

Media Release - Immediate Distribution - 27 July 2022
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Building and Construction Industry | Changes to the Building Code

The new Australian Government has wasted no time in moving to follow through on its promises to dismantle the Australian Building and Construction Commission (**ABCC**).

Over the weekend Tony Burke, Minister for Employment and Workplace Relations, issued a [media release](#) indicating the Government's intentions for the building and construction industry this week.

As foreshadowed, effective yesterday, 26 July 2022, a new look Building Code is in place.

The Government has introduced the [Code for the Tendering and Performance of Building Work Amendment Instrument 2022 \(Amended Code\)](#) which amends the [Code for the Tendering and Performance of Building Work 2016](#), more commonly known as the Building Code.

The [Explanatory Statement](#) to the Amended Code reaffirms the Government's intention to imminently abolish the Australian Building and Construction Commission (**ABCC**), and to repeal the *Building and Construction (Improving Productivity) Act 2016 (BCIIP Act)*, and the Building Code.

The Building Code, however, cannot be repealed until the BCIIP Act is repealed – which is expected to happen later this year.

So, as an interim measure the Amended Code streamlines the Building Code to remove the majority of the requirements it imposed, leaving only those required by the BCIIP Act.

What's changed?

The Building Code covers code covered entities; those building contractors or building industry participants that have submitted an expression of interest or tender for Commonwealth funded building work after 2 December 2016 (**Code Covered Entities**).

Some of the more significant changes for Code Covered Entities we set out below.

Content of enterprise agreements

The Amended Code repeals section 11 of the Building Code, which imposed additional requirements in relation to the content of enterprise agreements, compared to those in other industries, restricting the content of enterprise agreements.

The changes now mean that employers that are Code Covered Entities may see a resurgence of enterprise agreement claims from workers that may seem a distant memory for many employers. The changes opening the door for influential unions like the CFMMEU

to push for enterprise agreements that give workers, and the union, greater influence over operational decisions of employers.

For example, the Building Code expressly prohibited the inclusion of provisions that limited the right of an employer to manage its business or improve productivity.

Such prohibited provisions included any that:

- required an employer to consult or seek the approval of an officer, delegate or other union representative about the engagement of employees or subcontractors
- limited an employer's right to make decisions about the allocation of work or things like redundancy or redeployment of employees based on operational requirements
- required union logos or mottos to be included on company property or equipment

It remains to be seen how unions like the CFMMEU will manoeuvre during the next bargaining cycle now the prohibitions have been removed.

Whilst employers will not have to agree to any such provisions pushed, it may be practically more difficult for an employer to reject them during bargaining now that those provisions no longer fall foul of the Building Code.

Freedom of association

The Amended Code repeals section 13 of the Building Code, which imposed additional requirements in relation to freedom of association compared to those in other industries.

The changes now mean that the Amended Code no longer includes an obligation that Code Covered Entities must adopt and implement policies and practices that ensure persons are free to be or not be members of a union, represented by a union, or to participate or not participate in industrial activities.

For example, the Building Code obligated Code Covered Entities to ensure that:

- 'no ticket, no start' signage or similar was not displayed, that such arrangements were not implemented and that 'show card' days did not occur
- signs intended to vilify or harass employees who participate, or do not participate, in industrial activities were not displayed
- union logos, mottos or indicia were not applied to clothing, property or equipment supplied by employers which implied that membership of a union was anything other than an individual choice
- requirements were not imposed on Code Covered Entities or subcontractors engaged by the Code Covered Entities to employ a non-working job delegate, or hire an individual nominated by a union

The removal of those obligations may work to give unions greater flexibility on building sites to advance union interests and promote union membership amongst workers, using measures that have formerly not been allowed under the Building Code.

The general protections provisions of the Fair Work Act will, however, continue to make coercion and misleading representations about workplace rights unlawful.

Entry to premises

The Amended Code repeals section 14 of the Building Code, which set out requirements relating to right of entry.

True, the Fair Work Act and applicable state-based work health and safety legislation contain strict right of entry requirements for permit holders.

The Building Code, however, also contained additional obligations that effectively meant Code Covered Entities were in breach of the Building Code if they allowed a union official onto a site for a reason other than as permitted under right of entry requirements.

With that obligation no longer there, it will be important for Code Covered Entities to ensure that their managers do not become lax with right of entry, where union officials may seek to enter sites at the invitation of occupiers, without having to strictly comply with right of entry requirements.

What's next for enforcement in the industry?

Provisions of the BCIIIP Act empowering the ABCC and others to commence proceedings for contraventions of the BCIIIP Act for things like unlawful industrial action, picketing, and coercion remain, for the time being.

Those contraventions can attract significant penalties.

Although, the ABCC bringing such proceedings is perhaps unlikely, given its looming demise.

The repeal of the BCIIIP Act and the Building Code is expected later this year, sometime after the expected October 2022 budget update, which is expected to significantly reduce funding for the ABCC.

In the meantime, Minister Burke has indicated that consistent with other industries, in the building and construction industry, the Fair Work Ombudsman (**FWO**) will be tasked with enforcing compliance with the Fair Work Act.

The FWO will also step into the shoes of the ABCC in ongoing proceedings, most of which are against the CFMMEU.

Master Builders Australia has signalled its discontent with the changes, referencing [modelling from EY](#) it commissioned earlier this year, which found that abolishing the ABCC could cost the Australian economy \$47.5 billion by 2030.



If you require practical advice in relation to the changes, please feel free to get in touch for expert industrial relations law advice from the McCabes Lawyers Employment, Workplace Relations and Safety Team.

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