrial action.

c) If an Employee cannot do work due to any cause for which the Employer cannot reasonably be held responsible (for example geological conditions, breakdown of machinery or equipment for which the Employer cannot reasonably be held responsible) the Employer may take the following steps:

   i. The Employer will consult with affected Employees regarding the possibility of stand down, and

   ii. The Employer will take all reasonable steps to explore all possible options to ensure work continues.

   Once steps i and ii have been taken, the Employer has the right to stand down the Employee without pay.

3.10 Dispute Prevention and Settlement Procedure

a) A major objective of this Agreement is to eliminate lost time and/or production arising out of disputes or grievances. Any dispute in relation to a work related, industrial matter or any matters arising out of the operation of the Agreement, incidental to the operation of the Agreement, the NES, including subsections 65(5) or 76(4) of the FW Act shall be dealt with according to the following procedure:

   i. The circumstances that existed prior to the dispute or grievance or claim prevail, and work must continue as normal without detriment to any of the Parties.

ii. All Employees have the right to appoint an employee representative (which may be a Party to this Agreement, the Employee Representative elected under clause 8.3 of this Agreement or anyone else of the Employee's choice) in relation to a dispute. It is the express priority of all Parties to attempt to settle a dispute at the workplace level at first Instance.

iii. The Employer may appoint a representative of its choice in relation to a dispute.

iv. In the event of any work-related grievance arising between the Employer and an Employee or Employees, the matter shall be dealt with in the following manner:

A. The matter shall be first submitted by the Employee/s or their representative, to the site supervisor or the other appropriate site representative of the Employer and if not settled, to a more senior representative of the Employer.

B. Alternatively, the Employer may submit an issue to the Employee/s who may seek the assistance and involvement of a representative.

C. If still not resolved, there may be discussions between the employee/s and their representative and senior representative of the Employer.

D. Should the matter remain unresolved, and all of the steps of this procedure have been exhausted the matter may be referred by either Party to this dispute to the FWC. The FWC may exercise conciliation in the first instance and if the conciliation is unsuccessful the FWC may exercise arbitration powers.

b) This procedure shall be followed in good faith without unreasonable delay.

3.11 Counselling & Disciplinary Procedure

a) This procedure is to be followed for all disciplinary cases of unsatisfactory performance (includes absenteeism) or conduct, or for breach of procedures including, but not limited to safety, environmental, sexual harassment and workplace bullying.

b) At the request of the Employee, the Employee may choose to be represented at any stage of the counselling and disciplinary process by an employee representative of their choice.

c) While in most cases each step of the procedure will be followed in sequential order, in certain cases serious breaches of procedures may result in an Employee being dealt with immediately under Step 2 or Step 3 of this procedure.

d) This clause 3.11 does not take away the right of the Employer to dismiss an Employee without notice for serious misconduct (refer to clause 3.7(f) and (g)) or the right of an Employee to seek advice from his/her nominated representative at any stage of the procedure below.

3.11.1 Step 1 – Verbal Warning/Counselling

Where the Employer has a first concern regarding the performance, attendance and/or conduct of an Employee, the following procedure will apply:

a) An explanation of the concern and the performance and/or conduct expectations of the Employer will be given;

b) The Employee will be given an opportunity to provide an explanation;

c) The Employer will consider this explanation and any relevant facts;

d) If the Employer considers that the Employee's explanation is not reasonable, the Employee will be reminded of this procedure and that this is the first warning. At that time the Employer will inform the Employee that failure to correct the performance and/or conduct, or any other problems with the Employee's Performance or conduct may lead to further warnings; and

e) The Employee under counselling will be made aware of the standards of improvement in performance and/or conduct that are to be made.

3.11.2 Step 2 Written Warning/ Improved Performance

If the Employee fails to meet agreed standards of improvement in accordance with Step 1, or if the Employer has a second concern about the performance, attendance and/or conduct of the Employee regarding reasonable standards or performance and/or conduct, this step (2) will be taken:

a) The Employer will explain its concern with the standards of performance and/or conduct of the Employee;

b) The Employee will be given an opportunity to provide an explanation;

c) The Employer will consider this explanation and any relevant facts;

d) If the Employer considers that the Employee's explanation is not reasonable, a written warning is to be given referring to the first warning (at Step 1) and the opportunity previously given for improvement. The written warning will inform the Employee that it is a final warning and that failure to meet the stated standards of improvement or any further instances or poor performance and/or conduct will lead to dismissal without further warning; and

e) The written warning will also provide feedback to the Employee on how to improve his/her performance and/or conduct.

3.11.3 Step 3 – Final Warning

If the Employee continues to not meet the standards in terms of performance and or the Employer's code of conduct, the Employee will be issued with a Final Warning. The written warning will inform the Employee that it is a final warning and that failure to meet the stated standards of improvement or any further instances or poor performance and/or conduct will lead to dismissal without further warning.

3.11.4 Step 4 – Dismissal

If the Employee has failed to meet reasonable agreed standards of improvement in relation to his/her performance, attendance and/or conduct, or if the Employer has a third concern about the performance, attendance and/or conduct of the Employee regarding reasonable standards of performance and/or conduct, the following process will be taken:

a) The Employer will explain its concern with the Employee's performance and/or conduct;

b) The Employer will give the Employee an opportunity to provide an explanation;

c) The Employer will consider the explanation and any relevant facts; and

d) If the Employer considers that the Employee's explanation is not reasonable, notice of dismissal may be given by the Employer.

3.12 Consultative Committee

a) The Parties to this Agreement agree that effective consultation processes are essential for continuous workplace reform and that Employees will be appropriately consulted in respect of issues that impact on their employment conditions.

b) The Parties agree that a Consultative Committee will be established on the Project, and will normally comprise of equal numbers of management and employee representatives.

c) The Project Consultative Committee will deal with issues referred to them in relation to this Agreement. A meeting program for the Project Consultative Committee will be developed at the commencement of the Project.

d) The consultative committee will meet monthly or as agreed by the members of the committee. The chairperson will be responsible for issuing agendas and taking minutes.

e) The consultative committee's primary charter is to ensure good communication between the Parties concerning relevant issues that may affect the Project and the Employees, provided that the Employer is not required to disclose confidential or commercially sensitive information to relevant Employees.

f) Separate to the consultative committee process, clause 3.3 will apply and the Employer must consult with the Employees about major workplace changes that are likely to have a significant effect on the Employees.

g) The Employer will provide appropriate training to ensure that Project Consultative Committee members can participate in the consultative process.

3.13 Anti-Discrimination, Equal Employment Opportunity and Sexual Harassment

a) The Employer is committed to complying with its obligations under anti-discrimination legislation and preventing unlawful discrimination and harassment within the workplace.

b) The Parties to this Agreement have an obligation to comply with sex discrimination and anti-discrimination legislation. The Employer expects all Employees to comply with its policies and procedures including those dealing with harassment and discrimination in the workplace and the Project Work Rules.

c) Any breach of the Employer discrimination and harassment policies will be treated by the Employer as a very serious matter and depending on the circumstances, may result in dismissal.

3.14 Labour Hire Protocol

a) From time to time the Employer may enter into Labour Supply Contracts to meet the short term fluctuations in the labour requirements of the Project.

b) It is not the intention of the Employer to use Labour Hire Workers to undermine the terms and conditions of this Agreement. Accordingly, where the Employer engages Labour Hire Workers, any Labour Supply Contract for their engagement entered into after the commencement of this Agreement will require a condition that the relevant Labour Hire Workers will receive for work performed on the Project, remuneration for their ordinary hours of work (based on an overall assessment of such things as their total of wages and allowance under their applicable terms and conditions) that is no less in total dollar terms

when compared to the Base Rate of Pay for Ordinary Time Earnings that is specified by the classification under this Agreement which equates to the work that the Labour Hire Worker performs on the Project.

c) In the event that the Employer deems the use of Labour Hire Workers is necessary to meet requirements on a Project site, the Employer will consult with its Employees on the relevant site. This consultation must take place during paid time as soon as practicable after the Employer has deemed the use of Labour Hire Workers is necessary.

d) For the purposes of consultation, the Employer will provide:
   i. The type of work proposed to be undertaken by the Labour Hire Workers;
   ii. The reason the use of Labour Hire Workers has become necessary for the Employer to meet operational requirements;
   iii. The number of Labour Hire Workers likely to be required; and
   iv. The likely duration of the supply of the Labour Hire Workers or scope of the Labour Supply Contract.

e) The Employer will give genuine consideration to any reasonable concern or suggestion raised by any Employee during consultation.

f) For the avoidance of doubt, it will not be a contravention of the Agreement by the Employer for the purposes of section 50 of the Fair Work Act 2009 (Cth) if a labour hire firm does not comply with a contractual condition referred to in clause (b) above, provided that the Employer has complied with its obligation under that clause.

g) For the purposes of this clause:

   i. “Labour Hire Worker” means a person who is engaged by a licensed (where required) labour hire firm and performs works on the Project in accordance with a Labour Supply Contract where that work would be within the scope of a classification of this Agreement if the work was performed by an Employee.

   ii. "Labour Supply Contract” means a contract between the Employer and a licensed (where required) labour hire firm for the supply of labour to the Project. A contract that includes the provision of a service rather than labour is not a Labour Supply Contract for the purposes of this Agreement.

PART 4 WORKPLACE HEALTH AND SAFETY

4.1 Safety Commitment

a) The Parties will comply with all the obligations arising under the prevailing and relevant Acts, Regulations, Code of Practice and the Employer's policies and procedures.

b) The Employer has a legal obligation to exercise due diligence to ensure that the business complies with all Workplace Health and Safety laws and regulations. This includes making sure that the business has and uses appropriate resources and processes to eliminate or minimise the risks of working with silica and silica containing products and other airborne toxic substances.

c) All Employees are required to contribute positively to Project safety, including raising concerns regarding safety with the Employer.

d) No Employee will be required to work in any unsafe area or situation. An employee or employees may cease, or refuse to carry out, work if they have a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.

4.2 Project Inductions

a) At the commencement of their first working day on the Project, all Employees will attend a Project Induction that includes Project safety procedures. The inductions will be presented by an Employer representative.

b) The Employer will not allow any Employee engaged on the Project to commence work until they have demonstrated, to the Employer's satisfaction, a clear understanding of the issues raised during inductions.

c) Employees are required to provide a copy of their Construction Induction Certificate (e.g. White Card), before commencement, as evidence of general industry safety induction before undertaking the Project Induction.

4.3 Induction Training

All Employees will receive an induction on or before their commencement on the Project that details issues including:

a) Project Overview;

b) Project Enterprise Agreement including; Parties, Scope and Application of the Agreement, DPSP, general terms and conditions of employment;

c) Relevant Workplace Health and Safety, Quality and Environmental Procedures and expectations;

d) Code of conduct and workplace behaviour expectations;

e) Project/Site layout;

f) Respectful interface with community and road users; and

g) Work procedures.

On the successful completion of the Project Induction training program, Employees will be issued with an identification card which they must carry at all times.

4.4 Health & Safety Committee

The Employer will establish a Health & Safety Committee on the Project as appropriate in accordance with the *Work Health and Safety Act 2011* and corresponding Regulations. All Health and Safety Committee members will undertake an agreed silica awareness course and airborne toxic substance awareness courses as appropriate.

4.4.1 Health and Safety Representatives

a) The Employer and its Employees will comply with Part 5 of the WHS Act – Consultation, representation and participation in relation to the establishment of a health and safety committee.

b) When requested, Health and Safety representatives and deputies will be elected in accordance with Part 5 Division 3 of the WHS Act 2011, for a determined and agreed work group of which the Employee is a member.

c) Parties covered by this Agreement recognise the important role of Health & Safety representatives. The HSRs have a key role in the early intervention in health and safety Issues under this Agreement.

d) A health & safety representative will be allowed reasonable paid time during working hours to attend to occupational health and safety matters affecting employees they represent.

4.5 Fitness for Duty

a) The parties to this Agreement are committed to providing a safe, healthy and productive work environment. As part of this ongoing commitment, Employees will be required to participate in tests for alcohol and other drugs as required during their deployment on site.

b) For safety reasons Employees will need to be clean shaven while performing any work requiring a dust mask.

4.5.1 Alcohol and Other Drugs

a) The Parties to this Agreement are committed to creating and maintaining an environment where people recognise the health and safety risks of misusing alcohol and/or drugs in the workplace and community.

b) The Parties will comply with the requirements prescribed in applicable legislation, policies and procedures of the Employer, and site safety rules, in relation to alcohol and other drugs. These requirements will include, for example, alcohol and other drugs testing of Employees.

c) Employees who fail to comply with these requirements in relation to alcohol and other drugs (which may, depending on the circumstances, constitute serious misconduct), will be subject to disciplinary action in accordance with clause 3.11 of this Agreement.

d) Employees bound by this Agreement who require assistance and support with alcohol and/or other drugs issues, will have access to the Employer's employee assistance program or any other similar support service.

4.5.2 Non-Smoking

a) In the interests of work health and safety, smoking areas will be identified. Where an area is not designated it will be automatically a non-smoking area. Employees will be required to comply with the Project's smoke-free workplace policy.

b) Employees found smoking in non-smoking areas will be subject to disciplinary action in accordance with clause 3.11 of this Agreement.

4.6 Safety Incident Procedure

a) No Employee will be required to work in any unsafe area or situation an employee or employees may cease, or refuse to carry out work if they have a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.

b) This procedure will be in accordance with the WHS Act and corresponding Regulations. Parties will make all reasonable efforts to achieve a timely, final and effective resolution of the unsafe situation in accordance with this procedure.

c) Where an Employee becomes aware of an unsafe situation, the Employee must rectify the situation, if it is within their competence, is safe to do so and report the matter to management.

d) If a safety problem has been identified in a particular work area, the Work Area Health & Safety Representative will inspect the area with a management representative(s) and they will determine the appropriate action to be taken.

e) In the event Employees cease work due to a reasonable concern of an imminent risk to their health and safety will hold themselves available to be transferred elsewhere on the Project.

f) Work will cease only in areas immediately affected by a reasonable concern as to the existence of an imminent risk to health and safety.

g) Work in other areas will continue without interruption, and all Employees will remain available on site to carry out work in areas not immediately affected and/or to carry out rectification works.

h) Priority is to be given to safety rectification.

i) Should a safety dispute arise over whether one or more work areas are safe or not, the following procedure will apply:

   i. Where the situation cannot be rectified, immediate inspection of the affected area(s) will be carried out by Project Management and the Health & Safety representative(s);

   ii. As safety rectification work is agreed for any area, all Employees will immediately commence such rectification work;

   iii. Upon verification that such rectification has been completed, normal work will resume progressively in any area;

   iv. Employees will not leave the Project site unless directed to do so by the Employer, relevant Government authority or Emergency Services officials such as Police, Fire or Ambulance officers

j) For the sake of clarity, WHS policies and procedures are not incorporated in this Agreement and can be amended by the Employer as required, for example in the event of the WHS Act and Regulations being replaced or amended.

4.7 PPE

4.7.1 Mandatory Equipment

a) Employees will be provided, on commencement of employment, with a safety helmet, safety gloves and eye protection/safety glasses that meet Australian Standards.

b) The safety helmet and other items of personal protective equipment provided must be worn at all times as instructed during the site induction process. Helmets must not be painted, drilled or modified in any way, including any other paraphernalia not approved by the Employer.

c) Employees will be required to wear such clothing or equipment at all times as directed and/or required by the Employer. Any breach of this provision will give rise to disciplinary action. Disciplinary action taken under this clause may include verbal or written warnings and/or termination of employment.

d) Safety footwear will be supplied upon the commencement of employment. Damaged and/or worn PPE will be replaced on a fair wear and tear basis, provided they are produced to the Employer for inspection.

4.7.2 Job Related Equipment

a) The Employer will provide all necessary safety protective clothing, equipment and materials for use on specific work tasks as follows:

i. Hearing protection e.g. ear plugs/muffs;

ii. Factor 30+ protective sunscreen;

iii. Eye protection, including, as approved by the Employer, prescription safety glasses or safety glasses that fit over prescription glasses, that meets Australian Standard;

iv. Safety gloves, that meets Australian Standard;

v. Safety boots (replaced as a result of fair wear and tear);

vi. Gumboots; (as required)

vii. Dust masks;

viii. Wet weather jacket; (as required)

ix. Safety vests;

x. Long trousers;

xi. Long Sleeve shirt.

4.7.3 Clothing

The Employer will provide Employees with the following items of clothing to be worn while at work, which will be replaced as a result of fair wear and tear, provided they are produced to the Employer for inspection.

A set of clothing will consist of:

a) Five pairs of long trousers; and

b) Five high visibility long sleeve shirts.

c) All Employees engaged on the Project between 1 May and 30 September will be issued with one (1) high visibility winter jacket or agreed equivalent. Winter jackets will be replaced on a fair wear and tear basis, provided it is produced to the Company for inspection.

The type of jacket issued to Employees will be determined by the nature of work performed to ensure that the jacket is not unsafe for the work performed by each Employee.

4.8 Inclement Weather

a) Inclement weather means the existence of rain or abnormal climatic conditions (whether they be those of hail, snow, extreme cold, high wind, severe dust storm, extreme high temperature or the like or any combination thereof) by virtue of which it is either not reasonable or not safe for Employees exposed thereto to continue working whilst the same prevail.

b) The Employer and Employees will develop and implement procedures to ensure that productive work continues whenever and wherever it is safe and reasonable to do so. In the case of inclement weather arising from high temperature, the parties acknowledge that the heat management plan used on Project (as adopted or amended from time to time) is an appropriate, evidence-based and peer-reviewed policy which will be used to manage heat-related issues on the Project. For the avoidance of doubt, the heat management plan is not incorporated by reference into this Agreement.

c) In order to improve this area of lost productivity the following will apply to all Employees:

i. Employees may be transferred to an area or site not affected by inclement weather if useful work is available in that area or site, that work is within the scope of the Employees skill, competence and training, and the Employer provides, where necessary, transport;

ii. The Employer and Employees agree to adopt measures that involve a reasonable approach as to what constitutes inclement weather;

iii. The Employer and Employees agree to the use of non-productive time arising from inclement weather for structured, relevant and meaningful training, skills enhancement and learning applications. Where this cannot be achieved, Employees will not unnecessarily be kept on site;

iv. Non-productive time arising from inclement weather can be used for monthly Project briefings;

v. Non-productive time arising from inclement weather can also be used for safe work procedure briefings and discussion of major work activities.

vi. The Employer and Employees acknowledge that in the case of operators of plant with enclosed cabins, work will continue, subject to compliance with safe working procedures;

vii. The Employer and Employees are committed to an early resumption of work following any cessation of work which may arise from inclement weather;

viii. The practice of ‘one out all out’ for inclement weather will not occur. Should a portion of the Project be affected by inclement weather, all other Employees not so affected will continue working in accordance with the appropriate Agreement provisions, regardless that some Employees may be entitled to cease work due to inclement weather;

ix. All Employees must be available to clean up and dewater relevant work areas as directed by the Employer and/or the Health & Safety Committee following inclement weather, regardless of classification.

d) Where it is determined that an Employee is not able to perform any work because of Inclement Weather, a full-time and part-time Employee shall be entitled to payment by the Employer for ordinary time lost through inclement weather and the effects of inclement weather for up to 32 hours in each calendar month (non-cumulative). This payment is subject to the Employee remaining on site in readiness to work.

e) After four (4) hours after the cessation of work from inclement weather the Employer may release employees for the remainder of the day, if information indicates that inclement weather will continue.

f) Where the maximum of 32 hours pay in any 4 week period is reached and an Employee cannot resume work because of Inclement Weather, the Employer may stand down the Employee without pay until such time that the Employee is able to resume work, provided that the Employee may access accrued annual leave or accrued RDOs during the stand down period.

g) Critical Work in Rain – the Employer and Employees understand and accept that there may be occasions where certain critical work must be performed in the rain. Critical work includes but is not limited to: completion and protection of concrete pours, supply of material to site, spoil operations, critical shutdown activities, emergency work, any work required to ensure safety or environmental legal compliance.

h) Where an Employee is required by the Employer to perform critical work in inclement weather, the following will apply:

i. Such work will be conducted subject to appropriate safety procedures being in place;

ii. Employees will be provided with wet weather gear, as appropriate;

iii. Employees will be provided with safety equipment and respite to minimise the impact of work in the rain;

iv. On completion of work in the rain and where it is expected that rain will cease in a timeframe where meaningful work can be undertaken:

v. Employees may be provided with additional dry clothing to allow ordinary work to continue; or

vi. With the approval of the relevant area Superintendent, Employees who carry out critical work in the rain and who get wet as a result may be allowed to go home when critical work is completed.

i) Such critical work performed in inclement weather will be paid at the rate of double the Employee's Base Rate.

j) Employees who are sent home with the approval of the Superintendent within their ordinary time hours, will be paid the balance of their ordinary hours at their ordinary rate of pay. Employees who are sent home with the approval of the relevant area Superintendent after completing their ordinary hours but prior to the end of their normal rostered shift will be paid for actual hours worked.

4.9 Learning and Development

a) The Employer will provide structured training, development and assessment for new entrants to the industry to offset skills shortages and ensure career progression opportunities are available, e.g. progression from new entrant to unskilled to semi-skilled to skilled, including developing individuals and teams in support of Project employment priorities.

b) The Employer will provide skills enhancement for Employees via a range of methods including but not limited to coaching, mentoring, exposure and competency based training model.

c) Training will be relevant and delivered in a suitable forum including Toolbox meetings and structured training programs. Where possible, training will result in a Nationally Recognised Statement of Attainment.

d) This Learning and Development program will provide Employees with industry wide recognised portable skills which will facilitate the development of their career path.

e) In line with the Employer's commitment to providing each employee with quality training to assist them in the performance of their functions on the Project, the Employer may schedule mandatory training for employees in accordance with this clause.

f) Employees required to attend training will be paid for the time spent training at the employee's Base Rate. Such training will be conducted during ordinary hours.

4.10 Traineeships

a) As part of its commitment to the long-term future of the industry, the Employer may engage Trainees. Trainees will be engaged in either a Certificate II traineeship or a Certificate III traineeship.

b) A Certificate II traineeship will consist of no less than 16 modules.

c) A Certificate III traineeship will consist of no less than 24 modules.

d) Trainees will be classified in the same manner as Employees in accordance with the classification structure in this Agreement and will be paid in accordance with the following table.

Traineeship	Level of Completion	Rate of Pay
Certificate II	Less than 12 months	75% of the relevant Base Rate
	12 months or more and satisfactory completion of required units of competency	85% of the relevant Base Rate
	On completion	Relevant Base Rate CW3
Certificate III	Less than 12 months	75% of the relevant Base Rate
	12 months but less than 24 months and satisfactory completion of required units of competency	85% of the relevant Base Rate
	24 months or more and satisfactory completion of required units of competency	95% of the relevant Base Rate
	On completion	Relevant Base Rate CW5

e) Where the Trainee was employed by the Employer immediately prior to entering into the traineeship, the Trainee will not suffer a reduction in pay by virtue of entering into a traineeship.

f) Trainees may undergo recognition of prior to learning (RPL) in order to satisfy competency requirements. Where this is the case, the Trainee will be deemed to have completed the relevant unit of competency on or after the date upon which the Registered Training Organisation (RTO) deems the module to have been satisfied. A Trainee who is deemed to have completed units of competency by virtue of RPL will have the term of their traineeship reduced accordingly.

PART 5 CLASSIFICATION STRUCTURES, RATES OF PAY, ALLOWANCES AND OTHER ENTITLEMENTS DEFINITIONS

5.1 Classification Structures and Rates of Pay

a) At the commencement of employment, each Employee will be appointed by the Employer to a classification level based on skills, qualification and experience and in consideration of the substance of duties required to be carried out at the time of the Project. The skill-based classification structure is set out in Appendices A.

b) Employees will be required to perform such duties as are within the limits of the Employee's skill, competence and training, including work that is incidental or peripheral to the Employee's main function.

c) The Base Rates for each classification level are prescribed at Appendices A or B. The Base Rates and allowances in this Agreement are in compensation for, amongst other things, all disabilities and/or special skills and/or special rates associated with, or likely to be associated with the Project.

d) Apprentices engaged by the Employer will be paid in accordance with Appendix D.

e) The Base Rates under this Agreement will be adjusted only in accordance with Appendices A or B. All wage increases during the life of the Agreement will be made in accordance with Appendices A or B and will take effect from the first full pay period after the effective date.

5.2 Higher Duties

a) Where an Employee on any day is required and has agreed to perform duties of a higher Base Rate of pay than the Employee's ordinary classification, the Employee will be paid at the higher hourly Base Rate for the work so performed.

b) The Employee will be paid the higher hourly Base Rate for the entire day or shift if the Employee is required to work at that Base Rate for more than two hours. Otherwise, the Employee will be paid the higher Base Rate for the time so worked.

c) Following the completion of activities under the higher classification, the Employee will revert to the Base Rate that is applicable to their classification prior to undertaking the higher duties.

d) Notwithstanding the above, Employees who are being trained to operate plant or equipment which would otherwise attract a higher Base Rate, will not be paid at the higher Base Rate until they are assessed as being competent, and there is a position available at the classification that attracts the higher Base Rate. This clause will be utilised by the Employer for the purposes of bona fide training, and will not be used by the Employer to simply avoid payment to Employees at a classification which attracts a higher Base Rate. Any dispute arising in relation to this issue will be dealt with in accordance with clause 3.10.

5.3 Daily Fare and Travel Allowance

a) A daily fare and travel allowance will be paid to each Employee for each day or shift the Employee reports to work and actually worked (including all RDO's). This allowance will initially be $55.00 from commencement of the Agreement but will increase to $60.00 twelve months after the Agreement commences operation.

b) Except for the one-off increase referred to in subclause 5.3(a), this allowance will be a flat amount and is not included in the calculation of overtime, leave or any other loadings.

c) This travel allowance will be in compensation for, amongst other things, any travelling time or expenses including but not limited to parking fees incurred by Employees travelling to and from the Project, mobilisation and location. No other payments for travelling to and from work will be payable to any Employee.

d) Employees who are provided a work vehicle by the Employer to take home each night are not eligible for the daily travel allowance.

e) For clarity, an employee is not entitled to be paid this allowance in respect of any unworked Public Holidays, or when they are on any other type of leave of absence (whether paid or unpaid).

5.4 Productivity Payment

a) An Employee will receive a productivity payment of $9.64 for each productive hour worked, to provide incentive and in recognition of improved productivity performance during the operation of this Agreement.

b) For the avoidance of doubt, this allowance will be in lieu of any special rates or allowances included in any award or other industrial instrument other than for those provided for in this Agreement.

c) This productivity payment is a flat payment and will not be included in the calculation of overtime, leave or any shift or other loadings.

d) This productivity payment is not payable when Employees leave site due to inclement weather, or are on any type of leave, whether paid or not paid (e.g. annual leave, personal leave, jury duty, leave without pay, community service leave, parental leave or compassionate leave), or have been suspended with pay, or are absent for any other reason, including public holidays, absence due to a work-related injury, or are engaged in any form of industrial action.

5.5 People First Payment

The Project's success is built by our people. That is why we put our people first.

The people first payment is to better recognise and reward the Employees.

Each Employee covered by this Agreement will receive a payment of $55.00 per week or part thereof of service (including Authorised Paid Leave) on the Project which will be paid to Employees when the service on the Project comes to an end.

The payment will form part of the Employee's final termination pay at the conclusion of their service on the Project in recognition of their contribution to the Project's success.

5.6 Leading Hand Allowance

a) An Employee appointed by the Employer to be in charge of other Employees will be paid in accordance with Appendix C. With specific responsibility of directing and/or supervising the work of other Employees. The Leading Hand allowance will be a flat amount and will not be included in the calculation of overtime, leave or any shift or other loadings.

b) The numbers of workers assigned to each leading hand may increase or decrease according to the nature and type of tasks being performed.

5.7 First Aid Allowance

a) An Employee who is qualified to provide first aid and is appointed by the Employer to be a first aider will be paid a first aid allowance whilst the Employee maintains a current First Aid certificate.

b) The first aid allowance will be a flat amount and fixed for the life of the Agreement and will not be included in the calculation of overtime, leave or any shift or other loadings.

5.8 Overtime Meal Allowance

a) If an Employee is required to work more than two hours overtime after their ordinary hours of work, Monday to Friday, a payment of $24.51 for meals will be made.

b) In the circumstances where an Employee is required to work more than eight hours overtime on either Saturday or Sunday, a payment of $24.51 in lieu will be made.

c) This meal allowance will be a flat rate amount and will not be included in the calculation of overtime, leave or any shift or other loadings.

5.9 Tradesperson Allowance

a) An Employee engaged as a Tradesperson as prescribed at Appendix A of this Agreement will receive an allowance of $1.81 per hour actually worked; this allowance will be classified as all-purpose. This allowance is inclusive of the tool allowance in Appendix C.

5.10 Superannuation

a) The Employer will make superannuation contributions in accordance with the requirement under the Superannuation Guarantee and Administration Act 1992 (Cth) into a superannuation fund nominated by the Employee calculated on Ordinary Time Earnings (OTE). The minimum employer contribution will be $255 per week or the minimum statutory contribution rate (currently 11.5% of OTE) and will remain for the duration of this Agreement unless amended by legislation.

b) Where an Employee does not nominate a superannuation fund, the Employer will make superannuation contributions into the Employee's stapled superannuation fund or the Company's default superannuation fund which offers a MySuper product, is an exempt public sector scheme or is a fund of which the relevant Employee is a defined benefit member.

c) Employees can elect to "salary sacrifice" for additional superannuation contributions provided that:

i. the arrangement complies with the relevant legislation and Employer policy as amended from time to time;

ii. the Employee notifies the Employer of his or her election to salary sacrifice in writing prior to the wages and/or allowable entitlements being earned or accrued by the Employee;

iii. the superannuation fund is a complying superannuation fund; and

iv. the amount to be paid into the superannuation fund plus any balance of wage and/or allowable entitlements is equivalent to what the Employee would have been entitled to as wages and/or allowable entitlements under this Agreement.

d) Where an Employee elects the option of salary sacrificing some of their wages, there must be a signed agreement between the Employee and the Employer. This option must remain for a period of not less than six months, unless exceptional circumstances apply.

e) All superannuation contributions will be paid according to applicable fund requirements.

5.11 Redundancy

a) The Employer will make redundancy contributions for Employees covered by this Agreement into a redundancy pay scheme determined by the Employer which is an Approved Worker Entitlement Fund under the Fringe Benefits Tax Assessment Act 1986 (Cth).

b) Contributions will be made on a pro rata basis for any partial week worked. An employee will accrue at the daily rate of $35 for each day worked during the week (limited to Monday – Friday).

c) Where an employee takes an unauthorised absence, the employee will not accrue redundancy entitlements for that day.

d) The Employer contribution to this Fund will be as per the following table:

Operative date	**Contribution per week per Employee**
Date of approval of the Agreement by the Fair Work Commission.	$175.00

e) The contributions will be paid monthly in accordance with the requirements of the applicable redundancy pay scheme.

f) The payments under this clause are inclusive of any statutory entitlements an Employee may have to severance or redundancy payments.

PART 6 HOURS OF WORK, OVERTIME and RDO'S

6.1 Hours of Work

a) Subject to (b) the ordinary hours of work for Day Workers will be 8 hours per day, Monday to Friday between the hours of 6.00am and 6.00pm and will average 36 hours per week over a 4-week period, employees may also be required to work reasonable additional overtime hours.

b) In the majority of circumstances, the ordinary hours referred to in clause 6.1(a) will be worked between Monday to Friday, however in recognition of the nature of the Project, there may be a requirement for Day Workers to work ordinary hours outside the span of hours contained in clause 6.1(a). In these circumstances, it will be available to the Employer and affected Employees to agree to work an alternative arrangement of hours of work that provide an average of 36 hours a week over a nominated cycle. Weekends may be included in a nominated cycle. Ordinary hours worked on weekends will be paid at the appropriate penalty rate prescribed in this Agreement.

c) Start and finish location(s) and time(s) will be designed to support production and maximise equipment operating hours and maintenance time. These may be altered by the Employer to suit the needs of the Project, following consultation with the Employees affected or by the giving of 48 hours written notice by the Employer to the affected Employees concerned or by a lesser period in the case of an emergency.

d) Employees will be required to work reasonable weekend and non-weekend overtime when requested, as determined by the Employer, to meet the needs of the Employer's contractual requirements for completion of work on the Project. When considering the allocation of reasonable overtime, the Employer will have regard to relevant matters including those prescribed under s.62(3) of the Act.

e) Tool Box and Pre-Start meetings will generally be held prior to the commencement of each shift. Employees will be ready for work at the commencement of the Tool Box or Pre-Start and meetings will be paid at the Employee's Base Rate and forms part of the Employees ordinary hours.

6.2 Day Workers

Day Work is where an Employee is rostered to work ordinary hours of work between the hours of 6.00am and 6.00pm Monday to Friday. Day Workers may also be rostered to work ordinary hours of work on a weekend where agreed under clause 6.1(a).

6.2.1 Weekdays

a) Day Workers will be paid their relevant Base Rate and relevant allowances for the ordinary hours worked on a weekday.

b) Overtime will be paid at double the Base Rate.

6.2.2 Saturday

a) Day Workers will be paid double the Base Rate for all overtime worked on a Saturday.

b) A Day Worker required to work on a Saturday will be paid a minimum of four hours' work at the appropriate rates.

6.2.3 Sunday

a) All ordinary and overtime hours worked by Day Workers on a Sunday will be paid at double the Base Rate.

b) A Day Worker required to work on a Sunday will be paid a minimum of four hours' work at the appropriate rate.

6.2.4 Meal and Rest Breaks

a) For each shift or day where a minimum of 8 ordinary hours are worked, Day Workers will take an unpaid 30-minute meal break within 6 hours of commencement. For Day Workers, this meal break is not counted as time worked.

b) There will be one daily paid rest break of 20 minutes' duration to be taken at a time that suits the operational requirements of the Project.

c) Day Workers will take a 30-minute paid meal break in excess of 8 hours worked after commencement on a Saturday and Sunday.

d) Day Workers will receive a paid 20-minute break after the conclusion of 2 hours overtime following ordinary hours provided the Employee is to continue overtime. The Employee is further entitled to paid 20-minute breaks at the conclusion of every 4 hours overtime.

e) Day Workers will receive a paid 20-minute break after the first 4 hours of overtime work on the weekend. If the overtime continues beyond a further four hours after taking of the break, the employee will receive an additional paid 20-minute break.

f) The times of taking the breaks will be agreed between the Employer and majority of Employees affected.

6.2.5 Deferment and Staggering of Meal or Rest breaks

a) It may be necessary for the Employer to defer a meal or rest break to enable the completion of the task at hand in a timely manner. The deferment for the meal or rest break by up to one hour will be permissible. If a meal break is deferred for more than an hour, the Employee will be paid double the Base Rate for the duration of the deferment which is in excess of one hour and until the completion of the meal break.

b) Meal or rest breaks may be staggered between individual Employees to allow operations to continue without interruption.

6.3 Shift Workers

6.3.1 Weekdays

a) Shift Workers will be paid the following rates for ordinary hours worked on a weekday:

   i. Day Shift – Base Rate;

   ii. Afternoon Shift – Base Rate plus 50% of the Base Rate; and

   iii. Night Shift – Base Rate plus 50% of the Base Rate.

b) All time worked in excess of an Employee's ordinary hours, Monday to Friday, will be paid at double the relevant Base Rate. Where an Employee is engaged on shift work and the shift roster includes a regular overtime shift (weekdays or weekends), attendance at the additional shift is considered mandatory.

c) The ordinary hours of both afternoon and night shift will be 8 hours daily inclusive of meal breaks.

6.3.2 Weekends

a) All hours worked by Shift Workers on weekends will be paid at double the relevant Base Rate (subject to clauses (b) and (c) below).

b) An Afternoon Shift commencing at or after 6.00pm on a Sunday and a Night Shift commencing at or after 10.00pm on a Sunday will be paid as a weekday Afternoon or Night Shift and not as weekend.

c) Where a Shift Worker is working under a 5 day shift pattern from Monday to Friday, and the 5th shift in that pattern is an Afternoon Shift or Night Shift that commences on the Friday but ends on the Saturday, the Shift Worker will be paid for that 5th shift as a weekday Afternoon Shift or Night Shift, and not as a weekend.

d) Under no circumstances will an Employee be entitled to shift loading pursuant to this clause and overtime rates at the same time. For clarity, an Employee will receive either the relevant shift loading, or the overtime rate prescribed in this Agreement, but not both.

6.3.3 Meal and Rest Breaks

a) Unless otherwise agreed between a section or sections of Employees, Shift Workers will take a 30-minute meal break at no later than six hours after the commencement of each shift. For Shift Workers, the meal break will be counted as time worked when on shift work.

b) There will be one daily paid rest break of 20 minutes' duration to be taken at a time that suits the operational requirements of the Project. The times of taking the breaks will be agreed between the Employer and the majority of Employees affected.

6.3.4 Deferment and Staggering of Meal or Rest Breaks

a) It may be necessary for the Employer to defer a meal or rest break to enable the completion of the task at hand in a timely manner. The deferment of the meal or rest break by up to one hour will be permissible. If a meal break is deferred for more than one hour, the Employee will be paid double the relevant ordinary Base Rate for the duration of the deferment which is in excess of one hour until the completion of the meal break.

b) Meal or rest breaks may be staggered between individual Employees to allow operations to continue without interruption.

6.3.5 Notice

The Employer will give relevant Employees at least 48 hours' notice that they will need to commence shift work. Except in the case of emergencies or where there is a machinery breakdown, Employees will be given 48 hours' notice of variation to their shift roster.

6.3.6 Broken Shifts

a) Where an Employee receives less than 48 hours' notice and the shift continues for less than 5 consecutive days, the Employee is considered to be working a broken shift.

b) In the case of broken shifts (a shift that departs from the Employee's established shift roster) (i.e. does not fall within the definition of Shift Work in this Agreement – see Definition of Shift Worker"), the Employee will receive the overtime rate for Day

Workers on weekdays as prescribed at clause 6.2.1(b) for the duration of the broken shifts.

6.4 Recall

a) An Employee recalled to work overtime after leaving the Project (whether notified before or after leaving the Project) will be paid for a minimum of 4 hours' work at the appropriate rate for each time the Employee is recalled.

b) Except in the case of unforeseen circumstances arising, an Employee so recalled will not be required to work the full 4 hours if the jobs the Employee was recalled to perform is completed within a shorter period.

c) Employees will receive the appropriate overtime rate including an entitlement to an additional payment for Daily Fares and Travel allowance for that day.

6.5 Rest period after Overtime

a) An Employee who works so much Overtime between the termination of their ordinary work on one day and the commencement of their ordinary work on the next day and has not had at least 10 consecutive hours off duty between these times will, subject to this clause, be released after completion of such overtime until the Employee has had 10 consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

b) If, on the instructions of the Employer, the Employee resumes or continues work without having had 10 consecutive hours off duty, the Employee will be paid double time until he/or she is released from duty for a ten-hour rest period.

c) The provisions of this clause will apply in the case of Employees on shift work who rotate from one shift to another as if 8 hours were substituted for ten hours if overtime is worked:

i. For the purpose of changing shift rosters; or

ii. Where a shift worker does not report for duty and a day worker or shift worker is required to replace such shift worker; or

iii. Where a shift is worked by arrangement between the Employer and Employee.

d) Except as provided for in this clause, the Employer may require any Employee to work reasonable overtime.

6.6 Cancellation of Weekend Overtime

a) In circumstances, including but not limited to, plant failure, actual or forecast inclement weather, or cancelled material delivery, the Employer may cancel planned weekend overtime. The Employer will endeavour to notify affected Employees of weekend overtime cancellation by lunchtime on Fridays. However, the Employer reserves the right, in exceptional circumstances, to notify Employees of weekend overtime cancellation by no later than normal finishing time on Fridays. This will include posting of the notice of cancellation of weekend overtime on the noticeboard.

b) Equally, Employees through circumstances may find themselves unable to fulfil their commitment to attend the Project for planned weekend overtime. Such Employees will notify the Employer before the planned finishing time on Friday, with reasonable consideration given to exceptional circumstances of any late notification.

6.7 Work Throughs

a) Work throughs under this clause (6.7) are where Employees are directed by the Employer at the commencement of their shift/work day to maintain operations to keep equipment and/or plant running to facilitate work flows, and as such, are unable to take their normal scheduled meal breaks, at their crib room/amenities.

b) Work crews, when directed by the Employer, will work through normal scheduled meal breaks, provided that each of these Employees are entitled to pause for a reasonable time to refresh themselves. A reasonable break for the purposes of this clause will be generally a minimum of 20 minutes duration and taken when appropriate, at the location of the work operation.

c) In recognition of this work pattern, when Employees are required to maintain operations under this clause, they will receive an additional one (1) hour's pay, accruing every four (4) hour block after the normal meal break time, paid at double time. This payment is in lieu of the normal scheduled meal breaks and ability to take such a break at their crib room/amenities. This will not apply where Employees have their meal breaks rescheduled in accordance with this Agreement.

6.8 Rostered Days Off

a) For each ordinary day or shift worked, 0.8 of an hour's pay will accrue towards payment for a Rostered Day Off ("RDO").

b) It is the intention of this Agreement that there will be 13 scheduled RDO's observed for each year of this Agreement. Requirements of the Project and the program will determine the work roster and/or shift roster. There will be requirements to adjust RDO's (including any scheduled RDO's) during the life of the Project to meet the needs and program of the Project.

c) In the event that there is a requirement for work to be carried out on scheduled RDOs the Employer will, in advance of this requirement, notify, consult and reach agreement with affected Employees to perform this work. Agreement to perform this work will not be unreasonably withheld by an affected Employee.

d) To allow greater continuity of operation, the Employer and Employees may also agree to move or bank RDOs when such entitlement is due.

e) The Employer is committed to encouraging all Employees to take their accrued RDOs on a regular basis during the Project to maintain a satisfactory work/life balance.

f) It is the Employer's intention to have regular communication regarding the Project and the scheduling of RDOs.

g) Where an Employee does not have sufficient RDO hours accrued at the time of a scheduled RDO, the Employee may elect to take annual leave or some other form of leave.

h) The following is agreed in respect of RDOs:

   iv. If an RDO is moved or banked, the Employer will not be required to pay overtime rates for any RDO worked in these circumstances;

   v. Where the Employee terminates employment before any moved or banked RDO is taken, the moved or banked RDO will be paid at the Employee's relevant and applicable Base Rate at the time of termination;

vi. RDO's do not accrue while Employees are on unpaid or unauthorised leave or while taking RDOs

vii. Payment on an RDO will include the daily fares and travel.

i) The Employee will have the flexibility to request the Employer to:

i. Use accrued/banked RDOs for days off; or

ii. Pay out up to 50% of accrued RDOs at ordinary rates of pay.

PART 7 LEAVE ENTITLEMENTS

7.1 Annual Leave

a) An Employee will accrue paid annual leave at the rate of 4 weeks (for each 12-month period of continuous service). Annual leave is paid based on 36 hours per week at the Base Rate paid to the Employee immediately prior to the leave plus a loading of 17.5% (plus Leading Hand allowance if applicable). For the period, if any, that an Employee is engaged as a Shift Worker for the purposes of the National Employment Standards as defined by this Agreement, they will be entitled to a pro-rata accrual of 5 weeks (maximum) of annual leave per annum.

b) An Employee who would have received shift loadings prescribed by this Agreement had they not been on Annual Leave, will forgo the Annual Leave loading and will be entitled to the higher shift loadings.

c) The loading prescribed in 7.1(a) or (b), will apply to accrued but untaken annual leave on termination.

d) The period of annual leave will be exclusive of any public holiday that occurs during the period.

e) The Employer may direct Employees to take accrued annual leave on one month's notice, the Employer will generally close down the Project for one or more weeks over the Christmas – New Year period and in these cases, Employees will generally be required to ensure that they have sufficient Annual Leave remaining to enable them to take leave for the period of the shutdown. In the event that they do not have Annual Leave or RDO accruals, the Employee may be required to take Leave Without Pay for such period or a combination of Annual Leave, RDO and Leave Without Pay.

f) Unless otherwise agreed, one month's notice of the start of annual leave will be given by Employees. Annual leave may be taken in any combination of days or weeks agreed between the Employer and the Employee.

g) An Employee going on leave will be paid their wages in accordance with the normal pay cycle unless alternative arrangements have been agreed to with the Employer before the leave is taken.

h) Where an Employee has exhausted Annual Leave entitlements, leave without pay may be considered by the Employer and approval of such leave will be at the Employer's sole discretion. The Employee must make a formal request in writing providing a valid reason for such a request. If leave without pay is granted to the Employee, the Employee will not accrue any entitlements for the duration of leave without pay.

i) Accrued annual leave is paid out on termination of employment.

j) This clause 7.1 will be read and be interpreted in conjunction with the definition of "shiftworker" in clause 38 of the Building and Construction General On-Site Award 2020 for the purposes of the NES. If there is any inconsistency between this clause and NES, the more beneficial provision to an Employee prevails.

7.2 Personal/Carer's Leave

a) Employees will be entitled to accrue ten (10) days paid personal/carer's leave (including sick leave) per annum, based on the Employee's base rate of pay, in accordance with the FW Act.

b) Paid personal/carer's leave accrues progressively during the year.

c) An Employee will not be entitled to be paid personal/carer's leave for more ordinary hours than the Employee would have worked on the day.

d) Sick Leave is not paid while an employee is receiving Workers' Compensation.

e) Personal/carer's leave will be paid at the Employee's Base Rate for ordinary hours that the Employee would have worked on that day. To be paid personal/carer's leave, the employee must meet the following requirements:

   i. Have accrued personal/carer's leave;

   ii. Notify their Supervisor of the absence as soon as possible and no later than four hours from the Employee's start time. If the Employee fails to notify their Supervisor as soon as practicable (and not later than four hours from the Employee's start time), without good cause, this will constitute unauthorised unpaid leave. Such occurrence may commence counselling in accordance with the procedure set out in clause 3.11;

   iii. Advise the Employer how long the absence on personal leave is likely to be;

   iv. Produce evidence to the Employer of the illness or injury or the need to use personal leave, provided that where an Employee is absent on personal leave for two consecutive days or more or on more than two single day absences in any year, evidence satisfactory to the Employer will mean a medical certificate from a registered Health Practitioner or Statutory Declaration stating the nature of the illness and the period the Employee will be unable to work.

f) Personal/carer's leave will accumulate from year to year.

g) Accrued, but untaken, personal/carer's leave is paid out on redundancy or at the completion of the Project. Where an Employee is terminated in accordance with clause 3.7 (f) and (g), payment for unused personal/carer's leave will not occur.

h) An Employee will be granted paid personal/carer's leave up to the limit of their accrued entitlement.

i) On each occasion that an Employee takes carer's leave, the Employee must provide the Employer with a medical certificate from a registered Health Practitioner or complete a Statutory Declaration stating that the Employee, or an immediate family or household member for whom the Employee was caring, was or is unwell and that the Employee was unable to attend for work on that occasion. This requirement may be modified at the Employer's sole discretion. In the case of an unexpected emergency, proof may be required in a form determined by the Employer.

7.2.1 Unpaid Carer's Leave

a) Employees are entitled to a period of up to two (2) days unpaid carer's leave for each occasion that an immediate family member or other member of the Employee's household requires care and support because of an illness, injury or unexpected emergency and the Employee has exhausted all of their paid personal/carer's leave.

The Employer will consider an individual Employee's circumstances in respect of requests for any further unpaid carer's leave.

b) The Employee will provide notice to the Employer as soon as reasonably practicable. The Employer may require an employee to provide to the Employer in accordance with the National Employment Standards documentary evidence confirming the need to take such leave.

7.2.2 Absenteeism

If an Employee is taking personal/carer's leave such that there is an indication of a pattern of regular and/or excessive absenteeism, the Employer may commence counselling in accordance with the procedure set out in clause 3.11.

7.3 Compassionate Leave

a) Employees will be entitled to Compassionate Leave in accordance with the FW Act.

b) An Employee will be entitled to a period of two (2) days paid Compassionate Leave for each occasion when a member of the Employee's immediate family or a member of the Employee's immediate household contracts or develops a personal illness that poses a serious threat to his/her life; or sustains a personal injury that poses a serious threat to his/her life; or dies.

c) The Employee will provide notice to the Employer as soon as reasonably practicable.

d) The Employer may require an Employee to provide to the Employer, in accordance with the FW Act documentary evidence confirming the need to take such leave.

e) The Employer, at its sole discretion, may grant up to ten working days of unpaid Leave in accordance with this clause.

7.4 Parental Leave

Employees will be entitled to Parental Leave in accordance with applicable legislation (e.g., the FW Act, and the *Paid Parental Leave Act 2010* (Cth)).

7.5 Jury Service

a) An Employee called for jury service during ordinary hours will be reimbursed by the Employer by an amount equal to the difference between the amount paid by the Court and the amount of Base Rate earnings the Employee would have received for the ordinary hours expended at the Court, for a maximum of 10 days. For the avoidance of doubt, entitlement and eligibility for payment for jury duty service will be strictly in accordance with the prevailing legislation.

b) The Employee will notify the Employer as soon as practicable, of the date upon which the Employee is required to attend for jury service.

c) The Employee will provide the Employer with proof of attendance, duration of attendance and amount received.

7.6 Long Service Leave

The Employer will register each Employee in the QLeave scheme for the duration of the Employees period of employment on the Project.

7.7 Requests for Flexible Working Arrangements

An Employee, who is an Employee who has worked with the Employer for at least 12 months, and falls within one of the categories of Employees who can request flexible working arrangements, in accordance with the provisions of the FW Act, may submit a request to the Employer for a change in working arrangements, in accordance with these provisions, as amended from time to time.

7.8 Community Service Leave

Employees will be entitled to Community Service Leave in accordance with the FW Act.

7.9 Family & Domestic Violence Leave

a) 'Family and domestic violence' means violent, threatening or other abusive behaviour by a close relative of a person, a member of a person's household, or a current or former intimate partner of a person, that seeks to coerce or control the person and that causes the person harm or to be fearful.

b) 'Close relative' of an Employee, is a person who is a member of the Employee's immediate family; or is related to the Employee according to Aboriginal or Torres Strait Islander kingship rules.

c) 'Immediate family' of a person means:

   i. a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the person; or

   ii. a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the person.

d) An Employee is entitled to 10 days' paid leave to deal with family and domestic violence, as follows:

   i. the leave is available in full at the start of each 12 month period of the Employee's employment; and

   ii. the leave does not accumulate from year to year; and

   iii. is available in full to part-time and casual Employees.

e) A period of leave to deal with family and domestic violence may be less than a day by agreement between the Employee and the Employer.

f) The Employer and Employee may agree that the Employee can take additional unpaid leave to deal with family and domestic violence should the Employee exceed the 10 days.

7.10 Taking Paid Leave

An Employee may take paid leave to deal with family and domestic violence if the Employee:

a) is experiencing family and domestic violence; and

b) needs to do something to deal with the impact of the family and domestic violence and it is impractical for the employee to do that thing outside their ordinary hours of work.

Note: The reasons for which an Employee may take leave include making arrangements for their safety or the safety of a family member (including relocation), attending urgent court hearings, or accessing police services.

7.11 Public Holidays

a) All Employees will be entitled to the following Public Holidays without deduction of ordinary time earnings:

i. New Year's Day;

ii. Australia Day;

iii. Good Friday;

iv. Easter Saturday;

v. Easter Sunday

vi. Easter Monday;

vii. Anzac Day;

viii. Labour Day;

ix. Exhibition Holiday;

x. King's Birthday;

xi. Christmas Day;

xii. Boxing Day; or

xiii. Any other day, or part day, declared or prescribed by or under a law of the State of Queensland as a Public Holiday, other than a day or part-day or a kind of day or part-day that is excluded by the Fair Work Regulations 2009 (Cth) from counting as a Public Holiday.

b) A Day Worker required to work on a Public Holiday nominated herein will be paid at the rate of double time and a half of their Base Rate for all time so worked. For clarity, the double time and a half payment is in lieu of any applicable shift loadings.

c) A Shift Worker on Afternoon Shift or Night Shift rostered to work on a Public Holiday nominated herein will be paid at the rate of double time and a half of their Base Rate for all time so worked. For clarity, the double time and a half payment is in lieu of any applicable shift loadings.

d) Shift Worker(s) (excluding casuals) will be paid their ordinary time earnings for a Public Holiday they are rostered to work but are not required to work. This also includes payment for Public Holiday's that fall on a day that the Employee is not rostered to work. This clause 7.11(d) will only apply when the Public Holiday(s), as provided for in clause 7.11(a), which falls on any day between Monday and Friday.

e) Employees required to work on a Public Holiday will be afforded a minimum of 4 hours' work, or be paid as such.

f) It will be available for the Employer and a majority of the affected Employees to substitute a nominated Public Holiday for another day and the prescriptions of this clause 7.11 will apply to the substituted day.

PART 8 ADMINISTRATION

8.1 Income Protection

The Employer will continue to maintain income protection insurance with the current provider (sickness and injury) for Employees covered by this Agreement, or another provider agreed between the parties. The cost to the Employer shall not exceed $187.96 per person per month initially and then shall increase by no more than the Base Rate escalation percentage amounts from the dates applicable to increases to the Base Rate.

8.2 Payment of Wages

a) Payment will be by direct electronic funds transfer to the Employee's nominated financial institution account(s).

b) Employees are required to nominate to the Employer the account(s) at a bank or other financial institution at the time of engagement.

c) The pay week will be from Monday to Sunday, with wages being transferred to the Employees nominated financial institution on the following Thursday.

d) Where a payment falls on a public holiday, the Employer will make the payment in respect of Employees on the following working day.

e) All wage increases during the life of this Agreement will be made in accordance with Appendices A or B and will take effect from the first full pay period after the effective date.

f) Any overpayment of wages made to the Employee in error by the Employer will, by written agreement with the Employee, be deducted over a negotiated period (but not longer than six (6) weeks) and must be repaid while the Employee is employed by the Employer.

g) Employees will not unreasonably withhold consent for reimbursement of overpayment of wages.

8.3 Employee Representative

a) All parties to this Agreement acknowledge that employees have the right to representation by employee representatives in employment matters. The Company will not interfere in the selection of an employee representative. Employee representatives have the right to be treated fairly and to perform their role without any discrimination in their employment.

b) The Employer acknowledges that Employees may choose to elect an employee as a representative(s) (who may or may not be a union delegate). Such elected representative(s) will be allowed reasonable time during working hours to submit to the Employer matters affecting the Employees they represent. The Employee representative is required to perform productive work when not representing other Employees on the Project (that is, an Employee representative will not be a non-working shop steward). The Parties acknowledge that the benefits given under clause 8.3 and 8.4 apply only to the Employee representative appointed under this clause.

c) Employee representative(s) will, subject to approval by their Supervisor will be provided with reasonable time off with pay to:

   i. Attend any court or industrial tribunal proceedings and associated meetings that

relate to this Agreement;

ii. Consult with other Employees in relation to any matter arising out of this Agreement or in connection with their employment with the Employer. To avoid doubt, this clause 8.3 is not intended to confer rights on Employee representative(s) to perform similar functions of union officials, for the purpose of union officials avoiding right of entry requirements; and

iii. The Employee representative will be entitled to 5 days training leave per calendar year.

8.4 Employee Representative Facilities

a) The Employer shall allow an Employee representative appointed under clause 8.3 reasonable access to office resources when acting in the capacity of the Employee representative, for example:

i. A telephone;

ii. Access to a computer;

iii. A table and chairs;

iv. A filing cabinet;

v. Air conditioning/heating;

vi. Access to stationery and other administrative facilities, including use of email, (if available on site), following consultation between the Employee Representative and Site Management.

b) These resources will be available during working hours.

8.5 Compliance with Statutory Requirements

The Parties shall adhere to the requirements of all applicable Acts of Parliament of the Commonwealth and State and therefore comply with the relevant requirements of all those ordinances, regulations, by-laws, orders and proclamations made or Issued under any applicable Act.

8.6 Severability

a) It is the intention of those covered by this Agreement that the Agreement contains only permitted matters under the FW Act.

b) The severance of any term of this Agreement that is in whole, or in part, of no effect by virtue of the operation of s.253 of the FW Act will not be taken affect the binding force and effect of the remainder of the Agreement.

c) To the extent it is possible, all terms should be interpreted in a manner that would make them permitted matters.

8.7 Employee Awareness

Employees will be provided with a copy of this Agreement in their letter of offer and copies will be available on the Project.

8.8 Immigration Compliance

a) The Employer recognises its obligations in respect of compliance with applicable Australian immigration laws.

b) Prospective Employees may be required to complete an authority which authorises the Employer to obtain from the Department of Immigration and Citizenship, details of their immigration status.

c) No person, other than an Australian Citizen or Permanent Resident, will be employed by the Employer unless it is verified that they have the Right to Work in Australia.

PART 9 SIGNATORIES

Signed for and on behalf of the employer CPB Contractors Pty Ltd pursuant to section 126 of the *Corporations Act 2001* (Cth):

I am employed by CPB Contractors Pty Ltd, and I am authorised by CPB Contractors Pty Ltd to sign this agreement on its behalf as an authorised employer representative.

By:

Name Vince Sanfillipo

Address 520 Wickham St, Fortitude Valley, QLD 4006

Position General Manager, QLD & PNG

On 17/12/2024

Date *Signature*

In the presence of

Joanne Campbell

Name *Signature*

Signed by a representative of the employees covered by the agreement in accordance with regulation 2.06A of the *Fair Work Regulations 2009*:

By:

Name Joyce Emmerton

Address: 33 Herschel Street Brisbane

Position Heavy Plant Operator - HSR

On 17-12-2024

Date *Signature*

In the presence of

Ben Loakes

Name 17-12-24 *Signature*

Appendix A CLASSIFICATION STRUCTURE

Civil Worker Classifications

The Civil Worker (CW) classifications will apply to Employees performing work of the nature of Civil Construction who are engaged in the classifications set out below, and are employed to perform the works set out in clause 2.4 of this Agreement.

Determination of Classification for individual Employees:

1. The appropriate classification level will be determined by the primary role in which a person is engaged to perform by the Employer, regardless of that person's level of skill.
2. This means that the appropriate classification level for an individual will be determined on a task rather than skill basis.
3. Individual classification levels will only change where the primary task for which the individual is engaged changes.

	Indicative Classification	**From the first full pay period after Agreement approved Base Rate per hour**
CW1	New Entrant (an entry level with less than 12 months experience) General Labourer Stores Assistant	50.57
CW2	Skilled General Labourer Earthworks Trim Grade Checker Heavy Plant Spotter Concrete Gang Concrete Float Hand Paving Stringliner Store-person Yardperson Chainman	52.53
CW3	Elevated Work Platform Operator with Ticket Hoist Driver Concrete Finisher Form Worker Road Roller Operator under 12T Heavy Mobile Plant Operator (0-5T) Ticketed Dogman Steel fixer Ticketed Forklift Driver Ticketed Rigger/Scaffolder Telehandler (Up to 4.5T) Hiab Operator	54.73
CW4	Concrete Line Pump Operator Road Roller Operator 12T and over Concrete Finisher Concrete Paving Spreader Non-certified Tradesperson	57.46
CW5	Trade Qualified Tradesperson Crane Operator (5-20T) Operators of: Tractor up to but not exceeding 48kw (65bhp), Skid Steer Excavator up to but not exceeding 48kw (65bhp), Dumper/Water Cart not exceeding 40T, Mobile Concrete Pump Boom, Forklift not exceeding 48kw,	60.11

	Indicative Classification	From the first full pay period after Agreement approved Base Rate per hour
	Shotcrete Placing Machine, Paver Gantry Crane Operator	
CW6	Heavy Mobile Plant Operator (>20T-60T) Operators of: Tractor 48kw up to but not exceeding 370kw, Loader-Front End and Overhead from 48kw up to but not exceeding 370kw including:960, 966, 980, Dry Batch Plant, Pug Mill, Skid Steer Tractor from 48kw, Forklift from 48kw but not exceeding 220kw, Excavator not exceeding 3cubic metres, Dumper/Water Cart over 40T but not exceeding 100T, Dozer D8 without GPS, Compactor 825 without GPS, Graders 140,143,14,16 without GPS	62.84
CW7	Heavy Mobile Plant Operator (>60-100T) Operators of: Tractor from 370kw up to but not exceeding 450kw including Scraper 651/ Dozer DION, Trimmer, Excavator from 3 cubic metres, Loader-Front End and Overhead from 370kw up to but not exceeding 450kw, Wet batch Plant, Scraper 651, Compactor 825 with GPS, Graders 140,143,14,16 with GPS, Dozer D8 with GPS	65.57
CW8	Heavy Mobile Plant Operator (>100T) Operators of: Tractor from 450kw including Dozer D11, D10-48kw, 475, Grader with Final Trim, Scraper 637	68.32

Appendix B BASE RATES OF PAY

The Base Rates of pay for each classification will as prescribed in Appendix A, escalate from the first full pay period after the indicated escalation date as follows.

Classification	Commencement of Agreement	1/07/2025	1/07/2026	1/07/2027
	rate per hour	rate per hour	rate per hour	rate per hour
CW1	50.57	53.10	55.75	58.54
CW2	52.53	55.16	57.92	60.81
CW3	54.73	57.46	60.34	63.35
CW4	57.46	60.33	63.35	66.52
CW5	60.11	63.12	66.27	69.59
CW6	62.84	65.98	69.28	72.74
CW7	65.57	68.85	72.29	75.91
CW8	68.32	71.73	75.32	79.09

Appendix C ALLOWANCES & CONTRIBUTIONS

Flat or All Purpose	Allowance/Contribution	Amount
Flat	**Daily Fares and Travelling Allowance**	$55.00 from Agreement commencing operation. One off increase to $60.00 to be applied 12 months after the Agreement commences operation.
Flat	**Productivity Allowance (per hour worked)**	$9.64*
Flat	**People First Payment**	$55/week
Flat	**Leading Hand Allowance (per hour flat)**	
	- In charge of 2-5 persons	$1.99*
	- In charge of 6-10 persons	$2.53*
	- In charge of 11 plus persons	$3.36*
Flat	**First Aid Allowance (per day)**	
	- Senior First Aid	$4.15
	- Occupational First Aid	$6.55
Flat	**Overtime Meal Allowance**	$24.51*
All Purpose	Tradesperson Allowance	$1.81*
Flat		
N/A	**Shift Penalties**	
	Day Shift	Base Rate
	Afternoon Shift	Base Rate + 50%
	Night Shift	Base Rate + 50%
Flat	**Redundancy Contribution (per week)**	$175.00
N/A	**Superannuation (per week)**	11.5% or min $255 p/wk
Flat	**Income protection**	Employer cost $187.96 p/mth*
	*To be increased by the corresponding wage escalation percentage p/a on first pay period after 1 July each year. As per the table below.	

Escalated allowances	Commencement of Agreement	1/07/2025	1/07/2026	1/07/2027
Productivity (per hour worked)	$9.64	$10.12	$10.63	$11.16
Leading hand 2-5 (per hour flat)	$1.99	$2.09	$2.19	$2.30
Leading Hand 6-10 (per hour flat)	$2.53	$2.66	$2.79	$2.93
Leading Hand 11+ (per hour flat)	$3.36	$3.53	$3.71	$3.89
Overtime Meal	$24.51	$25.73	$27.02	$28.37
Tradesperson (per hour)	$1.81	$1.90	$1.99	$2.09
Income Protection (per month)	$187.96	$197.36	$207.23	$217.59

Appendix D APPRENTICES

Apprentices engaged directly by the Employer will be paid the following Rates of Pay:

Level	Percentage of Relevant Wage Rate of CW5
First Year of Apprenticeship	55%
Second Year of Apprenticeship	65%
Third Year of Apprenticeship	80%
Fourth Year of Apprenticeship	90%

Adult Apprentice Rates of Pay:

An Adult Apprentice is a person of 21 years of age or over at the time of entering into a contract of training in a specified trade.

Level	Percentage of Relevant Wage Rate of CW5
First Year of Apprenticeship	80%
Second Year of Apprenticeship	85%
Third Year of Apprenticeship	90%
Fourth Year of Apprenticeship	95%

Apprentices will have an entitlement to the following Allowances and contributions:

Productivity Allowance: The Employer will pay Fifty Percent (50%) Productivity Allowance prescribed at clause 5.4 for the first year of the apprenticeship. The Employer will pay one hundred Percent (100%) Productivity Allowance for the second and subsequent years of the employee's apprenticeship.

Daily Fares and Travelling Allowance: The Employer will pay the full daily fares and travelling allowances prescribed at clause 5.3.

Superannuation: The Employer will make Superannuation contribution as prescribed at Clause 5.10.

DECISION

Fair Work Act 2009
s.185—Enterprise agreement

UGL Rail Services Pty Limited
(AG2021/5298)

UGL AND CEPU ELECTRICAL DIVISION QUEENSLAND REGIONAL ENTERPRISE AGREEMENT 2020-2024

Manufacturing and associated industries

COMMISSIONER O'NEILL MELBOURNE, 15 JUNE 2021

Application for approval of the UGL and CEPU Electrical Division Queensland Regional Enterprise Agreement 2020-2024.

[1] An application has been made for approval of a greenfields agreement known as the *UGL and CEPU Electrical Division Queensland Regional Enterprise Agreement 2020-2024* (the Agreement). The application was made by UGL Rail Services Pty Limited (UGL) pursuant to s.185 of the *Fair Work Act 2009* (Act).

[2] The Agreement is a stand-alone agreement and applies to UGL with respect to the employment of all its employees in Queensland performing work within the classifications contained in appendices to the Agreement. The classifications include Electrical Workers Grades 1-10, Electrical Fitters, Communication Tradespersons, apprentices and adult apprentices. The Agreement does not apply to work performed on civil and mechanical structures or in commercial construction where the total construction value is over $200 million and where a project agreement applies.[1]

[3] In deciding whether to approve a greenfields agreement, the Commission must consider whether the Agreement relates to a genuine new enterprise that the employer proposes to establish. This is a jurisdictional fact which requires consideration of the objective character and identity of the business to which the Agreement will apply.

[4] The application was supported by a Declaration of Mr Dean Langridge, Industrial Relations Manager, dated 25 May 2021. The Declaration stated:

> "This agreement relates to a genuine new enterprise for UGL Rail Services Pty Ltd (including a new activity, project or undertaking) which was made at a time when the Applicant had not yet employed any of the persons who will be necessary for the normal conduct of the enterprise."

[5] Further information was sought as to the character and identity of the genuine new enterprise, and a further Declaration was provided on 8 June 2021. This Declaration stated:

> "This Agreement covers construction related activities performed by employees of UGL Rail Services Pty Ltd in Queensland. UGL Rail Services Pty Limited have not undertaken any activity, project or undertaking that would otherwise be covered by clause 1.7 of the Agreement. UGL Rail Services Pty Ltd has not yet employed any of the persons who will be necessary for the normal conduct of the enterprise otherwise be [sic] covered by clause 1.7 of the Agreement. UGL Rail Pty Ltd have not yet commenced work in establishing the genuine new enterprise."

[6] At a hearing on 11 June 2021 Mr Langridge provided further information about the proposed new enterprise, including that:

- the Agreement relates to a genuinely new enterprise for UGL, namely construction work in Queensland;
- UGL primarily performs maintenance on rolling stock; the agreement relates to an entirely new undertaking covering construction work for projects including Cross River Rail and Inland Rail;
- UGL currently has no operations in the State of Queensland and has not previously performed work covered by the scope of the Agreement;
- whilst UGL Rail operates in other States, there are no other enterprise agreements that would otherwise cover work within the scope of the Agreement;
- UGL has no current employees, nor has it previously employed employees, who would otherwise be covered by the Agreement; and
- UGL does not currently, nor has it previously, performed work that would be covered by the scope of the proposed Agreement.

[7] Based on the Applicant's submissions at the hearing and the material before me, I am satisfied that the proposed Agreement relates to a genuine new enterprise and that the Agreement meets the requirements of s.172(2)(b) of the Act.

[8] Pursuant to s.53(2)(b) of the Act, I note the Agreement was made with the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) and that the Agreement covers this organisation. The CEPU provided a Declaration of Mr Peter Ong, Divisional Branch Secretary, dated 26 May 2021 in support of the application.

[9] I am satisfied that each of the requirements of ss.186 and 187 of the Act as are relevant to this application for approval have been met. In accordance with s.187(5)(a) of the Act, I am satisfied that the CEPU is entitled to represent the industrial interests of a majority of employees who will be covered by the Agreement in relation to work that is to be performed under it. I am also satisfied based on the Declarations of Mr Langridge and Mr Ong that it is in the public interest to approve the Agreement and that the group of prospective employees covered was fairly chosen.

[10] The Applicant has provided written undertakings and a copy of the undertakings is attached in Annexure A. In accordance with s.191(1) of the Act, the undertakings are taken to be a term of the Agreement.

[11] I observe that the following provisions are likely to be inconsistent with the National Employment Standards (NES):

- Clause 3.4.3 – Notice of termination by employee;
- Clause 3.5.12 - Employees exempted;
- Clause 6.1.8 – Calculation of continuous service for annual leave; and
- Clause 6.2.6 – Employee must give notice.

However, noting the undertaking given by the Applicant, I am satisfied that the more beneficial entitlements of the NES will prevail where there is an inconsistency between the Agreement and the NES.

[12] The Agreement is approved and, in accordance with s.54 of the Act, will operate from 22 June 2021. The nominal expiry date of the Agreement is 31 January 2025.



COMMISSIONER

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Annexure A

IN THE FAIR WORK COMMISSION

FWC Matter No.:
AG2021/5298

Applicant:
UGL Rail Services Pty Limited

Section 185 – Application for approval of a single enterprise agreement

Undertaking – Section 190

I, Dean Langridge, Industrial Relations Manager have the authority given to me by UGL Rail Services Pty Limited to give the following undertakings with respect to the *UGL and CEPU Electrical Division Queensland Regional Enterprise Agreement 2020-2024* ("**Agreement**"):

1. For the purpose of the additional week of annual leave provided for in the National Employment Standards ("**NES**"), a shiftworker is a 7 day shiftworker who is regularly rostered to work on Sundays and public holidays.

2. This Agreement will be read and interpreted in conjunction with the NES. Where there is an inconsistency between this Agreement and the NES, and the NES provides a greater benefit, the NES provision will apply to the extent of the inconsistency.

These undertakings are provided on the basis of issues raised by the Fair Work Commission in the application before the Fair Work Commission.

D Langridge

Signature

8 June 2021

Date

[1] Clause 1.7, 1.6.1 and Appendix 2 of the Agreement.

Code for the Tendering and Performance of Building Work 2016

No longer in force

Administered by Department of Employment and Workplace Relations

This item is authorised by the following title:

Federal Safety Commissioner Act 2022

Latest version

F2022C00793 C04

26 July 2022 - 06 December 2022

Notice was given by Senator Cameron on 9/5/2017 to move on 9/8/2017 that this instrument be disallowed. The Senate debated the motion on 9/8/2017. The instrument was not disallowed.

All versions

Show known future amendments

Compilation date	Comp no.	ID	DL	Notes	Includes amendments
26 Jul 2022 - 06 Dec 2022	**C04**	**F2022C00793**			Code for the Tendering and Performance of Building Work Amendme (F2022L01007)
21 Mar 2019 - 25 Jul 2022	C03	F2019C00289			Code for the Tendering and Performance of Building Work Amendme Instrument 2019 (F2019L00324)
22 Aug 2017 - 20 Mar 2019	C02	F2017C00668			Code for the Tendering and Performance of Building Work Amendme Exemptions) Instrument 2017 (F2017L01052)
21 Feb 2017 - 21 Aug 2017	C01	F2017C00125			Code for the Tendering and Performance of Building Work Amendme (F2017L00132)

4 total

10

Back to top

As made

Effective date	Making date	ID	DL	Explanatory Statement/s
02 Dec 2016 - 20 Feb 2017	02 Dec 2016	F2016L01859		View Explanatory Statement/s

Back to top

We acknowledge the traditional owners and custodians of country throughout Australia and acknowledge their continuing connection to land, waters and community.

Code for the Tendering and Performance of Building Work 2016

made under section 34 of the

Building and Construction Industry (Improving Productivity) Act 2016

Compilation No. 3

Compilation date: 21 March 2019

Includes amendments up to: F2019L00324

Prepared by the Department of Jobs and Small Business, Canberra

Rectified Authorised Version registered 15/08/2019 F2019C00289

About this compilation

This compilation

This is a compilation of the *Code for the Tendering and Performance of Building Work 2016* that shows the text of the law as amended and in force on 21 March 2019 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

Rectified Authorised Version registered 15/08/2019 F2019C00289

Contents

Page

1	Name of code of practice	5
2	Commencement	5
3	Definitions	5
4	Funding entities	7
5	General	8
6	Application of the code of practice	8
6A	Exemption for essential service providers	9
6B	Exemption for essential services infrastructure	10
7	General responsibilities of code covered entities	12
8	Subcontractors and related bodies and entities	12
9	Compliance with laws, decisions, directions and orders	13
10	Unregistered written agreements and other agreements	14
11	Content of agreements and prohibited conduct, arrangements and practices	15
11A	Attempts to avoid section 11 requirements	17
11B	Sham contracting	18
11C	Collusive practices	18
11D	Security of payment	19
11E	Disputed payments	20
11F	Engagement of non-citizens or non-residents	20
12	Above-entitlements payments and related matters	21
13	Freedom of association	21
14	Entry to premises where building work is performed	23
15	Dispute settlement	23
16	Industrial impacts	24
16A	Fitness for work – alcohol or other drugs	24
17	Notification	26
18	Consequences of breaching this code of practice	26
19	Decision to impose an exclusion sanction	27
22	Determination of Compliance with Section 11	28
23	Key criteria for eligibility to be awarded Commonwealth funded building work	29
24	Expressions of interest and tenders	29
25	Projects requiring a WRMP	30
25A	Information to be provided by preferred tenderer	31
26	Contracts	31
27	Notification of head contractor	33
28	Notification by funding entities	33
29	Funding entity compliance	33
30	Requirement for a WRMP	34

Rectified Authorised Version registered 15/08/2019 F2019C00289

31 Application for approval of a WRMP 34
32 Content of a WRMP 34
33 Approval process of a WRMP 35
34 Compliance with an approved WRMP 35

Rectified Authorised Version registered 15/08/2019 F2019C00289

Part 1 Introductory

1 Name of code of practice

This code of practice is the *Code for the Tendering and Performance of Building Work 2016*.

2 Commencement

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

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 2016*.

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 means building work described in any of items 1 to 8 of Schedule 1, other than building work to which item 10 of that Schedule applies.

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.

essential services infrastructure: see subsection 6B(5).

acquiring entity: see subsection 18(2).

Rectified Authorised Version registered 15/08/2019 F2019C00289

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.

infrastructure exemption: see subsection 6B(2).

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

intelligence or security agency has the same meaning as in section 85ZL of the Crimes Act 1914.

security has the same meaning as in the *Australian Security Intelligence Organisation Act 1979.*

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:

Rectified Authorised Version registered 15/08/2019 F2019C00289

(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 Minister 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 Minister 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 paragraph 6(1)(e) 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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

Part 2 Conduct

5 General

This code of practice has been developed to:

(a) promote an improved workplace relations framework for building work and promote compliance with this code of practice, the Act and designated building laws and encourage the development of safe, healthy, fair, lawful and productive building sites 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) increase efficiency and cost savings in the work performed by code covered entities by ensuring that they understand and comply with this code of practice, the Act and designated building laws; and

(d) increase the likelihood of timely, predictable, and cost-efficient delivery of Commonwealth funded building work through the use of building contractors and building industry participants that consistently adhere to this code of practice, the Act and designated building laws; and

(e) help funding entities to identify and work with building contractors and building industry participants with track records of compliance with this code of practice, the Act and designated building laws; and

(f) reduce execution delays and costs in relation to Commonwealth funded building work by not engaging building contractors and building industry participants with track records of non-compliance with this code of practice, the Act and designated building laws; and

(g) establish an enforcement framework under which building contractors and 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

Rectified Authorised Version registered 15/08/2019 F2019C00289

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 any of items 1 to 9 of 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 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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

(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.

6B Exemption for essential services infrastructure

Applying for exemptions

(1) A building contractor or building industry participant may apply to the ABC Commissioner for an exemption from this code of practice.

(2) The ABC Commissioner must grant the exemption (the ***infrastructure exemption***) if the Commissioner is satisfied that:

(a) the principal business of the building contractor or building industry participant involves performing work for the provision of essential services related to supply of electricity, natural gas, water, waste water, or telecommunications; and

(b) the principal building work of the building contractor or building industry participant involves performing work for the provision of essential services infrastructure.

(3) An infrastructure exemption must be issued in writing and applies:

(a) for the period specified in the exemption; or

(b) if no period is specified, until it is revoked.

Revoking exemptions

(4) The ABC Commissioner must revoke an infrastructure exemption (including an exemption issued for a specified period) if the Commissioner is satisfied that paragraph (2)(a) or (b) no longer applies in relation to the building contractor or building industry participant.

*Meaning of **essential services infrastructure***

(5) ***Essential services infrastructure*** means systems or networks:

(a) to which consumers can connect for supply of electricity, natural gas, water, waste water, or telecommunications; and

(b) that:

(i) are important for the life, the personal safety or health, or the welfare, of the population or a significant part of it; or

Rectified Authorised Version registered 15/08/2019 F2019C00289

(ii) make a significant contribution to the Australian economy or an important part of it.

Effect of infrastructure exemption

(6) If a building contractor or building industry participant is a code covered entity the effect of an infrastructure exemption is that the entity is deemed to not be a code covered entity while the exemption applies.

(7) If a building contractor or building industry participant is not a code covered entity the effect of an infrastructure exemption is that section 6 does not apply while the infrastructure exemption applies.

Rectified Authorised Version registered 15/08/2019 F2019C00289

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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

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 the Act and 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, including work health and safety training requirements and asbestos safety requirements, 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:

(a) must comply with a compliance notice issued under section 99 of the Act;

Rectified Authorised Version registered 15/08/2019 F2019C00289

(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.

(6) Subsection (5) does 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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

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) are subject to Schedule 5.

(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;

Note: this does not prevent the inclusion of clauses in an enterprise agreement that encourage the employment of apprentices.

(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;

Rectified Authorised Version registered 15/08/2019 F2019C00289

(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;

Rectified Authorised Version registered 15/08/2019 F2019C00289

(p) provide for the rights of an official of a building association to enter premises other than in 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(1)(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:

Rectified Authorised Version registered 15/08/2019 F2019C00289

(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.

(2) Subsection (1) is subject to Schedule 5.

11B Sham contracting

(1) A code covered entity (the employer) must not engage, or propose to engage, an individual to perform building work under a contract for services where the true character of the engagement or proposed engagement is that of employment.

(2) A code covered entity (the employer) must not enter into a contract with another person (the contractor) under which services in the nature of building work are to be provided to the employer, if:

(a) the services are to be performed by an individual (who is not the contractor); and the individual has any ownership in, or is an officer or trustee of, the contractor; and

(b) if the contract were entered into with the individual, the contract would be a contract of employment.

11C Collusive practices

(1) A code covered entity must not engage in collusive tendering practices.

(2) For the purposes of subsection (1), collusive tendering practices include but are not limited to:-

(a) any agreement between tenderers as to who should be the successful tenderer;

(b) any meetings of tenderers to discuss tenders before the submission of tenders if the client is not present;

(c) any exchange of information between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderers;

(d) any agreements between tenderers to fix prices or conditions of contract; that is, any collaboration between tenderers on prices or conditions to be included in contracts without the consent of the client;

Rectified Authorised Version registered 15/08/2019 F2019C00289

(e) any assistance to any tenderer to submit a cover tender; that is, a tender submitted as genuine yet has been deliberately priced in order to not win the contract; and

(f) any agreement between tenderers before submission of tenders to fix the rate of payment of building association fees, where the payment of such fees is conditional on the tenderer being awarded the contract.

11D Security of payment

(1) A code covered entity must:

(a) comply with all applicable laws and other requirements relating to the security of payments that are due to persons; and

(b) ensure that payments which are due and payable by the code covered entity are made in a timely manner and are not unreasonably withheld; and

(c) have a documented dispute settlement process that details how disputes about payments to subcontractors will be resolved, and must comply with that process; and

(d) as far as practicable, ensure that disputes about payments are resolved in a reasonable, timely and cooperative way; and

(e) comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code covered entity in relation to Commonwealth funded building work; and

(f) report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due.

(2) A code covered entity must not engage in illegal or fraudulent phoenix activities for the purpose of avoiding any payment due to another building contractor or building industry participant or other creditor.

(3) A code covered entity must not:

(a) organise or take or threaten to organise or take action with intent to coerce a contractor, subcontractor or consultant to:

(i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or

(ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.

Rectified Authorised Version registered 15/08/2019 F2019C00289

(b) apply or attempt to apply undue influence or undue pressure on a contractor, subcontractor or consultant to:

(i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or

(ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.

11E Disputed payments

(1) A code covered entity must:

(a) ensure that its documented dispute settlement process detailing how disputes about payments to subcontractors will be resolved includes a referral process to an independent adjudicator for determination if the dispute cannot be resolved between the parties, and must comply with that process and any determination; and

(b) as far as practicable, ensure that disputes about payments referred to 11E(1)(a) are resolved in a reasonable, timely and cooperative way; and

(c) comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code covered entity in relation to Commonwealth funded building work; and

(d) report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due.

11F Engagement of non-citizens or non-residents

(1) A code covered entity must ensure that no person that is not an Australian citizen or Australian permanent resident (within the meaning of the *Migration Act 1958*) is employed to undertake building work for the code covered entity unless:

(a) the position is first advertised in Australia; and

(b) the advertising was targeted in such a way that a significant proportion of suitably qualified Australian citizens and Australian permanent residents would be likely to be informed about the position; and

(c) any skills or experience requirements set out in the advertising were appropriate to the position; and

(d) the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job.

Rectified Authorised Version registered 15/08/2019 F2019C00289

Note: The *Migration Act 1958* and its subordinate legislation contain requirements relating to the engagement of persons that are not Australian citizens or Australian permanent residents.

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

Rectified Authorised Version registered 15/08/2019 F2019C00289

(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

Rectified Authorised Version registered 15/08/2019 F2019C00289

(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, 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:

Rectified Authorised Version registered 15/08/2019 F2019C00289

(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) is subject to Schedule 5.

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.*

16A Fitness for work – alcohol or other drugs

(1) A code covered entity must ensure there is an approach to managing drug and alcohol issues in the workplace to help ensure that no person attending the site to perform building work does so under the influence of alcohol or drugs listed in Schedule 4.

Rectified Authorised Version registered 15/08/2019 F2019C00289

(2) A code covered entity that is a head contractor must not pass the implementation and cost of any drug and alcohol testing to its subcontractors.

Rectified Authorised Version registered 15/08/2019 F2019C00289

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 including, but not limited to, by having failed to comply with:

(i) work health and safety laws; or

(ii) the FW Act in relation to the underpayment of an employee's wages or entitlements; 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 refer the matter to the Minister with recommendations, if any, that a sanction should be imposed.

(1A) Where a matter has been referred to the Minister under subsection 18(1) (with the exception of a referral under subparagraph 18(1)(a)(i)) the Minister may:

(a) impose an exclusion sanction on the code covered entity; or

(b) 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 Minister 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.

(1B) Where a matter has been referred to the Minister under subparagraph 18(1)(a)(i) the Minister must impose an exclusion sanction on the code covered entity unless the Minister is satisfied that it would not be appropriate in the

Rectified Authorised Version registered 15/08/2019 F2019C00289

circumstances because of the nature of, or factors contributing to, the failure to comply. In those circumstances the Minister may 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.

(2) The Minister 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 Minister 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 Minister proposes to impose an exclusion sanction under section 18, the Minister 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 in relation to the proposed sanction.

(2) Where the Minister proposes to impose an exclusion sanction on a related entity of the code covered entity, the Minister must give the same information in subsection (1) to the related entity.

(3) After the date specified in a notice under subsection (1), the Minister 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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

(4) An exclusion sanction imposed on a code covered entity takes effect on the date specified by the Minister in the written notice of decision issued pursuant to paragraph (3)(c).

(5) Where the Minister proposes to impose an exclusion sanction on an acquiring entity in accordance with subsection 18(2), the Minister must treat the acquiring entity as if it were a code covered entity for the purpose of this section.

(6) The Minister must advise the Finance Minister prior to imposing an exclusion sanction on a code covered entity.

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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

Part 5 Funding Entities

23 Key criteria for eligibility to 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 Commonwealth funded 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 Commonwealth funded building work 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 of 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; and

(d) to demonstrate a positive commitment to the provision of appropriate training and skill development for their workforce. Such commitment may be evidenced by compliance with any state or territory government building training policies and supporting the delivery of nationally endorsed building and construction competencies; and

(e) include details of the number of current apprentice and trainee employees and the number and classes of persons that hold visas under the *Migration Act 1958* that are engaged by the respondent, and that are intended to be engaged by the respondent to undertake the Commonwealth funded building work; and

Rectified Authorised Version registered 15/08/2019 F2019C00289

(f) to advise whether the respondent has, within the preceding 3 year period:

(i) 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 the *Migration Act 1958*; or

(ii) been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) including by any related entity to a building contractor or building industry participant; or

(iii) owed any unsatisfied judgement debts (including such debts owed by any related entity) to a building contractor or building industry participant.

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(2) the ABCC must inform the funding entity about whether the ABCC requires any of

Rectified Authorised Version registered 15/08/2019 F2019C00289

the matters outlined in Schedule 3 to be addressed in the proposed WRMP for the project.

25A Information to be provided by preferred tenderer

(1) A funding entity must ensure that before a contract is entered into in respect of Commonwealth funded building work, the preferred tenderer provides the following information:

(a) the extent to which domestically sourced and manufactured building materials will be used to undertake the building work;

(b) whether the building materials to be used to undertake the building work comply with relevant Australian standards published by, or on behalf of, Standards Australia;

(c) the preferred tenderer's assessment of the whole-of-life costs of the project to which the building work relates;

(d) the impact on jobs of the project to which the building work relates; and

(e) whether the project to which the building work relates will contribute to skills growth.

26 Contracts

(1) A funding entity must not enter into a contract in respect of Commonwealth funded 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 Commonwealth funded 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 Commonwealth funded 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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

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 Commonwealth funded 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 the Act, 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.

(7) A funding entity must only enter into a contract in respect of Commonwealth funded building work with a code covered entity that will require its subcontractors:

(a) to advise, prior to entering into a contract with them, whether the subcontractor has, within the preceding three year period:

(i) 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 the *Migration Act 1958;* or

(ii) been required to pay any amounts under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) or owed any unsatisfied judgement debts (including by any related entity) to a building contractor or building industry participant; and

(b) to update the advice referred to in paragraph (7)(a) every six months for the duration of the contract between the code covered entity and the subcontractor.

(8) A funding entity must only enter into a contract in respect of Commonwealth funded building work with a code covered entity that only uses products in

Rectified Authorised Version registered 15/08/2019 F2019C00289

building work that comply with the relevant Australian standards published by, or on behalf of, Standards Australia.

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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

(2) A proposed WRMP must include:

(a) a fitness for work policy to manage alcohol and other drugs in the workplace that applies to all persons engaged to perform building work on a project and addresses the matters set out in Schedule 4; and

(b) details of the processes that are or will be put in place to ensure that all applicable laws and other requirements in relation to the security of payments that are due to persons in respect of building work will be adhered to throughout the life of the project.

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;

(b) addresses the matters in Schedule 3 that the ABCC requires to be addressed in the WRMP for the particular project; and

(c) addresses the matters in subsection 32(2).

(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).

Rectified Authorised Version registered 15/08/2019 F2019C00289

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

Rectified Authorised Version registered 15/08/2019 F2019C00289

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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

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 (***privately funded building work***):

(a) whose funding is not described in any of items 1 to 8; or

(b) whose funding is described in any of those items, if it is building work to which item 10 applies.

10 This item applies to building work for which both of the following conditions are met:

(a) the building work forms part of a project to support the operations of an intelligence or security agency;

(b) a Minister, who administers the provision of the Act under which the agency exists or the Department that the agency forms part of, has determined in writing that disclosing the connection of the Commonwealth with the work or project would prejudice security.

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Rectified Authorised Version registered 15/08/2019 F2019C00289

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).

Rectified Authorised Version registered 15/08/2019 F2019C00289

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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

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.

Rectified Authorised Version registered 15/08/2019 F2019C00289

Rectified Authorised Version registered 15/08/2019 F2019C00289

Schedule 4 Fitness for Work/Alcohol and other drugs in the workplace

(paragraph 32(2)(a))

The fitness for work policy referred to in paragraph 32(2)(a) must address:

1 how those on site (including employees of the head contractor, subcontractors and their employees and others) will be required to comply with the relevant fitness for work policy (i.e. through contract or some other enforceable means).

2 the use of an objective medical testing method/s to detect the presence of drugs or alcohol in a worker's system and outline the detection method/s to be used on the project.

3 the requirement that all of the following substances are tested for:

(i) Alcohol;

(ii) Opiates;

(iii) THC;

(iv) Cocaine;

(v) Benzodiazepines;

(vi) Amphetamine; and

(vii) Methamphetamine.

4 that a person who returns a positive result for any of the substances listed above will be deemed not to be fit for work (in respect of each substance listed above, subject to testing detectable levels, there is a zero level tolerance).

5 how a person who returns a positive result will be prevented from performing work until they can prove they are fit to return to work, and other processes that will apply in the event of a positive result or deemed positive result (i.e. a failure to submit to a test).

6 the requirement that, as a minimum, frequent and periodic testing (at least once per month) of the workforce (both construction workers and site office workers) will be as follows:

(i) where there are less than 30 workers on site – at least 10% of the workforce;

(ii) where there are 30 to 100 workers on site – a minimum of 5 workers per month; and

Rectified Authorised Version registered 15/08/2019 F2019C00289

(iii) where there are greater than 100 workers on site – a minimum of 10 workers per month.

7 procedures for the selection of personnel to be tested (including staged selection across a worksite or random selection for testing if the entire workforce is not to be tested in a testing round).

8 procedures for the targeted testing of higher-risk activities, voluntary testing and for-cause testing.

9 how workers who attend for work affected by drugs or alcohol will be counselled and assisted, apart from any disciplinary process that might apply.

Rectified Authorised Version registered 15/08/2019 F2019C00289

Schedule 5 Application of sections 11, 11A and 15

(subsections 11(2), 11A(2) and 15(2))

1 Application of sections 11, 11A and 15

(1) Subsections 11(1) and (3), 11A(1) and 15(1) do not apply in relation to an enterprise agreement made before 2 December 2016 that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant, to the extent that the requirements in those subsections must be met for the purposes of:

(a) the lodging of an expression of interest or tender by the contractor or participant before 1 September 2017; or

(b) the awarding, before 29 November 2018, of building work relating to an expression of interest or tender lodged by the contractor or participant in the period beginning on 2 December 2016 and ending at the commencement of the *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (the ***Amendment Act commencement***); or

(c) the undertaking of building work referred to in paragraph (b); or

(d) the awarding, before 1 September 2017, of building work relating to an expression of interest or tender lodged by the contractor or participant after the Amendment Act commencement if the enterprise agreement does not apply to the contractor, participant or related entity in respect of that building work; or

(e) the undertaking of building work referred to in paragraph (d).

(2) Subsections 11(1) and (3), 11A(1) and 15(1) do not apply in relation to an enterprise agreement that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant, if:

(a) the enterprise agreement:

(i) was made before 2 December 2016; and

(ii) applies to the contractor, participant or related entity in respect only of building work relating to an expression of interest or tender lodged by the contractor or participant before 2 December 2016; or

(b) the enterprise agreement:

(i) was made before 25 April 2014; and

Rectified Authorised Version registered 15/08/2019 F2019C00289

(ii) has not been varied in accordance with section 207 of the *Fair Work Act 2009*.

Rectified Authorised Version registered 15/08/2019 F2019C00289

Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes
Endnote 2—Abbreviation key
Endnote 3—Legislation history
Endnote 4—Amendment history

Abbreviation key—Endnote 2

The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Misdescribed amendments

A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation "(md)" added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation "(md not incorp)" is added to the details of the amendment included in the amendment history.

Rectified Authorised Version registered 15/08/2019 F2019C00289

Endnote 2—Abbreviation key

ad = added or inserted

am = amended

amdt = amendment

c = clause(s)

C[x] = Compilation No. x

Ch = Chapter(s)

def = definition(s)

Dict = Dictionary

disallowed = disallowed by Parliament

Div = Division(s)

exp = expires/expired or ceases/ceased to have effect

F = Federal Register of Legislation

gaz = gazette

LA = *Legislation Act 2003*

LIA = *Legislative Instruments Act 2003*

(md) = misdescribed amendment can be given effect

(md not incorp) = misdescribed amendment cannot be given effect

mod = modified/modification

No. = Number(s)

o = order(s)

Ord = Ordinance

orig = original

par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)

pres = present

prev = previous

(prev…) = previously

Pt = Part(s)

r = regulation(s)/rule(s)

reloc = relocated

renum = renumbered

rep = repealed

rs = repealed and substituted

s = section(s)/subsection(s)

Sch = Schedule(s)

Sdiv = Subdivision(s)

SLI = Select Legislative Instrument

SR = Statutory Rules

Sub-Ch = Sub-Chapter(s)

SubPt = Subpart(s)

underlining = whole or part not commenced or to be commenced

Rectified Authorised Version registered 15/08/2019 F2019C00289

Endnote 3—Legislation history

Name	Registration	Commencement	Application, saving and transitional provisions
Code for the Tendering and Performance of Building Work 2016	2 December 2016 (F2016L01859)	2 December 2016	
Code for the Tendering and Performance of Building Work Amendment Instrument 2017	20 February 2017 (F2017L00132)	21 February 2017	—
Code for the Tendering and Performance of Building Work Amendment (Infrastructure Exemptions) Instrument 2017	21 August 2017 (F2017L01052)	22 August 2017	—
Code for the Tendering and Performance of Building Work Amendment (Exemptions) Instrument 2019	20 March 2019 (F2019L00324)	21 March 2019	—

Rectified Authorised Version registered 15/08/2019 F2019C00289

Endnote 4 –Amendment History

Provision affected	How affected
Part 1	
s 3(1) …….	am F2017L01052
s 3(1) ……	rs F2019L00324
	ad F2019L00324
Part 2	
s 6B…….....	ad F2017L01052
s 6(3)……..	am F2019L00324
Part 3	
s 11(2)……	rs F2017L00132
s 11A(2)……..	rs F2017L00132
s 15(2)……	rs F2017L00132
Part 5	
s 26(1) ……..	am F2019L00324
s 26(2) ……..	am F2019L00324
s 26(3) ……..	am F2019L00324
s26(4) …….	am F2019L00324
s26(7) ……..	am F2019L00324
s26(8) ……..	am F2019L00324
Schedule 1	
Sch 1 ……	rs F2019L00324
Schedule 5	
Sch 5……...	ad F2017L00132

Rectified Authorised Version registered 15/08/2019 F2019C00289

Code for the Tendering and Performance of Building Work 2016

made under section 34 of the

Building and Construction Industry (Improving Productivity) Act 2016

Compilation No. 2

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Includes amendments up to: F2017L01052

Prepared by the Department of Employment

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About this compilation

This compilation

This is a compilation of the *Code for the Tendering and Performance of Building Work 2016* that shows the text of the law as amended and in force on 22 August 2017 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

Authorised Version F2017C00668 registered 24/08/2017

Contents

Page

1	Name of code of practice	5
2	Commencement	5
3	Definitions	5
4	Funding entities	7
5	General	8
6	Application of the code of practice	8
6A	Exemption for essential service providers	9
6B	Exemption for essential services infrastructure	10
7	General responsibilities of code covered entities	12
8	Subcontractors and related bodies and entities	12
9	Compliance with laws, decisions, directions and orders	13
10	Unregistered written agreements and other agreements	14
11	Content of agreements and prohibited conduct, arrangements and practices	15
11A	Attempts to avoid section 11 requirements	17
11B	Sham contracting	18
11C	Collusive practices	18
11D	Security of payment	19
11E	Disputed payments	20
11F	Engagement of non-citizens or non-residents	20
12	Above-entitlements payments and related matters	21
13	Freedom of association	21
14	Entry to premises where building work is performed	23
15	Dispute settlement	23
16	Industrial impacts	24
16A	Fitness for work – alcohol or other drugs	24
17	Notification	26
18	Consequences of breaching this code of practice	26
19	Decision to impose an exclusion sanction	27
22	Determination of Compliance with Section 11	28
23	Key criteria for eligibility to be awarded Commonwealth funded building work	29
24	Expressions of interest and tenders	29
25	Projects requiring a WRMP	30
25A	Information to be provided by preferred tenderer	31
26	Contracts	31
27	Notification of head contractor	33
28	Notification by funding entities	33
29	Funding entity compliance	33
30	Requirement for a WRMP	34

Authorised Version F2017C00668 registered 24/08/2017

31 Application for approval of a WRMP 34
32 Content of a WRMP 34
33 Approval process of a WRMP 35
34 Compliance with an approved WRMP 35

Authorised Version F2017C00668 registered 24/08/2017

Part 1 Introductory

1 Name of code of practice

This code of practice is the *Code for the Tendering and Performance of Building Work 2016*.

2 Commencement

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

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 2016*.

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.

essential services infrastructure: see subsection 6B(5).

acquiring entity: see subsection 18(2).

funding entity: see section 4.

FW Act means the *Fair Work Act 2009*.

Authorised Version F2017C00668 registered 24/08/2017

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.

infrastructure exemption: see subsection 6B(2).

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.

Authorised Version F2017C00668 registered 24/08/2017

(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 Minister 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 Minister 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 paragraph 6(1)(e) 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.

Authorised Version F2017C00668 registered 24/08/2017

Part 2 Conduct

5 General

This code of practice has been developed to:

(a) promote an improved workplace relations framework for building work and promote compliance with this code of practice, the Act and designated building laws and encourage the development of safe, healthy, fair, lawful and productive building sites 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) increase efficiency and cost savings in the work performed by code covered entities by ensuring that they understand and comply with this code of practice, the Act and designated building laws; and

(d) increase the likelihood of timely, predictable, and cost-efficient delivery of Commonwealth funded building work through the use of building contractors and building industry participants that consistently adhere to this code of practice, the Act and designated building laws; and

(e) help funding entities to identify and work with building contractors and building industry participants with track records of compliance with this code of practice, the Act and designated building laws; and

(f) reduce execution delays and costs in relation to Commonwealth funded building work by not engaging building contractors and building industry participants with track records of non-compliance with this code of practice, the Act and designated building laws; and

(g) establish an enforcement framework under which building contractors and 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

Authorised Version F2017C00668 registered 24/08/2017

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 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.

Authorised Version F2017C00668 registered 24/08/2017

(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.

6B Exemption for essential services infrastructure

Applying for exemptions

(1) A building contractor or building industry participant may apply to the ABC Commissioner for an exemption from this code of practice.

(2) The ABC Commissioner must grant the exemption (the ***infrastructure exemption***) if the Commissioner is satisfied that:

(a) the principal business of the building contractor or building industry participant involves performing work for the provision of essential services related to supply of electricity, natural gas, water, waste water, or telecommunications; and

(b) the principal building work of the building contractor or building industry participant involves performing work for the provision of essential services infrastructure.

(3) An infrastructure exemption must be issued in writing and applies:

(a) for the period specified in the exemption; or

(b) if no period is specified, until it is revoked.

Revoking exemptions

(4) The ABC Commissioner must revoke an infrastructure exemption (including an exemption issued for a specified period) if the Commissioner is satisfied that paragraph (2)(a) or (b) no longer applies in relation to the building contractor or building industry participant.

*Meaning of **essential services infrastructure***

(5) ***Essential services infrastructure*** means systems or networks:

(a) to which consumers can connect for supply of electricity, natural gas, water, waste water, or telecommunications; and

(b) that:

(i) are important for the life, the personal safety or health, or the welfare, of the population or a significant part of it; or

Authorised Version F2017C00668 registered 24/08/2017

(ii) make a significant contribution to the Australian economy or an important part of it.

Effect of infrastructure exemption

(6) If a building contractor or building industry participant is a code covered entity the effect of an infrastructure exemption is that the entity is deemed to not be a code covered entity while the exemption applies.

(7) If a building contractor or building industry participant is not a code covered entity the effect of an infrastructure exemption is that section 6 does not apply while the infrastructure exemption applies.

Authorised Version F2017C00668 registered 24/08/2017

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.

Authorised Version F2017C00668 registered 24/08/2017

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 the Act and 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, including work health and safety training requirements and asbestos safety requirements, 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:

(a) must comply with a compliance notice issued under section 99 of the Act;

Authorised Version F2017C00668 registered 24/08/2017

(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.

(6) Subsection (5) does 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.

Authorised Version F2017C00668 registered 24/08/2017

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) are subject to Schedule 5.

(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;

Note: this does not prevent the inclusion of clauses in an enterprise agreement that encourage the employment of apprentices.

(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;

Authorised Version F2017C00668 registered 24/08/2017

(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;

Authorised Version F2017C00668 registered 24/08/2017

(p) provide for the rights of an official of a building association to enter premises other than in 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(1)(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:

Authorised Version F2017C00668 registered 24/08/2017

(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.

(2) Subsection (1) is subject to Schedule 5.

11B Sham contracting

(1) A code covered entity (the employer) must not engage, or propose to engage, an individual to perform building work under a contract for services where the true character of the engagement or proposed engagement is that of employment.

(2) A code covered entity (the employer) must not enter into a contract with another person (the contractor) under which services in the nature of building work are to be provided to the employer, if:

(a) the services are to be performed by an individual (who is not the contractor); and the individual has any ownership in, or is an officer or trustee of, the contractor; and

(b) if the contract were entered into with the individual, the contract would be a contract of employment.

11C Collusive practices

(1) A code covered entity must not engage in collusive tendering practices.

(2) For the purposes of subsection (1), collusive tendering practices include but are not limited to:-

(a) any agreement between tenderers as to who should be the successful tenderer;

(b) any meetings of tenderers to discuss tenders before the submission of tenders if the client is not present;

(c) any exchange of information between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderers;

(d) any agreements between tenderers to fix prices or conditions of contract; that is, any collaboration between tenderers on prices or conditions to be included in contracts without the consent of the client;

Authorised Version F2017C00668 registered 24/08/2017

(e) any assistance to any tenderer to submit a cover tender; that is, a tender submitted as genuine yet has been deliberately priced in order to not win the contract; and

(f) any agreement between tenderers before submission of tenders to fix the rate of payment of building association fees, where the payment of such fees is conditional on the tenderer being awarded the contract.

11D Security of payment

(1) A code covered entity must:

(a) comply with all applicable laws and other requirements relating to the security of payments that are due to persons; and

(b) ensure that payments which are due and payable by the code covered entity are made in a timely manner and are not unreasonably withheld; and

(c) have a documented dispute settlement process that details how disputes about payments to subcontractors will be resolved, and must comply with that process; and

(d) as far as practicable, ensure that disputes about payments are resolved in a reasonable, timely and cooperative way; and

(e) comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code covered entity in relation to Commonwealth funded building work; and

(f) report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due.

(2) A code covered entity must not engage in illegal or fraudulent phoenix activities for the purpose of avoiding any payment due to another building contractor or building industry participant or other creditor.

(3) A code covered entity must not:

(a) organise or take or threaten to organise or take action with intent to coerce a contractor, subcontractor or consultant to:

(i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or

(ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.

Authorised Version F2017C00668 registered 24/08/2017

(b) apply or attempt to apply undue influence or undue pressure on a contractor, subcontractor or consultant to:

(i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or

(ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.

11E Disputed payments

(1) A code covered entity must:

(a) ensure that its documented dispute settlement process detailing how disputes about payments to subcontractors will be resolved includes a referral process to an independent adjudicator for determination if the dispute cannot be resolved between the parties, and must comply with that process and any determination; and

(b) as far as practicable, ensure that disputes about payments referred to 11E(1)(a) are resolved in a reasonable, timely and cooperative way; and

(c) comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code covered entity in relation to Commonwealth funded building work; and

(d) report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due.

11F Engagement of non-citizens or non-residents

(1) A code covered entity must ensure that no person that is not an Australian citizen or Australian permanent resident (within the meaning of the *Migration Act 1958*) is employed to undertake building work for the code covered entity unless:

(a) the position is first advertised in Australia; and

(b) the advertising was targeted in such a way that a significant proportion of suitably qualified Australian citizens and Australian permanent residents would be likely to be informed about the position; and

(c) any skills or experience requirements set out in the advertising were appropriate to the position; and

(d) the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job.

Authorised Version F2017C00668 registered 24/08/2017

Note: The *Migration Act 1958* and its subordinate legislation contain requirements relating to the engagement of persons that are not Australian citizens or Australian permanent residents.

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

Authorised Version F2017C00668 registered 24/08/2017

(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

Authorised Version F2017C00668 registered 24/08/2017

(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, 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:

Authorised Version F2017C00668 registered 24/08/2017

(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) is subject to Schedule 5.

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.*

16A Fitness for work – alcohol or other drugs

(1) A code covered entity must ensure there is an approach to managing drug and alcohol issues in the workplace to help ensure that no person attending the site to perform building work does so under the influence of alcohol or drugs listed in Schedule 4.

Authorised Version F2017C00668 registered 24/08/2017

(2) A code covered entity that is a head contractor must not pass the implementation and cost of any drug and alcohol testing to its subcontractors.

Authorised Version F2017C00668 registered 24/08/2017

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 including, but not limited to, by having failed to comply with:

(i) work health and safety laws; or

(ii) the FW Act in relation to the underpayment of an employee's wages or entitlements; 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 refer the matter to the Minister with recommendations, if any, that a sanction should be imposed.

(1A) Where a matter has been referred to the Minister under subsection 18(1) (with the exception of a referral under subparagraph 18(1)(a)(i)) the Minister may:

(a) impose an exclusion sanction on the code covered entity; or

(b) 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 Minister 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.

(1B) Where a matter has been referred to the Minister under subparagraph 18(1)(a)(i) the Minister must impose an exclusion sanction on the code covered entity unless the Minister is satisfied that it would not be appropriate in the

Authorised Version F2017C00668 registered 24/08/2017

circumstances because of the nature of, or factors contributing to, the failure to comply. In those circumstances the Minister may 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.

(2) The Minister 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 Minister 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 Minister proposes to impose an exclusion sanction under section 18, the Minister 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 in relation to the proposed sanction.

(2) Where the Minister proposes to impose an exclusion sanction on a related entity of the code covered entity, the Minister must give the same information in subsection (1) to the related entity.

(3) After the date specified in a notice under subsection (1), the Minister 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.

Authorised Version F2017C00668 registered 24/08/2017

(4) An exclusion sanction imposed on a code covered entity takes effect on the date specified by the Minister in the written notice of decision issued pursuant to paragraph (3)(c).

(5) Where the Minister proposes to impose an exclusion sanction on an acquiring entity in accordance with subsection 18(2), the Minister must treat the acquiring entity as if it were a code covered entity for the purpose of this section.

(6) The Minister must advise the Finance Minister prior to imposing an exclusion sanction on a code covered entity.

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.

Authorised Version F2017C00668 registered 24/08/2017

Part 5 Funding Entities

23 Key criteria for eligibility to 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 Commonwealth funded 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 Commonwealth funded building work 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 of 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; and

(d) to demonstrate a positive commitment to the provision of appropriate training and skill development for their workforce. Such commitment may be evidenced by compliance with any state or territory government building training policies and supporting the delivery of nationally endorsed building and construction competencies; and

(e) include details of the number of current apprentice and trainee employees and the number and classes of persons that hold visas under the *Migration Act 1958* that are engaged by the respondent, and that are intended to be engaged by the respondent to undertake the Commonwealth funded building work; and

Authorised Version F2017C00668 registered 24/08/2017

(f) to advise whether the respondent has, within the preceding 3 year period:

(i) 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 the *Migration Act 1958*; or

(ii) been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) including by any related entity to a building contractor or building industry participant; or

(iii) owed any unsatisfied judgement debts (including such debts owed by any related entity) to a building contractor or building industry participant.

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(2) the ABCC must inform the funding entity about whether the ABCC requires any of

Authorised Version F2017C00668 registered 24/08/2017

the matters outlined in Schedule 3 to be addressed in the proposed WRMP for the project.

25A Information to be provided by preferred tenderer

(1) A funding entity must ensure that before a contract is entered into in respect of Commonwealth funded building work, the preferred tenderer provides the following information:

(a) the extent to which domestically sourced and manufactured building materials will be used to undertake the building work;

(b) whether the building materials to be used to undertake the building work comply with relevant Australian standards published by, or on behalf of, Standards Australia;

(c) the preferred tenderer's assessment of the whole-of-life costs of the project to which the building work relates;

(d) the impact on jobs of the project to which the building work relates; and

(e) whether the project to which the building work relates will contribute to skills growth.

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.

Authorised Version F2017C00668 registered 24/08/2017

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 the Act, 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.

(7) A funding entity must only enter into a contract in respect of building work with a code covered entity that will require its subcontractors:

(a) to advise, prior to entering into a contract with them, whether the subcontractor has, within the preceding three year period:

(i) 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 the *Migration Act 1958;* or

(ii) been required to pay any amounts under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) or owed any unsatisfied judgement debts (including by any related entity) to a building contractor or building industry participant; and

(b) to update the advice referred to in paragraph (7)(a) every six months for the duration of the contract between the code covered entity and the subcontractor.

(8) A funding entity must only enter into a contract in respect of building work with a code covered entity that only uses products in building work that comply with

Authorised Version F2017C00668 registered 24/08/2017

the relevant Australian standards published by, or on behalf of, Standards Australia.

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.

Authorised Version F2017C00668 registered 24/08/2017

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.

Authorised Version F2017C00668 registered 24/08/2017

(2) A proposed WRMP must include:

(a) a fitness for work policy to manage alcohol and other drugs in the workplace that applies to all persons engaged to perform building work on a project and addresses the matters set out in Schedule 4; and

(b) details of the processes that are or will be put in place to ensure that all applicable laws and other requirements in relation to the security of payments that are due to persons in respect of building work will be adhered to throughout the life of the project.

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;

(b) addresses the matters in Schedule 3 that the ABCC requires to be addressed in the WRMP for the particular project; and

(c) addresses the matters in subsection 32(2).

(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).

Authorised Version F2017C00668 registered 24/08/2017

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

Authorised Version F2017C00668 registered 24/08/2017

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.

Authorised Version F2017C00668 registered 24/08/2017

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***).

Authorised Version F2017C00668 registered 24/08/2017

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).

Authorised Version F2017C00668 registered 24/08/2017

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.

Authorised Version F2017C00668 registered 24/08/2017

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.

Authorised Version F2017C00668 registered 24/08/2017

Schedule 4 Fitness for Work/Alcohol and other drugs in the workplace

(paragraph 32(2)(a))

The fitness for work policy referred to in paragraph 32(2)(a) must address:

1 how those on site (including employees of the head contractor, subcontractors and their employees and others) will be required to comply with the relevant fitness for work policy (i.e. through contract or some other enforceable means).

2 the use of an objective medical testing method/s to detect the presence of drugs or alcohol in a worker's system and outline the detection method/s to be used on the project.

3 the requirement that all of the following substances are tested for:

(i) Alcohol;

(ii) Opiates;

(iii) THC;

(iv) Cocaine;

(v) Benzodiazepines;

(vi) Amphetamine; and

(vii) Methamphetamine.

4 that a person who returns a positive result for any of the substances listed above will be deemed not to be fit for work (in respect of each substance listed above, subject to testing detectable levels, there is a zero level tolerance).

5 how a person who returns a positive result will be prevented from performing work until they can prove they are fit to return to work, and other processes that will apply in the event of a positive result or deemed positive result (i.e. a failure to submit to a test).

6 the requirement that, as a minimum, frequent and periodic testing (at least once per month) of the workforce (both construction workers and site office workers) will be as follows:

(i) where there are less than 30 workers on site – at least 10% of the workforce;

(ii) where there are 30 to 100 workers on site – a minimum of 5 workers per month; and

Authorised Version F2017C00668 registered 24/08/2017

(iii) where there are greater than 100 workers on site – a minimum of 10 workers per month.

7 procedures for the selection of personnel to be tested (including staged selection across a worksite or random selection for testing if the entire workforce is not to be tested in a testing round).

8 procedures for the targeted testing of higher-risk activities, voluntary testing and for-cause testing.

9 how workers who attend for work affected by drugs or alcohol will be counselled and assisted, apart from any disciplinary process that might apply.

Authorised Version F2017C00668 registered 24/08/2017

Schedule 5 Application of sections 11, 11A and 15

(subsections 11(2), 11A(2) and 15(2))

1 Application of sections 11, 11A and 15

(1) Subsections 11(1) and (3), 11A(1) and 15(1) do not apply in relation to an enterprise agreement made before 2 December 2016 that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant, to the extent that the requirements in those subsections must be met for the purposes of:

(a) the lodging of an expression of interest or tender by the contractor or participant before 1 September 2017; or

(b) the awarding, before 29 November 2018, of building work relating to an expression of interest or tender lodged by the contractor or participant in the period beginning on 2 December 2016 and ending at the commencement of the *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (the ***Amendment Act commencement***); or

(c) the undertaking of building work referred to in paragraph (b); or

(d) the awarding, before 1 September 2017, of building work relating to an expression of interest or tender lodged by the contractor or participant after the Amendment Act commencement if the enterprise agreement does not apply to the contractor, participant or related entity in respect of that building work; or

(e) the undertaking of building work referred to in paragraph (d).

(2) Subsections 11(1) and (3), 11A(1) and 15(1) do not apply in relation to an enterprise agreement that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant, if:

(a) the enterprise agreement:

(i) was made before 2 December 2016; and

(ii) applies to the contractor, participant or related entity in respect only of building work relating to an expression of interest or tender lodged by the contractor or participant before 2 December 2016; or

(b) the enterprise agreement:

(i) was made before 25 April 2014; and

Authorised Version F2017C00668 registered 24/08/2017

(ii) has not been varied in accordance with section 207 of the *Fair Work Act 2009*.

Authorised Version F2017C00668 registered 24/08/2017

Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes
Endnote 2—Abbreviation key
Endnote 3—Legislation history
Endnote 4—Amendment history

Abbreviation key—Endnote 2

The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Misdescribed amendments

A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation "(md)" added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation "(md not incorp)" is added to the details of the amendment included in the amendment history.

Authorised Version F2017C00668 registered 24/08/2017

Endnote 2—Abbreviation key

ad = added or inserted

am = amended

amdt = amendment

c = clause(s)

C[x] = Compilation No. x

Ch = Chapter(s)

def = definition(s)

Dict = Dictionary

disallowed = disallowed by Parliament

Div = Division(s)

exp = expires/expired or ceases/ceased to have effect

F = Federal Register of Legislation

gaz = gazette

LA = *Legislation Act 2003*

LIA = *Legislative Instruments Act 2003*

(md) = misdescribed amendment can be given effect

(md not incorp) = misdescribed amendment cannot be given effect

mod = modified/modification

No. = Number(s)

o = order(s)

Ord = Ordinance

orig = original

par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)

pres = present

prev = previous

(prev…) = previously

Pt = Part(s)

r = regulation(s)/rule(s)

reloc = relocated

renum = renumbered

rep = repealed

rs = repealed and substituted

s = section(s)/subsection(s)

Sch = Schedule(s)

Sdiv = Subdivision(s)

SLI = Select Legislative Instrument

SR = Statutory Rules

Sub-Ch = Sub-Chapter(s)

SubPt = Subpart(s)

underlining = whole or part not commenced or to be commenced

Authorised Version F2017C00668 registered 24/08/2017

Endnote 3—Legislation history

Name	Registration	Commencement	Application, saving and transitional provisions
Code for the Tendering and Performance of Building Work 2016	2 December 2016 (F2016L01859)	2 December 2016	
Code for the Tendering and Performance of Building Work Amendment Instrument 2017	20 February 2017 (F2017L00132)	21 February 2017	—
Code for the Tendering and Performance of Building Work Amendment (Infrastructure Exemptions) Instrument 2017	21 August 2017 (F2017L01052)	22 August 2017	—

Authorised Version F2017C00668 registered 24/08/2017

Endnote 4 –Amendment History

Provision affected	How affected
Part 1	
s 3(1) …….	am F2017L01052
Part 2	
s 6B…….....	ad F2017L01052
Part 3	
s 11(2)……	rs F2017L00132
s 11A(2)……..	rs F2017L00132
s 15(2)……	rs F2017L00132
Schedule 5	
Sch 5……...	ad F2017L00132

Authorised Version F2017C00668 registered 24/08/2017

Building and Construction Industry (Improving Productivity) Act 2016

No. 87, 2016

Compilation No. 1

Compilation date:	2 December 2016
Includes amendments up to:	Act No. 88, 2016
Registered:	7 December 2016

Prepared by the Office of Parliamentary Counsel, Canberra

Authorised Version C2016C01131 registered 07/12/2016

About this compilation

This compilation

This is a compilation of the *Building and Construction Industry (Improving Productivity) Act 2016* that shows the text of the law as amended and in force on 2 December 2016 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

Authorised Version C2016C01131 registered 07/12/2016

Contents

Chapter 1—Preliminary 1

1 Short title 1
2 Commencement 1
3 Main object of this Act 2
4 Simplified outline of this Act 2
5 Definitions 4
6 Meaning of *building work* 13
7 Meaning of *industrial action* 15
8 Meaning of *protected industrial action* 16
9 Meaning of *ancillary site* 17
10 Extension of Act to Christmas Island and Cocos (Keeling) Islands 17
11 Extension of Act to EEZ and waters above continental shelf 17
12 Geographical application of offences 18
13 Act to bind Crown 18

Chapter 2—The Australian Building and Construction Commissioner 19

Part 1—Simplified outline of this Chapter 19

14 Simplified outline of this Chapter 19

Part 2—The Australian Building and Construction Commissioner 20

15 ABC Commissioner and Deputy ABC Commissioners 20
16 Functions of ABC Commissioner 20
17 Minister's directions to ABC Commissioner 22
18 Minister may require reports 22
19 Delegation by ABC Commissioner 22
20 Quarterly and annual reports 23
21 Appointment 25
22 Acting appointments 26
23 Remuneration 26
24 Leave of absence 27
25 Engaging in other paid employment 27
26 Disclosure of interests 27
27 Resignation 27

Authorised Version C2016C01131 registered 07/12/2016

28 Termination 28

Part 3—The Australian Building and Construction Commission 29

29 The Australian Building and Construction Commission 29
30 Staff 29
31 Persons assisting the ABC Commissioner 29
32 Consultants 30

Part 4—Security of Payments Working Group 31

32A Security of Payments Working Group 31
32B Membership of Working Group 31
32C Appointment of members 32
32D Chair 32
32E Remuneration 32
32F Resignation of members 33
32G Termination of appointment 33
32H Other terms and conditions 33
32J Meetings 34
32K Annual report 34

Chapter 3—The Building Code 35

33 Simplified outline of this Chapter 35
34 Minister may issue Building Code 35
35 Building industry participants to report on compliance with Building Code 37

Chapter 4—The Federal Safety Commissioner 39

Part 1—Simplified outline of this Chapter 39

36 Simplified outline of this Chapter 39

Part 2—The Federal Safety Commissioner 40

37 Federal Safety Commissioner 40
38 Functions of Federal Safety Commissioner 40
39 Minister's directions to Federal Safety Commissioner 41
40 Delegation by Federal Safety Commissioner 41
41 Acting Federal Safety Commissioner 42
42 Consultants 42

Part 3—WHS Accreditation Scheme for Commonwealth building work 43
43 WHS Accreditation Scheme for Commonwealth building work ... 43

Chapter 5—Unlawful action 45
44 Simplified outline of this Chapter ... 45
45 Action to which this Chapter applies ... 45
46 Unlawful industrial action prohibited ... 45
47 Unlawful picketing prohibited ... 46
48 Injunction against unlawful industrial action or picket ... 46
49 Payments relating to periods of industrial action ... 47

Chapter 6—Coercion, discrimination and unenforceable agreements 49

Part 1—Simplified outline of this Chapter 49
50 Simplified outline of this Chapter ... 49

Part 2—Coercion and discrimination 50

Division 1—Civil penalties 50
51 Action to which this Part applies ... 50
52 Coercion relating to allocation of duties etc. to particular person ... 50
53 Coercion relating to superannuation ... 51
54 Coercion of persons to make, vary, terminate etc. enterprise agreements etc. ... 51
55 Coverage by particular instruments ... 52

Division 2—General provisions 53
56 Multiple reasons for action ... 53
57 Reason for action to be presumed unless proved otherwise ... 53
58 Advising, encouraging, inciting or coercing action ... 53

Part 3—Unenforceable agreements 55
59 Project agreements not enforceable ... 55

Chapter 7—Powers to obtain information 56

Part 1—Simplified outline of this Chapter 56
60 Simplified outline of this Chapter ... 56

Authorised Version C2016C01131 registered 07/12/2016

Part 2—Examination notices 57

61A Minister may nominate AAT presidential members to issue examination notices 57
61B ABC Commissioner may apply to nominated AAT presidential member for examination notice 57
61C Issue of examination notice 59
61D Form and content of examination notice 60
61E ABC Commissioner may give examination notice to person in relation to whom it is issued and vary time for compliance 61
61F Conduct of examination etc. 62
62 Offence for failing to comply with examination notice 63
63 Payment for expenses incurred in attending an examination 64
64 ABC Commissioner must notify Commonwealth Ombudsman of issue of examination notice 64
65 Review and report by Commonwealth Ombudsman 65

Part 3—Powers of Australian Building and Construction Inspectors and Federal Safety Officers 67

Division 1—Appointment of Australian Building and Construction Inspectors 67

66 Australian Building and Construction Inspectors 67
67 Identity cards for inspectors 68

Division 2—Appointment of Federal Safety Officers 70

68 Federal Safety Officers 70
69 Identity cards for Federal Safety Officers 71

Division 3—Powers of authorised officers 73

70 Purposes for which powers of authorised officers may be exercised 73
71 When powers of authorised officers may be exercised 74
72 Power of authorised officers to enter premises 74
73 Showing identity card before entry 76
74 Powers of authorised officers while on premises 76
75 Persons assisting authorised officers 77
76 Power to ask for person's name and address 77
77 Power to require persons to produce records or documents 78
78 Hindering or obstructing authorised officers 78
79 Power to keep records or documents 79

Authorised Version C2016C01131 registered 07/12/2016

Chapter 8—Enforcement 81

Part 1—Simplified outline of this Chapter 81

80 Simplified outline of this Chapter 81

Part 2—Orders for contraventions of civil remedy provisions 82

Division 1—Obtaining an order for contravention of civil remedy provision 82

81 Penalty etc. for contravention of civil remedy provision 82
82 Interest up to judgement 84
83 Conduct contravening more than one civil remedy provision 84
84 Multiple contraventions 84
85 Proceedings may be heard together 85
86 Civil evidence and procedure rules for proceedings relating to contraventions of civil remedy provisions 85

Division 2—Civil proceedings and criminal proceedings 86

87 Civil proceedings after criminal proceedings 86
88 Criminal proceedings during civil proceedings 86
89 Criminal proceedings after civil proceedings 86
90 Evidence given in civil proceedings not admissible in criminal proceedings 86
91 Civil double jeopardy 87

Division 3—Miscellaneous 88

92 Ancillary contravention of civil remedy provisions 88
93 Exceptions etc. to civil remedy provisions—burden of proof 88
94 Liability of bodies corporate 88
95 Actions of building associations 89
96 Unincorporated building associations 90
97 Capacity, state of mind etc. of person being coerced etc. 90

Part 3—Other powers of enforcement for inspectors 92

98 Enforceable undertakings relating to contraventions of civil remedy provisions 92
99 Compliance notices 93
100 Review of compliance notices 95

Chapter 9—Miscellaneous 96

Part 1—Simplified outline of this Chapter 96

101 Simplified outline of this Chapter 96

Authorised Version C2016C01131 registered 07/12/2016

Part 2—Provisions relating to information 97

Division 1—Provisions relating to requirements to provide information 97

102 Self-incrimination etc. 97
103 Protection from liability relating to examination notices 98
104 Certain records and documents are inadmissible 98

Division 2—Protecting information acquired for the purposes of this Act 100

105 Disclosure of information by the ABC Commissioner or Federal Safety Commissioner 100
106 Confidentiality of information obtained under an examination notice 102
107 Reports not to include information relating to an individual's affairs 104

Part 3—Powers of ABC Commissioner etc. 106

108 ABC Commissioner may publicise non-compliance 106
109 ABC Commissioner may intervene in court proceedings 106
110 ABC Commissioner may make submissions in FWC proceedings 106
111 ABC Commissioner and other inspectors may institute proceedings under the FW Act, etc. 107
112 General Manager of the FWC must keep ABC Commissioner informed 107

Part 4—Provisions relating to courts 109

113 Jurisdiction of the Federal Court 109
114 Exercising jurisdiction in the Fair Work Division of the Federal Court 109
115 No limitation on Federal Court's powers 110
116 Appeals from relevant State or Territory courts 110
117 Court not to require undertaking as to damages 111

Part 5—Miscellaneous 112

118 ABC Commissioner etc. not liable for conduct in good faith 112
119 Delegation by Minister 112
119A Review of operation of this Act 113
120 Rules and regulations 113

Endnotes 115

Endnote 1—About the endnotes 115

Endnote 2—Abbreviation key 117

Endnote 3—Legislation history 118

Endnote 4—Amendment history 119

Authorised Version C2016C01131 registered 07/12/2016

Authorised Version C2016C01131 registered 07/12/2016

An Act to re-establish the Australian Building and Construction Commissioner, and for related purposes

Chapter 1—Preliminary

1 Short title

This Act may be cited as the *Building and Construction Industry (Improving Productivity) Act 2016*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	1 December 2016
2. Sections 3 to 120	The later of: (a) 1 January 2014; and (b) the day after this Act receives the Royal Assent.	2 December 2016 (paragraph (b) applies)

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Main object of this Act

(1) The main object of this Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively, without distinction between interests of building industry participants, and for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.

(2) This Act aims to achieve its main object by the following means:

(a) improving the bargaining framework so as to further encourage genuine bargaining at the workplace level;

(b) promoting respect for the rule of law;

(c) ensuring respect for the rights of building industry participants;

(d) ensuring that building industry participants are accountable for their unlawful conduct;

(e) providing effective means for investigating and enforcing this Act, designated building laws (to the extent that those laws relate to building work) and the Building Code;

(f) improving work health and safety in building work;

(g) encouraging the pursuit of high levels of employment in the building industry, including by encouraging youth employment with an emphasis on engaging apprentices;

(h) providing assistance and advice to building industry participants in connection with their rights and obligations under this Act, designated building laws and the Building Code.

4 Simplified outline of this Act

This Act regulates certain conduct of building industry participants who perform building work.

The Australian Building and Construction Commissioner, and those who are part of the Australian Building and Construction Commission, exercise powers and perform functions in relation to building work. For example, the ABC Commissioner and other inspectors investigate, monitor and promote compliance with this Act, the Building Code and designated building laws. Designated building laws are specified workplace relations laws and industrial instruments under those laws. The Building Code is a code of practice issued under this Act in respect of building work that certain persons must comply with.

The Federal Safety Commissioner, and Federal Safety Officers, are responsible for promoting work health and safety in relation to building work. They also have a role in relation to the Work Health and Safety Accreditation Scheme, which is a scheme prescribed by the rules for accrediting persons who carry out building work funded by the Commonwealth or a Commonwealth authority.

Unlawful industrial action and unlawful picketing are prohibited by this Act, and anyone can obtain an injunction to prevent this happening. Other action relating to coercion and discrimination is also prohibited by this Act.

The ABC Commissioner, inspectors and Federal Safety Officers may obtain information. An examination notice, issued by a nominated AAT presidential member on application by the ABC Commissioner, may require a person to give information. Inspectors and Federal Safety Officers can also enter premises for certain purposes. There are protections for, and limitations on the use of, information that is provided under this Act.

Inspectors and affected persons are able to apply to certain courts when a person contravenes a civil remedy provision. The court may order a pecuniary penalty, grant an injunction or make another order. The ABC Commissioner and inspectors have other powers to enforce compliance with this Act (such as being able to accept enforceable undertakings).

Authorised Version C2016C01131 registered 07/12/2016

The ABC Commissioner can intervene in, or institute, court or FWC proceedings. The ABC Commissioner can also publicise non-compliance with this Act, designated building laws and the Building Code.

5 Definitions

In this Act:

AAT presidential member means a person who is a presidential member of the Administrative Appeals Tribunal under the *Administrative Appeals Tribunal Act 1975*.

ABC Commissioner means the Australian Building and Construction Commissioner referred to in subsection 15(1).

accredited person means a person who is accredited under the WHS Accreditation Scheme.

ancillary site has the meaning given by section 9.

authorised applicant for an order relating to a contravention of a civil remedy provision means:

(a) the ABC Commissioner or any other inspector; or

(b) a person affected by the contravention; or

(c) a person prescribed by the rules for the purposes of this paragraph.

Rules prescribing persons for the purposes of paragraph (c) may provide that a person is prescribed only in relation to circumstances specified in the rules.

authorised officer means an inspector or a Federal Safety Officer.

bargaining representative has the meaning given by the FW Act.

builder has the meaning given by subsection 43(8).

building agreement means an agreement that applies to building work (whether or not it also applies to other work).

building association means an industrial association whose rules allow membership by members of at least one of the following groups:

(a) building employers;

(b) building employees;

(c) building contractors;

whether or not those rules also allow membership by other persons.

Building Code means the code of practice referred to in section 34.

building contractor means a person who has entered into, or who has offered to enter into, a contract for services under which the person:

(a) carries out building work; or

(b) arranges for building work to be carried out.

building employee means:

(a) a person whose employment consists of, or includes, building work; or

(b) a person who accepts an offer of engagement as an employee for work that consists of, or includes, building work.

building employer means an employer who employs, or offers to employ, building employees.

building enterprise agreement means an enterprise agreement that applies to building work (whether or not it also applies to other work).

building industry law enforcement has the meaning given by section 106.

building industry participant means any of the following:

(a) a building employer;

(b) a building employee;

(c) a building contractor;

(d) a person who enters into a contract with a building contractor under which the building contractor agrees to carry out

Authorised Version C2016C01131 registered 07/12/2016

building work or to arrange for building work to be carried out;

(e) a building association;

(f) an officer, delegate or other representative of a building association.

building matter means a matter that relates to a building industry participant.

building site means a site at which building work is being or may be performed.

building work has the meaning given by section 6.

civil penalty order means an order under paragraph 81(1)(a).

civil remedy provision means:

(a) a Grade A civil remedy provision; or

(b) a Grade B civil remedy provision.

Commission means the Australian Building and Construction Commission referred to in subsection 29(2).

Commissioner means the ABC Commissioner or a Deputy ABC Commissioner.

Commonwealth authority has the meaning given by the *Commonwealth Authorities and Companies Act 1997*.

Commonwealth industrial instrument means any of the following:

(a) an award or transitional award (within the meaning of the FW Transitional Act);

(b) a workplace agreement (within the meaning of the FW Transitional Act);

(c) a pre-reform certified agreement or a pre-reform AWA (within the meaning of the FW Transitional Act);

(d) an order of the Australian Industrial Relations Commission or the FWC;

(e) the Australian Fair Pay and Conditions Standard (within the meaning of the FW Transitional Act);
(f) a fair work instrument (within the meaning of the FW Act);
(g) the National Employment Standards (within the meaning of the FW Act).

Commonwealth Ombudsman means the person for the time being holding office as Ombudsman under the *Ombudsman Act 1976*.

Commonwealth place means a place referred to in paragraph 52(i) of the Constitution, other than the seat of government.

compliance powers means functions and powers conferred on an authorised officer.

compliance purposes means:
(a) for an inspector—the purposes referred to in subsection 70(1); or
(b) for a Federal Safety Officer—the purposes referred to in subsection 70(2).

conduct includes an omission.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

constitutionally-covered entity means:
(a) a constitutional corporation; or
(b) the Commonwealth; or
(c) a Commonwealth authority; or
(d) a body corporate incorporated in a Territory; or
(e) an organisation.

copy a document includes take extracts from the document.

Deputy ABC Commissioner means a Deputy Australian Building and Construction Commissioner referred to in subsection 15(2).

designated building law means:

(a) the *Independent Contractors Act 2006*, the FW Act or the FW Transitional Act; or
(b) a Commonwealth industrial instrument.

designated official means any of the following:
(a) the ABC Commissioner;
(b) a Deputy ABC Commissioner;
(c) an inspector;
(d) a member of staff referred to in subsection 30(1);
(e) a person assisting the ABC Commissioner under section 31;
(f) a person engaged as a consultant under section 32;
(g) the General Manager of the FWC;
(h) the Commonwealth Ombudsman, a Deputy Commonwealth Ombudsman or a member of the staff referred to in subsection 31(1) of the *Ombudsman Act 1976*;
(i) a person acting under a delegation under this Act from a person referred to in any of the preceding paragraphs.

disclose means divulge or communicate.

employee has its ordinary meaning, and:
(a) includes an individual who is usually an employee within that meaning; but
(b) does not include an individual on a vocational placement.

employer has its ordinary meaning, and includes a person that is usually an employer within that meaning.

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

entrusted person has the meaning given by subsection 106(1).

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

examination means an attendance by a person, before the ABC Commissioner, where the person is required as a result of an

Authorised Version C2016C01131 registered 07/12/2016

examination notice to answer questions relevant to an investigation.

examination notice means an examination notice issued under Part 2 of Chapter 7.

Federal Circuit Court means the Federal Circuit Court of Australia.

Federal Court means the Federal Court of Australia.

Federal Safety Commissioner means the Federal Safety Commissioner referred to in section 37.

Federal Safety Officer means:

(a) the Federal Safety Commissioner; or

(b) a person appointed as a Federal Safety Officer under subsection 68(1).

full-time Commissioner means:

(a) the ABC Commissioner; or

(b) a Deputy ABC Commissioner appointed on a full-time basis.

funding entity has the meaning given by subsection 34(2C).

FW Act means the *Fair Work Act 2009*.

FWC means the Fair Work Commission.

FW Transitional Act means the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Grade A civil remedy provision means:

(a) a section of this Act (other than a section that is divided into subsections) that has a note at its foot stating "Grade A civil penalty"; or

(b) a subsection of this Act that has a note at its foot stating "Grade A civil penalty".

Authorised Version C2016C01131 registered 07/12/2016

Note: The maximum penalty for a Grade A civil remedy provision is 1,000 penalty units for bodies corporate, and otherwise 200 penalty units (see subsection 81(2)).

Grade B civil remedy provision means:

(a) a section of this Act (other than a section that is divided into subsections) that has a note at its foot stating "Grade B civil penalty"; or

(b) a subsection of this Act that has a note at its foot stating "Grade B civil penalty".

Note: The maximum penalty for a Grade B civil remedy provision is 100 penalty units for bodies corporate, and otherwise 20 penalty units (see subsection 81(2)).

independent contractor has the same meaning as in the FW Act.

industrial action has the meaning given by section 7.

industrial association means:

(a) an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law (within the meaning of the FW Act); or

(b) an association of employees, or independent contractors, or both, a purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors; or

(c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment, independent contractors or both;

and includes:

(d) a branch of such an association; and

(e) an organisation; and

(f) a branch of an organisation.

inspector means:

(a) the ABC Commissioner; or

(b) a person appointed as an Australian Building and Construction Inspector under subsection 66(1).

land has a meaning affected by subsection 6(6).

lawyer means a person who is admitted to the legal profession by a Supreme Court of a State or Territory.

lockout has the meaning given by subsection 7(3).

nominated AAT presidential member means an AAT presidential member in respect of whom a nomination is in force under section 61A to issue examination notices under Part 2 of Chapter 7.

occupier has the same meaning as in the FW Act.

officer, in relation to an organisation or industrial association, means a person who holds an office in, or is an employee of, the organisation or association.

official employment has the meaning given by subsection 106(8).

organisation has the same meaning as in the *Fair Work (Registered Organisations) Act 2009*.

part-time Commissioner means a Deputy ABC Commissioner appointed on a part-time basis.

person has a meaning affected by section 96.

pre-construction agreement has the meaning given by subsection 43(8).

premises has the same meaning as in the FW Act.

protected industrial action has the meaning given by section 8.

protected information means information that:

(a) was disclosed or obtained under an examination notice or at an examination; and

(b) was obtained by an entrusted person in the course of official employment; and

Authorised Version C2016C01131 registered 07/12/2016

(c) relates to a person other than the entrusted person.

protected person has the meaning given by subsection 8(3).

quarter means a period of 3 months beginning on 1 July, 1 October, 1 January or 1 April.

relevant court means each of the following courts:

(a) the Federal Court;
(b) the Federal Circuit Court;
(c) a Supreme Court of a State or Territory;
(d) a District Court, or County Court, of a State.

relevant State or Territory court means each of the following courts:

(a) a District, County or Local Court of a State;
(b) a magistrates court;
(c) the Industrial Relations Court of South Australia;
(d) the Industrial Court of New South Wales;
(e) any other State or Territory court that is prescribed by the rules.

resources platform means an artificial island, installation or structure attached to the seabed for the purpose of exploration for, or exploitation of, resources or for other economic purposes.

Secretary means the Secretary of the Department.

single enterprise has the meaning given by subsection 59(2).

this Act includes the rules and the regulations.

unlawful industrial action: action is ***unlawful industrial action*** if:

(a) the action is industrial action (see section 7); and
(b) the action is not protected industrial action (see section 8).

unlawful picket has the meaning given by subsection 47(2).

Authorised Version C2016C01131 registered 07/12/2016

WHS Accreditation Scheme means the Work Health and Safety Accreditation Scheme referred to in section 43.

Working Group means the Security of Payments Working Group established by section 32A.

6 Meaning of *building work*

(1) Subject to subsections (3), (4) and (5), ***building work*** means any of the following activities:

(a) 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;

(b) the construction, alteration, extension, restoration, repair, demolition or dismantling of railways (not including rolling stock) or docks;

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;

(d) any operation that is part of, or is preparatory to, or is for rendering complete, work covered by paragraph (a), (b) or (c), for example:

(i) site clearance, earth-moving, excavation, tunnelling and boring; or

(ii) the laying of foundations; or

(iii) the erection, maintenance or dismantling of scaffolding; or

(iv) the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site; or

(v) site restoration, landscaping and the provision of roadways and other access works;

(e) transporting or supplying goods, to be used in work covered by paragraph (a), (b), (c) or (d), directly to building sites

(including any resources platform) where that work is being or may be performed;

but does not include any of the following:

(f) the drilling for, or extraction of, oil or natural gas;

(g) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;

(h) any work that is part of a project for:

(i) the construction, repair or restoration of a single dwelling-house; or

(ii) the construction, repair or restoration of any building, structure or work associated with a single dwelling-house; or

(iii) the alteration or extension of a single dwelling-house, if it remains a single dwelling-house after the alteration or extension.

(2) To avoid doubt, paragraphs (1)(f) and (g) do not prevent this Act from applying to building work (within the meaning of paragraphs (1)(a) to (e)) that is performed on land in which there is an interest relating to the mining of oil, gas or minerals.

Note: This Act extends to any resources platform, and to certain ships, in the exclusive economic zone or in the waters above the continental shelf (see section 11).

(3) Paragraph (1)(h) does not apply if the project is part of a multi-dwelling development that consists of, or includes, the construction of at least 5 single dwelling-houses.

(4) Subject to subsection (5), ***building work*** includes any activity that is prescribed by the rules for the purposes of this subsection.

(5) ***Building work*** does not include any activity that is prescribed by the rules for the purposes of this subsection.

(6) In this Act:

land includes land beneath water.

7 Meaning of *industrial action*

(1) ***Industrial action*** is action of any of the following kinds:

(a) the performance of building work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to building work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of building work by an employee or on the acceptance of or offering for building work by an employee;

(c) a failure or refusal:

(i) by employees to attend work, where that work is building work; or

(ii) to perform any building work at all by employees who attend work, where that work is building work;

(d) the lockout of employees from their work by their employer, where that work is building work.

Note: In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.

(2) However, ***industrial action*** does not include the following:

(a) action by employees that is authorised or agreed to, in advance and in writing, by the employer of the employees;

(b) action by an employer that is authorised or agreed to, in advance and in writing, by, or on behalf of, employees of the employer;

(c) action by an employee if:

(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

When there is a lockout

(3) There is a ***lockout*** of employees from their work by an employer if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

8 Meaning of *protected industrial action*

(1) Action is ***protected industrial action*** if the action is protected industrial action within the meaning of the FW Act.

(2) However, action is not ***protected industrial action*** if the action is protected industrial action (within the meaning of the FW Act) for a proposed enterprise agreement but:

(a) the action is engaged in in concert with one or more persons who are not protected persons; or

(b) the organisers include one or more persons who are not protected persons.

(3) The following persons are ***protected persons***:

(a) an employee organisation (within the meaning of the FW Act) that is a bargaining representative for the proposed enterprise agreement;

(b) a member of such an organisation who is employed by the employer and who will be covered by the proposed enterprise agreement;

(c) an officer of such an organisation acting in that capacity;

(d) an employee who is a bargaining representative for the proposed enterprise agreement.

9 Meaning of *ancillary site*

A site is an ***ancillary site*** if the site is:

(a) a site from which goods are transported or supplied, or building industry participants are transported, directly to a building site; or

(b) a site where a building industry participant, who is performing building work, or managing building work that is being performed, on a building site, does work relating to the building work.

10 Extension of Act to Christmas Island and Cocos (Keeling) Islands

(1) This Act extends to the Territory of Christmas Island and to the Territory of Cocos (Keeling) Islands.

(2) This Act applies in relation to the Territory of Christmas Island and to the Territory of Cocos (Keeling) Islands with any modifications that are prescribed by the rules.

11 Extension of Act to EEZ and waters above continental shelf

(1) This Act extends to or in relation to:

(a) any resources platform in the exclusive economic zone or in the waters above the continental shelf; and

(b) any ship, in the exclusive economic zone or in the waters above the continental shelf, that is travelling to or from (or both to and from) an Australian port.

Extensions prescribed by rules

(2) Without limiting subsection (1), if the rules prescribe further extensions of this Act, or specified provisions of this Act, to or in relation to the exclusive economic zone or to the waters above the continental shelf, then this Act extends accordingly.

Authorised Version C2016C01131 registered 07/12/2016

12 Geographical application of offences

Division 14 (standard geographical jurisdiction) of the *Criminal Code* does not apply in relation to an offence against this Act.

Note: The extended geographical application that section 11 gives to this Act will apply to the offences in this Act.

13 Act to bind Crown

(1) This Act binds the Crown in each of its capacities.

(2) Nothing in this Act renders the Commonwealth or a State or Territory liable to be prosecuted for an offence.

Authorised Version C2016C01131 registered 07/12/2016

Chapter 2—The Australian Building and Construction Commissioner

Part 1—Simplified outline of this Chapter

14 Simplified outline of this Chapter

Many of the functions and powers under this Act are conferred on the Australian Building and Construction Commissioner (or the ABC Commissioner) and those who are part of the Australian Building and Construction Commission.

The Commissioner is appointed under and the Commission is established by this Chapter. This Chapter also includes the terms and conditions of the Commissioner, the staff of the Commission, and the people who assist the Commissioner.

Authorised Version C2016C01131 registered 07/12/2016

Part 2—The Australian Building and Construction Commissioner

15 ABC Commissioner and Deputy ABC Commissioners

(1) There is to be an Australian Building and Construction Commissioner.

(2) The ABC Commissioner is to be assisted by the number of Deputy Australian Building and Construction Commissioners appointed from time to time.

16 Functions of ABC Commissioner

(1) The ABC Commissioner has the following functions:

(aa) promoting the main object of this Act (see section 3);

(a) monitoring and promoting appropriate standards of conduct by building industry participants, including by:

(i) monitoring and promoting compliance with this Act, designated building laws and the Building Code by building industry participants; and

(ii) referring matters to other relevant agencies and bodies;

(b) investigating suspected contraventions, by building industry participants, of this Act, designated building laws or the Building Code;

(ba) ensuring building employers and building contractors comply with their obligations under this Act, designated building laws and the Building Code;

(c) instituting, or intervening in, proceedings in accordance with this Act;

(d) providing assistance and advice to building industry participants regarding their rights and obligations under this Act, designated building laws and the Building Code;

Authorised Version C2016C01131 registered 07/12/2016

(e) providing representation to a building industry participant who is, or might become, a party to a proceeding under this Act, a designated building law or the Building Code, if the ABC Commissioner considers that providing the representation would promote the enforcement of this Act, the law or the Code;

(f) disseminating information about this Act, designated building laws and the Building Code, and about other matters affecting building industry participants, including disseminating information by facilitating ongoing discussions with building industry participants;

(g) any other functions conferred on the ABC Commissioner by this Act or by another Act.

(2) In performing the functions referred to in subsection (1), the ABC Commissioner must ensure that the policies and procedures adopted and resources allocated for protecting and enforcing rights and obligations arising under this Act, designated building laws and the Building Code are, to the greatest extent practicable having regard to industry conditions based on complaints received by the ABC Commissioner, applied in a reasonable and proportionate manner to each of the categories of building industry participants.

(3) Without limiting subsection (1), the ABC Commissioner must perform his or her functions in relation to the following provisions of the FW Act:

(a) Chapter 2, including (but not limited to) in relation to wages and entitlements;

(b) Part 3-1 (general protections, including protection of freedom of association and prohibitions on coercion), including (but not limited to):

(i) section 351 (discrimination); and

(ii) sections 357 to 359 (sham arrangements);

(c) Part 3-3 (industrial action), including (but not limited to):

(i) section 474 (payments not to be made relating to certain periods of industrial action); and

(ii) section 475 (accepting or seeking payments relating to periods of industrial action);

(d) Part 3-4 (right of entry).

17 Minister's directions to ABC Commissioner

(1) The Minister may, by legislative instrument, give written directions to the ABC Commissioner specifying the manner in which the ABC Commissioner must exercise the powers or perform the functions of the ABC Commissioner under this Act.

(2) The Minister must not give a direction under subsection (1) about a particular case.

(3) The ABC Commissioner must comply with a direction under subsection (1).

(4) Despite anything in section 44 of the *Legislative Instruments Act 2003*, section 42 of that Act (disallowance of legislative instruments) applies to a direction under subsection (1) of this section.

18 Minister may require reports

(1) The Minister may, in writing, direct the ABC Commissioner to give the Minister specified reports relating to the ABC Commissioner's functions and powers.

Note: See also section 107, which restricts the disclosure of personal information in a report.

(2) The ABC Commissioner must comply with the direction.

(3) A direction under subsection (1) is not a legislative instrument.

19 Delegation by ABC Commissioner

(1) The ABC Commissioner may, in writing, delegate all or any of his or her powers and functions under this Act (other than his or her functions or powers as an inspector) to:

Authorised Version C2016C01131 registered 07/12/2016

(a) a Deputy ABC Commissioner; or
(b) an inspector who is an employee of the Commission; or
(c) an SES employee or acting SES employee who is an employee of the Commission; or
(d) a person (whether or not an SES employee) who is an employee of the Commission and prescribed by the rules for the purposes of this paragraph.

(2) Powers or functions under section 61B or 61F or subsection 61E(3) or (4) (examination notices) may only be delegated to:
(a) a Deputy ABC Commissioner; or
(b) if no Deputy ABC Commissioner is currently appointed—an SES employee or acting SES employee.

(3) In exercising powers or performing functions under a delegation, the delegate must comply with any directions of the ABC Commissioner.

(4) As soon as practicable after delegating any power or function under this section, the ABC Commissioner must publish details of the delegation.

(5) The ABC Commissioner may give a direction for the purposes of subsection (3).

(6) A written direction under subsection (5) that is of general application is a legislative instrument.

(7) A written direction under subsection (5) that relates to a particular case is not a legislative instrument.

20 Quarterly and annual reports

(1A) As soon as practicable after the end of each quarter of each financial year, the ABC Commissioner must prepare and give to the Minister a report on the performance of the ABC Commissioner's functions and the exercise of the ABC Commissioner's powers during that quarter.

Authorised Version C2016C01131 registered 07/12/2016

Section 20

(1) As soon as practicable after the end of each financial year, the ABC Commissioner must prepare and give to the Minister a report on the performance of the ABC Commissioner's functions and the exercise of the ABC Commissioner's powers during that year.

Note: See also section 34C of the *Acts Interpretation Act 1901*, which contains extra rules about annual reports.

(2) A report under subsection (1A) or (1) must include:

(a) details of:

(i) the number, and type, of matters that were investigated by the ABC Commissioner during the quarter or year (as the case requires); and

(ii) the cost, during that quarter or year, of each such investigation; and

(b) details of assistance and advice provided during that quarter or year to building industry participants; and

(c) details of the extent to which the Building Code was complied with during that quarter or year; and

(d) details of:

(i) the number, and type, of matters that were investigated by the ABC Commissioner during that quarter or year in relation to building employers; and

(ii) the cost, during that quarter or year, of each such investigation; and

(e) details of the following, both in total and in relation to each category of building industry participant:

(i) the number of proceedings commenced in accordance with this Act in that quarter or year;

(ii) the cost, during that quarter or year, of those proceedings (including legal expenses); and

(f) details of the number, and total cost, of such proceedings finalised in that quarter or year; and

(g) details of the legal expenses incurred during that quarter or year as a result of enforcement action undertaken by the ABC Commissioner; and

(h) details of industry conditions, during that quarter or year, based on complaints received by the ABC Commissioner during that quarter or year; and

(i) details of activities that the ABC Commissioner has undertaken during that quarter or year to monitor the compliance of products used in building work with relevant Australian standards published by, or on behalf of, Standards Australia; and

(j) details of the number, and type, of matters for which examination notices were issued under this Act.

Note: See also section 107, which restricts the disclosure of personal information in a report.

(3) The report must also include:

(a) details of directions given by the Minister during that quarter or year under section 17 or 18; and

(b) details of delegations by the ABC Commissioner under section 19 during that quarter or year.

(4) The Minister may notify the ABC Commissioner in writing of particular work health and safety matters that need not be covered in the paragraph (2)(c) part of the report.

(5) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after its receipt by the Minister.

21 Appointment

(1) A Commissioner is to be appointed by the Minister by written instrument.

(2) The appointment:

(a) is to be on a full-time basis for the ABC Commissioner; and

(b) is to be on a full-time basis or part-time basis for a Deputy ABC Commissioner.

(3) The Minister must not appoint a person as a Commissioner unless the Minister is satisfied that the person:
  (a) has suitable qualifications or experience; and
  (b) is of good character; and
  (c) will uphold the APS Values set out in section 10 of the *Public Service Act 1999*, including by performing his or her functions in an apolitical manner and acting impartially and professionally.

(4) A Commissioner holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

(5) A Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

22 Acting appointments

The Minister may, by written instrument, appoint a person to act as the ABC Commissioner:
  (a) during a vacancy in the office of ABC Commissioner (whether or not an appointment has previously been made to the office); or
  (b) during any period, or during all periods, when the ABC Commissioner:
    (i) is absent from duty or from Australia; or
    (ii) is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see section 33A of the *Acts Interpretation Act 1901*.

23 Remuneration

(1) A Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, a Commissioner is to be paid the remuneration that is prescribed by the rules.

Authorised Version C2016C01131 registered 07/12/2016

(2) A Commissioner is to be paid the allowances that are prescribed by the rules.

(3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

24 Leave of absence

(1) A full-time Commissioner has the recreation leave entitlements that are determined by the Remuneration Tribunal.

(2) The Minister may grant a full-time Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

(3) The Minister may grant a part-time Commissioner leave of absence (including recreation leave) on the terms and conditions as to remuneration or otherwise that the Minister determines.

25 Engaging in other paid employment

(1) A full-time Commissioner must not engage in paid employment outside the duties of his or her office without the Minister's approval.

(2) A part-time Commissioner must not engage in any paid employment that conflicts or may conflict with the proper performance of the Commissioner's duties.

26 Disclosure of interests

A Commissioner must give written notice to the Minister of all material personal interests that the Commissioner has or acquires and that conflict or could conflict with the proper performance of the Commissioner's functions.

27 Resignation

(1) A Commissioner may resign his or her appointment by giving the Minister a written resignation.

(2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

28 Termination

(1) The Minister may terminate the appointment of a Commissioner:
  (a) for misbehaviour; or
  (b) if the Commissioner is unable to perform the duties of his or her office because of physical or mental incapacity; or
  (c) if the Commissioner fails to perform his or her functions with impartiality as between all categories of building industry participants.

(2) The Minister must terminate the appointment of a Commissioner if:
  (a) the Commissioner:
    (i) becomes bankrupt; or
    (ii) takes steps to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
    (iii) compounds with one or more of his or her creditors; or
    (iv) makes an assignment of his or her remuneration for the benefit of one or more of his or her creditors; or
  (b) for a full-time Commissioner:
    (i) the Commissioner is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
    (ii) the Commissioner engages, except with the Minister's approval, in paid employment outside the duties of his or her office (see subsection 25(1)); or
  (c) for a part-time Commissioner—the Commissioner engages in paid employment that conflicts or could conflict with the proper performance of his or her duties (see subsection 25(2)); or
  (d) in any case—the Commissioner fails, without reasonable excuse, to comply with section 26 (disclosure of interests).

Authorised Version C2016C01131 registered 07/12/2016

Part 3—The Australian Building and Construction Commission

29 The Australian Building and Construction Commission

(1) This section applies to the body, known as the Office of the Fair Work Building Industry Inspectorate, that was established by section 26J of the *Fair Work (Building Industry) Act 2012* (as in force before the commencement of this section).

(2) That body continues in existence by force of this section, under and subject to the provisions of this Act, under the name of the Australian Building and Construction Commission.

30 Staff

(1) The staff of the Commission are to be persons engaged under the *Public Service Act 1999*.

(2) For the purposes of the *Public Service Act 1999*:
  (a) the ABC Commissioner and the staff of the Commission together constitute a Statutory Agency; and
  (b) the ABC Commissioner is the Head of that Statutory Agency.

31 Persons assisting the ABC Commissioner

The ABC Commissioner may also be assisted:
  (a) by employees of Agencies (within the meaning of the *Public Service Act 1999*); or
  (b) by officers or employees of a State or Territory; or
  (c) by officers or employees of authorities of the Commonwealth, a State or a Territory;

whose services are made available to the ABC Commissioner in connection with the performance of any of his or her functions.

Note 1: For example, State or Territory employees could be made available to assist the ABC Commissioner in providing education in a particular region.

Note 2: See also section 71 of the *Public Service Act 1999*, which makes provision for State employees to perform services in an Agency (as defined in that Act).

32 Consultants

(1) The ABC Commissioner may, on behalf of the Commonwealth, engage persons having suitable qualifications and experience as consultants to the ABC Commissioner.

(2) The terms and conditions of the engagement of a person are those determined by the ABC Commissioner in writing.

Authorised Version C2016C01131 registered 07/12/2016

Part 4—Security of Payments Working Group

32A Security of Payments Working Group

(1) The Security of Payments Working Group is established by this section.

(2) The functions of the Working Group are the following:

(a) monitoring the impact of the activities of the Commission on the conduct and practices of building industry participants in relation to their compliance with laws (***security of payment laws***) of the Commonwealth, the States and the Territories that relate to the security of payments that are due to persons in relation to building work;

(b) making recommendations to the ABC Commissioner about policies, procedures or programs that could be implemented to improve compliance by building industry participants with security of payment laws;

(c) making recommendations to the Minister about any matter that the Minister requests the Working Group to consider;

(d) any other functions conferred on the Working Group by the rules.

32B Membership of Working Group

(1) The Working Group consists of the following members:

(a) the ABC Commissioner;

(b) at least one member who has experience or background in employee representation in the building industry;

(c) at least one member who has experience or background in employer representation in the building industry;

(d) at least one member who has experience or background in contractor representation in the building industry;

(e) any other members (if any) appointed under section 32C.

(2) The rules may specify entities that must be represented on the Working Group.

32C Appointment of members

(1) A member of the Working Group (other than the ABC Commissioner) is to be appointed by the Minister by written instrument.

Note: A member of the Working Group is eligible for reappointment (see section 33AA of the *Acts Interpretation Act 1901*).

(2) A member appointed by the Minister holds office on a part-time basis.

(3) A member appointed by the Minister holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.

32D Chair

(1) The Minister must appoint a member (other than the ABC Commissioner) to be the Chair of the Working Group.

(2) The Minister may, by written instrument, appoint a member (other than the ABC Commissioner) to act as the Chair:

(a) during a vacancy in the office of Chair (whether or not an appointment has previously been made to the office); or

(b) during any period, or during all periods, when the Chair:

(i) is absent from duty or from Australia; or

(ii) is, for any reason, unable to perform the duties of the office.

Note: See sections 20 and 33A of the *Acts Interpretation Act 1901*.

32E Remuneration

(1) A member of the Working Group appointed by the Minister is not entitled to be paid remuneration or allowances.

(2) A member of the Working Group appointed by the Minister is entitled to be reimbursed reasonable expenses that he or she incurs in performing functions as a member.

32F Resignation of members

(1) A member of the Working Group appointed by the Minister may resign his or her appointment by giving the Minister a written resignation.

(2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

32G Termination of appointment

The Minister may terminate the appointment of a member of the Working Group appointed by the Minister:

(a) for misbehaviour; or

(b) if the member is unable to perform the duties of his or her office because of physical or mental incapacity; or

(c) if the member:

(i) becomes bankrupt; or

(ii) takes steps to take the benefit of any law for the relief of bankrupt or insolvent debtors; or

(iii) compounds with one or more of his or her creditors; or

(iv) makes an assignment of his or her remuneration for the benefit of one or more of his or her creditors; or

(d) if the member is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months.

32H Other terms and conditions

A member of the Working Group appointed by the Minister holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

Authorised Version C2016C01131 registered 07/12/2016

32J Meetings

(1) The Chair must convene:

(a) such meetings of the Working Group as are, in his or her opinion, necessary for the performance of its functions; and

(b) at least 4 meetings of the Working Group in each financial year.

(2) The procedures to be followed at a meeting of the Working Group are to be determined by the Chair.

32K Annual report

The Chair must, as soon as practicable after the end of each financial year, prepare and give to the Minister, for presentation to the Parliament, a report on:

(a) the membership of the Working Group during the financial year; and

(b) the operations of the Working Group during the financial year.

Authorised Version C2016C01131 registered 07/12/2016

Chapter 3—The Building Code

33 Simplified outline of this Chapter

The Minister may issue a Building Code under this Chapter. The Building Code is a code of practice that certain persons (such as constitutional corporations and the Commonwealth) must comply with in respect of building work.

The ABC Commissioner can require a person to report on his or her compliance with the Building Code.

34 Minister may issue Building Code

(1) The Minister may, by legislative instrument, issue one or more documents that together constitute a code of practice that is to be complied with by persons in respect of building work.

Note: The code is called the Building Code (see the definition of ***Building Code*** in section 5).

(2) Without limiting subsection (1), the Minister:

(a) must issue one or more documents under that subsection in relation to procurement matters relating to building work; and

(b) may issue one or more documents under that subsection in relation to work health and safety matters relating to building work.

Note: A single document may contain the entire Building Code (including the matters referred to in paragraph (2)(a) and, if applicable, paragraph (2)(b)).

(2A) Without limiting subsection (1) or paragraph (2)(a), a document issued under subsection (1) relating to procurement matters must require a funding entity to ensure that the preferred tenderer for building work provides the following information:

(a) the extent to which domestically sourced and manufactured building materials will be used to undertake the building work;
(b) whether the building materials to be used to undertake the building work comply with relevant Australian standards published by, or on behalf of, Standards Australia;
(c) the preferred tenderer's assessment of the whole-of-life costs of the project to which the building work relates;
(d) the impact on jobs of the project to which the building work relates;
(e) whether the project to which the building work relates will contribute to skills growth.

(2B) Without limiting subsection (1) or paragraph (2)(a), a document issued under subsection (1) relating to procurement matters must require a funding entity to require building industry participants to only use products in building work that comply with relevant Australian standards published by, or on behalf of, Standards Australia.

(2C) 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 that Act) that is directed by the Minister administering that Act to comply with the Building Code.

(2D) Without limiting subsection (1), the Building Code must include provisions ensuring that no person is employed to undertake building work unless:
(a) the position is first advertised in Australia; and
(b) the advertising was targeted in such a way that a significant proportion of suitably qualified and experienced Australian citizens and Australian permanent residents (within the meaning of the *Migration Act 1958*) would be likely to be informed about the position; and

(c) any skills or experience requirements set out in the advertising were appropriate to the position; and

(d) the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job.

(2E) If a document issued under subsection (1) includes requirements in relation to the content of building enterprise agreements, a building industry participant may, before 29 November 2018, submit expressions of interest, tender for and be awarded building work funded (whether directly or indirectly) by the Commonwealth or a Commonwealth authority even if a building enterprise agreement, made before the document is issued, that covers the building industry participant does not comply with any one or more of the requirements.

Note: However, a building enterprise agreement, made after the document is issued, that covers a building industry participant must comply with the requirements if the building industry participant is to tender for building work.

(3) The Building Code cannot require a person to comply with the Code in respect of particular building work (the ***current work***) unless:

(a) the person is a building contractor that is a constitutional corporation; or

(b) the person is a building industry participant and the current work is to be carried out in a Territory or Commonwealth place; or

(c) the person is the Commonwealth or a Commonwealth authority.

35 Building industry participants to report on compliance with Building Code

(1) The ABC Commissioner may give a written notice to a person who is required to comply with the Building Code in respect of particular building work.

Note: See subsection 34(3) for the persons who are required to comply with the Building Code.

(2) The notice may direct the person to give a written report to the ABC Commissioner containing specified information about the extent to which the person complied with the Building Code in respect of that building work.

(3) The person must comply with the notice within the period specified by the notice. The period must be at least 14 days.

Note: Grade B civil penalty.

(4) A notice under subsection (1) is not a legislative instrument.

Authorised Version C2016C01131 registered 07/12/2016

Chapter 4—The Federal Safety Commissioner

Part 1—Simplified outline of this Chapter

36 Simplified outline of this Chapter

The Federal Safety Commissioner is an SES position in the Department. The Commissioner has 2 main functions: in relation to work health and safety in building work and the Work Health and Safety Accreditation Scheme.

The Work Health and Safety Accreditation Scheme is a scheme prescribed by the rules. Any person who wishes to carry out building work funded by the Commonwealth or a Commonwealth authority must be accredited by the Federal Safety Commissioner in accordance with the scheme.

Authorised Version C2016C01131 registered 07/12/2016

Part 2—The Federal Safety Commissioner

37 Federal Safety Commissioner

(1) The Secretary must, by writing, designate a position in the Department as the position of Federal Safety Commissioner.

Note: For creation of positions, see section 77 of the *Public Service Act 1999*.

(2) That position can only be occupied by an SES employee.

(3) The Federal Safety Commissioner is the SES employee who occupies, or the acting SES employee who is acting in, that position.

(4) An instrument under subsection (1) is not a legislative instrument.

38 Functions of Federal Safety Commissioner

The Federal Safety Commissioner has the following functions:

(a) promoting work health and safety in relation to building work undertaken by a constitutional corporation, the Commonwealth or a Commonwealth authority;

(b) performing functions as the accreditation authority for the purposes of the WHS Accreditation Scheme;

(c) promoting the benefits of the WHS Accreditation Scheme and disseminating information about the WHS Accreditation Scheme;

(ca) auditing compliance with National Construction Code performance requirements in relation to building materials;

(d) referring matters to other relevant agencies and bodies;

(e) any other functions conferred on the Federal Safety Commissioner by this Act or by another Act.

39 Minister's directions to Federal Safety Commissioner

(1) The Minister may, by legislative instrument, give written directions to the Federal Safety Commissioner specifying the manner in which the Federal Safety Commissioner must exercise the powers or perform the functions of the Federal Safety Commissioner under this Act.

(2) The Minister must not give a direction under subsection (1) about a particular case.

(3) The Federal Safety Commissioner must comply with a direction under subsection (1).

(4) Despite anything in section 44 of the *Legislative Instruments Act 2003*, section 42 of that Act (disallowance of legislative instruments) applies to a direction under subsection (1) of this section.

40 Delegation by Federal Safety Commissioner

(1) The Federal Safety Commissioner may, in writing, delegate all or any of his or her powers and functions under this Act to:
  (a) a Federal Safety Officer; or
  (b) an SES employee or acting SES employee; or
  (c) a person (whether or not an SES employee) prescribed by the rules for the purposes of this paragraph.

(2) In exercising powers or performing functions under a delegation, the delegate must comply with any directions of the Federal Safety Commissioner.

(3) As soon as practicable after delegating any power or function under this section, the Federal Safety Commissioner must publish details of the delegation.

(4) The Federal Safety Commissioner may give a direction for the purposes of subsection (2).

Authorised Version C2016C01131 registered 07/12/2016

(5) A written direction under subsection (4) that is of general application is a legislative instrument.

(6) A written direction under subsection (4) that relates to a particular case is not a legislative instrument.

41 Acting Federal Safety Commissioner

(1) If an SES employee, or acting SES employee, is acting in the position of Federal Safety Commissioner:

(a) the employee has and may exercise all the powers, and is to perform all the functions and duties, of the occupier of the position of Federal Safety Commissioner; and

(b) this Act, and any other law of the Commonwealth, applies in relation to the employee as if the employee were the occupier of the position of Federal Safety Commissioner.

(2) Anything done by or in relation to a person purporting to act in the position of Federal Safety Commissioner is not invalid merely because the occasion to act had not arisen or had ceased.

42 Consultants

(1) The Federal Safety Commissioner may, on behalf of the Commonwealth, engage persons having suitable qualifications and experience as consultants to the Federal Safety Commissioner.

(2) The terms and conditions of the engagement of a person are those determined by the Federal Safety Commissioner in writing.

Authorised Version C2016C01131 registered 07/12/2016

Part 3—WHS Accreditation Scheme for Commonwealth building work

43 WHS Accreditation Scheme for Commonwealth building work

Accreditation scheme

(1) The rules may prescribe an accreditation scheme, to be known as the Work Health and Safety Accreditation Scheme, for persons who wish to carry out building work funded by the Commonwealth or a Commonwealth authority.

(2) The rules must provide for the Federal Safety Commissioner to be the accrediting authority under the scheme.

(3) The rules may prescribe fees for applications made under the rules.

Commonwealth building work to be carried out by accredited persons

(4) The Commonwealth or a Commonwealth authority must not fund building work unless:

(a) contracts for the building work will be entered into with builders who are accredited persons; and

(b) at the time of the funding, the Commonwealth or Commonwealth authority takes appropriate steps to ensure that builders will be accredited persons when they carry out the building work.

This subsection does not apply to building work prescribed by the rules.

(5) For the purposes of this section, the Commonwealth or a Commonwealth authority funds building work if it:

(a) pays for, or otherwise funds or finances, the building work (whether directly or indirectly); or

(b) facilitates the carrying out of the building work by entering into, or otherwise funding or financing (whether directly or indirectly), a pre-construction agreement that relates to the building work.

(6) If another provision of a law of the Commonwealth is inconsistent with subsection (4), subsection (4) prevails to the extent of the inconsistency unless the other provision expressly refers to this section.

(7) Failure to comply with subsection (4) does not affect the validity of anything done by the Commonwealth or a Commonwealth authority in relation to building work.

Definitions

(8) In this Act:

builder, in relation to building work, means a person who carries out any of the building work.

pre-construction agreement means an agreement to lease or transfer land, a building or a part of a building on the condition, or on conditions that include the condition, that building work will be carried out on the land, the building or the part of the building.

Chapter 5—Unlawful action

44 Simplified outline of this Chapter

Anyone can apply for an injunction under this Chapter to restrain a person from organising or engaging in unlawful industrial action or an unlawful picket that relates to building work. The unlawful industrial action or picket must also relate to a constitutionally-covered entity (such as if the action is taken by or against a constitutionally-covered entity).

Unlawful industrial action includes bans on working, employees failing to attend work and employers locking out employees.

The provisions of the FW Act relating to strike pay also apply in relation to unlawful industrial action.

45 Action to which this Chapter applies

This Chapter applies to the following action:

(a) action taken by a constitutionally-covered entity;

(b) action that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;

(c) action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity:

(i) to take, or not take, particular action in relation to another person; or

(ii) to threaten to take, or not take, particular action in relation to another person.

46 Unlawful industrial action prohibited

A person must not organise or engage in unlawful industrial action.

Note: Grade A civil penalty.

47 Unlawful picketing prohibited

(1) A person must not organise or engage in an unlawful picket.

Note: Grade A civil penalty.

(2) An ***unlawful picket*** is action:

(a) that:

(i) has the purpose of preventing or restricting a person from accessing or leaving a building site or an ancillary site; or

(ii) directly prevents or restricts a person accessing or leaving a building site or an ancillary site; or

(iii) would reasonably be expected to intimidate a person accessing or leaving a building site or an ancillary site; and

(b) that:

(i) is motivated for the purpose of supporting or advancing claims against a building industry participant in respect of the employment of employees or the engagement of contractors by the building industry participant; or

(ii) is motivated for the purpose of advancing industrial objectives of a building association; or

(iii) is unlawful (apart from this section).

Note: See also Division 2 of Part 2 of Chapter 6 (reason for action and coercion).

48 Injunction against unlawful industrial action or picket

(1) Any person may apply to a relevant court for an injunction under this section.

Note: An authorised applicant may also apply under section 81 for an injunction.

Authorised Version C2016C01131 registered 07/12/2016

(2) The court may grant an injunction in the terms the court considers appropriate if the court is satisfied that unlawful industrial action, or an unlawful picket, is:

(a) occurring; or

(b) threatened, impending or probable; or

(c) being organised.

(3) The court may grant an interim injunction pending determination of an application under subsection (1) if the court is satisfied that it is desirable to do so.

(4) The power of the court to grant an injunction restraining a person (the ***defendant***) from engaging in conduct may be exercised:

(a) whether or not it appears to the court that the defendant intends to engage again, or to continue to engage, in conduct of that kind; and

(b) whether or not the defendant has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any person if the defendant engages in conduct of that kind.

49 Payments relating to periods of industrial action

Division 9 of Part 3-3 of the FW Act (payment relating to periods of industrial action) applies in relation to industrial action relating to building work with the following modifications:

(a) references in that Division to industrial action are to be read as references to industrial action within the meaning of this Act to which this Chapter applies under section 45;

(b) references in that Division to protected industrial action are to be read as references to protected industrial action within the meaning of this Act;

(c) if the person who contravenes a civil remedy provision to which any of items 21 to 24 of the table set out in section 539 of the FW Act relates is a body corporate—then, for the purposes of subsection 539(2) and paragraph 546(2)(b) of

that Act, the pecuniary penalty must not be more than 1,000 penalty units.

Chapter 6—Coercion, discrimination and unenforceable agreements

Part 1—Simplified outline of this Chapter

50 Simplified outline of this Chapter

It is unlawful for a person to do something (or threaten to do something) intending to coerce another person:

(a) to employ a person, engage a contractor or allocate duties or responsibilities relating to building work; or

(b) in relation to the choice of superannuation fund for the superannuation contributions of a building employee; or

(c) to agree to make, vary or terminate a Commonwealth industrial instrument relating to building work.

It is also unlawful for a person to take action against a building employer because building employees are or are not covered by a Commonwealth industrial instrument.

However, action is only unlawful if the action is connected to a constitutionally-covered entity.

A court can make an order under Chapter 8 if a person is alleged to have taken unlawful action. Division 3 of Part 2 of Chapter 8 has rules relating to coercion. There are also rules relating to a person's reasons for action and to coercion in Division 2 of Part 2 of this Chapter.

An agreement (other than a Commonwealth industrial instrument) may be unenforceable if building employees who are not all employed in a single enterprise enter into the agreement to secure standard employment conditions in respect of building work that the employees carry out at a particular building site or sites.

Part 2—Coercion and discrimination

Division 1—Civil penalties

51 Action to which this Part applies

This Part applies to the following action:

(a) action taken by a constitutionally-covered entity;

(b) action that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;

(c) action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity:

(i) to take, or not take, particular action in relation to another person; or

(ii) to threaten to take, or not take, particular action in relation to another person.

52 Coercion relating to allocation of duties etc. to particular person

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

(a) employ, or not employ, a particular person as a building employee; or

(b) engage, or not engage, a particular independent contractor as a building contractor; or

(c) allocate, or not allocate, particular duties or responsibilities to a building employee or building contractor; or

(d) designate a building employee or building contractor as having, or not having, particular duties or responsibilities.

Note 1: See also Division 2 (reason for action and coercion).

Note 2: Grade A civil penalty.

53 Coercion relating to superannuation

(1) A person must not:

(a) organise or take, or threaten to organise or take, any action; or

(b) refrain, or threaten to refrain, from taking action;

with intent:

(c) to coerce a building employee to nominate a particular superannuation fund or scheme to receive the employee's superannuation contributions; or

(d) to coerce a building employer to pay to a particular superannuation fund or scheme the employer's superannuation contributions for building employees.

Note 1: See also Division 2 (reason for action and coercion).

Note 2: Grade A civil penalty.

(2) Subsection (1) does not apply to protected industrial action.

54 Coercion of persons to make, vary, terminate etc. enterprise agreements etc.

(1) A person must not:

(a) organise or take, or threaten to organise or take, any action; or

(b) refrain, or threaten to refrain, from taking any action;

with intent to coerce another person, or with intent to apply undue pressure to another person, to agree, or not to agree:

(c) to make, vary or terminate a building enterprise agreement; or

(d) to approve any of the things mentioned in paragraph (c).

Note 1: See also Division 2 (reason for action and coercion).

Note 2: Grade A civil penalty.

(2) Subsection (1) does not apply to protected industrial action.

Authorised Version C2016C01131 registered 07/12/2016

(3) An employer must not coerce, or attempt to coerce, an employee of the employer in relation to who is to be, or is not to be, the employee's bargaining representative for a proposed enterprise agreement.

Note: Grade A civil penalty.

(4) An employer must not apply, or attempt to apply, undue pressure to an employee of the employer in relation to who is to be, or is not to be, the employee's bargaining representative for a proposed enterprise agreement.

Note: Grade A civil penalty.

(5) To the extent that section 343 of the FW Act relates to:

(a) the making, varying or terminating of an enterprise agreement; or

(b) the appointment, or termination of appointment, of a bargaining representative for a proposed enterprise agreement;

that section does not apply if the agreement is a building enterprise agreement.

55 Coverage by particular instruments

(1) A person must not take action against a building employer because:

(a) building employees of the building employer are covered, or not covered, by a Commonwealth industrial instrument; or

(b) it is proposed that building employees of the building employer be covered, or not be covered, by a Commonwealth industrial instrument.

Note 1: See also Division 2 (reason for action).

Note 2: Grade A civil penalty.

(2) Subsection (1) does not apply to protected industrial action.

Authorised Version C2016C01131 registered 07/12/2016

Division 2—General provisions

56 Multiple reasons for action

For the purposes of section 47 (unlawful picketing prohibited) and this Part, a person takes action for a particular reason if the reasons for the action include that reason.

57 Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of section 47 (unlawful picketing prohibited) or a civil remedy provision in this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of the section or provision;

it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to an interim injunction.

58 Advising, encouraging, inciting or coercing action

(1) If:

(a) for a particular reason (the ***first person's reason***), a person advises, encourages or incites, or takes any action with intent to coerce, a second person to take action; and

(b) the action, if taken by the second person for the first person's reason, would contravene section 47 (unlawful picketing prohibited) or a civil remedy provision in this Part;

the first person is taken to have contravened the section or provision.

Note: See also section 97 (capacity, state of mind etc. of person being coerced etc.).

Authorised Version C2016C01131 registered 07/12/2016

(2) Subsection (1) does not limit section 92 (ancillary contravention of civil remedy provisions).

Authorised Version C2016C01131 registered 07/12/2016

Part 3—Unenforceable agreements

59 Project agreements not enforceable

(1) An agreement is unenforceable to the extent that it relates to building employees if:

(a) the agreement is entered into with the intention of securing standard employment conditions for building employees in respect of building work that they carry out at a particular building site or sites; and

(b) not all the employees are employed in a single enterprise; and

(c) a party to the agreement is a constitutional corporation and at least some of the employees are employees of that corporation; and

(d) the agreement is not a Commonwealth industrial instrument.

(2) A ***single enterprise*** is:

(a) a business, project or undertaking that is carried on by an employer; or

(b) the activities carried on by:

(i) the Commonwealth, a State or a Territory; or

(ii) a body, association, office or other entity established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or

(iii) any other body in which the Commonwealth, a State or a Territory has a controlling interest.

Chapter 7—Powers to obtain information

Part 1—Simplified outline of this Chapter

60 Simplified outline of this Chapter

A person may be required under an examination notice issued under Part 2 to give information, produce documents or answer questions relating to an investigation of a suspected contravention of this Act or a designated building law by a building industry participant. The notice is issued, on application by the ABC Commissioner, by a nominated AAT presidential member. The Commonwealth Ombudsman oversees the exercise of this power. A person who attends an examination may be entitled to have paid any expenses incurred in attending the examination.

Australian Building and Construction Inspectors and Federal Safety Officers (who together are called authorised officers) are appointed under this Chapter. Authorised officers have powers, including the power to enter premises, the power to ask a person's name and address and the power to require persons to produce records or documents.

Intentionally hindering or obstructing an authorised officer who is exercising any of these powers is prohibited.

Authorised Version C2016C01131 registered 07/12/2016

Part 2—Examination notices

61A Minister may nominate AAT presidential members to issue examination notices

(1) The Minister may, by writing, nominate an AAT presidential member to issue examination notices under this Part.

(2) The Minister may nominate an AAT presidential member who is a Judge to issue examination notices under this Part only if the Judge has consented, by writing, to the nomination.

(3) A nomination ceases to have effect if:

(a) the nominated AAT presidential member ceases to be an AAT presidential member; or

(b) the Minister, by writing, withdraws the nomination.

(4) A nominated AAT presidential member has, in performing a function of or connected with issuing an examination notice under this Part, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.

61B ABC Commissioner may apply to nominated AAT presidential member for examination notice

General requirements

(1) The ABC Commissioner may apply, in writing, to a nominated AAT presidential member for the issue of an examination notice referred to in subsection (2) if the ABC Commissioner believes on reasonable grounds that a person:

(a) has information or documents relevant to an investigation by an inspector into a suspected contravention, by a building industry participant, of this Act or a designated building law; or

Authorised Version C2016C01131 registered 07/12/2016

(b) is capable of giving evidence that is relevant to such an investigation.

(2) The examination notice may require the person:
(a) to give information to the ABC Commissioner; or
(b) to produce documents to the ABC Commissioner; or
(c) to attend before the ABC Commissioner and answer questions relevant to the investigation.

Form and content of application

(3) An application for an examination notice must:
(a) if a form is prescribed by the regulations—be in that form; and
(b) include any information prescribed by the regulations.

(4) An application for an examination notice must not relate to more than one person, but may relate to more than one investigation.

Application must be accompanied by affidavit

(5) An application for an examination notice must be accompanied by an affidavit by the ABC Commissioner including the following:
(a) the name of the person to whom the application relates;
(b) details of the investigation (or investigations) to which the application relates;
(c) the grounds on which the ABC Commissioner believes the person has information or documents, or is capable of giving evidence, relevant to the investigation (or investigations) referred to in paragraph (b);
(d) details of other methods used to attempt to obtain the information, documents or evidence;
(e) the number (if any) of previous applications for an examination notice that the ABC Commissioner has made in relation to the person in respect of the investigation (or investigations) referred to in paragraph (b);
(f) information about whether the ABC Commissioner has made, or expects to make, any other applications for an

Authorised Version C2016C01131 registered 07/12/2016

examination notice in relation to the investigation (or investigations) referred to in paragraph (b) and, if so, the persons to whom those applications relate.

Further information

(6) A nominated AAT presidential member to whom an application for an examination notice is made may request the ABC Commissioner to give the presidential member further information in relation to the application.

(7) If a request for further information is made under subsection (6), the ABC Commissioner must give the further information in writing as soon as practicable after receiving the request.

61C Issue of examination notice

(1) A nominated AAT presidential member to whom an application for an examination notice has been made must issue the examination notice if the presidential member is satisfied of the following:

(a) that an inspector has commenced the investigation (or investigations) to which the application relates;

(b) that there are reasonable grounds to believe that the person to whom the application relates has information or documents, or is capable of giving evidence, relevant to the investigation (or investigations);

(c) that any other method of obtaining the information, documents or evidence:

(i) has been attempted and has been unsuccessful; or

(ii) is not appropriate;

(d) that the information, documents or evidence would be likely to be of assistance in the investigation (or investigations);

(e) that, having regard to all the circumstances, it would be appropriate to issue the examination notice;

(f) any other matter prescribed by the regulations.

Authorised Version C2016C01131 registered 07/12/2016

(2) A nominated AAT presidential member must not issue an examination notice except in the circumstances referred to in subsection (1).

(3) An examination notice must not be issued in relation to more than one person, but may be issued in relation to more than one investigation.

(4) If:

(a) an application for an examination notice is made in relation to more than one investigation; and

(b) the nominated AAT presidential member to whom the application is made is not satisfied of the matters referred to in subsection (1) in relation to each of those investigations;

the nominated AAT presidential member must issue the examination notice in relation to the investigation (or investigations) in relation to which the nominated AAT presidential member is satisfied of the matters referred to in subsection (1).

61D Form and content of examination notice

An examination notice must:

(a) if a form is prescribed by the regulations—be in that form; and

(b) if the notice requires a person to give information under paragraph 61B(2)(a) to the ABC Commissioner—specify the time by which, and the manner and form in which, the information is to be given; and

(c) if the notice requires a person to produce documents under paragraph 61B(2)(b) to the ABC Commissioner—specify the time by which, and the manner in which, the documents are to be produced; and

(d) if the notice requires a person to attend before the ABC Commissioner to answer questions relevant to an investigation—specify the time and place for the attendance; and

(e) be signed by the nominated AAT presidential member who issued it; and

(f) include any other information prescribed by the regulations.

Note: See also sections 62 (offence for failing to comply with examination notice), 79 (power to keep records or documents), 102 (self-incrimination) and 103 (protection from liability).

61E ABC Commissioner may give examination notice to person in relation to whom it is issued and vary time for compliance

ABC Commissioner may give examination notice to person in relation to whom it is issued

(1) If a nominated AAT presidential member issues an examination notice, the ABC Commissioner may give the notice to the person in relation to whom it is issued.

(2) If an examination notice is not given to the person in relation to whom it is issued within 3 months after the day on which it was issued, the notice ceases to have effect at the end of that period.

ABC Commissioner may vary time for compliance with examination notice

(3) If:

(a) the ABC Commissioner gives an examination notice to a person under subsection (1); and

(b) the time specified in the notice under paragraph 61D(b), (c) or (d) is not at least 14 days after the notice is given to the person;

the ABC Commissioner must, at the same time as the examination notice is given to the person, also give notice to the person of a time later than the time specified in the notice.

(4) The ABC Commissioner may, at any time after giving an examination notice to the person in relation to whom it is issued, give notice to the person of a time later than the time:

(a) specified in the notice under paragraph 61D(b), (c) or (d); or

(b) notified under subsection (3).

(5) A later time notified under subsection (3) or (4) must be at least 14 days after the examination notice is given to the person.

(6) If the person is notified of a later time under subsection (3) or (4), the examination notice has effect as if the later time (or the latest of those times) were the time specified in the examination notice.

61F Conduct of examination etc.

Application of section

(1) This section applies if a person is required by an examination notice to attend before the ABC Commissioner to answer questions relevant to an investigation.

ABC Commissioner to conduct examination

(2) The ABC Commissioner must conduct the examination of the person.

Representation by lawyer

(3) The person may, if he or she so chooses, be represented at the examination by a lawyer of the person's choice.

Oath or affirmation

(4) The ABC Commissioner may require the information or answers given by the person at the examination to be verified by, or given on, oath or affirmation, and either orally or in writing. For that purpose, the ABC Commissioner may administer the oath or affirmation.

(5) The oath or affirmation is an oath or affirmation that information or answers are, or will be, true.

Authorised Version C2016C01131 registered 07/12/2016

ABC Commissioner must not require person to give certain undertakings

(6) The ABC Commissioner must not require the person to undertake:
  (a) not to disclose information or answers given at the examination; or
  (b) not to discuss matters relating to the examination with any other person.

62 Offence for failing to comply with examination notice

(1) A person commits an offence if:
  (a) the person has been given an examination notice; and
  (b) the person fails:
    (i) to give information or produce a document in accordance with the notice; or
    (ii) to attend to answer questions in accordance with the notice; or
    (iii) to take an oath or make an affirmation, when required to do so under subsection 61F(4); or
    (iv) to answer questions relevant to the investigation while attending as required by the examination notice.

Note: A court may impose a maximum penalty of 30 penalty units instead of, or in addition to, a term of imprisonment. A body corporate that is convicted of an offence may be fined up to 5 times that maximum penalty (see subsections 4B(2) and (3) of the *Crimes Act 1914*).

Penalty: Imprisonment for 6 months.

(2) This Part does not require a person to give information, produce a document or answer questions if to do so would disclose information that:
  (a) is the subject of legal professional privilege; or
  (b) would be protected by public interest immunity.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

63 Payment for expenses incurred in attending an examination

(1) A person who attends an examination as required by an examination notice is (subject to subsection (2)) entitled to be paid fees and allowances, fixed by or calculated in accordance with the rules, for reasonable expenses (other than legal expenses) incurred by the person in attending the examination.

(2) The person is not entitled to be paid for expenses under this section unless the person:

(a) applies, in writing, to the ABC Commissioner for payment of the expenses within 3 months after the examination is completed; and

(b) provides to the ABC Commissioner sufficient evidence to establish that the person incurred the expenses.

(3) An application under paragraph (2)(a) must:

(a) if a form is prescribed by the rules—be in that form; and

(b) include any information prescribed by the rules.

64 ABC Commissioner must notify Commonwealth Ombudsman of issue of examination notice

(1) As soon as practicable after an examination notice has been issued, the ABC Commissioner must:

(a) notify the Commonwealth Ombudsman that the examination notice has been issued; and

(b) give the Commonwealth Ombudsman a copy of:

(i) the examination notice; and

(ii) the affidavit that accompanied the application for the examination notice; and

(iii) any other information in relation to the examination notice that was given to the nominated AAT presidential member who issued the notice.

(2) If notice under subsection 61E(3) or (4) is given to a person, the ABC Commissioner must notify the Commonwealth Ombudsman as soon as practicable after giving notice.

Authorised Version C2016C01131 registered 07/12/2016

65 Review and report by Commonwealth Ombudsman

ABC Commissioner to give report etc. to Commonwealth Ombudsman

(1) As soon as practicable after an examination of a person is completed, the ABC Commissioner must give the Commonwealth Ombudsman:
  (a) a report about the examination; and
  (b) a video recording of the examination; and
  (c) a transcript of the examination.

(2) The report under paragraph (1)(a) must include:
  (a) a copy of the examination notice under which the examination was conducted; and
  (b) the following information:
    (i) the time and place at which the examination was conducted;
    (ii) the name of each person who was present at the examination;
    (iii) any other information prescribed by the rules.

Review of exercise of powers under this Part

(3) The Commonwealth Ombudsman:
  (a) must review the exercise of powers under this Part by the ABC Commissioner and any person assisting the ABC Commissioner; and
  (b) may do anything incidental or conducive to the performance of that function.

(4) The Commonwealth Ombudsman's powers under the *Ombudsman Act 1976* extend to a review by the Ombudsman under this section as if the review were an investigation by the Ombudsman under that Act.

Authorised Version C2016C01131 registered 07/12/2016

(5) The exercise of those powers in relation to a review by the Ombudsman under this section is taken, for all purposes, to be an exercise of powers under the *Ombudsman Act 1976*.

Commonwealth Ombudsman to report to Parliament

(6) As soon as practicable after the end of each quarter of each financial year, the Commonwealth Ombudsman must prepare and present to the Parliament a report about examinations conducted during that quarter. The report must include the results of reviews conducted under this section during that quarter.

(7) The Commonwealth Ombudsman may prepare and present to the Parliament any other reports about the results of reviews conducted under this section the Commonwealth Ombudsman considers appropriate.

Authorised Version C2016C01131 registered 07/12/2016

Part 3—Powers of Australian Building and Construction Inspectors and Federal Safety Officers

Division 1—Appointment of Australian Building and Construction Inspectors

66 Australian Building and Construction Inspectors

(1) The ABC Commissioner may, by written instrument, appoint any of the following persons as an Australian Building and Construction Inspector:

(a) a person who is an employee of the Commonwealth or who holds an office or appointment under a law of the Commonwealth;

(b) a person who is an employee of a State or Territory or who holds an office or appointment under a law of a State or Territory;

(c) a consultant engaged by the ABC Commissioner under section 32.

(2) The ABC Commissioner must not appoint a person referred to in paragraph (1)(c) as an inspector unless the ABC Commissioner is satisfied that the person is an appropriate person to be appointed as an inspector.

(3) The ABC Commissioner is an inspector by force of this subsection.

(4) In exercising powers or performing functions as an inspector, an inspector appointed under subsection (1) must comply with any directions of the ABC Commissioner.

(5) The ABC Commissioner may give directions for the purposes of subsection (4).

(6) A written direction under subsection (5) that is of general application is a legislative instrument.

(7) A written direction under subsection (5) that relates to a particular case is not a legislative instrument.

67 Identity cards for inspectors

(1) The ABC Commissioner must issue an identity card to an inspector appointed under subsection 66(1).

(2) The Minister must issue an identity card to the ABC Commissioner.

Form of identity card

(3) The identity card must:
(a) be in the form approved by the ABC Commissioner; and
(b) contain a recent photograph of the person to whom it is issued.

Inspector must carry card

(4) An inspector must carry the identity card at all times when performing functions or exercising powers as an inspector.

Note: The ABC Commissioner is an inspector (see the definition of ***inspector*** in section 5).

Offence

(5) A person commits an offence of strict liability if:
(a) the person ceases to be an inspector; and
(b) the person does not, within 14 days of so ceasing, return the person's identity card to the ABC Commissioner or the Minister (as the case requires).

Penalty: 1 penalty unit.

Authorised Version C2016C01131 registered 07/12/2016

Exception—card lost or destroyed

(6) Subsection (5) does not apply if the identity card was lost or destroyed.

Note: A defendant bears an evidential burden in relation to the matter in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

Authorised Version C2016C01131 registered 07/12/2016

Division 2—Appointment of Federal Safety Officers

68 Federal Safety Officers

(1) The Federal Safety Commissioner may, by written instrument, appoint any of the following persons as a Federal Safety Officer:

(a) a person who is an employee of the Commonwealth or who holds an office or appointment under a law of the Commonwealth;

(b) a person who is an employee of a State or Territory or who holds an office or appointment under a law of a State or Territory;

(c) a consultant engaged under section 42.

(2) The Federal Safety Commissioner must not appoint a person referred to in paragraph (1)(c) as a Federal Safety Officer unless the Federal Safety Commissioner is satisfied that the person is an appropriate person to be appointed as a Federal Safety Officer.

(3) The Federal Safety Commissioner is a Federal Safety Officer by force of this subsection.

(4) In exercising powers or performing functions as a Federal Safety Officer, a Federal Safety Officer appointed under subsection (1) must comply with any directions of the Federal Safety Commissioner.

(5) The Federal Safety Commissioner may give directions for the purposes of subsection (4).

(6) A written direction under subsection (5) that is of general application is a legislative instrument.

(7) A written direction under subsection (5) that relates to a particular case is not a legislative instrument.

Authorised Version C2016C01131 registered 07/12/2016

69 Identity cards for Federal Safety Officers

(1) The Federal Safety Commissioner must issue an identity card to a Federal Safety Officer appointed under subsection 68(1).

(2) The Minister must issue an identity card to the Federal Safety Commissioner.

Form of identity card

(3) The identity card must:
  (a) be in the form approved by the Federal Safety Commissioner; and
  (b) contain a recent photograph of the person to whom it is issued.

Federal Safety Officer must carry card

(4) A Federal Safety Officer must carry the identity card at all times when performing functions or exercising powers as a Federal Safety Officer.

Note: The Federal Safety Commissioner is a Federal Safety Officer (see the definition of ***Federal Safety Officer*** in section 5).

Offence

(5) A person commits an offence of strict liability if:
  (a) the person ceases to be a Federal Safety Officer; and
  (b) the person does not, within 14 days of so ceasing, return the person's identity card to the Federal Safety Commissioner or the Minister (as the case requires).

Penalty: 1 penalty unit.

Exception—card lost or destroyed

(6) Subsection (5) does not apply if the identity card was lost or destroyed.

Authorised Version C2016C01131 registered 07/12/2016

Note: A defendant bears an evidential burden in relation to the matter in subsection (6) (see subsection 13.3(3) of the *Criminal Code*).

Authorised Version C2016C01131 registered 07/12/2016

Division 3—Powers of authorised officers

70 Purposes for which powers of authorised officers may be exercised

Compliance purposes for inspectors

(1) An inspector may exercise compliance powers (other than a power under section 98 or 99) in relation to a building matter for one or more of the following purposes:

(a) ascertaining whether this Act, a designated building law or the Building Code is being, or has been, complied with;

(b) ascertaining whether a court order relating to this Act, a designated building law or the Building Code has been complied with, or is being complied with, by a building industry participant;

(c) the purposes of a provision of the rules that confers functions or powers on inspectors;

(d) the purposes of a provision of another Act that confers functions or powers on inspectors.

Note: The powers in sections 98 (enforceable undertakings) and 99 (compliance notices) may be exercised for the purpose of remedying the effects of certain contraventions.

Compliance purposes for Federal Safety Officers

(2) A Federal Safety Officer may exercise compliance powers for one or more of the following purposes:

(a) ascertaining whether a constitutional corporation, the Commonwealth or a Commonwealth authority that is an applicant for accreditation meets the accreditation requirements;

(b) ascertaining whether a constitutional corporation, the Commonwealth or a Commonwealth authority that is an accredited person has complied, or is complying, with conditions of the accreditation;

Authorised Version C2016C01131 registered 07/12/2016

(c) ascertaining whether an accredited person has complied, or is complying, with conditions of the accreditation in respect of building work in a Territory or Commonwealth place.

Functions and powers subject to terms and conditions

(3) The functions and powers of an authorised officer are subject to any conditions and restrictions specified in his or her instrument of appointment.

Note: Inspectors and Federal Safety Officers are authorised officers (see the definition of ***authorised officer*** in section 5).

71 When powers of authorised officers may be exercised

An authorised officer may exercise compliance powers:

(a) at any time during working hours; or

(b) at any other time, if the authorised officer reasonably believes that it is necessary to do so for compliance purposes.

72 Power of authorised officers to enter premises

Powers of inspectors to enter premises

(1) An inspector may, without force:

(a) enter premises, if the inspector reasonably believes that:

(i) this Act, a designated building law or the Building Code applies to building work that is being, or applied to building work that has been, performed on the premises; or

(ii) a breach by a building industry participant of this Act, a designated building law or the Building Code has occurred, is occurring or is likely to occur; or

(b) enter business premises, if the inspector reasonably believes that:

(i) there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises; or

(ii) a person who ordinarily performs work or conducts business at the premises has information relevant to compliance purposes.

Note: Intentionally hindering or obstructing an inspector is prohibited (see section 78).

Powers of Federal Safety Officers to enter premises

(2) A Federal Safety Officer may, without force:

(a) enter premises, if the officer reasonably believes that building work is being carried out, or has been carried out by an applicant or accredited person referred to in subsection 70(2); or

(b) enter business premises, if the officer reasonably believes that:

(i) there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises; or

(ii) a person who ordinarily performs work or conducts business at the premises has information relevant to compliance purposes.

Note: Intentionally hindering or obstructing a Federal Safety Officer is prohibited (see section 78).

Limitation on authorised officers entering premises

(3) Despite subparagraph (1)(a)(i) and paragraph (2)(a), an authorised officer must not enter a part of premises that is used for residential purposes unless the officer reasonably believes that the work referred to in that subparagraph or paragraph is being performed on that part of the premises.

(4) Despite subparagraphs (1)(b)(ii) and (2)(b)(ii), an authorised officer must not enter business premises under either of those subparagraphs if the authorised officer reasonably believes that the person concerned is not at those premises.

Authorised Version C2016C01131 registered 07/12/2016

Section 73

73 Showing identity card before entry

An authorised officer must, before or as soon as practicable after entering premises, show his or her identity card to the occupier, or another person who apparently represents the occupier, if the occupier or other person is present at the premises.

74 Powers of authorised officers while on premises

Entry other than under subparagraph 72(1)(b)(ii) or (2)(b)(ii)

(1) An authorised officer who enters premises under paragraph 72(1)(a) or (2)(a), or subparagraph 72(1)(b)(i) or (2)(b)(i), may exercise one or more of the following powers while on the premises:

(a) inspect any work, process or object;

(b) interview any person;

(c) require a person to tell the authorised officer who has custody of, or access to, a record or document;

(d) require a person who has custody of, or access to, a record or document to produce the record or document to the authorised officer either while the authorised officer is on the premises, or within a specified period;

(e) inspect, and make copies of, any record or document that:

(i) is on the premises; or

(ii) is accessible from a computer that is on the premises;

(f) take samples of any goods or substances in accordance with any procedures prescribed by the rules.

Note: See also sections 79 (power to keep records or documents), 102 (self-incrimination) and 104 (certain records and documents are inadmissible).

Entry under subparagraph 72(1)(b)(ii) or (2)(b)(ii)

(2) An authorised officer who enters premises under subparagraph 72(1)(b)(ii) or (2)(b)(ii) may interview the person concerned while on those premises.

Refusing or failing to participate in an interview

(3) A refusal or failure by a person to participate in an interview under this section is not to be treated as conduct covered by section 149.1 of the *Criminal Code*.

75 Persons assisting authorised officers

(1) A person may accompany an authorised officer onto premises to assist the authorised officer if the ABC Commissioner or Federal Safety Commissioner (as the case requires) is satisfied that:

(a) the assistance is necessary and reasonable; and

(b) the person assisting has suitable qualifications and experience to properly assist the authorised officer.

(2) The person assisting:

(a) may do such things on the premises as the authorised officer requires to assist the authorised officer to exercise compliance powers; but

(b) must not do anything that the authorised officer does not have power to do.

(3) Anything done by the person assisting is taken for all purposes to have been done by the authorised officer.

76 Power to ask for person's name and address

(1) An authorised officer may require a person to tell the authorised officer the person's name and address if the authorised officer reasonably believes that the person has contravened a civil remedy provision.

(2) If the authorised officer reasonably believes that the name or address is false, the authorised officer may require the person to give evidence of its correctness.

(3) The person must comply with a requirement under subsection (1) or (2) if:

(a) the authorised officer advises the person that he or she may contravene a civil remedy provision if he or she fails to comply with the requirement; and

(b) the authorised officer shows his or her identity card to the person.

Note: Grade B civil penalty.

(4) Subsection (3) does not apply if the person has a reasonable excuse.

77 Power to require persons to produce records or documents

(1) An authorised officer may require a person, by notice, to produce a record or document to the authorised officer.

Note: See also sections 79 (power to keep records or documents) and 102 (self-incrimination).

(2) The notice must:

(a) be in writing; and

(b) be served on the person; and

(c) require the person to produce the record or document at a specified place within a specified period of at least 14 days.

(3) The person must comply with the notice.

Note: Grade B civil penalty.

(4) Subsection (3) does not apply if the person has a reasonable excuse.

78 Hindering or obstructing authorised officers

A person must not intentionally hinder or obstruct an authorised officer in exercising his or her compliance powers, or induce or attempt to induce any other person to do so.

Note: Grade A civil penalty.

Authorised Version C2016C01131 registered 07/12/2016

79 Power to keep records or documents

(1) If a record or document is produced to an authorised officer in accordance with this Division or Part 2 (examination notices), the authorised officer may:

(a) inspect, and make copies of, the record or document; and

(b) keep the record or document for any period that is necessary.

(2) While the authorised officer keeps a record or document, he or she must allow the following persons to inspect, or make copies of, the record or document at all reasonable times:

(a) the person who produced the record or document;

(b) any person otherwise entitled to possession of the record or document;

(c) a person authorised by a person referred to in paragraph (a) or (b).

Certified copy to be supplied to person entitled to document

(3) A person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy that is certified, by one of the following persons, to be a true copy:

(a) the ABC Commissioner;

(b) a Deputy ABC Commissioner;

(c) an inspector;

(d) a member of staff referred to in subsection 30(1);

(e) a person assisting the ABC Commissioner under section 31;

(f) a person engaged as a consultant under section 32;

(g) the Federal Safety Commissioner;

(h) a Federal Safety Officer;

(i) an APS employee assisting the Federal Safety Commissioner;

(j) a person engaged as a consultant under section 42.

Authorised Version C2016C01131 registered 07/12/2016

Treatment of certified copy

(4) The certified copy must be received in all courts and tribunals as evidence as if it were the original.

Authorised Version C2016C01131 registered 07/12/2016

Chapter 8—Enforcement

Part 1—Simplified outline of this Chapter

80 Simplified outline of this Chapter

An authorised applicant (who may be an inspector or a person affected by a contravention of a civil remedy provision) may apply to certain courts for an order relating to the contravention. A court may make any order, such as imposing a pecuniary penalty on a person or granting an injunction. This Chapter also includes general rules relating to contraventions of civil remedy provisions (such as who bears burdens of proof, double jeopardy, and the treatment of persons and bodies that are not individuals).

The ABC Commissioner can accept an enforceable undertaking if the Commissioner reasonably believes that a person has contravened a civil remedy provision. The enforceable undertaking can be enforced by certain courts. An inspector can also give a compliance notice requiring a person who the inspector reasonably believes has contravened a civil remedy provision to rectify the contravention. Certain courts can review the compliance notice.

Authorised Version C2016C01131 registered 07/12/2016

Part 2—Orders for contraventions of civil remedy provisions

Division 1—Obtaining an order for contravention of civil remedy provision

81 Penalty etc. for contravention of civil remedy provision

(1) A relevant court, on application by an authorised applicant, may make one or more of the following orders relating to a person (the ***defendant***) who has contravened a civil remedy provision:

(a) an order imposing a pecuniary penalty on the defendant;

(b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;

(c) any other order that the court considers appropriate.

Note: An authorised applicant may not be able to make an application for an order if there is an enforceable undertaking in force or a compliance notice has been given (see subsections 98(4) and 99(5)).

Maximum penalty for civil remedy provisions

(2) The maximum pecuniary penalty is:

(a) for a Grade A civil remedy provision—1,000 penalty units if the defendant is a body corporate and otherwise 200 penalty units; and

(b) for a Grade B civil remedy provision—100 penalty units if the defendant is a body corporate and otherwise 20 penalty units.

Injunctions

(3) The orders that may be made under paragraph (1)(c) include:

(a) injunctions (including interim injunctions); and

(b) any other orders that the court considers necessary to stop the conduct or remedy its effects, including orders for the sequestration of assets.

(4) If the contravention is a contravention of section 46 or 47 (unlawful industrial action and picketing prohibited), then the power of the court to grant an injunction restraining a person (the ***defendant***) from engaging in conduct may be exercised:

(a) whether or not it appears to the court that the defendant intends to engage again, or to continue to engage, in conduct of that kind; and

(b) whether or not the defendant has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any person if the defendant engages in conduct of that kind.

Pecuniary penalties

(5) A pecuniary penalty under paragraph (1)(a) is payable to the Commonwealth, or to some other person if the court so directs. It may be recovered as a debt.

(6) In determining a pecuniary penalty under paragraph (1)(a), the court must take into account all relevant matters, including:

(a) the nature and extent of the contravention; and

(b) the nature and extent of any loss or damage suffered because of the contravention; and

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

(7) The Consolidated Revenue Fund is appropriated for the purposes of a debt due to a person other than the Commonwealth in relation to a penalty under paragraph (1)(a). The *Financial Management and Accountability Act 1997* does not apply in relation to those amounts.

82 Interest up to judgement

(1) This section applies to an order (other than a civil penalty order) under this Division in relation to an amount that a person was required to pay to, or on behalf of, another person under this Act.

(2) In making the order the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.

(3) Without limiting subsection (2), in determining the amount of interest, the court must take into account the period between the day the relevant cause of action arose and the day the order is made.

83 Conduct contravening more than one civil remedy provision

(1) If conduct constitutes a contravention of 2 or more civil remedy provisions, proceedings may be instituted under this Part against a person in relation to the contravention of any one or more of those provisions.

(2) However, the person is not liable to more than one pecuniary penalty under this Part in relation to the same conduct.

84 Multiple contraventions

(1) A relevant court may make a single civil penalty order against a person for multiple contraventions of a civil remedy provision if proceedings for the contraventions are founded on the same facts, or if the contraventions form, or are part of, a series of contraventions of the same or a similar character.

(2) However, any pecuniary penalty imposed must not exceed the sum of the maximum penalties that could be ordered if a separate pecuniary penalty were ordered for each of the contraventions.

Authorised Version C2016C01131 registered 07/12/2016

85 Proceedings may be heard together

A relevant court may direct that 2 or more proceedings relating to contraventions of civil remedy provisions are to be heard together.

86 Civil evidence and procedure rules for proceedings relating to contraventions of civil remedy provisions

A relevant court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a contravention of a civil remedy provision.

Authorised Version C2016C01131 registered 07/12/2016

Division 2—Civil proceedings and criminal proceedings

87 Civil proceedings after criminal proceedings

A relevant court may not make a civil penalty order against a person for a contravention of a civil remedy provision if the person has been convicted of an offence constituted by conduct that is the same, or substantially the same, as the conduct constituting the contravention.

88 Criminal proceedings during civil proceedings

(1) Proceedings for a civil penalty order against a person for a contravention of a civil remedy provision are stayed if:

(a) criminal proceedings are commenced or have already been commenced against the person for an offence; and

(b) the offence is constituted by conduct that is the same, or substantially the same, as the conduct alleged to constitute the contravention.

(2) The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings are dismissed.

89 Criminal proceedings after civil proceedings

Criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil remedy provision regardless of whether an order has been made under this Part against the person in relation to the contravention.

90 Evidence given in civil proceedings not admissible in criminal proceedings

(1) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:

Authorised Version C2016C01131 registered 07/12/2016

(a) the individual previously gave the information or produced the documents in proceedings for a civil penalty order against the individual for an alleged contravention of a civil remedy provision (whether or not the order was made); and

(b) the conduct alleged to constitute the offence is the same, or substantially the same, as the conduct alleged to constitute the contravention.

(2) However, subsection (1) does not apply to criminal proceedings in relation to the falsity of the evidence given by the individual in the proceedings for the civil penalty order.

91 Civil double jeopardy

If a person is ordered to pay a pecuniary penalty under a civil remedy provision in relation to particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth in relation to that conduct.

Note: A court may make other orders, such as an order for compensation, in relation to particular conduct even if the court has made a civil penalty order in relation to that conduct.

Authorised Version C2016C01131 registered 07/12/2016

Division 3—Miscellaneous

92 Ancillary contravention of civil remedy provisions

(1) A person must not:

(a) attempt to contravene a civil remedy provision; or

(b) aid, abet, counsel or procure a contravention of a civil remedy provision; or

(c) induce (by threats, promises or otherwise) a contravention of a civil remedy provision; or

(d) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil remedy provision; or

(e) conspire with others to effect a contravention of a civil remedy provision.

Civil penalty

(2) A person who contravenes subsection (1) in relation to a civil remedy provision is taken to have contravened the provision.

93 Exceptions etc. to civil remedy provisions—burden of proof

If, in proceedings for a civil penalty order against a person for a contravention of a civil remedy provision, the person wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating the civil remedy provision, then the person bears an evidential burden in relation to that matter.

94 Liability of bodies corporate

Conduct of a body corporate

(1) Any conduct engaged in on behalf of a body corporate:

(a) by an officer, employee or agent (an ***official***) of the body within the scope of his or her actual or apparent authority; or

Authorised Version C2016C01131 registered 07/12/2016

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of an official of the body, if the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the official;

is taken, for the purposes of this Act, to have been engaged in also by the body.

State of mind of a body corporate

(2) If, for the purposes of this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:

(a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and

(b) that the person had that state of mind.

Meaning of state of mind

(3) The state of mind of a person includes:

(a) the knowledge, intention, opinion, belief or purpose of the person; and

(b) the person's reasons for the intention, opinion, belief or purpose.

95 Actions of building associations

(1) For the purposes of this Act, each of the following is taken to be action of a building association:

(a) action taken by the committee of management of the building association;

(b) action taken by an officer or agent of the building association acting in that capacity;

(c) action taken by a member, or group of members, of the building association if the action is authorised by:

(i) the rules of the association; or

(ii) the committee of management of the association; or

Authorised Version C2016C01131 registered 07/12/2016

(iii) an officer or agent of the association acting in that capacity;

(d) action taken by a member of the building association who performs the function of dealing with an employer on behalf of the member and other members of the association, acting in that capacity;

(e) if the building association is an unincorporated building association that does not have a committee of management—action taken by a member, or group of members, of the association.

(2) Paragraphs (1)(c) and (d) do not apply if:

(a) the committee of management of the building association; or

(b) a person authorised by the committee; or

(c) an officer of the building association;

has taken all reasonable steps to prevent the action.

(3) If, for the purposes of this Act, it is necessary to establish the state of mind of a building association in relation to particular action, it is enough to show:

(a) that the action was taken by a person, or a group, referred to in any of paragraphs (1)(a) to (e); and

(b) that the person, or a person in the group, had that state of mind.

(4) Subsections (1) to (3) have effect despite subsections 94(1) and (2) (liabilities of bodies corporate).

96 Unincorporated building associations

For the purposes of this Act, a reference to a person includes a reference to an unincorporated building association.

97 Capacity, state of mind etc. of person being coerced etc.

In applying a provision of this Act that refers to:

(a) coercing a person to do a particular thing; or

(b) applying undue pressure to a person to do a particular thing; or

(c) encouraging a person to do a particular thing; or

(d) advising a person to do a particular thing; or

(e) inciting a person to do a particular thing; or

(f) engaging in conduct with the intention of doing any of the above;

it is not relevant whether or not that person is able, willing or eligible to do that particular thing.

Authorised Version C2016C01131 registered 07/12/2016

Part 3—Other powers of enforcement for inspectors

98 Enforceable undertakings relating to contraventions of civil remedy provisions

Application of this section

(1) This section applies if the ABC Commissioner reasonably believes that a person has contravened a civil remedy provision.

Accepting an undertaking

(2) The ABC Commissioner may accept a written undertaking given by the person in relation to the contravention, except as provided by subsection (5).

Withdrawing or varying an undertaking

(3) The person may withdraw or vary the undertaking at any time, but only with the ABC Commissioner's consent.

Relationship with orders in relation to contraventions of civil remedy provisions

(4) An inspector must not apply for an order under Division 1 of Part 2 relating to a contravention of a civil remedy provision by a person if an undertaking given by the person under this section in relation to the contravention has not been withdrawn.

Note: A person other than an inspector who is otherwise entitled to apply for an order relating to the contravention may do so.

Relationship with compliance notices

(5) The ABC Commissioner must not accept an undertaking relating to a contravention if the person has been given a notice relating to the contravention under section 99 (compliance notices).

Authorised Version C2016C01131 registered 07/12/2016

Enforcement of undertakings

(6) If the ABC Commissioner considers that the person who gave the undertaking has contravened any of its terms, the ABC Commissioner may apply to a relevant court or a relevant State or Territory court for an order under subsection (7).

(7) If the court is satisfied that the person has contravened a term of the undertaking, the court may make one or more of the following orders:
  (a) an order directing the person to comply with the term of the undertaking;
  (b) an order awarding compensation for loss that a person has suffered because of the contravention;
  (c) any other order that the court considers appropriate.

99 Compliance notices

Application of this section

(1) This section applies if an inspector reasonably believes that a person has contravened one or more of the following to the extent that the contravention relates (whether directly or indirectly) to building work:
  (a) this Act;
  (b) a designated building law;
  (c) the Building Code.

Giving a notice

(2) The inspector may (subject to subsection (4)) give the person a notice requiring the person to do either or both of the following within a reasonable time specified in the notice:
  (a) take specified action to remedy the direct effects of the contravention referred to in subsection (1);
  (b) produce reasonable evidence of the person's compliance with the notice.

Authorised Version C2016C01131 registered 07/12/2016

(3) The notice must also:

(a) set out the name of the person to whom the notice is given; and

(b) set out the name of the inspector who gave the notice; and

(c) set out brief details of the contravention; and

(d) explain that a failure to comply with the notice may contravene a civil remedy provision; and

(e) explain that the person may apply to a relevant court or a relevant State or Territory court for a review of the notice on either or both of the following grounds:

(i) the person has not committed the contravention set out in the notice;

(ii) the notice does not comply with subsection (2) or this subsection; and

(f) set out any other matters prescribed by the rules.

Relationship with enforceable undertakings

(4) An inspector must not give a person a notice relating to a contravention if:

(a) the person has given an undertaking under section 98 relating to the contravention; and

(b) the undertaking has not been withdrawn.

Relationship with civil remedy provisions

(5) An inspector must not apply for an order under Division 1 of Part 2 relating to a contravention of a civil remedy provision by a person if:

(a) the inspector has given the person a notice relating to the contravention; and

(b) either of the following subparagraphs applies:

(i) the notice has not been withdrawn, and the person has complied with the notice;

Authorised Version C2016C01131 registered 07/12/2016

(ii) the person has made an application under section 100 (review of compliance notices) relating to the notice that has not been completely dealt with.

Note: A person other than an inspector who is otherwise entitled to apply for an order relating to the contravention may do so.

(6) A person who complies with a notice relating to a contravention of a civil remedy provision is not taken:

(a) to have admitted to contravening the provision; or

(b) to have been found to have contravened the provision.

Person must comply with notice

(7) A person must comply with a notice given under this section.

Note: Grade B civil penalty.

(8) Subsection (7) does not apply if the person has a reasonable excuse.

100 Review of compliance notices

(1) A person who has been given a notice under section 99 (compliance notices) may apply to a relevant court or a relevant State or Territory court for a review of the notice on either or both of the following grounds:

(a) the person has not committed a contravention set out in the notice;

(b) the notice does not comply with subsection 99(2) or (3).

(2) At any time after the application has been made, the court may stay the operation of the notice on the terms and conditions that the court considers appropriate.

(3) The court may confirm, cancel or vary the notice after reviewing it.

Authorised Version C2016C01131 registered 07/12/2016

Chapter 9—Miscellaneous

Part 1—Simplified outline of this Chapter

101 Simplified outline of this Chapter

For persons who are required by this Act to provide information, Part 2 contains provisions relating to self-incrimination, protection from liability for providing the information and the admissibility of the information provided. The Part also contains rules to protect the privacy of that information, while allowing its disclosure in certain circumstances.

Part 3 gives some additional powers to the ABC Commissioner, such as the ability to publicise non-compliance and to intervene in or commence court and FWC proceedings.

Provisions relating to courts, such as the conferral of power on the Federal Court and appeals from certain State or Territory courts, are dealt with by Part 4.

Certain officials under this Act are protected from civil proceedings under Part 5. That Part also allows the Minister to delegate certain powers, and contains a rule-making and regulation-making power.

Authorised Version C2016C01131 registered 07/12/2016

Part 2—Provisions relating to information

Division 1—Provisions relating to requirements to provide information

102 Self-incrimination etc.

Excuses that are not available

(1) A person is not excused from giving information, producing a record or document, or answering a question, under an examination notice, or under paragraph 74(1)(d) or subsection 77(1), on the ground that to do so:

(a) would contravene any other law; or

(b) might tend to incriminate the person or otherwise expose the person to a penalty or other liability.

Note: However, if a person is given an examination notice, the person is protected, by section 103, from liability for contravening the other law.

Use/derivative use indemnity in relation to examination notices

(2) In the case of an individual who gives information, produces a record or document, or answers a question, under an examination notice, neither:

(a) the information or answer given or the record or document produced; nor

(b) any information, document or thing obtained as a direct or indirect consequence of giving the information or answer or producing the record or document;

is admissible in evidence against the individual in proceedings, other than:

(c) proceedings for an offence against section 62 (failure to comply with examination notice); or

Authorised Version C2016C01131 registered 07/12/2016

(d) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Act (false or misleading information or documents); or

(e) proceedings for an offence against section 149.1 of the *Criminal Code* that relates to this Act (obstruction of Commonwealth officials).

Use/derivative use indemnity in relation to other requirements

(3) In the case of an individual who gives information, produces a record or document, or answers a question, under paragraph 74(1)(d) or subsection 77(1), neither:

(a) the information or answer given or the record or document produced; nor

(b) any information, document or thing obtained as a direct or indirect consequence of giving the information or answer or producing the record or document;

is admissible in evidence against the individual in criminal proceedings, other than proceedings referred to in paragraphs (2)(d) and (e) of this section.

103 Protection from liability relating to examination notices

A person who, in good faith:

(a) gives information; or

(b) produces a record or document; or

(c) answers a question;

when required to do so under an examination notice is not liable to:

(d) any proceedings for contravening any other law because of that conduct; or

(e) civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.

104 Certain records and documents are inadmissible

The following:

Authorised Version C2016C01131 registered 07/12/2016

(a) any record or document inspected or copied under paragraph 74(1)(e) of which an individual had custody, or to which an individual had access, when it was inspected or copied;

(b) any information, document or thing obtained as a direct or indirect consequence of inspecting or copying a record or document described in paragraph (a) of this section;

are not admissible in evidence in criminal proceedings against the individual, other than:

(c) proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* that relates to this Act (false or misleading information or documents); or

(d) proceedings for an offence against section 149.1 of the *Criminal Code* that relates to this Act (obstruction of Commonwealth officials).

Authorised Version C2016C01131 registered 07/12/2016

Division 2—Protecting information acquired for the purposes of this Act

105 Disclosure of information by the ABC Commissioner or Federal Safety Commissioner

Information to which this section applies

(1) This section applies to information that is acquired by any of the following persons in the course of performing functions, or exercising powers, as such a person:

(a) the ABC Commissioner;
(b) a Deputy ABC Commissioner;
(c) an inspector;
(d) a member of staff referred to in subsection 30(1);
(e) a person assisting the ABC Commissioner under section 31;
(f) a consultant under section 32;
(g) a person assisting an inspector;
(h) the Federal Safety Commissioner;
(i) a Federal Safety Officer;
(j) an APS employee assisting the Federal Safety Commissioner;
(k) a consultant under section 42.

However, the ABC Commissioner must not under this section disclose, or authorise the disclosure of, protected information.

Disclosure that is necessary or appropriate, or likely to assist administration or enforcement

(2) The ABC Commissioner or Federal Safety Commissioner may disclose, or authorise the disclosure of, the information if the Commissioner reasonably believes:

(a) that it is necessary or appropriate to do so for the purposes of the performance of the Commissioner's functions or the exercise of the Commissioner's powers; or

Authorised Version C2016C01131 registered 07/12/2016

(b) that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

Disclosure to the Minister

(3) The ABC Commissioner or Federal Safety Commissioner may disclose, or authorise the disclosure of, the information to the Minister if the Commissioner reasonably believes that the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under:

(a) this Act; or

(b) for the ABC Commissioner—the FW Act or the FW Transitional Act.

Disclosure to the Department

(4) The ABC Commissioner or Federal Safety Commissioner may disclose, or authorise the disclosure of, the information to:

(a) the Secretary; or

(b) an SES employee, or an APS employee, in the Department;

for the purpose of briefing, or considering briefing, the Minister if the Commissioner reasonably believes the disclosure is likely to assist the Minister to consider a complaint or issue in relation to a matter arising under:

(c) this Act; or

(d) for the ABC Commissioner—the FW Act or the FW Transitional Act.

Interaction with section 107

(5) For disclosures of information, or authorisations of disclosures of information, by the ABC Commissioner, subsections (2) to (4) have effect subject to section 107 (reports not to include information relating to individual's affairs).

Authorised Version C2016C01131 registered 07/12/2016

106 Confidentiality of information obtained under an examination notice

(1) This section restricts what a person (the ***entrusted person***) may do with protected information that the person has obtained in the course of official employment.

Note: Although this section applies only to information that a person obtained in the course of official employment, the obligations under this section continue to apply after the person ceases to be in official employment.

Recording or disclosing

(2) The entrusted person must not:

(a) make a record of protected information; or

(b) disclose protected information.

Penalty: Imprisonment for 12 months.

Permitted recording or disclosure by designated officials

(3) If the entrusted person is a designated official at the time of the recording or disclosure, then each of the following is an exception to the offence in subsection (2):

(a) the recording or disclosure is for the purposes of the performance of the ABC Commissioner's functions or the exercise of the ABC Commissioner's powers;

(b) the recording or disclosure happens in the course of the performance of the duties of the entrusted person's official employment;

(c) in the case of a disclosure—the disclosure is to a person appointed or employed by:

(i) the Commonwealth, a State or Territory; or

(ii) an authority of the Commonwealth, a State or Territory;

for the purpose of assisting in building industry law enforcement;

(d) the recording or disclosure is in accordance with rules made for the purposes of this paragraph.

Authorised Version C2016C01131 registered 07/12/2016

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

Permitted recording or disclosure by other persons

(4) If the entrusted person is not a designated official at the time of the recording or disclosure, then each of the following is an exception to the offence in subsection (2):

(a) the recording or disclosure is for the purposes of the performance of the ABC Commissioner's functions or the exercise of the ABC Commissioner's powers;

(b) the recording or disclosure happens in the course of the performance of the duties of the entrusted person's official employment that relate to building industry law enforcement;

(c) the recording or disclosure is in accordance with rules made for the purposes of this paragraph.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

Disclosure to a Minister by a designated official

(5) The exception in subsection (3) does not apply to a disclosure if:

(a) the entrusted person discloses protected information to any Minister; and

(b) the entrusted person is a designated official; and

(c) the disclosure is not required or authorised by section 18 (Minister may require reports) or 20 (quarterly and annual reports).

Disclosure in reports under this Act

(6) The exception in subsection (3) does not apply to a disclosure if:

(a) the entrusted person discloses protected information in a report under section 18 or 20; and

(b) section 107 (reports not to include information relating to an individual's affairs) is not complied with in respect of the disclosure of the information in the report.

Authorisation for purposes of Privacy Act

(7) A disclosure of personal information is taken to be authorised by this Act for the purposes of paragraph 6.2(b) of Australian Privacy Principle 6 if the information is protected information and the disclosure is made in accordance with subsection (3) or (4) of this section.

Definitions

(8) In this Act:

building industry law enforcement means enforcement of a law of the Commonwealth, a State or a Territory where the enforcement is in respect of:

(a) conduct by, or in relation to, a building industry participant in that capacity; or

(b) conduct that is, or relates to, building work.

official employment means:

(a) appointment or employment by, or the performance of services for:

(i) the Commonwealth, a State or Territory; or

(ii) an authority of the Commonwealth, a State or Territory; or

(b) appointment as an inspector.

107 Reports not to include information relating to an individual's affairs

(1) Information relating to the affairs of an individual must not be included in a report under section 18 (Minister may require reports) or 20 (quarterly and annual reports) if:

(a) the individual is named, or otherwise specifically identified, in the report as the individual to whom the information relates; or

(b) it is reasonably likely that people generally (other than people to whom the individual has disclosed information relating to

the individual's affairs) would be able to work out the identity of the individual to whom the information relates.

(2) For the purposes of applying paragraph (1)(b) to information relating to a particular individual's affairs, the context in which the information appears, and information that is otherwise publicly available, must be taken into account (as well as any other relevant matter).

Authorised Version C2016C01131 registered 07/12/2016

Part 3—Powers of ABC Commissioner etc.

108 ABC Commissioner may publicise non-compliance

If the ABC Commissioner considers that it is in the public interest to do so, the ABC Commissioner may publish details of:

(a) non-compliance with the Building Code, including the name of the person who has failed to comply; and

(b) non-compliance by a building industry participant with this Act or designated building laws, including the name of the participant who has failed to comply.

109 ABC Commissioner may intervene in court proceedings

(1) The ABC Commissioner may intervene in the public interest in a civil proceeding before a court in a matter that:

(a) arises under this Act; or

(b) arises under the *Independent Contractors Act 2006*, the FW Act or the FW Transitional Act and involves:

(i) a building industry participant; or

(ii) building work.

(2) If the ABC Commissioner intervenes in a proceeding under subsection (1), the ABC Commissioner is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

110 ABC Commissioner may make submissions in FWC proceedings

(1) The ABC Commissioner may intervene or make a submission in a matter before the FWC that arises under the FW Act or the FW Transitional Act if the matter involves:

(a) a building industry participant; or

(b) building work.

(2) If the ABC Commissioner intervenes in a proceeding under subsection (1), the ABC Commissioner is taken to be a party to the proceeding and has all the rights, duties and liabilities of such a party.

(3) The ABC Commissioner makes a submission under subsection (1) by giving written notice to the General Manager of the FWC.

111 ABC Commissioner and other inspectors may institute proceedings under the FW Act, etc.

(1) If a provision of the FW Act, the FW Transitional Act, or of an instrument under either of those Acts, authorises a Fair Work Inspector (within the meaning of the FW Act) to:

(a) make an application to the FWC; or

(b) make an application to, or otherwise institute proceedings in, a court;

the provision is also taken to authorise an inspector to make such an application, or institute such proceedings, in any case where the application or proceedings relates to a matter that involves:

(c) a building industry participant; or

(d) building work.

(2) If the inspector makes an application, or institutes proceedings, the FW Act, the FW Transitional Act and any such instrument have effect, in relation to the application or proceedings, as if the inspector were a Fair Work Inspector (within the meaning of the FW Act).

(3) Directions under section 704 or 705 of the FW Act do not apply to the inspector in relation to the application or proceedings.

112 General Manager of the FWC must keep ABC Commissioner informed

The General Manager of the FWC must, as soon as practicable, notify the ABC Commissioner of:

Authorised Version C2016C01131 registered 07/12/2016

(a) every application lodged with the FWC, or the General Manager of the FWC, under the FW Act or the FW Transitional Act, where the application relates to a matter that involves:

(i) a building industry participant; or

(ii) building work; and

(b) the outcome of each application.

Authorised Version C2016C01131 registered 07/12/2016

Part 4—Provisions relating to courts

113 Jurisdiction of the Federal Court

Jurisdiction is conferred on the Federal Court in relation to any matter arising under this Act.

114 Exercising jurisdiction in the Fair Work Division of the Federal Court

(1) This section applies if:

(a) a writ of mandamus or prohibition or an injunction is sought in the Federal Court against a person holding office under this Act; or

(b) a declaration is sought under section 21 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Act; or

(c) an injunction is sought under section 23 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Act; or

(d) a prosecution is instituted in the Federal Court under this Act; or

(e) an appeal is instituted in the Federal Court from a judgement of the Federal Circuit Court or a court of a State or Territory in a matter arising under this Act; or

(f) proceedings in relation to a matter arising under this Act are transferred to the Federal Court from the Federal Circuit Court; or

(g) the Federal Circuit Court or a court of a State or Territory states a case or reserves a question for the consideration of the Federal Court in a matter arising under this Act; or

(h) the High Court remits a matter arising under this Act to the Federal Court.

Authorised Version C2016C01131 registered 07/12/2016

(2) The jurisdiction of the Federal Court is to be exercised in the Fair Work Division of the Federal Court.

115 No limitation on Federal Court's powers

To avoid doubt, nothing in this Act limits the Federal Court's powers under section 21, 22 or 23 of the *Federal Court of Australia Act 1976*.

116 Appeals from relevant State or Territory courts

Appeals from original decisions of relevant State or Territory courts

(1) An appeal lies to the Federal Court from a decision of a relevant State or Territory court exercising jurisdiction under this Act.

(2) No appeal lies from a decision of a relevant State or Territory court exercising jurisdiction under this Act, except:

(a) if the court was exercising summary jurisdiction—an appeal, to that court or another relevant State or Territory court of the same State or Territory, as provided for by a law of that State or Territory; or

(b) in any case—an appeal as provided for by subsection (1).

Appeals from appellate decisions of relevant State or Territory courts

(3) An appeal lies to the Federal Court from a decision of a relevant State or Territory court made on appeal from a decision that:

(a) was a decision of that court or another relevant State or Territory court of the same State or Territory; and

(b) was made in the exercise of jurisdiction under this Act.

(4) No appeal lies from a decision to which subsection (3) applies, except an appeal as provided for by that subsection.

Leave to appeal not required

(5) It is not necessary to obtain the leave of the Federal Court, or the court appealed from, in relation to an appeal under subsection (1) or (3).

117 Court not to require undertaking as to damages

If the ABC Commissioner or any other inspector is an applicant in court proceedings under this Act, the FW Act or the FW Transitional Act, the court cannot require the ABC Commissioner, the inspector or another person, as a condition of granting an interim injunction, to give undertakings as to damages.

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Part 5—Miscellaneous

118 ABC Commissioner etc. not liable for conduct in good faith

(1) Civil proceedings do not lie for loss, damage or injury of any kind suffered by a person as a result of anything done, or omitted to be done, in good faith and without negligence by a person referred to in subsection (2):

(a) in the exercise, or purported exercise, of functions, powers or duties under, or in relation to, this Act; or

(b) in the exercise, or purported exercise, of functions, powers or duties under, or in relation to, the *Independent Contractors Act 2006*, the FW Act or the FW Transitional Act, where the exercise, or purported exercise, of the function, power or duty relates to a matter that involves:

(i) a building industry participant; or

(ii) building work.

(2) The persons are:

(a) a designated official; and

(b) the Federal Safety Commissioner; and

(c) a Federal Safety Officer; and

(d) an APS employee assisting the Federal Safety Commissioner; and

(e) a person engaged as a consultant under section 42.

119 Delegation by Minister

(1) The Minister may, in writing, delegate all or any of the Minister's functions or powers under Chapter 3 (the Building Code) to the ABC Commissioner.

(2) In performing functions or exercising powers delegated under subsection (1), the ABC Commissioner must comply with any directions of the Minister.

Authorised Version C2016C01131 registered 07/12/2016

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

(3) The Minister may give a direction for the purposes of subsection (2).

(4) A written direction under subsection (3) that is of general application is a legislative instrument.

(5) A written direction under subsection (4) that relates to a particular case is not a legislative instrument.

119A Review of operation of this Act

(1) Before the end of the period of 12 months after the commencement of this section, the Minister must cause to be conducted a review into the operation of this Act.

(2) The Minister must cause to be prepared a report of a review under subsection (1).

(3) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the completion of the preparation of the report.

120 Rules and regulations

Rules

(1) The Minister may, by legislative instrument, make rules prescribing matters:

(a) required or permitted by this Act to be prescribed by the rules; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without limiting subsection (1), the rules may make provision for, and in relation to, the following:

(a) the manner in which, and the time within which, applications under this Act may be made and dealt with;

Authorised Version C2016C01131 registered 07/12/2016

(b) the form of notices that are required or permitted to be given under this Act.

(3) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, the first rules made for the purposes of subsection 6(4) or (5) (meaning of ***building work***) or 10(2) (extension of Act to Christmas Island and Cocos (Keeling) Islands) may be expressed to take effect from the commencement of the subsection for which the rules are made, if those rules are made within 120 days after this subsection commences.

Regulations

(4) The Governor-General may make regulations prescribing:

(aa) matters required or permitted by this Act to be prescribed by the regulations; or

(ab) matters necessary or convenient to be prescribed for carrying out or giving effect to this Act; or

(a) penalties for offences against the rules, not exceeding a fine of 10 penalty units; or

(b) civil penalties for contraventions of the rules, not exceeding:

(i) for a body corporate—25 penalty units; or

(ii) in any other case—5 penalty units.

Authorised Version C2016C01131 registered 07/12/2016

Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes
Endnote 2—Abbreviation key
Endnote 3—Legislation history
Endnote 4—Amendment history

Abbreviation key—Endnote 2
The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4
Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Editorial changes
The *Legislation Act 2003* authorises First Parliamentary Counsel to make editorial and presentational changes to a compiled law in preparing a compilation of the law for registration. The changes must not change the effect of the law. Editorial changes take effect from the compilation registration date.

If the compilation includes editorial changes, the endnotes include a brief outline of the changes in general terms. Full details of any changes can be obtained from the Office of Parliamentary Counsel.

Misdescribed amendments
A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can

be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation "(md)" added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation "(md not incorp)" is added to the details of the amendment included in the amendment history.

Endnote 2—Abbreviation key

ad = added or inserted

am = amended

amdt = amendment

c = clause(s)

C[x] = Compilation No. x

Ch = Chapter(s)

def = definition(s)

Dict = Dictionary

disallowed = disallowed by Parliament

Div = Division(s)

ed = editorial change

exp = expires/expired or ceases/ceased to have effect

F = Federal Register of Legislation

gaz = gazette

LA = *Legislation Act 2003*

LIA = *Legislative Instruments Act 2003*

(md) = misdescribed amendment can be given effect

(md not incorp) = misdescribed amendment cannot be given effect

mod = modified/modification

No. = Number(s)

o = order(s)

Ord = Ordinance

orig = original

par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)

pres = present

prev = previous

(prev…) = previously

Pt = Part(s)

r = regulation(s)/rule(s)

reloc = relocated

renum = renumbered

rep = repealed

rs = repealed and substituted

s = section(s)/subsection(s)

Sch = Schedule(s)

Sdiv = Subdivision(s)

SLI = Select Legislative Instrument

SR = Statutory Rules

Sub-Ch = Sub-Chapter(s)

SubPt = Subpart(s)

underlining = whole or part not commenced or to be commenced

Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Building and Construction Industry (Improving Productivity) Act 2016	87, 2016	1 Dec 2016	s 3–120: 2 Dec 2016 (s 2(1) item 2) Remainder: 1 Dec 2016 (s 2(1) item 1)	
Building and Construction Industry (Consequential and Transitional Provisions) Act 2016	88, 2016	1 Dec 2016	Sch 1 (item 6) and Sch 2: 2 Dec 2016 (s 2(1) items 3, 4)	Sch 2

Authorised Version C2016C01131 registered 07/12/2016

Endnote 4—Amendment history

Provision affected	How affected
Chapter 9	
Part 2	
Division 2	
s 106	am No 88, 2016

BREAKING

Albo calls snap national cabinet amid fuel crisis

CFMEU site unskilled workers paid more than nurse, engineers and police

UNSKILLED labourers on CFMEU sites are laughing all the way to the bank, after data discovered by The Sunday Mail shows their wages are higher than engineers, teachers, accountants and nurses.

DARYL PASSMORE

less than 2 min read June 26, 2016 - 12:00AM The Sunday Mail (Qld)

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LABOURERS on CFMEU worksites are raking in bigger pay packets than professional engineers, tertiary education teachers, accountants and nurses.

The extent of the militant union's stranglehold on the sector – and its readiness to wield industrial action muscle to maintain it – is revealed in a detailed report on Queensland construction by Deloitte Access Economics earlier this week, and data gathered by *The Sunday Mail*.



Workers head to a pub following a union-held National Day of Mourning rally, as an annual memorial for workers who have died on site. Picture: Tim Marsden

Master Builders Queensland says the "rogue union" is holding the sector and taxpayers "hostage", and Infrastructure Association of Queensland warns high wages deter investment in job-creating projects.

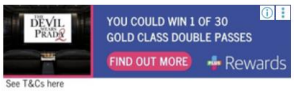
But union chiefs say the public should be wary of "misleading" reports produced for "purely political reasons" by lobby groups for the development industry which wanted to drive down wages and conditions.

An entry-level unskilled labourer covered by the union's collective enterprise bargaining agreement earned $119,357 in 2014, while a carpenter pulled in $132,940, the Deloitte report shows. That is more than engineers ($112,280), business analysts ($103,731) and police ($98,764).

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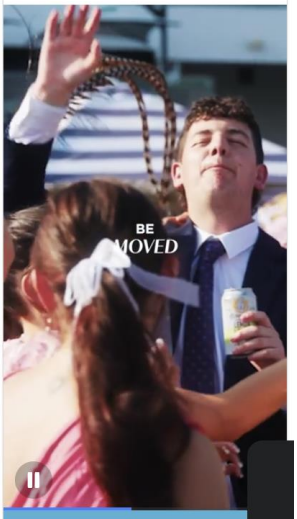
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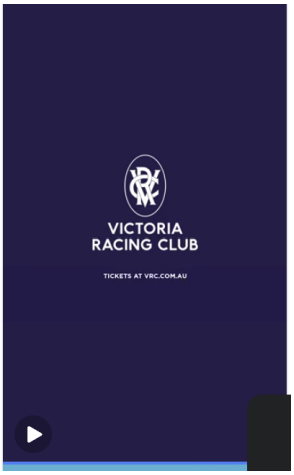
TICKETS FROM $30!

In the past two years, the CFMEU-negotiated wages have risen further to $148,334 for chippies and $133,359 for labourers – nearly double the federal award rates for the same jobs. The wages are based on a 50-hour week, allowing for a guaranteed RDO once a fortnight.

The CFMEU agreements – which also apply to subcontractor and labour-hire workers – include fares and travel, an allowance for working on multistorey buildings and income-protection insurance.

Master Builders director Corlia Roos said: “This is not an anti-union argument. It’s about a rogue union which is out to line its own coffers.”

Dave Noonan, of the CFMEU’s construction division, said that independent analysis of a similar Deloitte-Master Builders report in Victoria showed it had exaggerated construction workers’ income and underestimated some other employees.



FEDERAL CIRCUIT COURT OF AUSTRALIA

DIRECTOR, FAIR WORK BUILDING INDUSTRY INSPECTORATE v DEVINE CONSTRUCTIONS PTY LTD & ORS *[2019] FCCA 1394*

Catchwords:
INDUSTRIAL LAW – Application for the imposition of pecuniary penalties – whether principal under a contract for services took adverse action against contractor – whether adverse action taken because contractor did not have an enterprise agreement that covered CFMEU – whether principal discriminated against contractor because contractor did not have an enterprise agreement that covered CFMEU.

Legislation:
Fair Work Act 2009 (Cth), ss.340, 340(1), 342, 342(1), 354, 354(1)(a)(iii), 550, 550(1), 361
Workplace Relations Act 1996 (Cth), ss.327, 340, 340(2), 341, 342(1), 344, 418(e), Div 5A, Pt 8
Workplace Relations Regulations 2006 (Cth), regs.8.13(1), 8.13(2), 8.13(5)

Cases cited:
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union (2014) 253 CLR 243
Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No.1] (2012) 2012 CLR 500
National Tertiary Education Union v Royal Melbourne Institute of Technology (2013) 234 IR 139
Shop Distributive and Allied Employees Association v Karellas Investments Pty Ltd (2008) 166 FCR 562
Tsilibakis v Transfield Services (Australia) Pty Ltd [2015] FCA 740
Yorke v Lucas (1985) 158 CLR 661

Applicant:	DIRECTOR, FAIR WORK BUILKDING INDUSTRY INSPECTORATE
First Respondent:	DEVINE CONSTRUCTIONS PTY LTD
Second Respondent:	MICHAEL TUCKER
Third Respondent:	ANDREW BLORE

344

Fourth Respondent:	WAYNE SENGELMAN
File Number:	BRG 773 of 2015
Judgment of:	Judge Jarrett
Hearing date:	14 June 2016
Date of Last Submission:	14 June 2016
Delivered at:	Brisbane
Delivered on:	24 May 2019

REPRESENTATION

Counsel for the Applicant:	Mr Duffy QC with Mr Mackie
Solicitors for the Applicant:	Clayton Utz
Counsel for the Respondents:	Mr Murdoch QC
Solicitors for the Respondents:	ClarkeKann Lawyers

ORDERS

(1) Within 14 days of today, the parties bring in minutes of orders, including directions for the determination of penalty, upon which they agree to give effect to these reasons;

(2) Otherwise the application be adjourned to a date to be fixed for the making or orders consistent with these reasons and in relation to the issues of penalty.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT BRISBANE

BRG 773 of 2015

DIRECTOR, FAIR WORK BUILKDING INDUSTRY INSPECTORATE
Applicant

And

DEVINE CONSTRUCTIONS LIMITED
First Respondent

MICHAEL TUCKER
Second Respondent

ANDREW BLORE
Third Respondent

WAYNE SENGELMAN
Fourth Respondent

REASONS FOR JUDGMENT

1. A person must not take adverse action against another person because that other person has a workplace right or has not exercised a workplace right: s.340(1) of the *Fair Work Act 2009* (Cth).

2. Further, a person must not discriminate against an employer because employees of the employer are covered by an enterprise agreement that does not cover an employee organisation or a particular employee organisation: s.354(1)(a)(iii) of the Fair Work Act.

3. In this case, the applicant alleges that the first respondent took adverse action against an employer called Craig's Engineering Pty Ltd because:

a) Craig's Engineering had exercised a workplace right to have an enterprise agreement with its employees that did not cover the Construction, Forestry, Mining and Energy Union of Employees; and

b) Craig's Engineering had an enterprise agreement with its employees that did not cover the CFMEU.

4. The adverse action alleged to have been taken by the first respondent against Craig's Engineering was:

a) preventing Craig's Engineering from carrying out work it was contracted to undertake for the first respondent, cast in these proceedings as the failure of the first respondent to accept Craig's Engineering's offer of services in respect of a particular subcontract for construction related work described in the pleadings, evidence and submissions as the Bracing and Waler Works; and

b) refusing to engage Craig's Engineering for the purpose of construction related work described in the pleadings, evidence and submissions as the Structural Steel Works.

5. The applicant seeks declarations of contraventions of the *Fair Work Act 2009* (Cth) by each of the respondents and the imposition of pecuniary penalties against each of them. The application is opposed by all respondents.

6. The facts upon which the applicant relies to prove its case unfolded at a civil construction site on which the first respondent was the head contractor and described in the evidence as the Double One 3 Apartments, 113 Commercial Road, Teneriffe, Brisbane.

7. The second and third respondents are alleged to have been *involved in* the first respondent's contravention of the Fair Work Act for the purposes of s.550(1) of the Act, in respect of the contravention alleged to have arisen in connection with the Bracing and Waler Works.

8. The fourth respondent is alleged to have been *involved in* the first respondent's contravention of the Fair Work Act for the purposes of

s.550(1) of the Act, in respect of the contravention alleged to have arisen in connection with the Structural Steel Works.

9. Evidence in chief was given by way of affidavit. The applicant relied upon affidavits of Jamie Lynch filed on 28 January, 2016 and 9 November, 2016, Andrew Rainbow and Sharon Wolff both filed on 9 November, 2015, and Elizabeth Rakitovszky filed on 15 June, 2016.

10. Mr Lynch and Mr Rainbow were cross-examined. Ms Wolff and Ms Rakitovszky were employees of the applicant at the relevant times of affirming their affidavits. Their affidavits were in relation to the production of relevant documents. They were not required for cross-examination.

11. The respondents rely upon affidavits of the second, third and fourth respondents each filed on 14 December, 2015, 26 May, 2016 and 9 June, 2016, Allana Agnew filed on 26 May, 2016, and Eamonn Cremin filed on 14 December, 2015.

12. Each of the second, third and fourth respondents, and Mr Cremin were cross-examined. Mr Harin Paw was also called to give oral evidence by the respondents. Ms Agnew's affidavit dealt with a formal matter and she was not cross-examined.

Background

13. The facts within this section of these reasons are uncontroversial. They are the subject of admissions in the pleadings and are otherwise common ground having regard to the evidence given by the witnesses called by each of the parties.

14. During parts of 2013 and 2014 the first respondent was responsible as head contractor for the Double One 3 Apartments Project.

15. The second respondent, Mr Michael Tucker was at all relevant times an employee of the first respondent and was engaged in the position of General Manager. The third respondent, Mr Andrew Blore was at all relevant times an employee of the first respondent and was a contracts administrator. The fourth respondent, Mr Wayne Sengelman was at all relevant times also an employee of the first respondent and was a

project manager. There is no dispute that each gentleman was at all times acting within the scope of his actual or apparent authority.

16. Craig's Engineering Pty Ltd is a company that entered into contracts for services to provide building and construction work such as that in issue in this case. Mr Jamie Lynch was, and continues to be, a project manager employed by Craig's Engineering. Mr Andrew Rainbow was also a project manager employed by Craig's Engineering.

17. In either March or April, 2013 the first respondent entered into a contract with Craig's Engineering whereby Craig's Engineering would perform the Bracing and Waler Works on the Double One 3 Apartments Project. The work was undertaken by Craig's Engineering between 9 April and 6 August, 2013.

18. The parties agree that between 23 and 25 July, 2013 Mr Tucker knew that the CFMEU did not want Craig's Engineering to perform the Bracing and Waler Works as the first respondent and Craig's Engineering had agreed.

19. Further, and quite separately from the Bracing and Waler Works, on or about 11 October, 2013 Mr Lachlan Vigna, a contracts administrator working for the first respondent sent a message to Craig's Engineering inviting Craig's Engineering to tender for work described as the Structural Steel Works which was to be carried out at the Double One 3 Apartments Project. In response, on about 23 October, 2013 Mr Lynch sent a tender for the Structural Steel Works to the first respondent. Mr Lynch subsequently met with Mr Vigna and Mr Blore to discuss the tender. There was also a telephone discussion in January, 2014 between Mr Lynch and Mr Blore in which the tender was further discussed.

20. The Bracing and Waler Works were undertaken between about 9 April, 2013 and 6 August, 2013. The parties agree that during that period the relationship between the first respondent and Craig's Engineering was that of a principal and independent contractor pursuant to a contract for services, within the terms of s.342(1) item 3 of the Fair Work Act.

21. On about 22 or 23 January, 2014 Mr Blore and two other employees of the first respondent recommended to Mr Tucker, that the Structural

Steel Works be awarded to a contractor other than Craig's Engineering. Then, on 23 January, 2014 Mr Tucker decided, on behalf of the first respondent, to award the Structural Steel Works contract to that other contractor.

22. The parties agree that during the period 11 October, 2013 to 23 January, 2014 the relationship between the first respondent and Craig's Engineering was that of a principal proposing to enter into a contract for services with an independent contractor, within the terms of s.342(1) item 4 of the Fair Work Act.

Craig's Engineering Pty Ltd Employee Collective Agreement

23. The applicant's case depends, in part, upon there being in place during 2013 and early 2014 an enterprise agreement between Craig's Engineering and its employees that did not cover the CFMEU, or any other employee union. Whether such an agreement was in place is in issue between the parties.

24. The evidence demonstrates that an agreement called the *Employee Collective Agreement For Craig's Engineering Pty Ltd* was lodged with the Workplace Authority Director on 21 November, 2007.

25. In 2007 an employer could make an agreement in writing with persons employed at the time in a single business (or part of a single business) of the employer whose employment would be subject to the agreement. By s.327 of the *Workplace Relations Act* 1996 (Cth) such an agreement was described as an *employee collective agreement*.

26. Exhibit 1 in these proceedings is a certified, but unexecuted copy of a document entitled "EMPLOYEE COLLECTIVE AGREEMENT FOR CRAIGS ENGINEERING PTY LTD". The certification on exhibit 1 is in the following terms;

> *I James Strang, Assistant Director, Workplace Relations Advice and Pay Tools, of the Fair Work Ombudsman certify for the purposes of section 156 of the Evidence Act 1995 (Cth), that this is a true and correct copy of Craig's Engineering Pty Ltd Employee Collective Agreement, ID Number WPA/Old ID: CAEN073880513 which the Fair Work Ombudsman retains custody of.*

[Signed] 10/6/16

27. Another copy of the agreement appears as annexure ER-5 to the affidavit of Elizabeth Rakitovszky filed on 15 June, 2016. Page 11 of that document provides a section for both a "Representative of the Employees" and the "Employer" to sign. There are no signatures on that page, but the certification to which I have earlier referred appears on that document as well.

28. It is this agreement that the applicant relies upon to prove this aspect of its case. The respondents argue that the applicant has not sufficiently proved the existence or validity of the agreement and so the applicant's case must fail.

29. The statutory regime that applied to the approval of employee collective agreements generally when the Craig's Agreement was made is relevant. That approval scheme is found in the now repealed Workplace Relations Act 1996. Subsection 340(2) of that Act relevantly provided (emphasis in original):

> *(2) An employee collective agreement or union collective agreement is* **approved** *if:*
>
> > *(a) the employer has given all of the persons employed at the time whose employment will, or would but for the operation of an ITEA that has passed its nominal expiry date, be subject to the agreement a reasonable opportunity to decide whether they want to approve the agreement; and*
> >
> > *(b) either:*
> >
> > > *(i) if the decision is made by a vote--a majority of those persons who cast a valid vote decide that they want to approve the agreement; or*
> > >
> > > *(ii) otherwise--a majority of those persons decide that they want to approve the agreement.*

30. Relevantly, s.342(1) of the Workplace Relations Act provided:

> ***342 Employer must Lodge certain workplace agreements with the Workplace Authority Director***
>
> *(1) If an ..., an employee collective agreement ... has been approved in accordance with section 340, the employer must*

lodge the agreement, in accordance with section 344, within 14 days after the approval.

31. Section 344 of the Workplace Relations Act provided:

> *(1) The employer in relation to a workplace agreement lodges the workplace agreement with the Workplace Authority Director if:*
>
> *(a) the employer lodges a declaration under subsection (2); and*
>
> *(b) the workplace agreement:*
>
> *(i) in the case of an ITEA--meets the signature requirements of subsection 340(1); or*
>
> *(ii) in the case of a collective agreement--meets the signature requirements of regulations made for the purposes of paragraph 418(e); and*
>
> *(c) a copy of the signed agreement is annexed to the declaration.*
>
> *(2) An employer lodges a declaration with the Workplace Authority Director if:*
>
> *(a) the employer gives it to the Workplace Authority Director; and*
>
> *(b) it meets the form requirements mentioned in subsection (3).*
>
> *(3) The Workplace Authority Director may, by notice published in the Gazette, set out requirements for the form of a declaration for the purposes of paragraph (2)(b).*
>
> *...*

32. Subsection 418(e) of the Workplace Relations Act provided that the regulations that might be made pursuant to that Act might make provision in relation to the signing of workplace agreements by persons bound by those agreements, or representatives of those person. The *Workplace Relations Regulations 2006* (Cth) make such provision. Subregulation 8.13(1) and (2), as it was in November, 2007 required an employer to obtain signatures of certain persons to a collective agreement and relevant details of those persons. However, failure to

comply with those subregulations was not fatal. Paragraph (5) of reg.8.13 provides:

> *The validity of a workplace agreement is not affected by a failure to comply with subregulations (1) and (2).*

33. The evidence demonstrates that the Craig's Agreement was lodged with the Workplace Authority Director on 21 November, 2007. It was accompanied by a declaration made on 21 November, 2007 by Danielle Wilkinson, someone said to be "an agent appointed by the employer and given authority to make this declaration". Ms Wilkinson was not called to give evidence, but her declaration was produced as part of the records held by the Fair Work Ombudsman in its role established under the Fair Work Act and as successor to the Workplace Authority Director. The declaration is in rather curious form, but nonetheless, there appears to be a clear declaration that all employees employed at the time whose employment will be subject to the employee collective agreement were given a reasonable opportunity to decide if they wanted to approve the agreement.

34. By reason of the Workplace Relations Act as it stood on 21 November, 2007 when the Craig's Agreement was lodged, the agreement needed to pass the "Fairness Test" prescribed by Division 5A of Part 8 of the Act. When the Agreement was first lodged it was assessed as not passing that test. The Workplace Authority Director required changes to the agreement so that it passed that test.

35. Pursuant to an *Employer Declaration Form* and an *Undertaking to vary a collective agreement in response to the Fairness Test* signed by David Humphrey, a bargaining agent appointed by Craig's Engineering, on 7 November, 2008 the agreement was varied. On 7 November, 2008 a letter was sent to Amy Wilson, Craig's Engineering Pty Ltd. The letter does not include the name of an author, except that it provides at the end of the text "Workplace Authority Director". The changes required were made by an agent of Craig's Engineering giving an undertaking to the satisfaction of the Workplace Authority Director.

36. By correspondence dated 7 November, 2008 the Workplace Authority Director notified Craig's Engineering that the Collective Agreement passed the Fairness Test. The correspondence provided:

> *Your Agreement as changed by your undertaking continues to operate from the date the undertaking was received by the Workplace Authority.*
>
> ...
>
> *This notice relates only to whether or not a workplace agreement passes the Fairness Test. It does not verify that an agreement complies with the other requirements of the* Workplace Relations Act 1996*, for example that it does not contain prohibited content.*

37. Both Mr Lynch and Mr Rainbow gave evidence in cross-examination that they were aware of the Craig's Agreement. Mr Rainbow gave evidence that he had signed the agreement, probably as long ago as 2008 and that he was aware that other employees had signed the agreement. Mr Lynch gave evidence that when preparing tenders for work he had reference to the "EBA" rates of pay. That was a reference to the rates of pay for employees of Craig's Engineering calculated by reference to current enterprise bargaining agreements to which the "Unions" were party or by which they were covered. However, according to the evidence the other terms of the collective agreement were liable to govern the employment of employees of Craig's Engineering.

38. Neither copy of the Craig's Agreement in evidence is signed. But that does not affect the validity of the agreement: reg.8.13(5) of the Workplace Regulations 2006.

39. The respondents submit that there is insufficient evidence to support a finding that there was a "Craig's Engineering Pty Ltd Collective Agreement", that it was approved in the way required by the Workplace Relations Act and even if there was, that there is insufficient evidence to support a finding that the agreement did not cover the CFMEU.

40. Senior counsel for the applicant argued that the evidence did establish that the Craig's Agreement was approved and that it did not cover the CFMEU. *First*, he pointed to the declaration by Danielle Wilkinson that the relevant requirements of the Workplace Relations Act had been satisfied. *Second*, he argued by reference to s.341 of the Workplace Relations Act that it was a contravention of that Act for an employer to lodge with the Workplace Authority Director a workplace agreement

that has not been approved in accordance with s.340 and I should presume that Craig's Engineering acted in accordance with the law. *Third*, s.342(1) of the Act imposed an obligation on Craig's Engineering to lodge the employee collective agreement in accordance with s.344 of the Act within 14 days after its approval and there was evidence that it had been lodged as required. *Fourth*, the documents produced by Ms Rakitovszky established that Craig's Engineering lodged the employee collective agreement in accordance with s.344 of the Act. *Fifth*, Craig's Engineering had acted in accordance with the agreement as the evidence of Mr Lynch and Mr Rainbow demonstrated. *Finally*, the fact that the agreement appeared unsigned did not affect its validity.

41. Further, I was taken by senior counsel for the applicant to a paragraph in *Shop Distributive and Allied Employees Association v Karellas Investments Pty Ltd* (2008) 166 FCR 562 where the Full Court of the Federal Court of Australia explained the operation of the provision in the Workplace relations Act that gave operative force to an employee collective agreement and the way in which non-compliance with s.340(2) of the Act (relating to approval) impacted upon the operation of the agreement:

> *25. Of greater current importance is the question of whether Karellas' failure to satisfy the requirements of s 340(2)(a) (if it did so fail) meant that the employee collective agreement that it lodged with the Employment Advocate on 1 May 2007 had not been "made". Plainly, one of the requirements that would enable it to be said that the agreement had been approved, for the purposes of the Act, would not have been met.* ***Nonetheless, the agreement came into operation, in accordance with its terms, on and from the date of its lodgement. Section 347(2) so provided. By s 351, it was and remains binding on the employer and its relevant employees.*** *If it is alleged that such an agreement has not been approved, a person who has standing under s 405 may seek certain forms of redress. One of them, as already noted, is the imposition, on the employer, of a civil penalty under s 341. Another is an order, under s 409(a) of the Act, declaring that the workplace agreement is void). Any such order operates prospectively: see s 412(1).*
>
> *26. This review of the legislative provisions leads strongly to the conclusion that Parliament intended that an employee collective agreement will be treated as having been made and having come*

into operation notwithstanding a failure, on the part of the employer, to meet its obligations under s 340(2) of the Act. In this respect employee collective agreements may be contrasted with multiple business agreements, which according to s 347(3) of the Act, only come into operation if a necessary precondition has been satisfied.

...

28. Having regard to this legislative scheme, it cannot be said that for the purposes of the Act, an employee collective agreement has not been made on the basis that one of the preconditions for treating it as having been approved by the relevant employees has not been met. ...

(my emphasis)

42. I am satisfied that there was an agreement made between Craig's Engineering and its employees that was an *employee collective agreement* for the purposes of the Workplace Relations Act. I am satisfied on the balance of probabilities that the agreement was approved as required by s.340(2) of Act. I am satisfied that Craig's Engineering was bound by the Craig's Agreement as were all persons whose employment was subject to the agreement. I am satisfied that the Craig's Agreement did not cover the CFMEU. It was an agreement that was in force as a consequence of the *Fair Work Transitional Provisions and Consequential Amendments Act 2009* (Cth). It was a transitional instrument which continued in existence despite the repeal of the Workplace Relations Act. It was continued in validity by the Fair Work Act (by schedule 3 and schedule 12).

43. I am satisfied that in 2013 and 2014 the employees of Craig's Engineering were covered by the Craig's Agreement, as was Craig's Engineering. The collective agreement did not cover the CFMEU or the Builders Labourers' Federation. It was in force as at the time the Bracing and Waler Works were undertaken by Craig's Engineering and at the time Craig's engineering tendered for the Structural Steel Works.

The Bracing and Waler Works

44. The third respondent gave evidence that in his role as contracts administrator for the project he was responsible for:

a) identifying the subcontractors that needed to be engaged to complete the project; and

b) overseeing the tendering processes required to engage subcontractors to perform the work.

45. The third respondent gave detailed evidence about the tendering process for projects generally. He said that he created a short list of around five to ten potential tenderers based on appropriate criteria and advice from and conversations with relevant persons. He then contacted the companies on the short list and invited them to submit a price by using a particular program called "Aconex". After each tenderer submitted a price, he would consider each tender, with particular attention on determining whether they had properly understood the proposed work on the project. In the event of any apparent misunderstandings, he would contact the tenderers directly to discuss their tender.

46. The third respondent said that he recommended Craig's Engineering for the Bracing and Waler Works because he was satisfied that it had the capacity to perform the Bracing and Waler Works and could perform those works most efficiently at the best price.

47. In April, 2013 the first respondent entered into a contract with Craig's Engineering for the Bracing and Waler Works. A copy of the Bracing and Waler Works contract is contained in annexure SW-3 to Ms Sharon Wolff's affidavit filed on 9 November, 2015. The contract is signed by the "subcontractor" but not by the relevant officer of the first respondent. That is because the copy of the contract in evidence appears as an attachment to an email sent by the third respondent to Mr Lynch on 27 March, 2013.

48. The contract relevantly provides (my emphasis):

> *The Subcontractor shall provide all necessary labour, materials, tools, plant, and equipment* ***as required and inferred by the specification, drawings, Scope of Works, conditions of contract, the relevant Australian Standards, codes & statutory requirements and other documentation*** *to complete trade related works to DoubleOne 3 Apartments Project.*
>
> ...

4.0 TRADE SPECIFIC

…

4.2 ***The Subcontractor is to allow to procure, fabricate, deliver to site, and install the diaphragm wall bracing & walers, including all welding, grinding, bearing plates, "U-bolts" bearing seats, angles, side plates, bracing, angles, brackets, stiffeners, ties, flanges and similar as required to complete the works.***

4.3 The Subcontractor has allowed for all cranage, labour, materials, plant and equipment, (including all access equipment), including the establishment or movement of plant, material and equipment as required to complete the installation at the diaphragm wall bracing & waler works.

4.4. The Subcontractor is to allow to remove and disposal of the diaphragm wall bracing & walers including the cutting off of exposed bolts to remove the hazard. Please note that the OVC lower crane will be operational at this point, so cranage for the removal works only will be by DVC.

4.5. The Subcontractor has allowed for all labour, materials, plant and equipment, (including all access equipment), including the establishment or movement of plant, material and equipment as required to complete the removal of the diaphragm wall bracing & waler works.

4.6. The Subcontractor shall allow for all levelling nuts, shims and packers under steel members, chemical, anchors and masonry fixings, all as required.

4.7 The Subcontractor shall allow for all grouting under or behind base plates walers and the like.

4.8 Allow to supply & install all HD bolts (chemsets or approved equivalent) as required and in accordance with the construction program.

4.9 Allow to supply all cast in elements & HD bolts (chemsets or approved equivalent) as required and in accordance with the construction program to be installed by others.

…

4.26 The Subcontractor acknowledges and accepts all site access and conditions.

...

49. It is in relation to these works that the applicant's first contention that the first respondent contravened the Fair Work Act arises. The applicant pleads that on 25 July, 2013 the first respondent refused to make use of, or agree to make use of, the services of two employees of Craig's Engineering that Craig's Engineering had intended to, and had offered the first respondent to, perform under their contract *because* Craig's Engineering:

a) had the benefit of an enterprise agreement that did not cover the CFMEU; and/or

b) had not exercised its workplace right to make an enterprise agreement that would or might cover the CFMEU; and/or

c) did not have an enterprise agreement that covered the CFMEU.

50. It also pleads that the first respondent discriminated against Craig's Engineering by refusing to allow Craig's Engineering workers to perform duties under the Bracing and Waler Works contract on 25 July, 2013 because the employees of Craig's Engineering were not covered by an enterprise agreement that also covered the CFMEU.

51. In the afternoon of 9 July, 2013 the fourth respondent sent an email to an email address group titled "Devine Constructions" in the following terms:

For your information

Use the information below as a guide only, consult respective Unions or QMBA for the latest up to date information on Company status.

Regards

Wayne Sengelman

52. Below the excerpt of that email there is an email from "Darcy murdoch" to the fourth respondent also dated 9 July, 2013, which refers to an "updated list". Below that email is an email from "Michelle Clare" to Darcy Murdoch also dated 9 July, 2013 which refers to an attached "EBA list". The document attached to the email is

titled "Signed EBA Companies As at 12 June 2013". It contains several headings such as "Builders", "Formworkers", "Steelfixing" and so on. Under the headings are lists of what appear to be company names with dates next to those names. The evidence of the fourth respondent was that Michelle Clare was an industrial relations officer of the Builders Labourers Federation and that the Builders Labourers Federation became integrated in the CFMEU and later became known as the "Construction and General Division of the CFMEU". According to the fourth respondent, that amalgamation did not occur until sometime after July, 2013. The second respondent said that the amalgamation did not occur until 2014. The evidence does establish when the BLF formed part of the CFMEU. But it does not matter.

53. In cross-examination the fourth respondent accepted that he sent the email dated 9 July and that the email was "a broadcast email to all employees of Devine Constructions". He said that he had asked for the "EBA list" because he wanted a list of active subcontractors in the market at that time and not because it "is a list of those who have got agreements with the CFMEU".

54. The second respondent says that he was a recipient to that email. In his affidavit filed on 14 December, 2015 relevantly he says that:

    a) he appreciated the list contained information that had been compiled by someone in the CFMEU about whether that person thought the named company had an enterprise agreement (at paragraph 11.7);

    b) he did not understand the email "to be any sort of instruction, direction or even advice from the Fourth Respondent to me to use or not use the particular contractors within that list"; and

    c) he "did not give any employees of the First Respondent any direction or instruction about how to use the information in the EBA List Email".

55. The applicant submits that the 9 July email "should be understood as an instruction to not engage contractors unless they had a CFMEU Agreement, to use the attached list from the CFMEU as a guide, but to confirm that its contents were up to date before relying upon it". I

accept that is a fair construction of the email. The text of the email is to that effect. It was an instruction to consult the list but, by implication at least, to ensure that the information in the list was accurate. Having regard to the content of the list, the reference to "Company Status" is, on balance, a reference to the status of the company having an EBA with the CFMEU.

56. At 5:52pm on 23 July, 2013 the fourth respondent sent an email to the second respondent in the following terms (emphasis and errors in original):

> *Hi Mike*
>
> *Subject: 113 contractor not compliant*
>
> *As discussed, please find below and attached details of Craigs Engineering's contract sum, scope and schedule as follows:*
>
> • *Owner* *Craig Douglas 074 0408 206*
>
> • *Contract sum* *$60,000 ref: attached letter of intent*
>
> • *Structure steel* *supply & install - temp Braces and Walers*
>
> • *Work Agreement* *AWA*
>
> • *Duration* *approx 2 days - set out/rig/grout*
>
> • *Due onsite* *Saturday 27.7.13*
>
> • *Other Project* *currently working on Mater childrens hospital and previously worked on Hamilton Harbour H1 H2 H3*
>
> •
>
> ***Brief State of play***
>
> *Chad the BLF organizer has indicated craigs are "black" and the unions will do everything in their power to stop Craigs from coming onsite,*
>
> *However, Chad will allow steel to be delivered by Craigs with alternate compliant labour to install.*
>
> *Chad is also happy to discuss and resolve with Craigs.*
>
> *Craig Douglas the owner, whom I spoke with today, will contact Chad tomorrow to discuss.*

Spoken to Andrew Sutherland and he was going to contact Chad (BLF) and Craigs to resolve.

I certainly don't want this to turn into a battle its not worth it, given the duration and sum of the works.

If the two parties can't come to an amicably resolution for the two days of work, I will firstly consult you on the matter with the intent of approaching Craigs (off the record) to supply alternate labour and craneage to install. steel.

Regards,

Wayne Sengelman

57. Mr Andrew Rainbow was employed as a project manager by Craig's Engineering for the relevant period of time. He says that his responsibilities included (at paragraph 5 of his affidavit):

a) Preparing and submitting quotes and estimations on behalf of CE;

b) Organising and overseeing work of CE employees;

c) Overseeing the installation of steel on projects; and

d) Preparation of safe work method statements for CE projects.

58. Mr Rainbow said that on 25 July, 2013 he attended the project site with another employee, Mr Jason Smith. The purpose of Mr Rainbow's attendance, he says, was "to attend a site induction in order to carry out works associated with the Bracing and Walers Package". Upon Mr Rainbow's arrival, Mr Smith said to him words to the effect of "This guy Darcy over here said he is not going to let us on site". The man referred to as "Darcy", is, according to the evidence of the fourth respondent given in cross-examination, Darcy Murdoch, a labourer for the first respondent and the CFMEU union delegate on the project at the time. According to Mr Rainbow, he and Mr Murdoch had the following exchange (at paragraphs 11 and 12 of his affidavit):

Murdoch: You boys from Craig's cannot come on site. If you try to work on site the whole job site will walk. Craig's are not signed up to our EBA.

Rainbow: That's not my problem, go see Wayne [Sengelman]. We are here to do our induction and drop off and mark out steel works.

59. Mr Rainbow and Mr Smith then entered the project site and commenced their work. Mr Rainbow said that he was told that the fourth respondent wished to speak with him. He and the fourth respondent had the following conversation (at paragraph 15 of his affidavit):

> *Sengelman: "What are we going to do about this? They are not going to let you on site to do any work because you don't have a union EBA."*
>
> *[Rainbow]: "We have your hold down bolts here. We are ready to mark out. You're pouring the slab tomorrow. It's not my problem; it's your problem."*

60. According to Mr Rainbow's evidence, the fourth respondent left his office and about five minutes later returned. Mr Rainbow and the fourth respondent then had a further exchange to the following effect (at paragraph 17 of his affidavit):

> *Sengelman: "We can take your hold down bolts off but Jason is not allowed to touch them. He is not allowed to do any work here. You guys aren't allowed to do any work here."*
>
> *[Rainbow]: "Everything is not going to be marked out ready for your pour then. Devine can do the marking out. I will be their foreman and Jason can be the delivery driver."*

61. Mr Rainbow said that he remained on site for the day and instructed a "Devine foreman how to mark out the site", a job which "would normally have been undertaken by a CE employee".

62. At 8:57am on 25 July, 2013 the fourth respondent sent an email to the second respondent in the following terms (emphasis and errors in original):

> *Mike*
>
> ***RE: Craigs non union EBA Agreement***
>
> *Managed to get Craig's Engineering and the Union (chad) talking yesterday.*

Basically, as of this morning, I'm getting two conflicting outcomes from their discussions.

Craigs is saying all is okay and their working through the matter and

Chad is still adamant he will not let Craig's onsite and that DVC/Craigs need to cross hire the onsite works.

Events this morning at 6.30am

Two Craigs employees turned up this morning for inductions and to set up cast ins bolts for our next slab pour (photo attached)

Chad wanted them gone or he was going to "pull the site" I managed to convince him that Craigs were here on a supervisory capacity only, and that steel fixers would be installing bolts.

Does the means justify the end

DVC could fight this battle alongside with Craigs and have the steel eventually installed, however DVC will have to live with the aftermath, not Craigs

My intent is to speak with Craig the owner of Craigs Eng to come to an arrangement wher he out sources plant and labour to install steel.

63. At 11:38am on 25 July, 2013 the second respondent sent an email to the fourth respondent in the following terms:

I have left a message for Closey to call me

64. At 2:24pm on 25 July, 2013 the fourth respondent sent an email to the second respondent in the following terms:

Update

Spoke with Craig Douglas from Craigs engineering in an attempt to go forward with this issue, long story short.

In light of what happened this morning with the unions and looking at his company's future, Craig's had a realization he needs to "sign" and so he is going to call Chad up again to resolve.

Craig still adamant Chad has gone back on his word, he believes Chad was fine with everything they both spoke and agreed with last night.

I suggested he has both CFMEU and BLF involved in the talks and agreements.

He agreed on my strategy, so I have contacted Andrew sutherland who will ring him and sort this arvo, hopefully.

Also reminded him on the "give and take" relationship we have with the project and the time/cost of the works.

65. At 2:34pm on 25 July, 2013 the second respondent sent an email to the fourth respondent in the following terms:

Mate keep this up and you will finish up in the diplomatic corp

66. Both the second respondent and fourth respondent were cross-examined about these emails. The fourth respondent could not remember many of the details although he accepted that he wrote those attributed to him. Despite his difficulty with recalling the emails and the circumstances in which he came to write them, in cross-examination the fourth respondent said or accepted that:

a) the reference to "contractor not compliant" in the subject lines of the emails is that the contractor did not have "an agreement with the CFMEU or BLF";

b) he was told by someone else what "Chad" had said and he took seriously what had been communicated to him about what had been said by "Chad";

c) it was Craig Douglas (the owner of Craig's Engineering) that initially suggested that Craig's Engineering would be approached "off the record to supply alternate labour and crainage to install steel" – it was not the idea of the fourth respondent;

d) he never spoke to Chad Bragdon about the matters discussed in the emails. The only "union bloke" that he spoke to was Andrew Sutherland. Later he accepted that he also spoke to Peter Close, "the assistant secretary of the CFMEU";

e) the phrase in the email "I managed to convince him that Craigs were here on a supervisory capacity only …" was a "bad choice of words"; and

f) by the phrase "fight the battle" he meant to "take on the union who were wrongly insisting that Craig's couldn't work onsite because they didn't have a union EBA agreement".

67. The fourth respondent denied that he coached or coerced Craig's Engineering in any way to enter into an EBA with the CFMEU or BLF.

68. In relation to the first email, the second respondent said at paragraph 18 of his affidavit filed on 14 December, 2015 that:

a) he did not have any clear understanding of the nature of the issue between Craig's Engineering and the CFMEU. He thought that it could have been any one of a wide variety of issues that tend to arise between a union and a subcontractor. He specifically referred to "bad blood" between the two arising out of "industrial conflict" from a prior construction project, although did not suggest that it was the reason for the issues at the time; and

b) the fourth respondent had a sufficient delegation of authority to deal with the issue between Craig's Engineering and the CFMEU without the need to obtain permission or direction from the second respondent and he did not discuss with the fourth respondent, or anyone else, the matters identified therein.

69. In respect of the second email, the second respondent said that he never gave the fourth respondent or anyone else any directions as to how to deal with Craig's Engineering prior to receiving the email.

70. The second respondent said that he contacted Mr Peter Close after receiving the second email. He said that he contacted Mr Close to "try to avoid any industrial issues causing a delay to the Project because of any bad blood between the CFMEU and CE". The substance of the conversation, the second respondent says, was to the effect of:

> *Tucker: "Closey, there seems to be an issue with Craig's on 113, mate it is $60k worth of work and Craig's have the contract for it, so let's get on with it and leave it alone."*

Close: "Yeah ok. I'll see"

71. The second respondent says that Mr Close did not confirm what the issue was between CFMEU and Craig's Engineering. The second respondent says that he "did not know that the CFMEU did not want CE to perform work on the Project because CE did not have a CFMEU Agreement". However, he accepted that in speaking to "Chad" and Mr Close he was communicating with both or either of the two unions.

72. In cross-examination the second respondent was taken to the emails dated 23 and 25 July, 2013. He was asked what he understood the emails to mean, particularly:

    a) the subject "113 - non compliant contractor - Craigs Engineering" and "Subject: 113 contractor not compliant"; and

    b) the sentence, "However, Chad will allow steel to be delivered by Craigs with alternate compliant labour to install".

73. In response the second respondent said "There's nothing in this that says that there's an issue with an EBA, as far as I'm concerned". His evidence was that he did not think about them at all. He said that he did not understand the subject lines to mean that Craig's Engineering "did not have an EBA with the CFMEU". He denied that that terminology was used within the first respondent's business, albeit he qualified his response by saying "at that stage". His evidence about his understanding of the emails was that they referred to complications that Craig's Engineering had with the CFMEU (or BLF) whilst working on a project at the Mater Children's Hospital. According to the second respondent, "A lot of subcontractors that had worked on that project were not recommended by the unions after that". He said that the words "compliant labour" did not mean anything to him.

74. The second respondent seems to suggest that the emails were in response to a request from him that the fourth respondent "give me a brief summary of the contract as he sees it, meaning the price and everything else, what they were doing there". He denied that the 23 July email identified that there was a "problem". Instead he said that the email was "giving me a heads up on what the contract issue is" and that "there might be a problem at some stage".

75. However, by the time of the 25 July emails, the second respondent accepts that there was "the making of a problem". He accepted that he understood the text under the heading, "Does the means justify the end", in the first 25 July email to mean that the first, second and fourth respondents "could do the right thing and fight the battle, but it will cost Devine more than it will cost Craig's to do that". The second respondent accepted that there was an alternative to fighting. The transcript reveals: (T64 line 39 – 44):

> *That's right. You see that. And, in effect, is he not saying, "Rather than fighting this battle alongside with Craig's, what about we roll over and I will convince Craig's to do something different"?---You could take that in .....*
>
> *Well, did you?---Reading it there, that would be one way of getting around the big issue. Yes.*

76. In re-examination the second respondent said that he did "fight" the unions with Craig's Engineering because he "phoned the unions up and said go away".

77. In response to the fourth respondent saying in the second 25 July email that "Craig's had a realization he needs to "sign" …" the second respondent accepted that he understood part of that to mean that "Mr Douglas realised that he was in a position where he had to go and get an EBA with the CFMEU".

78. In respect of the statement, "I managed to convince him that Craigs were here on a supervisory capacity only …", the second respondent said that the employees of Craig's Engineering were "probably not" on site on 25 July in a supervisory capacity only.

79. The second respondent's evidence was that no one informed him that there was no longer an issue regarding employees of Craig's Engineering conducting work on the project site. He seemingly took no further action after leaving a message for Mr Close because people stopped reporting problems to him.

80. The second respondent conceded that he was aware that the CFMEU did not want Craig's Engineering to perform work on the project site. Whilst the second and fourth respondent did not directly admit these

matters, I am satisfied that the second and fourth respondents (and therefore the first respondent) knew:

a) that the CFMEU did not want Craig's Engineering to perform work on the project site because Craig's Engineering did not have a CFMEU agreement;

b) the fourth respondent told the CFMEU that Craig's Engineering would not install bolts on the project site;

c) the fourth respondent informed the second respondent of the above matters by email on 23 and 25 July, 2013; and

d) on 25 July, 2013 the second respondent contacted Mr Close to discuss the CFMEU's concerns regarding Craig's Engineering performing work on the project site.

81. In cross-examination Mr Rainbow said that the workers on the project site on 25 July, 2013 "were marking out and installing the same day". Senior counsel for the respondents cross-examined Mr Rainbow about the process of installing the hold down bolts. His evidence was that the bolts were required to be put in place before the slab of concrete was poured, thus securing the bolts. He gave the following evidence (T39 lines 35-47 and T40 lines 1-27):

> *You had a second discussion with Wayne Sengelman, didn't you?---I spoke to him after that. Yes.*
>
> *Yes. And the two of you had a problem, didn't you?---We did.*
>
> *And it was you who came up with the solution?---I did.*
>
> *And the solution was a very practical one, wasn't it?---Mmm.*
>
> *And the solution was that Jason could drive the vehicle on the site and drop off the bolts?---Yes.*
>
> *First stage. Jason could then go back to the Craig's factory. Correct?---Yes.*
>
> *And, presumably, he did productive work back there?---Yes.*
>
> *And you remained on the site, and you showed the Devine personnel where the marks were to go on the diaphragm?---Yes.*

So you spent the day there, and you directed the marking out?---Correct.

And that was a practical way that you proposed to get around the threat of a site walkout?---Correct.

And Wayne Sengelman agreed with your suggestion, and that's how it happened?---Correct.

Now, what that meant was that the project wasn't held up by a walkout?---Correct.

Correct?---Yes.

And it meant that Craig's were able to deliver the bolts as they had intended?---Correct.

Craig's were able to ensure that the placement of the bolts was marked out where Craig's wanted them to be - - - ?---Yes.

- - - because you oversaw that?---Yes.

And Craig's were able to ensure that the bolts were, therefore, in the position that they needed to be for when Craig's came back to place the beams? --- Correct.

82. Mr Rainbow accepted that the job was completed, the job passed, and Craig's Engineering was paid in full. He accepted that nothing that the first respondent did slowed down the progress of work performed by Craig's Engineering. His evidence was that any obstruction to their work was because of the "union people". The first respondent, Mr Rainbow accepted, had worked with him to enable the work to get done in light of the "hassles" from the union. The "union threat" was only made to Mr Rainbow on the one occasion – 25 July, 2013. Because of the solution that he proposed to the fourth respondent and later implemented, a "head-to-head conflict with the union that day" was avoided. In respect of the later days that employees of Craig's Engineering attend the project site, Mr Rainbow said that there were no further hassles and the Craig's Engineering employees could carry out the work they were required to perform.

83. The second respondent gave evidence that employees of Craig's Engineering performed their duties under the contract on 25 July, 2013. He said that their duties involved the delivery of hold down bolts and

"supervision of the marking out of the site and providing instructions while the Site was being marked out for the Bracing and Waler Works". But those services were not the services that the first respondent had contracted Craig's Engineering to perform (see clauses 4.8 and 4.9 of the subcontract set out above). They are the works and services that Mr Rainbow suggested could be performed by Craig's Engineering together with the first respondent's employees so as to avoid the "union people".

84. The second respondent gave evidence that the project site was not ready for the installation of the hold down bolts in the morning of 25 July, 2013. He said that was because the slab was not poured until after 25 July and Craig's Engineering's "offer" on 25 July, 2013 to install the hold down bolts could not have been accepted by the first respondent. However, I cannot accept that evidence because the weight of the evidence is that the site was ready to be marked out and that is why Mr Rainbow and his off-sider were there. The bolts were to be positioned ready to take "the beams" before the concrete for the relevant slab was poured. That is consistent with the email sent by the fourth respondent at 8:57am on 25 July, 2013 which acknowledged that:

> *Two Craigs employees turned up this morning for inductions and to set up cast ins bolts for our next slab pour (photo attached)*

85. On 30 July, 2013 Mr Rainbow received a telephone call from Mr Harin Paw. Mr Paw, at relevant times, was an employee of the first respondent engaged in the position of Project Engineer. Mr Rainbow said that he had the following conversation with Mr Paw (at paragraphs 21 and 23 of his affidavit):

> *Paw: "Devine are ready for Craig's to come back and set the chem studs. Have you guys sorted out your EBA problem?"*
>
> *[Rainbow]: "Craig [Douglas] is looking in it. Nothing has happened with it. You can't just get one and go sign it. Your employees have to sign it; it has to be approved. You can't just do it in a couple of days."*

86. The applicant suggests that in that conversation with Mr Rainbow, Mr Paw "inferred that CE would not be allowed to complete the works until CE had a CFMEU Agreement". The applicant pleads that the second part of the following conversation refers to the progress of

Craig Douglas's dealings with the CFMEU (paragraph 23 of Mr Rainbow's affidavit):

> *Paw: "Where is Craig with it?"*
>
> *[Rainbow]: "I haven't spoken to him about it. You will have to talk to him yourself ... You will have to get Wayne to talk to Craig."*
>
> *Paw: "Alright then."*

87. I am satisfied that the earlier portion of that conversation, extracted above in these reasons (at paragraph 21 of Mr Rainbow's affidavit), was in relation to Craig's Engineering's "EBA problem".

88. Mr Rainbow said that "later on that day", on 30 July, 2013 he had the following conversation with the fourth respondent (at paragraph 25 of his affidavit):

> *[Rainbow]: "Craig has sent an expression of interest to the CFMEU but we haven't heard anything back. You can't just instantly signed up to an EBA. We don't know what rates they pay. What are the CFMEU/BLF rates for boilermakers? Because I've had a look at their EBA rates and they don't have any rates for boilermakers. How can we have an EBA with them if they don't have any rates for boilermakers? Go back and ask them what rates we are supposed to be paying."*
>
> *Sengelman: "Okay. I don't know. I'll find out."*

89. As previously mentioned, on 26 July, 2013 Mr Paw was forwarded the email chain between the fourth respondent and the second respondent dated 23 and 25 July, 2013. Mr Paw did not give any evidence in relation to this.

90. The respondents in their written submissions refer to several terms of the Bracing and Waler Works contract, as extracted above, and particularly emphasise the use of the phrase "as required" in several clauses to establish that "the services of CE under the Subcontract were to be performed as required by the First Respondent". Further, they submit that it was not a term of the contract that the employees of Craig's Engineering were to perform all work connected with the Bracing and Waler Works, with specific reference to the marking out of the site for subsequent installation of the hold down bolts.

Consideration – the bracing and waler works claims

91. The applicant submits that the Court should find that the first respondent took adverse action against and discriminated against Craig's Engineering by refusing to accept its offer to deliver hold down bolts onto the site and then to mark out the steel works to prepare for installation of the hold bolts. The applicant pleads that neither Mr Rainbow nor Mr Smith performed the duties that Craig's Engineering had intended them to perform.

92. The respondents' argument is put in the alternative. *Firstly*, Craig's Engineering did not offer services on 25 July, 2013. The services that the applicant contends were *offered* were provided for under the Bracing and Waler Works contract, which does not amount to an *offer*. Mr Rainbow and Mr Smith did nothing more and nothing less than they were obliged to do by their employer's subcontract with the first respondent. *Secondly*, if the conduct of the Craig's Engineering employees was tantamount to *services offered by the independent contractor* then there was no refusal because those employees performed the relevant services. The respondents submit that those services were:

a) to deliver the hold down bolts to the project site;

b) to oversee the delivery of the hold down bolts; and

c) to oversee employees of the first respondent to mark out the site for the later installation of the hold down bolts.

93. The applicant relies on three particular circumstances to support its contentions. *First*, the conversations involving Mr Andrew Rainbow, Mr Darcy Murdoch, and the fourth respondent, which purportedly demonstrate that Mr Murdoch and the fourth respondent refused to allow employees of Craig's Engineering to work on the project site. *Second*, an email from the fourth respondent purportedly to employees of the first respondent "impliedly instructing them to ensure that subcontractors were covered by enterprise agreements to which the CFMEU was a party". The respondents deny that the email constituted such an instruction and deny that the email was received by the recipients to it as such an instruction. *Third*, an email from the fourth

respondent to the second respondent in which reference is made to Mr Chad Bragdon, "of the CFMEU", who allegedly informed the fourth respondent that Craig's Engineering "was not to perform any work on the Site because they did not have a CFMEU Agreement".

94. The applicant claims that the respondents' actions on that day caused two relevant impacts, namely:

a) that Craig's was prohibited from performing the contract it had with the first respondent in the way in which it was intended to do; and

b) that the events of 25 July were considered in the subcontractor comparison document in relation to the structural works contract dealt with later in these reasons.

95. The applicant submits that the fourth respondent, Mr Sengelman, is liable under s.550 for this contravention.

96. The first issue to be addressed, I think, is whether the first respondent, through Mr Sengleman, took any adverse action against Craig's Engineering. The respondents argue that he did not and so the applicant does not have the benefit of the operation of s.361 of the Fair Work Act. Notwithstanding that argument, if the respondents' argument is correct, then no occasion for the application of s.361 of the Act arises because there has been no adverse action for the purposes of s.340 of the Act and the applicant's case on this point would fail.

97. It is worth recalling the text of the relevant item in s.342 of the Fair Work Act which defines *adverse action* for the purposes of that Act. Stated in a direct way, and adding in references to the actors in these proceedings, the relevant text is:

> *Adverse action is taken by the first respondent against Craig's Engineering, if the first respondent refuses to make use of services offered by Craig's Engineering.*

98. I accept that the services offered by Craig's Engineering on 25 July, 2013 are set out in the evidence of Mr Rainbow. I am satisfied that Mr Rainbow and Mr Smith, as employees of Craig's Engineering, presented to the project site on 25 July, 2013 ready to perform the

services that their employer had contracted to perform for the first respondent. Their presentation for that purpose was clearly, in my view, an offer to perform the services that Craig's Engineering had promised to perform under the subcontract. That they were services that Craig's Engineering were otherwise contracted or obliged to perform is nothing to the point. The work they intended to do – deliver the hold down bolts to site and mark out the positions of the bolts ready for the concrete was work that Craig's Engineering was contractually obliged to perform and they were on site offering services – namely the performance of the contract. So much appears from clauses 4.2 and 4.8 of schedule 3 to the Scope of Work for the Bracing and Waler Works contract. The marking out for the placement of the hold down bolts was an integral part of installing those bolts as required by clauses 4.2 and 4.8. The contrary was never suggested.

99. The respondents submit that it was not a term of the contract that employees of Craig's Engineering would perform all work connected with the Bracing and Waler Works. They emphasise that the contract provided that the services of Craig's Engineering were to be performed *as required*. On their case, Mr Rainbow and Mr Smith attended the project site on 25 July, 2013 to deliver the hold down bolts to the site and to mark out the site for the later installation of the bolts. They argue that the evidence does not demonstrate that the employees of Craig's Engineering attended the site to install, or to offer to install, the hold down bolts and that the work which was done by the first respondent's employees was work that Craig's Engineering either did not have to perform, or it was not *required* to perform for the purposes of its subcontract.

100. However, there are difficulties with this argument. The phrase *as required* where it appears throughout the Scope of Work for the Bracing and Waler Works contract is, in my view, a reference to the provision of goods and services "as required and inferred by the specification, drawings, Scope of Works, conditions of contract, the relevant Australian Standards, codes & statutory requirements and other documentation to complete trade related works to DoubleOne 3 Apartments Project" as provided for in the subcontract. It was not a reference to the first respondent's ad hoc requirements that might be made from time to time. The only relevant qualification upon the work

to be undertaken by Craig's Engineering was that it be undertaken "in accordance with the construction program" (see clauses 4.8 and 4.9 for example) and that it be necessary "to complete the works". To read the phrase *as required* where it appears in the subcontract in the way in which the respondents contend is inconsistent with the context in which that phrase appears throughout the subcontract.

101. I am satisfied that Mr Sengleman refused to let the Craig's Engineering employees perform the services that they offered to perform on behalf of Craig's Engineering. Mr Rainbow's unchallenged evidence that Mr Sengleman said to him, "We can take your hold down bolts off but Jason is not allowed to touch them. He is not allowed to do any work here. You guys aren't allowed to do any work here." establishes that the first respondent, through the fourth respondent's actions, refused to make use of the services offered by Craig's Engineering in accordance with its subcontract. It is no answer to this finding to say that it was the actions of the CFMEU or its delegate on site, Mr Murdoch, that prevented Craig's Engineering from performing its work. The first respondent was in control of the site and it was Mr Sengleman who directed Mr Rainbow not to perform any work.

102. The respondents place reliance upon the fact that Mr Rainbow came up with and offered a solution to the problem which Mr Sengleman was happy to accept. The respondents submit that in the event that the Court was satisfied that the employees of Craig's Engineering offered services on 25 July, 2013, there was nonetheless no refusal of those services because the employees of Craig's Engineering did in fact perform the services, namely:

a) they delivered the hold down bolts to the site;

b) they oversaw the delivery of the hold down bolts onto the site; and

c) they oversaw the employees of the first respondent marking out the site for the later installation of the hold down bolts.

103. But none of that is to the point. Mr Rainbow's solution was devised by him after the relevant adverse action was taken by Mr Sengleman against Craig's Engineering. Craig's Engineering did not contract to

oversee the delivery of the hold down bolts to the site or to oversee the employees of the first respondent marking out the site for the later installation of the hold down bolts. In offering those solutions, Mr Rainbow was offering a solution to the impasse created by the first respondent and its requirement that Craig's Engineering not perform any work on site. In that respect, the submissions of senior counsel for the applicant aptly summarised the position:

> *... the CFMEU were then threatening Devine's to pull the site and Mr Sengelman was, in effect, standing there saying, "Well, you've got to come up with a solution."*

104. I find that when Mr Sengleman told Mr Rainbow and Mr Smith that "We can take your hold down bolts off but Jason is not allowed to touch them. He is not allowed to do any work here. You guys aren't allowed to do any work here", the first respondent took *adverse action* as defined in item 3(d) of the table to s.342(1) of the Fair Work Act.

105. The applicant must prove on the balance of probabilities that the first respondent took that action *because* of at least one of the reasons identified earlier. The submissions of senior counsel for the respondents were made on the unspoken basis that if the Court found that there was adverse action taken against Craig's Engineering on 25 July, 2013, s.361 of the Act would be engaged and the onus would shift to the respondents to prove to the requisite standard the relevant adverse action was not taken for a proscribed reason.

106. That requires a consideration and determination about the reasons that motivated Mr Sengelman to give the direction that I have found he gave. The Court's task is to identify the "operative and immediate reason for the taking adverse action": *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No.1]* (2012) 2012 CLR 500 at [65], [103]-[104] and [140]; *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) 253 CLR 243 at [19] per French CJ and Kiefel J and at [85] per Gageler J.

107. The respondents submit that Mr Sengleman's refusal was not motivated by the reasons alleged by the applicant, namely that Craig's Engineering:

a) was entitled to the benefit of the Craig's Engineering Collective Agreement, which did not cover the CFMEU or the BLF; and

b) was able to initiate, or participate in, the process of creating an enterprise agreement that would or might cover the CFMEU but had not done so.

108. The respondents submit that the issue for determination is the reason or reasons that motivated the fourth respondent on 25 July, 2013 to act in the way that he did on that day. I accept that submission.

109. The evidence clearly establishes that the CFMEU or the BLF or both did not want Craig's Engineering performing any work on site because there was no relevant EBA with either of those unions. I am also satisfied that the site delegate, Mr Murdoch, had threatened both Mr Rainbow and the first respondent (through amongst others Mr Sengleman) that "the site would be pulled" if Craig's Engineering were permitted to perform any relevant work on the site.

110. The emails that were sent by Mr Sengleman on 25 and 26 July, 2013 make clear that Mr Sengleman knew that the reason why the CFMEU or the BLF objected to Craig's Engineering performing work on the site was because it had no relevant agreement with either of those unions. I accept the applicant's submission that both the fourth respondent and the second respondent knew what the Union was doing was wrong.

111. The respondents argue that although Mr Sengleman's email of 25 July, 2013 identifies Craig's Engineering as "black", there is a "large area of uncertainty" about how Craig's Engineering came to be "black". Senior counsel suggested that it could have related to Craig Douglas's dealings with the CFMEU around that time or what he termed a "legacy issue" carried over from work at the Mater Children's Hospital. Whilst that is a possibility, I do not consider on the evidence that it is probable. That is especially so in light of the broadcast email sent by Mr Sengleman on 9 July, 2013 which specifically had a list of contractors with whom the CFMEU or the BLF had relevant agreements.

112. The respondents submit that even if there was a "ban" of employees of Craig's Engineering from attending the project site, it was a ban imposed by a third party. However, I reject that submission. The words of Mr Sengleman's statement to Mr Rainbow are clear. The direction was imposed by the first respondent albeit as a result of the threats of the CFMEU or the BLF and its delegate.

113. But I am not satisfied that the fourth respondent refused the offer of services of the employees of Craig's Engineering because "Craig's Engineering had its own agreement, which didn't involve the CFMEU, and they did not have an EBA with the CFMEU". The evidence establishes that the real reason for Mr Sengleman's conduct was the threat made by the delegate to "pull the site". The evidence does not establish that at the operative time on 25 July, 2013 Mr Sengleman gave the direction he did because of the absence of any relevant agreement between Craig's Engineering and the CFMEU or the BLF. Rather, his motivation was to avoid the site being closed down by the Unions and the consequential chaos that would ensue. That was the real, substantial and operative reason for the direction given by Mr Sengleman.

114. The respondents emphasise the efforts they say they made to prevent further interference with the work to be performed by Craig's Engineering including the second respondent's phone call to Mr Close, the scheduling of work by Craig's Engineering such that work would be performed on weekends where necessary when union personnel were less likely to interfere, and the attendance on site of Mr Paw on one occasion to minimise risk of interference. Those matters demonstrate that the existence of a relevant agreement between Craig's Engineering and the relevant union was of no particular importance to the first respondent. What was important was keeping the Union happy such that it did not move to close down the project site.

115. Further, I accept the respondents' submission that Mr Sengleman's subsequent conduct is consistent with a conclusion that the operative reason for his direction to Mr Rainbow and Mr Smith was to keep the Union delegate from shutting down the site. Mr Sengleman assisted in resolving the problem caused by the Union delegate. The contents of the email dated 25 July, 2013 at 8:57am is consistent with that finding:

> *I managed to convince him that Craigs were here on a supervisory capacity only, and that steel fixers would be installing bolts.*
>
> *...*
>
> *My intent is to speak with Craig the owner of Craigs Eng to come to an arrangement wher he out sources plant and labour to install steel.*

116. I accept the respondents' submission that the substantial and operative reason for the fourth respondent's actions on 25 July, 2013 was to overcome the conduct of the CFMEU and the impact of that conduct on the ability of Craig's Engineering to perform its obligations under the subcontract. The workplace rights of Craig's Engineering identified by the applicant were not a substantial or operative part of the fourth respondent's reasoning. At best they are a surrounding circumstance.

117. The respondents submit that in any event, the fourth respondent had no knowledge or understanding of the meaning of the concepts underpinning the alleged reasons. It cannot be said, the respondents submit, the fourth respondent's actions were motivated by reasons the fundamental notions about which he did not understand. He did not understand the concept of "coverage". Therefore, the respondents argue, the fourth respondent's actions were not motivated by the exercise of (or failure to exercise) a workplace right to have an enterprise agreement which did or did not cover the CFMEU.

118. As to the claim that the first respondent contravened s.354 of the Fair Work Act, the applicant's case fails for the same reasons. The applicant claims that the first respondent contravened s.354 by discriminating against Craig's Engineering by refusing to allow its workers to perform duties under the contract on 25 July, 2013 because Craig's Engineering were not covered by an enterprise agreement that also covered the CFMEU. If Craig's Engineering was covered by an enterprise agreement that also covered the CFMEU then the first respondent would not have prevented Craig's Engineering's workers from performing their full duties on 25 July, 2013. The applicant submits that the evidence which supports its claim under s.340 supports this claim.

119. However, I do not accept those submissions. Assuming that there was discrimination between Craig's Engineering's workers and other workers that discrimination did not happen *because* of the reasons identified by the applicant. It happened for the same reasons that Mr Sengleman directed the worker's not to perform any work on the project site.

120. Senior counsel for the applicant submitted that the incident or incidents that occurred on 25 July, 2013 "resonated as a reason in relation to the steel contract", to which I will come later in these reasons. In support of that submission, senior counsel referred to the comment associated with Craig's Engineering on the subcontractor comparison spreadsheet, "Non-EBA – we already had union issues caused by Craigs when erecting bracing & walers earlier on in the project". It was submitted that that comment can only be a reference to the incident that occurred on 25 July. However, those matters do not detract from the real reason why Mr Sengleman took the action that he did – it was because the Union delegate on site was going to "pull the site" if the Craig's Engineering workers worked on the site.

121. In light of my findings about the alleged contraventions of ss.340 and 354 of the Fair Work Act arising out of the events of 25 July, 2013 Mr Sengleman cannot be said to have been *involved in* any contravention of the Act for the purposes of s.550.

The structural steel works tender

122. The second relevant package of work was termed the "structural steel works". On its face the structural steel works was a more complicated package of work because, as the third respondent puts it (paragraph 19 of his affidavit filed on 14 December, 2015):

a) it involved a much larger scope of works;

b) it required the subcontractor to perform different tasks in different areas; and

c) there were significant logistical issues associated with moving and installing the steel around the various work areas.

123. The third respondent was responsible for the tender process and preparing documentation including an "Authority to Let" and a "Subcontractor Comparison" spreadsheet. The third respondent, Mr Cremin and Mr Paw co-signed the Authority to Let before providing it to the second respondent. It acted as a brief as well as their recommendation. The second respondent was ultimately responsible for making the decision about to whom the structural steel works tender would be awarded.

124. The third respondent gave evidence about the method of the tender process used for the structural steel works package. A few short of a dozen companies were invited to tender for the structural steel works package. Craig's Engineering was one of the seven companies that submitted a tender. The third respondent said that each of the initial tenderers provided quotes which were "all far too high in the context of the budgeted amount" and each of those tenderers was contacted to obtain further information about their respective tenders.

125. On 11 October, 2013 Mr Lachlan Vigna sent a message to Craig's Engineering via the Aconex program inviting Craig's Engineering to tender for the structural steel works package. On 25 October, 2013 Mr Lynch submitted a tender on behalf of Craig's Engineering.

126. On 21 November, 2013 Mr Lynch attended a meeting with Mr Vigna and the third respondent in respect of the tender. Mr Lynch gave evidence that he and the third respondent had a conversation to the following effect (paragraph 15 of his affidavit filed on 14 October, 2015):

> *Blore: "Do Craig's Engineering have an EBA Agreement?"*
>
> *[Lynch]: "No, we don't; we have our own company agreement and we pay the workers the EBA rates."*
>
> *Blore: "We would like you to do the job but you don't have an EBA Agreement."*
>
> *[Lynch]: "We don't need to have an EBA agreement to work on a building site. We've got a registered agreement."*
>
> *Blore: "We have had problems with the union on the entire job."*

127. In Mr Lynch's affidavit he says that a reference to "the union" in the above extract was a reference to either the CFMEU or the BLF. He said that he did not ask during that conversation what "problems" the third respondent referred to. In fact, Mr Lynch's evidence in cross-examination was that "[Craig's Engineering] never had industrial issues".

128. Mr Lynch was challenged in cross-examination about his evidence concerning the 21 November meeting. His evidence was not shaken and he added that the third respondent said to him during the meeting that the first respondent would be happy for Craig's Engineering to do the structural steel works. He was aware that Craig Douglas of Craig's Engineering had spoken to Andrew Sutherland of the CFMEU but he did not know what the conversation was about.

129. In cross-examination Mr Lynch accepted that he asked the third respondent a question to the effect of "Does Craig's Engineering need a CFMEU agreement to be successful in getting the structural steelworks tender?". He said that he was aware that the first respondent required workers on their projects to be paid "EBA rates". However, when it was put to him that the discussion with the third respondent was about the need to pay the "EBA rate" rather than the need to have an agreement with the CFMEU, he reiterated that "it was about the EBA agreement to work on that site". However, he did agree that when he raised with Mr Blore whether Craig's needed a CFMEU agreement to be successful in getting the structural steelworks package that Mr Blore said, "No, not at all. We are just working through the tender process and we are looking at options."

130. The third respondent said the meeting on 21 November, 2013 was a standard part of the tendering process. It was more efficient to deal with the tenderers "face to face", though such meetings were only conducted with tenderers who submitted the "most competitive prices". Similar meetings, he says, took place with Steel Construct Australia Pty Ltd and two other tenderers. The third respondent gave the following evidence in reply to Mr Lynch's affidavit (paragraph 36 of his affidavit filed on 14 December, 2015):

> *36.4 I did not tell Mr Lynch that First Respondent would like to engage CE to do the Structural Steel Works but would not do so*

because CE were not covered by a CFMEU Agreement - that is untrue.

36.5 As I recall, the majority of the discussion was about the scope of works and how we could adjust the scope to reduce the price and improve our position in relation to the Project budget.

36.6 During the meeting, I do recall asking Mr Lynch if CE had resolved the issues with the union that I had heard about.

36.7 By "issues" I recall Mr Lynch telling me that CE had some problems with the CFMEU.

36.8 I recall Mr Lynch saying something like that CE had spoken to Andrew Sutherland and they were "sorting it out". I understood this to mean there was little to no risk of industrial issues arising between CE and the CFMEU.

36.9 I recall saying to Mr Lynch that we were happy for CE to do the Structural Steel Works.

131. Mr Lynch denied saying to the third respondent that Craig's Engineering was "sorting it out".

132. In November or December, 2013 Mr Cremin suggested to the third respondent that Steel Construct be invited to submit a tender. Mr Cremin said that the reason for recommending Steel Construct to the third respondent was that:

a) he had experience from working for a different and prior employer that Steel Construct had performed similar construction works;

b) Steel Construct's quality of work on that previous job was good and they delivered the work within the allocated budget; and

c) he thought that Steel Construct would likely do a good job if they were successful with their tender.

133. On 11 or 12 December, 2013 Mr Cremin contacted Mr Simon Newitt, of Steel Construct, to discuss the structural steel works tender. Mr Newitt said that he would be interested in providing a tender. Some emails were then exchanged between the two resulting in Steel Construct's proposal for the structural steel works. A copy of a chain

of two emails is annexed to the affidavit of Ms Wolff. The first in time is an email from Mr Newitt to Mr Cremin and the second is an email from Mr Cremin to the third respondent. There are a number of handwritten notes and markings. The third respondent was cross-examined about these emails.

134. The first in time email is a quote of $103,650 plus GST, valid for 30 days, and lists a number of inclusions. With the assistance of the third respondent's oral evidence, the following handwritten notes are relevant:

a) handwritten notes were taken during a meeting that took place with Mr Newitt on 16 December;

b) the words "including crainage" which appear in the inclusions section of the email are underlined;

c) the email is struck through by two lines between which "S/S" appears. The third respondent said that "S/S" refers to "superseded";

d) the words "NON – EBA" appear written in the middle of the first page of the chain.

135. The third respondent accepted that he handwrote the words "NON – EBA" on the chain of the two emails. He said that it is to mean that Steel Construct did not have an EBA with the CFMEU or BLF. He did not accept, initially, that it would have come up as a topic of discussion during the meeting with Mr Newitt on 16 December. Mr Cremin said that he asked Mr Newitt whether or not Steel Construct had an EBA, he was told that Steel Construct did not, and he conveyed to Mr Newitt that for Steel Construct to have an EBA with the CFMEU "would be an easier option for us".

136. On 12 December, 2013 Steel Construct submitted an initial tender quoting $103,650 for the work. The third respondent said that was "significantly lower than the initial tender quotes of the other tenderers".

137. On 17 December, 2013 Mr Newitt sent an email to Mr Cremin and the third respondent. It appears to be a revised quotation. Relevantly it provides (annexure SW-12 to Ms Wolff's affidavit):

> *With regards to the EBA with CFMEU, they have advised that they will require the following –*
>
> *1. registration -$1,650.00*
>
> *2. Employee membership - $441.00 per person – I will have to register 6 permanent employees - $2,646.00*
>
> *3. EBA rates increase my project labour costs also.*
>
> *I'd need to apply a portion of these costs to your project – say 50% - $3,000.00 plus GST.*

138. After being taken to this email, and with some probing by senior counsel for the applicant, the third respondent accepted that from that email it could be inferred that Mr Newitt had made inquiries with the CFMEU (or BLF or both) subsequent to and by reason of some discussions that they had had in their meeting on 16 December. That is to say, the meeting on 16 December plainly included some discussion about foreshadowed issues concerning the CFMEU (or BLF or both).

139. The third respondent and Mr Vigna, a contracts administrator of the first respondent, prepared a "comparison spread sheet" for the structural steel tender. It was described as a "living document" because it was added to from time to time. In fact, multiple documents were created rather than a single document being overwritten with changes.

140. On 22 January, 2014 the third respondent completed and signed the document titled "Authority to Let" a copy of which is annexure SW-17 to the affidavit of Ms Sharon Wolff. The Authority to Let lists, *inter alia*, eight subcontractors with their initial and revised (if any) tender quotes and some "Comments/Special Conditions" for each subcontractor. It is signed by Mr Paw, the third respondent, Mr Cremin, the second respondent, and three other persons who it seems signed in respect of "Information Only". Relevantly, it provides:

Subcontractor	*Final*	*Comments/Special Conditions*

1. Steel Construct Australia	*$97,160*	*Using Mulherin Rigging for the installation works – supervised by SCA – approved by CFMEU*
2. ...	*$116,620*	*Union approved*
3. ...	*$95,490*	*Union recommended not to use.*
4. ...	*$112,270*	*Union recommended not to use.*
5. Craig's Engineering	*$111,402*	*Union recommended not to use - in the process of signing an EBA.*
6. ...	*$117,538*	*Allowed to use union labour Union recommended not to use - in the process of signing an EBA.*
7. ...	*$126,755*	*Too expensive*
8. ...	*$128,637*	*Too expensive*

141. It also, relevantly, contains a "Checklist" in relation to only Steel Construct. The focus was placed solely upon Steel Construct's tender because it was the recommendation of the third respondent, Mr Cremin and Mr Paw. The checklist provides:

Contract Type	*Design & Construct*
DVC Scope of Work	*Accepted*
Tender Interview Minutes	*Accepted*
Financial Check as per CCM	*Please Select*
History	*Has not worked for DVC*
Reference Check	*Not Performed* *Eamonn has used Simon on previous projects*
Current Workload/Capacity	*Has Capacity*
Quality	*Average*

Payment Terms	*30 days EOM*
Retention – Cash	*10% to a max of 5%*
Retention – Bank Guarantees	*N/A*
EBA	*Compliant*
WH&S	*Accepts DVC's WH&S Requirements*

142. Mr Paw gave evidence that his involvement in the structural steel tender began on 23 January, 2014 when the Authority to Let and the subcontractor comparison spreadsheet documents were left on the computer keyboard at his desk. He said that he did not look at the comparison spreadsheet. He said that he did not have any discussions with anyone about either the Authority to Let or the subcontractor comparison spreadsheet. He said that he signed the Authority to Let because he did not see any significant difference from profit or loss, he saw a profit against Steel Construct, and he trusted Mr Cremin's and the third respondent's expertise. He said that he was required to sign the Authority to Let in order for the works to continue.

143. Some tenderers provided more revised quotes than others. The third respondent said that he had more interaction with three of the companies because their initial quotes were less clear than the quotes of other tenderers and because more consultation was required to ensure that their prices were sufficiently particularised and accounted for the requirements to complete the work. He also provided reasons why Craig's Engineering was not offered further consultation in respect of their quote: the Craig's Engineering tender was sufficiently clear and particularised and adequately addressed the requirements of the job. As it turned out, some consultation did in fact occur evidenced by the meeting between Mr Lynch, Mr Vigna and the third respondent on 21 November, 2013.

144. The Authority to Let was signed by each of the third respondent, Mr Paw, and Mr Cremin. It was then sent to the second respondent for

final approval along with other documents including the subcontractor comparison spreadsheet and each tenderer's quote.

145. The second respondent explained that the comments in the Authority to Let referring to the approval or recommendation of the "Union" was "a "risk management tool" to identify the potential risk of industrial issues if a particular subcontractor was engaged". Those comments, he said, were not determinative in his decision. He gave evidence that such comments did not influence the decision to engage a particular subcontractor but rather indicated that "attention or energy" would be required in "managing the industrial issues that a subcontractor might be likely to bring along". He said that he neither knew who included the comments nor enquired why the comments were included on the Authority to Let. In any event, he says, the comment in respect of Craig's Engineering was of "next to no importance" because Craig's Engineering was not being considered as it had not passed the critical assessments of "price, methodology and capacity".

146. The third respondent's evidence about the comments in the Authority to Let was (at T33 line 29-36):

> *What is it intended to do?---The – this was a – I'm going to say a Devine standard document that you fill out – it's a template, for want of a better word, that you complete. So at the end of the day I would normally put the contractor I recommend at the top of the list so one doesn't have to try and filter all of the information and this document, although there's other stuff on there, has – is mostly to do with price. The section there regarding comments is, I suppose, additional comments that you feel may be of relevance. I typically try to put a comment next to everything for – for whatever reason.*

147. In re-examination he clarified or added to his earlier explanation about the use of the comments section of the Authority to Let (at T45 lines 35-45):

> *When you say issues surrounding a contractor and involving the unions what do you mean by that?---I don't really want to know exactly what the issues are. If I'm aware that there's issues that surround that contractor, whether it be from another project, whether it be them paying the right rates, entitlements. It could be that the relationship between the organiser and – and that contractor isn't great. I – I'm not really interested what the*

reason is. If I'm told that they – I wouldn't use them if I were you or you shouldn't use them or steer away from – whatever the – the – the terminology may be. That's – I wouldn't say good enough for me but it's sufficient.

Sufficient for what, though?---To know that there may be an issue there and for me to put a comment on my comparison and make management aware of it.

148. The second respondent said in cross-examination that he did not ask the third respondent what was meant by the comments on the Authority to Let but that he understood "Union recommended not to use in the process of signing an EBA" in relation to Craig's Engineering to mean "That the union would prefer that we didn't use them … but, in a sense, the fact that they were negotiating with a contractor, with the unions to possibly sign an EBA would have been a slight advantage for them, I would have thought". Just what that advantage might have been was not explored. He said that he gave some regard to the comments. The transcript of his re-examination relevantly provides (T71 lines 26 – 34):

and what you said was that you had some regard to it; what do you mean by "some regard"?---We use that column more so as a management tool so that we know what we have to do. If we're going to – if the guys put a contractor forward that hasn't got an EBA or unions aren't recommended or something like that, we then have to work out how we're going to manage that subcontractor and manage the industrial relations around that subcontractor.

Did it effect whether a particular contractor tenderer got the job?---In this case, not at all.

149. He said that he probably did not read the comment on the comparison spreadsheet, "We already had union issues caused by Craig's when erecting bracers and walers earlier on in the project".

150. In cross-examination Mr Cremin gave evidence that there was consultation with union representatives about which subcontractors were *approved* or *recommended*. He said that "the union came and asked us who were we using for structural steel". Rather than a formal meeting, however, he said that "They walk into your office. I wouldn't call it a meeting. They present themselves". Mr Cremin said that he spoke to Dennis Mitchell, a delegate of the CFMEU, about Steel

Construct in December, 2013. He said that Mr Mitchell was not happy that the first respondent was engaging Steel Construct.

151. The third respondent said that whether a tenderer was "a non-EBA" subcontractor was relevant. He later said that it was not of significance. An extract of his evidence is the most appropriate way in which to illustrate this inconsistency in the third respondent's evidence. Relevantly, it provides (at T13 lines 1-34):

> *What else could it have been that you – that you discussed with him on or about – or on or after that meeting of 16 December relevant to that question of him not having an EBA with the CFMEU?---I don't recall the specifics of the conversation, but the issue or the – it would have been discussed at some point. As part of the standard documentation, on the Authority to Let and not so much on the comparison but, nevertheless, you put it in to understand and be aware of the status or the – I suppose the status of each of the tenderers. So it was merely an understanding of where and what each of the tenderers or subcontractors, tenderers, I suppose, where they – where they stood. So if you're comparing a non-EBA subby versus an EBA subby, it's relevant to know that because there is – there are different pay rates and, like I said, as part of the documentation that we're required to submit to management for approval. That was one of the items to address.*
>
> *It's not just a matter of pay rates though, is it?---It's probably pay rates amongst other things. Yes.*
>
> *Amongst other things?---Yes.*
>
> *But, in any event, I think the effect of your answer – I will put to you the effect of your answer is this: that whether or not they have an EBA with the CFMEU is a factor that's of significance when comparing tenderers from the point of view of who to award the contract to?---I disagree. It's not of significance.*
>
> *I thought though you just answered previously that it was a factor?---It was something to be aware of, but it wasn't a significant reason or factor.*
>
> *I'm sorry to do this to you, but I'm going to have to pick you up on this. When you say it's not a significant factor, let me just accept your answer for the moment, do you accept from me, however, that the effect of your evidence is that it was a factor to be taken into account? By which I mean something that's*

relevant as opposed to totally irrelevant; do you understand?--- Yes. It had a relevance.

Now, when you say it's not significant, do you mean this: it wouldn't be the decisive factor---is that what you mean by not significant? Correct.

152. Moreover, Mr Cremin gave evidence that whether a subcontractor had an EBA (or engaged a company that had an EBA) with the CFMEU was an important fact for the decision-maker to know.

153. The evidence demonstrated that the work to be undertaken and which was the subject of the invitation to tender for the structural steel works was the subject of revision. It is the applicant's case that Craig's Engineering was not provided with the revised "structural drawings from the engineer". Thus, Craig's Engineering was unable to provide a revised (and presumably lower) price. Annexed to Ms Wolff's affidavit are copies of three emails from Mr Lynch of Craig's Engineering. The first is to Mr Vigna, dated 17 December, 2013 in which the third respondent is copied, and provides:

What is happening with the structural steel package. Have you confirm the changes

The second email is to the third respondent, dated 20 January, 2014 and provides:

Have you received the structural drawings from the engineer,

I just want to get the design and price back and. we can get started,

The third email is also to the third respondent, dated 2 January, 2014 and provides:

What is happening with the structural steel package, I have you finalized the drawings,

Tried to call,

154. In cross-examination the third respondent said that the drawings to which Mr Lynch refers were "amended drawings from the engineer". Mr Lynch says that he did not receive a response to, at least, his email of 22 January, 2014. The third respondent said that he could not

confirm whether he responded to Mr Lynch's emails. In re-examination the third respondent said that Steel Construct was the only tenderer that was provided a copy of the revised designs.

155. Mr Newitt sent an email to Mr Cremin on 20 January, 2014 in which the third respondent was copied. It relevantly provides:

> *As discussed, I can engage Mulherin Rigging to carry out the site installation works.*
>
> *They have advised me that they have an EBA Agreement with the CFMEU.*

156. The third respondent explained that Mr Newitt proposed that they engage Mulherin Rigging for the purposes of providing the labour required to perform the work in the structural steel package. In re-examination he clarified that the personnel performing the Steel Construct contract were to be exclusively from Mulherin Rigging and not employees of Steel Construct. He acknowledged that the Mulherin Rigging proposition would prove more expensive than if Steel Construct used their own workers. That is, the original quote price was $91,500 and the revised quote price, which took into account the engagement of Mulherin Rigging, was some $99,600. However, the third respondent did not accept that "whoever was working on site [had] to have an EBA with the CFMEU" and that the Mulherin Rigging proposition was a result of that requirement.

157. The utility or purpose of Mr Newitt's proposal was tested in cross-examination. Mr Cremin denied that the reason Steel Construct engaged Mulherin Rigging was to avoid the impediment caused by Steel Construct not having an EBA with the CFMEU. He gave the following evidence (p75 lines 33 – 38 of transcript of 15.6.16):

> *All right. It results, does it not, as one can see from the email, in a price increase? Prior to the discussion we had with Simon before this was to make sure that if he was using his direct labour on the job that he included all the rates and allowances required under Devine's project, which he wouldn't normally pay, which would have resulted in a price increase. After that he came back to me and said, "I would like to use Mulherin Rigging."*

158. The second respondent said that he understood "EBA Compliant" to mean "they would be working on EBA rates as per our EBA, because they had to do that, so they would be compliant in those issues". He explained that comments such as "Non-union EBA priced using EBA rates" means the particular subcontractor is using "EBA rates". He said that part of the reason that he allowed Steel Construct to subcontract Mulherin Riggings was because he knew their performance levels from experience and from reputation. He was not aware, however, that Steel Construct had put in a tender prior to the Mulherin proposal, although it "wouldn't surprise" him.

159. The third respondent accepted that the only reason for the increase in price was the proposed engagement of Mulherin Rigging. He did not accept that the reason that he was willing to recommend this further increase to the project was because it skirted the problem that Steel Construct did not have an agreement with the CFMEU. The position of the third respondent was exposed by senior counsel for the applicant as thus (at p22 lines 9-2 of transcript of 15.6.16):

> *All right. Well, perhaps we can leave this topic on – on this point. Your evidence to the court is this – that the reason that Steel Construct used Mulherin Constructions or Mulherin Rigging to do this job was entirely because of a choice of Steel Construct and had nothing whatsoever to do with a requirement from you that Steel Construct had to have an EBA with the CFMEU?---That's correct. There was no requirement from me.*
>
> *None at all. And, consequently, the fact that that was going to increase the price to Devine was no concern of yours. It was entirely his choice as to what price he put in?---That's correct.*
>
> *And you were willing to accommodate it?---That's correct.*

160. When asked why Steel Construct would engage Mulherin Rigging if it was more expensive, the third respondent suggested that perhaps when Mr Newitt attended the project site for the meeting on 16 December he saw some CFMEU flags hanging around the site and that he surmised that there are "other influences there that may hinder his work". Consequently, "He may understand from previous experience that he needs to adjust his price to allow for … additional costs for the additional labour rates or something". Ultimately the third respondent says that the Mulherin Rigging proposal and the incidental price

increase was a result of Mr Newitt's own reckoning and was not a consequence of the third respondent raising the CFMEU as an issue in the meeting of 16 December.

161. Mr Cremin, the third respondent and Mr Newitt attended a "tender interview relevant to Steel Construct's tender for the Structural Steel Works Tender" on 22 January, 2014. Annexed to Ms Wolff's affidavit is an email from the third respondent to Mr Newitt dated 22 January, 2014 attached to which is a document titled "subcontractor tender interview". There are a number of questions and next to each are two available boxes, "yes/no" and "comments". One particular question provides: "Do you have a: EBA, or Australian Workplace Agreement Other". The "yes/no" box is empty. Under "comments" there is in handwriting "EBA held by site installers Mulherin Rigging".

162. In cross-examination Mr Cremin said that he was required to provide a response to that question, however, says that it was totally unnecessary. However, he later gave the following evidence in cross-examination (p78 lines 10 – 15 of transcript of 15.6.16):

> *All right. I will just – just to clarify, I will suggest to you this and you can agree or disagree, that is that these things that you go to the trouble to discuss with potential subcontractors and go to the trouble of having them written down are there because they're relevant to decisions to be made about awarding of contracts. Now, you can either disagree with that or agree with that?---Yes, I would agree with that. Yes.*

163. In support of its claim, the applicant referred to several instances where documents produced by or for the first respondent and used for the purpose of the tender process made reference to "EBA" or "CFMEU". The subcontractor comparison spreadsheet (which is exhibit 5 in these proceedings) contains many references to the EBA issue:

a) next to the words "Erection/installation" are the words "Mulherin rigging (EBA)";

b) in the column dedicated to Steel Construct are the words "Using a EBA rigger – approved by CFMEU";

c) in the column dedicated to Hoskins Engineering are the words "EBA – approved by unions". The third respondent gave

evidence that tenderers with such a connotation were approved by the CFMEU (or BLF);

d) under the heading "MC Engineering" are two separate columns, "Non-Union-EBA" and "Priced using Union-EBA Installers". The third respondent gave evidence that the former was a quote submitted if MC Engineering completed the work by their own employees and the latter was a quote submitted if MC Engineering completed the work by engaging other workers that were covered by an EBA which covered the CFMEU;

e) in the column dedicated to Craig's Engineering at the bottom are the words "Non-EBA – we already had union issues caused by Craigs when erecting Bracing & Walers earlier on in the project". The third respondent's evidence was that he was bringing to the attention of others who would need to sign off on the package the history with Craig's Engineering on the project. He accepted that the history was relevant in making the decision to whom to award the structural steel package. The transcript of his cross-examination relevantly provides (at p29 lines 18-35 of transcript of 15.6.16):

Well, what I'm suggesting to you is that's what you're trying to communicate by the words you used here – that a problem had been caused by Craig's previously and the problem you're identify or the bit that was caused by Craig's is they didn't have a union EBA?---I don't believe so.

All right. What was it, then?---It was an issue that came up regarding Craig's.

Yes. But you're saying it's caused by Craig's. What was caused by Craig's? What are you trying to communicate to the decision-maker by using these words?---Well, them having or not having an EBA, in my opinion, doesn't have a lot to do with it. Whether it be them having issues on another job, whether it be personality issues between the local organiser and – and Craig's management – I don't know what the issues are. I just believe that there is – well, I understand that there is issues.

Right. So you didn't know what had happened but you were willing to put in a document to send to your superiors for a serious decision to be made – an allegation that whatever the

problem was had been caused by Craig's – even though you didn't even know what it was?---That's how I understand it. Correct.

164. The third respondent was asked if he specifically asked the tenderers whether or not they had an enterprise agreement that covered the CFMEU. He was elusive in his answer. Initially he denied that he did. Then he provided some explanation for how then the first respondent received information about each tenderer's "EBA status" (to borrow the phraseology from some of the evidence). Finally he accepted that he, or someone else would have asked each tenderer whether or not they had an enterprise agreement that covered the CFMEU.

165. On or about 22 and 23 January, 2014 the third respondent, Mr Paw, and Mr Cremin recommended that the structural steel works package be awarded to Steel Construct. On 23 January, 2014 the second respondent on behalf of the first respondent decided to award the structural steel works contract to Steel Construct.

166. Sometime later, but before 10 February, 2014 (he cannot recall when) Mr Lynch says that he telephoned the third respondent during which they had a conversation to the effect of (paragraph 22 of his affidavit filed on 14 October, 2015):

Blore: "Has Craig's signed up to the EBA Agreement?"

[Lynch]: "No, Craig's Engineering is still waiting for the union to organise one. Craig's had approached the BLF to arrange a meeting and that's all we can do. It is up to them."

Blore: "We need to get this EBA agreement sorted out before we can go any further. We don't want to have any trouble with the union on site."

167. The third respondent's evidence of that conversation is as follows (paragraph 38 of his affidavit filed on 14 December, 2015) (emphasis in original):

38.1 I cannot remember exactly what Mr Lynch said [sentence fragment omitted, objection sustained] Mr Lynch kept referring to and making a big issue around the fact that CE didn't have an enterprise agreement naming the CFMEU as a party (CFMEU Agreement). Mr Lynch kept asking about it and tried to get me to

say that CE needed a CFMEU Agreement to be successful in Structural Steel Works Tender by suggesting that to me.

38.2 Mr Lynch also referred to the length of time that it was taking to finalise the Structural Steel Works tender.

38.3 I did not say to Mr Lynch "Has Craig's signed up to the EBA Agreement?" – that is untrue. I had no interest in encouraging CE to have a CFMEU Agreement and I understood they were resolving their issues with the CFMEU from my previous meeting with Mr Lynch.

38.4 I did not tell Mr Lynch that "We need to get this EBA Agreement sorted out before we can go any further" – that is untrue. Obtaining a CFMEU Agreement was certainly not a precondition to CE progressing in relation to the Structural Steel Works Tender.

38.5 CE not having a CFMEU agreement was not relevant to the tender process. I told Mr Lynch that it was not. I recall saying words to the following effect to Mr Lynch

"No, not at all. We are just working through the tender process and we are looking at options."

168. Mr Lynch denied saying that he "kept referring to the fact that CE didn't have an enterprise agreement to which the CFMEU was a party". He also says that he had no reason to bring up the "EBA issue" because the first respondent would have been aware that Craig's Engineering did not have a "CFMEU-approved enterprise agreement".

169. Mr Lynch recalls being asked during the phone call on 10 February, 2014 to tender for the "metal works package on the Project". He says that a tender was subsequently submitted. He could not remember whether Craig's Engineering had successfully tendered for other work on the project, namely some work referred to as "the Energex pulling eye".

170. Mr Lynch says that in early March, 2014 he had a further telephone conversation with the third respondent to the effect of (paragraph 24 of his affidavit filed on 14 October, 2015):

Blore: "Craig's Engineering is a little too expensive."

[Lynch]: "What part of the tender is too expensive?"

Blore: "You're just too expensive."

[Lynch]: "What can you tell me about the structural steel pacakage?"

Blore: "Devine has let it out to a company who has an EBA agreement."

[Lynch]: "Do you need a signed EBA agreement to work on this site?"

Blore: "Yes. We do not want any problems with the union."

[Lynch]: "It's your job, that's up to you."

171. Mr Lynch's understanding was that Craig's Engineering was not awarded the structural steel package because it did not have an EBA that covered the CFMEU or BLF.

172. The third respondent commented on Mr Lynch's version of that conversation as follows (paragraph 39 of his affidavit filed on 14 December, 2015):

> *39.1 I recall telling Mr Lynch that CE had not been awarded the Structural Steel Works Tender. However, I did not tell Mr Lynch that CE needed a CFMEU Agreement to work on the Project - that is not true. Yet again, however, I recall that Mr Lynch enquired if the fact that CE was unsuccessful was related to this topic (CFMEU Agreement/past issues with the CFMEU).*
>
> *39.2 I recall telling Mr Lynch that I would like CE to tender for the trade package of work known as "metal work". The fact that CE did or did not have a CFMEU Agreement was not relevant to my decision to invite CE to tender for the metal work.*

173. I prefer Mr Lynch's evidence about this conversation. I am satisfied that a conversation occurred as he records (and I have set out in [170] above. Mr Blore's evidence did not directly answer Mr Lynch's claims because he referred to a "CFMEU Agreement" rather than "a signed EBA agreement". That is to say, Mr Lore did not cavil directly with Mr Lynch's evidence.

174. On 13 May, 2014, sometime after Steel Construct had commenced the structural steel work, Mr Newitt sent an email to the third respondent in which he relevantly said:

Are unions still attending regularly? My guys could install quicker than Mulherin for a lot less. We would need two days. My guys cost me 40-55hr whereas, Mulherin are costing me more like 90hr under contract conditions.

175. In re-examination the third respondent said that the question that he truly was being asked was in relation to the union delegate, Mr Darcy Murdoch who had been on site "pretty much full-time", and particularly whether he is still around or whether any other union officials were attending the site regularly.

176. What eventuated after that time, according to the third respondent, was that Steel Construct completed some of the installation work using its own employees and not that of Mulherin Rigging.

Reasons

177. The third respondent said that he recommended that Steel Construct be awarded the structural steel works package because (paragraph 33 of his affidavit filed on 14 December, 2015):

33.1 Steel Construct had their own mini-crane which meant that the First Respondent's tower crane could be used for other work – this was a significant advantage because it gave us greater flexibility in completing the Project and so allowed us to complete the Project more efficiently;

33.2 Steel Construct had the best price factoring in the fact that they were providing the mini-crane;

33.3 because of the information that I obtained throughout the tender process, I was satisfied that Steel Construct had the skills and capacity to perform the required work; and

33.4 the Project Manager for the Project, Mr Eamonn Cremin, had worked with Steel Construct previously and told me that they were good operators who could perform the work to the standard required without any issues.

178. In cross-examination it was put to the third respondent that whether or not a tenderer had an EBA with the CFMEU was something that throughout the entire time of the tender assessment processes was of vital interest to him and to the first respondent. His answer was that it was of interest but not of great importance. He said that regular

inquiry during the course of assessment processes with various contractors was "part of the process". The fact that Craig's Engineering did not have an EBA with the CFMEU, he said, did not mean that he could not recommend them for the job. However, he did not say that he would recommend them for the job notwithstanding that they did not have an EBA with the CFMEU.

179. In re-examination the third respondent gave an explanation for why price was the critical factor in his decision to recommend Steel Construct. The transcript records that explanation (p41 lines 43-47 and p42 lines 1-13 of transcript of 15.6.16):

> *And are you able to say why you are able to recall that price was the factor that influenced the selection of the successful tenderer?---Price is obviously demonstrated with quotes initially. When I think about what the subcontract price it is both what's presented here and what I anticipate still to be spent so what is the end cost? So if I believe that Steel Construct could complete the works with minimal – minimal issues quickly, efficiently, not cause any delays to other contractors, then the end result is that we will probably stay closer to what the original quote is. We probably won't have a contractor – and it happens from time to time – come back to us and say, "I didn't allow for this. I didn't anticipate that. It was a little bit harder than I expected to – somebody else is holding me up." And therefore come back to us and ask for assistance – ask for more money. So price has a lot to do with performance. If the subcontractor has understood the scope – he understands the site. He understands what needs to be done. If we feel he has got the same understanding it's – it's a good – it's a good fit. So the end price to – to – to the project is going to be – the intention is to – to be the best price.*
>
> *And in the case of the structural steel works on this project, who had the best price?---Steel Construct Australia.*

180. Senior counsel for the respondents directed the third respondent to the checklist on the Authority to Let where, next to the item "Reference Check", the third respondent entered "Not Performed Eamonn has used Simon on previous projects". The third respondent explained that a recommendation from Mr Cremin, a project manager, held great weight and it would be unlikely that reference checks would be required.

181. Mr Cremin's evidence was that the mini-crane was an advantage that Steel Construct had over the other tenderers.

182. The second respondent said that his decision was informed by:

a) the information contained in documents provided to him by the third respondent (including the Authority to Let, quotes from each tenderer and the subcontractor comparison spreadsheet);

b) the recommendation of the third respondent and Mr Cremin;

c) his own knowledge and experience.

183. It arose in cross-examination, and in re-examination, that the primary information upon which the second respondent operated was the Authority to Let and the subcontractor comparison spreadsheet. He said that he *would have* first consulted the Authority to Let, primarily considering the pricing. He accepted that he had some regard to the comments on the Authority to Let document. The "Checklist" in the Authority to Let, he said, was part of the reason for his decision.

184. He said that his decision was based on the following reasons (paragraph 27 of his affidavit filed on 14 December, 2015):

> *37.1 The critical considerations for me were who had a combination of a competitive (or the best) price, along with efficient methodology and the ability to do the job; especially so in this case because I knew the Project was on a tight budget.*
>
> *37.2 I could see from the documentation that Steel Construct had the capacity to do the job, in particular because they had been recommended by Third Respondent and the Project Manager.*
>
> *37.3 Steel Construct had their own mini-crane which meant that the First Respondent's tower crane would not be tied up and could be used for other work - this gave us greater productivity and flexibility because it allowed us to complete the Project more efficiently.*
>
> *37.4 Steel Construct had the best price on an overall basis factoring in the fact they were providing the mini-crane.*

185. In cross-examination the second respondent seemed to contend that price was the sole determining factor, albeit he advocated a pragmatic

approach to ascertaining the true price. That is to say, he did not consider the tender price at face value but also considered possible costs escalations caused by delay or further costs. He explained that whereas MC Engineering quoted a lower price by around $2,000, Steel Construct provided its own mini-crane meaning the first respondent would be able to use its crane that would otherwise have been allocated to the structural steel works. He accepted that a reasonably accurate estimate of the costs of the potential subcontractors using the first respondent's crane was $15,000. That amount, it seems, is the cost of the provision of the first respondents' employees for 40 hours of work for the purpose of operating the crane. He acknowledged that the sum of $15,000 had been added to each tenderer's quote price to take into account the use of the first respondent's crane – that is all tenderers save for Steel Construct. The quotes did not expressly provide for any potential benefit to be derived from the utility of the first respondent's crane elsewhere in circumstances where Steel Construct could provide its own crane. That, the second respondent explained, was a factor that he took into account.

186. The outcome was that Steel Construct was a "better deal". Although the second respondent conceded that he made no notes or calculations in these respect, he said that "it's one of those things that you – you understand when you're in – in the industry that we're in, particularly on my – my side of the business is, you know, what is the cost – the direct cost? And then what is the offsite cost?".

187. In re-examination he explained that he was comforted that Mr Cremin had worked with Steel Construct before because it meant that he had a relationship with that company. There was nothing else unusual or extraordinary about Steel Construct's tender.

188. He did not consider Craig's Engineering to be appropriate because "their quote price was too high and they did not offer to provide their own mini-crane".

Submissions–- the structural steel works claim: s.340

189. It is uncontroversial that between 1 October, 2013 and 23 January, 2014 the relationship between the first respondent and Craig's Engineering was that of a principal proposing to enter into a contract

for services with an independent contractor within the meaning of s.342(1) item 4 of the Fair Work Act.

190. Put in terms of s.342(1) item 4(a) of the Fair Work Act the adverse action said to have been taken by the first respondent against Craig's Engineering in respect of the Structural Steel Works was the refusal to make use of, or agree to make use of, services offered by Craig's Engineering (pleaded in paragraph 39 of the Amended Statement of Claim as the first respondent's refusal to engage Craig's Engineering to perform the structural steel works). The first respondent accepts that it refused to engage Craig's Engineering to perform the structural steel works.

191. Senior counsel for the respondents argued that the evidence did not establish that the first respondent took any *adverse action* against Craig's Engineering as the applicant alleged because the awarding of the structural steel works contract had to be seen "in the particular circumstances of the evidence where there was a tender process and where on the evidence Craig's were not the most favourable price and where in the evidence which is advanced in relation to the authority to let there was a detailed budgetary analysis of the prices that were offered by the tenderers and as a result of that analysis it was clear to [the respondents] that the Craig's tender price was number 5".

192. Further, the respondents submitted that there was no refusal to engage Craig's Engineering within the meaning of s.342 because the conduct of the first, second and third respondents (and that of Mr Cremin and Mr Paw) did not amount to a refusal to engage or to agree to engage Craig's Engineering. The submission was put thus: the third respondent could not recommend Craig's Engineering for the structural steel package because it had already recommended Steel Construct, and the contract could not be awarded to Craig's Engineering by the second respondent because the second respondent had already awarded the contract to Steel Construct.

193. Senior counsel for the respondents added that the first respondent was never required to make a decision as to whether the tender submitted by Craig's Engineering would be accepted or not accepted. The relevant decision to be made by the second respondent, senior counsel contended, was whether the recommendation to award the contract to

Steel Construct would be accepted or not accepted. That was so because the second respondent acted upon the recommendations of the third respondent and Mr Cremin.

194. However, in my view, even assuming those matters to be accurate, that does not mean that the first respondent did not take *adverse action* against Craig's Engineering. All that is required for the first respondent to have taken *adverse action* against Craig's Engineering was the refusal to engage it for that contract in circumstances where the relationship between the parties meets the description in the left hand column of the table in s.342(1) of the Act. Whether that *adverse action*, however, is actionable as a contravention of the Fair Work Act, depends upon the reason for which that *adverse action* was taken.

195. I find that the first respondent took *adverse action* for the purposes of s.342(1) item 4(a) of the Fair Work Act against Craig's Engineering when it refused to engage Craig's Engineering to perform the structural steel works contract and awarded that contract to Steel Construct Australia.

196. In light of the evidence about the information contained in the Authority to Let and the subcontractor spreadsheet about matters involving the union and in light of my finding as to *adverse action*, I am satisfied, and I find, that the provisions of s.361 of the Fair Work Act are engaged so that the onus is upon the respondents to demonstrate that they did not take that *adverse action* for a proscribed reason.

197. The applicant claims that the first respondent contravened s.340 by taking that adverse action against Craig's Engineering *because* Craig's Engineering:

a) had a workplace right being entitled to the benefit of the Craig's Engineering Collective Agreement, which did not cover the CFMEU; and

b) had not exercised a workplace right, being the right to make an enterprise agreement that would or might cover the CFMEU Agreement.

198. As I have already set out in these reasons, the task for the Court is to identify the "operative and immediate reason for the taking adverse action".

199. The identity of the decision-maker is critical. The applicant submits that where multiple people submit a formal recommendation of a course of action, and that recommendation is adopted, then all those involved may be "decision-makers" for the purpose of the Fair Work Act: *Tsilibakis v Transfield Services (Australia) Pty Ltd* [2015] FCA 740 at [121]-[127]. He points to the Authority to Let to demonstrate that the decision not to award Craig's Engineering the structural steel contract was made by the second respondent on the recommendation of the third respondent, Mr Cremin and Mr Paw. The applicant also referred to the evidence of the second respondent that he gave particular weight to the recommendation but also considered the Authority to Let and the recommendations of the employees involved in the tender. Therefore, the applicant submits that the relevant decision-makers were the second and third respondents, Mr Cremin and Mr Paw. I accept that submission.

200. The respondents contend that the second respondent was the ultimate decision-maker concerning the letting of the structural steel works contract and so, it is only his reasons for so deciding that are relevant. I reject that submission.

201. The applicant argues that the first, second and third respondents took adverse action against Craig's Engineering by not awarding it the structural steel works contract *because*, inter alia, it did not have an enterprise agreement that covered the CFMEU. In support of its claim, the applicant referred to the evidence of Mr Lynch. As I have set out above, according to Mr Lynch:

a) the third respondent said to him during conversation "We need to get this EBA agreement sorted out before we can go any further. We don't want to have any trouble with the union on site"; and

b) after the structural steel package had been awarded to Steel Construct in March, 2014 Mr Lynch and the third respondent had the following conversation:

[Lynch]: "Do you need a signed EBA agreement to work on this site?"

Blore: "Yes. We do not want any problems with the union."

202. The applicant submits that the third respondent's denial about saying those things to Mr Lynch should not be accepted and is not supported by the other evidence. In particular, the applicant referred to:

a) the Authority to Let which provides "Union recommended not to use - in the process of signing an EBA." next to Craig's Engineering;

b) the subcontractor comparison spreadsheet which provides:

i) in respect of Steel Construct "Using a EBA rigger – approved by CFMEU"; and

ii) in respect of Craig's Engineering "Non-EBA – we already had union issues caused by Craigs when erecting bracing & walers earlier on in the project";

c) the emails of 9, 23 and 25 July, 2013 referred to above in detail in connection with the Bracing and Walers Work.

203. I have earlier recorded my preference for Mr Lynch's evidence over Mr Blore's evidence concerning this conversation. I accept the applicant's submissions that the matters he identified support Mr Lynch's version of the conversation.

204. The respondents submitted that the second respondent's decision was based on the following considerations:

a) the competitive or best price;

b) efficient methodology and ability to do the job;

c) Steel Construct had the capacity to do the job, in particular because they had been recommended by the third respondent and Mr Cremin;

d) Steel Construct had a mini-crane which meant that the first respondent's tower crane would not be tied up and could be used

for other work given greater productivity and flexibility to the first respondent; and

e) Steel Construct had the best price on an overall basis taking into account the mini-crane.

205. The applicant submitted that the Court was not obliged to take the second respondent's evidence at face value and relied upon the following passage from *Barclay* at [44] – [45] (citation omitted):

> *44. ...The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?".*
>
> *45. This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity.*

206. The objective evidence, the applicant argues, is replete with expression of concern about whether tenderers were covered by an enterprise agreement that covered the CFMEU. The applicant refers to the documentary evidence in support of its submission that the "EBA issue" was directly relevant to the decisions made by the second and third respondents. The second respondent gave evidence that he had some regard to the comments on the Authority to Let. Mr Paw said that he perused but did not read the various comments. But of course, perusing is reading. Moreover, there was no mention in the Authority to Let of a mini-crane – something which the second and third

respondents swore to being a significant factor in their respective decisions.

207. The applicant argues that the third respondent "did not care very much about price at all" save that he was concerned about remaining within budget. In support of that assertion, the applicant refers to the increase in Steel Construct's tender price upon proposing to engage Mulherin Rigging. The applicant submitted that the third respondent was not concerned with that price increase because they would not be faced with an "EBA issue". Additionally, the third respondent ignored the requests by Mr Lynch for the amended drawings, demonstrating that he was not concerned with any possibility of ascertaining a better price from Craig's Engineering.

208. Senior counsel for the respondents pointed to the documentary evidence said to support the respondents' evidence. The Authority to Let, it was submitted, demonstrated the focus on price. It contains a ranking of tenderers from one to eight. However, the ranking of tenderers is not in price or quotation order as one might expect. Even taking into account that the position of Steel Construct on the list is influenced by the provision of a mini-crane, price alone does not seem to be the reason for the ranking of tenderers on the Authority to Let.

209. The Authority to Let contains a "Comments/Special Conditions" section. The comments next to six of the eight tenderers refer to the CFMEU or "Union". The other two comments are "Too expensive". The reference to two tenderers being "Too expensive" tends to suggest that the others were not too expensive and that there must have been some other distinction or distinctions between them. Two are obvious. The first is price or the "Gain or Loss" to the first respondent (expressed as a percentage of the margin by which the price was more than or less than the first respondent's budgeted sum for the works). The second are the comments that appear on the form that reference the "Union". Only the first two tenderers are said to be "Union approved". None of the others are. Of the two that were "Union approved", one was for a higher price than three of the other tenders.

210. The respondents submitted that the relevant distinction between Steel Construct and Craig's Engineering was price. However, in circumstances where Craig's Engineering was not given the

opportunity to submit a revised quotation, and as senior counsel for the applicant put it, Craig's Engineering was not tendering on a level playing field, I cannot accept that submission. The applicant submits that by Mr Lynch asking for the revised drawings, Craig's Engineering was in effect putting the first respondent on notice that it intended to give a revised quotation for the work. The applicant argues that because the third respondent did not reply, he was not interested in Craig's Engineering submitting a revised price because they had already solved Steel Construct's "EBA issue", an issue which remained with Craig's Engineering. It was further submitted that an inference is open that the third respondent did not foresee a similar solution open to Craig's Engineering.

211. Senior counsel for the respondents submitted that notwithstanding the state of mind of the three nominators, the evidence demonstrates that the second respondent acted solely on the things about which he gave evidence. However, that submission fails to appreciate the evidence of the second respondent that he gave *some regard* to the comments on the Authority to Let. On his own evidence those matters played some part in his decision making process. The respondents submitted that that regard was had to how the subcontractor would be managed, and how the industrial relations around that subcontractor would be managed. But those matters were a function of whether Craig's Engineering had a relevant agreement with the CFMEU or BLF. Against the background of the dispute with the CFMEU that occurred at the time of the Bracing and Waler Works it is, in my view, an inescapable conclusion that Craig's Engineering was unattractive to the first respondent because engagement of them would lead to more difficulties with the CFMEU, the progress of the relevant works and the progress of the project more generally.

212. Senior counsel for the respondents submitted that the comments on the Authority to Let (and presumably the comparison spreadsheet as well) are explained by reference to clause 33 and paragraphs 35.2 and 35.3 of the Devine Constructions Pty Ltd and CFMEU Union Collective Agreement 2011-2015. Senior counsel submitted:

> *So where you have a body of rights and obligations to consult, I would suggest it's not unusual to find that the unions, having been consulted, express views, so that references to union*

approves, or union recommends not to use, in my submission, are to be seen in the context of a unionised site where the unions have a substantial body of rights. It's, in my submission, consistent with the evidence from the company witnesses, that it was necessary to note these things because, going forward, if there was a successful tender from a company that the union had recommended not to use, during the performance of that tenderer's contract, the industrial relations would need to be managed.

213. The increase in Steel Construct's quote price from $91,585 to some $99,600 was addressed in submissions. Senior counsel for the respondents accepted that the increase was solely due to "EBA labour rates", that is, the engagement of Mulherin Rigging for labour. It was put to senior counsel that because the increase in price was accepted, it must mean that having EBA workers was important. It was submitted that the reason the increase in price was accepted was because of the first respondent's obligation under its enterprise agreement. Further, the evidence demonstrates, it was submitted, that Mulherin Rigging was engaged *and* they were paying "EBA rates", not necessarily *because* they were – the point being the rates that they were paying, not the origin of the rates. In fact, Craig's Engineering had indicated in its tender that it would pay "EBA rates". Thus, paying the "EBA rates" was something that each tenderer had contemplated and adopted in their respective tenders. The respondents submit that the fact that Steel Construct had subcontracted the labour under its contract with the first respondent to an organisation that paid "EBA rates" should not be seen as a requirement, imposed by the first respondent, that the Union should be kept happy by engaging a contractor that paid "EBA rates". But a conclusion that the use of Mulherin Rigging labour somehow improved the attractiveness of the Steel Construct tender underscores the importance of a relevant agreement being in place

214. The applicant submits that neither the second nor third respondents relied upon the notion of payment of "EBA rates" in arriving at their decision. Craig's Engineering was not asked if it paid "EBA rates". The evidence of Mr Lynch was that Craig's Engineering did in fact pay "EBA rates". There was no reference or mention to payment of "EBA rates" in any of the relevant emails. Further, even if there were consultations with the union and if there was a reliance on what fell

from those consultations, the respondents have not discharged their onus because no evidence was called from anyone from the union. The relevant conversations that I have recorded above dealt with whether Craig's Engineering had an EBA with the relevant union.

215. The applicant submits that the first respondent was indeed interested in whether tenderers had an enterprise agreement that covered the CFMEU and that matter was important. The evidence demonstrates that on 20 January, 2014 Mr Newitt advised the first respondent that he had solved the "EBA issue" by proposing to engage Mulherin Rigging, and two days later was awarded the structural steel works contract. The reference to the "EBA issue" begs the question: "What EBA issue?" The answer could only be "Whether the employer of the relevant workers had an EBA with the CFMEU".

216. The respondents submitted that it would be speculation rather than inference to conclude that the reason for Steel Construct utilising Mulherin Rigging for labour on the structural steel works was to secure the approval of the relevant union. But the inference is plainly open and in my view it is compelling given:

a) the fact that each tenderer was asked a question about whether it was covered by an enterprise agreement that covered the CFMEU in the tender documents; and

b) there were specific comments about union approval recorded in the Authority to Tender.

217. The respondents submitted that the historical context of the business dealings between the first respondent and Craig's Engineering is relevant. For instance, Craig's Engineering performed worked on the project after the Bracing and Waler Works. Thus, it is submitted, the incident on 25 July did not prevent Craig's Engineering from securing further work with the first respondent or on the project. Sometimes Craig's Engineering "were successful in their tenders, sometimes they weren't". I accept that those matters tend against the ultimate proposition advanced by the applicant and support the respondents' proposition that the existence of an EBA between Craig's Engineering and the CFMEU was of no importance.

218. The second respondent denied that the alleged reason formed part of his reasons to not award Craig's Engineering the contract. He also said that he did not base his decision on the words "Union recommended not to use". The respondents submit that the third respondent and Mr Cremin based their decision to recommend Steel Construct based on price and ability to complete the job efficiently.

219. I accept the respondents' argument that price was a critical factor in determining which subcontractor would be offered the structural steel works contract. But that does not mean that the matters identified by the applicant were not also substantial and operative reasons for the relevant decision. Indeed, a person takes action for a particular reason if the reasons for the action include that reason: s.360 of the Fair Work Act. It was for the respondents to prove on the balance of probabilities that it did not take adverse action against Craig's Engineering for a proscribed reason. In my view, the respondents do not discharge that onus. The evidence establishes that the second and third respondents and Mr Cremen took the information on both the Authority to Let and the subcontractor comparison spreadsheet into account when making his decision. The information about Craig's Engineering and its "EBA status" was relevant information. That it was included in both the subcontractors spreadsheet and the Authority to Let evidences that. The oral testimony confirm that as well. Further, Mr Cremin failed to disavow prohibited reasons as affecting his decision to recommend against Craig's Engineering. That is plainly a relevant matter: *National Tertiary Education Union v Royal Melbourne Institute of Technology* (2013) 234 IR 139 at [131].

220. I am not persuaded on the balance of probabilities or otherwise that the second and third respondents, and thereby the first respondent did not refuse to engage the services of Craig's Engineering for the purposes of the structural steel works because Craig's Engineering did not have an enterprise bargaining agreement with the CFMEU or any other relevant union, or had exercised its workplace right to not enter into an enterprise bargaining agreement with any relevant union.

The structural steel works claim: s.354

221. The applicant claims that the first respondent contravened s.354 by discriminating against Craig's Engineering because its employees were

not covered by an enterprise agreement that covered the CFMEU or the BLF.

222. The respondents submit that there was no discrimination as alleged because Craig's Engineering was not awarded the contract based on "price and capacity", and there was no discrimination against Craig's Engineering which is distinguishable from that of the other five unsuccessful tenderers.

223. Senior counsel for the respondents submitted that the case against the first respondent was entirely unclear (p14 lines 36-41 of transcript of 16.6.16):

> *But nowhere do we see in the pleadings the particular area of discrimination which is said to have occurred. So it's not really being pleaded as a discrimination case and in our submission, very difficult for us to establish what they say the relevant comparators are, and very difficult to, in the absence of knowing what the comparators are, to answer a case that is frankly so vague.*

224. But the purport of the applicant's case is clear. Craig's Engineering was treated differently to Structural Steel Australia and a substantial and operative reason for that treatment was that employees of Craig's Engineering were not covered by an enterprise agreement that also covered a particular employee organisation, being the CFMEU.

225. Neither party developed their arguments in respect of this aspect of the claim in the course of submissions. I have approached this aspect of the claim on the basis that the adverse action that I have identified above in respect of the first respondent's refusal to engage Craig's Engineering for the structural steel works is also discrimination for the purposes of s.354 of the Act because that conduct discriminates between Craig's engineering and other tenderers who were union approved. On that basis, the applicant's claim for a contravention of s.354 of the Act is made out.

The structural steel works claim: s.550

226. The applicant claims that the second and third respondents are liable under s.550 of the Fair Work Act for these contraventions. The issue

in dispute is whether the second and third respondents were *involved in* the contraventions of the first respondent.

227. The applicant submits that the second and third respondents had knowledge of the essential facts constituting the contravention and intentionally participated in the contravention: *Yorke v Lucas* (1985) 158 CLR 661 at [14]-[17]. On the evidence they were plainly involved in the contraventions. Senior counsel for the respondents did not contend to the contrary in the event that I found the contraventions proved. The second respondent and third respondents each had knowledge of all of the matters that constituted the contraventions of ss.340 and 354 of the Act.

Conclusions

228. The applicant has not proved that in respect of the Bracing and Waler Works the first respondent took any adverse action for a proscribed reason in contravention of s.340 of the Fair Work Act. The respondents have demonstrated that the relevant adverse action was taken for a reason other than a proscribed reason. The proceedings against all respondents insofar as the claims arise out of the Bracing and Waler Works must be dismissed.

229. The applicant has, however, demonstrated that in respect of the structural steel works the first respondent contravened ss.340 and 354 of the Fair Work Act because it refused to engage Craig's Engineering to perform the structural steel works and a substantial and operative reason for that refusal was that Craig's Engineering did not have an enterprise bargaining agreement with the CFMEU. The second and third respondents were involved in those contraventions for the purposes of s.550 of the Fair Work Act.

230. The parties should bring in short minutes of orders that reflect these reasons and which provide for the orderly disposition of the balance of the proceedings concerning penalty. I will make directions accordingly.

I certify that the preceding two hundred and thirty (230) paragraphs are a true copy of the reasons for judgment of Judge Jarrett

Date: 24 May 2019