



**Australian Government**  
**Australian Building and  
Construction Commission**

# **Code for the Tendering and Performance of Commonwealth Funded Building Work 2016**

## **Funding Entity Model Clauses**

### **Directly Commonwealth Funded Building Work**

1 September 2017

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## 1. Purpose

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Funding entities are responsible for ensuring all expressions of interest, tenders and contractual documentation clearly set out the requirements of the *Code for the Tendering and Performance of Building Work 2016* (Building Code). All parties invited to express interest in, or tender for, Commonwealth funded building work, must be informed of the application of the Building Code to the work.

This document contains model clauses that can be used in expression of interest or tender documentation (however described) and contracts issued by funding entities who are directly funding Commonwealth funded building work to ensure application of the Building Code.

In the model clauses, the following terms are used:

- 'Works' is used to refer to the Commonwealth funded building work that is the subject of the expression of interest, tender or contract.
- 'Contractor' is used to refer to the building contractor of building industry participant who enters into a contract with the funding entity for the Works.
- 'Subcontractor' is used to refer to any building contractor or building industry participant who enters into a subcontract with the Contractor in relation to the Works.
- 'Contract' is used to refer to a contract between the Contractor and the funding entity for the Works.

The Building Code can be downloaded  
from: <https://www.legislation.gov.au/Details/F2017C00668>

## 2. Advertisement clause

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The clause below should be used by funding entities for advertisements calling for expressions of interest or requests for tender (however described) for directly Commonwealth Funded Building Work:

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### **COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016**

The *Code for the Tendering and Performance of Building Work 2016* applies to the building work associated with this project. By submitting an expression of interest in, or tender for, this project, you will become subject to the *Code for the Tendering and Performance of Building Work 2016*.

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### 3. Tender clauses

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The clauses below should be used in expression of interest or tender documentation (however described) for directly Commonwealth Funded Building Work. The appropriate terminology and sections should be selected in the below clauses to reflect whether those clauses are being used in expression of interest documentation or tender documentation:

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#### COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

1.1.1. In these clauses:

<b>ABCC</b>	means the body referred to in subsection 29(2) of the Act.
<b>Act</b>	means the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> .
<b>Building Code</b>	means the <i>Code for the Tendering and Performance of Building Work 2016</i> , which is available at <a href="https://www.legislation.gov.au/Details/F2017C00668">https://www.legislation.gov.au/Details/F2017C00668</a> .
<b>Building Work</b>	has the same meaning as in subsection 3(4) of the Building Code.
<b>Commonwealth Funded Building Work</b>	means Building Work in items 1-8 of Schedule 1 of the Building Code.
<b>Enterprise Agreement</b>	has the same meaning as in the <i>Fair Work Act 2009</i> .
<b>Exclusion Sanction</b>	has the same meaning as in subsection 3(3) of the Building Code.
<b>Related Entity</b>	has the same meaning as in subsection 3(2) of the Building Code.
<b>Works</b>	means Commonwealth Funded Building Work that is the subject of this [Request for Expression of Interest/Request for Tender].

1.1.2. The Building Code applies to the Works.

1.1.3. As part of their [response/tender], [Respondents/Tenderers] must submit:

- a. a signed "Declaration of Compliance" which is attached to this [Request for Expression of Interest/Request for Tender]; and
- b. the further information outlined in Attachment A to the "Declaration of Compliance".

This is a minimum content and format requirement.

1.1.4. The following are essential requirements:

- a. [Respondents/Tenderers] and their Related Entities are not covered by an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code;
- b. [Respondents/Tenderers] are not subject to an Exclusion Sanction;
- c. [Respondents/Tenderers] have not 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 which has not been stayed or revoked and for which the period for compliance has expired without the [Respondent/Tenderer] having complied with the decision, direction or order;
- d. [Respondents/Tenderers] will only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia; and

*To be included in tender documentation (but not expression of interest documentation) where: (1) the Commonwealth's contribution to the project that includes the Works is at least \$5,000,000 and represents at least 50% of the total construction project value proportion of that project; or (2) the Commonwealth's contribution to the project that includes the Works is at least \$10,000,000 (irrespective of its proportion of the total construction project value).*

*e. Tenderers have submitted a Workplace Relations Management Plan with their tender for approval by the ABCC in accordance with Part 6 of the Building Code.*

*The Commonwealth will only enter into a contract with a [Respondent/Tenderer] whose Workplace Relations Management Plan has been approved by the ABCC.*

The Commonwealth will exclude [Respondents/Tenderers] from further consideration if at any time before a contract is executed in relation to the Works the Commonwealth considers that they do not comply with these essential requirements.

- 1.1.5. The Commonwealth may exclude [Respondents/Tenderers] from further consideration if at any time before a contract is executed in relation to the Works they are excluded from performing Building Work funded by a state or territory government.

*To be included in expression of interest documentation (but not tender documentation) where: (1) the Commonwealth's contribution to the project that includes the Works is at least \$5,000,000 and represents at least 50% of the total construction project value proportion of that project; or (2) the Commonwealth's contribution to the project that includes the Works is at least \$10,000,000 (irrespective of its proportion of the total construction project value).*

- 1.1.6. *Where the Commonwealth issues a Request for Tender in relation to the Works, Tenderers will be required to submit a Workplace Relations*

*Management Plan with their tenders for approval by the ABCC in accordance with Part 6 of the Building Code. The Commonwealth will only enter into a contract with an entity whose Workplace Relations Management Plan has been approved by the ABCC*

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#### 4. Declaration of Compliance

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The Declaration of Compliance below should be included as an attachment to expression of interest or tender documentation (however described) for directly Commonwealth Funded Building Work. The appropriate terminology should be selected in the below Declaration of Compliance to reflect whether it is being used in expression of interest documentation or tender documentation.

Funding entities should require the [Respondent/Tenderer] to produce a copy of the ABCC Letter of Compliance (Determination)<sup>1</sup> or a completed Self-Declaration A or C in respect of the enterprise agreement or other industrial instrument that covers the Tenderer/Respondent in relation to the Works. Tenderers/Respondents are also required to complete Section Two of Attachment A to this document. Section Two requires details of any other enterprise agreements made or varied (in accordance with section 207 of the *Fair Work Act 2009*) on or after 25 April 2014, that cover the Tenderer/Respondent or their Related Entities in respect of building work.

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### DECLARATION OF COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

1.1.1. In this Declaration of Compliance:

<b>ABCC</b>	means the body referred to in subsection 29(2) of the Act.
<b>ABC Commissioner</b>	means the Australian Building and Construction Commissioner referred to in subsection 15(1) of the Act.
<b>Act</b>	means the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> .
<b>Building Code</b>	means the <i>Code for the Tendering and Performance of Building Work 2016</i> , which is available at <a href="https://www.legislation.gov.au/Details/F2017C00668">https://www.legislation.gov.au/Details/F2017C00668</a> .
<b>Building Contractor</b>	has the same meaning as in the Act.
<b>Building Industry Participant</b>	has the same meaning as in the Act.
<b>Building Work</b>	has the same meaning as in subsection 3(4) of the Building Code.

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<sup>1</sup> Transitional ABCC Letters of Compliance for enterprise agreements made before 2 December 2016 are no longer valid. Funding entities can identify when a Letter of Compliance is a transitional Letter of Compliance because it states the contractor is eligible to tender until 29 November 2018.



<b>Commonwealth Funded Building Work</b>	means Building Work in items 1-8 of Schedule 1 of the Building Code.
<b>Enterprise Agreement</b>	has the same meaning as in the <i>Fair Work Act 2009</i> .
<b>Exclusion Sanction</b>	has the same meaning as in subsection 3(3) of the Building Code.
<b>Related Entity</b>	has the same meaning as in subsection 3(2) of the Building Code.
<b>Works</b>	means the Commonwealth Funded Building Work that is the subject of this [Request for Expression of Interest/Request for Tender].

**Name of Commonwealth project:** \_\_\_\_\_

**Name of [Respondent/Tenderer], ABN and ACN:** \_\_\_\_\_

- 1.1.2. The [Respondent/Tenderer] confirms that it has complied with the Building Code in preparing its [response/tender].
- 1.1.3. The [Respondent/Tenderer] acknowledges that it and its Related Entities must comply with the Building Code in relation to all Building Work described in Schedule 1 of the Building Code for which an expression of interest or request for tender (however described) is called on or after the date that the Building Code commenced, being 2 December 2016, and, should it be the successful Tenderer, in relation to the Works.
- 1.1.4. The [Respondent/Tenderer] undertakes to ensure that it and its subcontractors that it subcontracts any of the Works to, should it be the successful Tenderer, comply with the Building Code.
- 1.1.5. The [Respondent/Tenderer] acknowledges the powers and functions of the ABC Commissioner and the ABCC under the Act and the Building Code and undertakes to ensure that it and its subcontractors will comply with any requests made by the ABCC and the ABC Commissioner within those powers and functions, including but not limited to requests for entry under section 72 of the Act, requests to interview any person under section 74 of the Act, requests to produce records or documents under sections 74 and 77 of the of the Act and requests for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.
- 1.1.6. The [Respondent/Tenderer] declares that where it proposes to subcontract any of the Works, should it be the successful Tenderer, it will:
- a. not enter into a subcontract with a subcontractor who:
    - i. is covered by, or has Related Entities covered by, an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code;

- ii. is subject to an Exclusion Sanction;
  - iii. unless approved otherwise by the ABC Commissioner, is excluded from performing Building Work funded by a state or territory government; and
- b. only enter into a subcontract where:
- i. the subcontractor undertakes to only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia;

*To be included where: (1) the Commonwealth's contribution to the project that includes the Works is at least \$5,000,000 and represents at least 50% of the total construction project value proportion of that project; or (2) the Commonwealth's contribution to the project that includes the Works is at least \$10,000,000 (irrespective of its proportion of the total construction project value).*

ii. *the subcontractor undertakes to comply with the Workplace Relations Management Plan approved by the ABCC in accordance with Part 6 of the Building Code that applies to the Works;*

- iii. the subcontractor has submitted a declaration of compliance, including the further information outlined in Attachment A to the declaration of compliance, in substantively the same form as the model declaration of compliance applicable to contractors and subcontractors in relation to the Building Code;
- iv. the subcontract with the subcontractor contains clauses in substantively the same form as the model contract clauses applicable to contractors and subcontractors in relation to the Building Code; and
- v. the subcontractor has advised, prior to entering into a contract with the [Respondent/Tenderer] 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
- vi. the subcontractor has agreed to update the advice referred to in 1.1.6(b)(v) every six months for the duration of the contract between the [Respondent/Tenderer] and the subcontractor.

1.1.7. The [Respondent/Tenderer] declares that it has provided all of the further information required by Attachment A to this Declaration of Compliance.

1.1.8. The [Respondent/Tenderer] declares that:

- a. it, and its Related Entities, are not covered by an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code (Respondent/Tenderer must complete Section Two of Attachment A);
- b. it is not subject to an Exclusion Sanction;
- c. it has not 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 which has not been stayed or revoked and for which the period for compliance has expired without the [Respondent/Tenderer] having complied with the decision, direction or order;
- d. it will only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia, should it be the successful Tenderer; and

*To be included in tender documentation (but not expression of interest documentation) where: (1) the Commonwealth's contribution to the project that includes the Works is at least \$5,000,000 and represents at least 50% of the total construction project value proportion of that project; or (2) the Commonwealth's contribution to the project that includes the Works is at least \$10,000,000 (irrespective of its proportion of the total construction project value).*

- e. *it has provided as part of its tender a Workplace Relations Management Plan for approval by the ABCC in accordance with Part 6 of the Building Code.*

[To be signed by the [Respondent/Tenderer]—insert appropriate signature block.]

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## ATTACHMENT A – INFORMATION REGARDING COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

[Respondents/Tenderers] must provide the following information as part of their Declaration of Compliance. This information can either be set out in this table or in an annexure to this Attachment and the Declaration of Compliance.

### Section One – required for EOI and tender responses (however described)

Item	Requirement	Compliance
1	Does the [Respondent/Tenderer], or its Related Entities, have an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code?	<p style="text-align: center;">Yes /No</p> <hr/> <p>Details: complete section two of this Attachment A and attach the required evidence according to the [Respondent/Tenderer]'s situation. Refer to the ABCC's 'eligibility to tender' webpage at <a href="https://www.abcc.gov.au/building-code/eligibility-tender">https://www.abcc.gov.au/building-code/eligibility-tender</a> for further information.</p>
2	Is the [Respondent/Tenderer] excluded from performing Building Work funded by a state or territory government? If so, the Commonwealth reserves the right to exclude the [Respondent/Tenderer] from further consideration.	<p style="text-align: center;">Yes/No</p> <hr/> <p>Details:</p>
3	Does the [Respondent/Tenderer] positively commit to the provision of appropriate training and skills development for their workforce, and, if so, what evidence can the [Respondent/Tenderer] supply in relation to this (for example, evidence of its compliance with any state or territory government building training policies and evidence of its support in the delivery of nationally endorsed building and construction competencies)?	<p style="text-align: center;">Yes/No</p> <hr/> <p>Details:</p>

4	How many current apprentice and trainee employees are engaged or intended to be engaged by the [Respondent/Tenderer] to undertake the Works?	Details:
5	How many and what classes of persons that holder visas under the Migration Act 1958 are engaged or intended to be engaged by the [Respondent/Tenderer] to undertake the Works?	Details:
6	Has the [Respondent/Tenderer] within the preceding 3 years had an adverse decision, direction or order of a court or tribunal made against it for a breach of a designated building law, work health and safety law or the <i>Migration Act 1958</i> ?	Yes / No
		Details:
7	Has the [Respondent/Tenderer] or its Related Entities within the preceding 3 years 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) to a Building Contractor or Building Industry Participant?	Yes / No
		Details:
8	Has the [Respondent/Tenderer] or its Related Entities within the preceding 3 years owed any unsatisfied judgement debts to a Building Contractor or Building Industry Participant?	Yes / No
		Details:

**Section Two– required for EOI and tender responses (however described)**

Does the [Respondent/Tenderer], or its Related Entities, have an enterprise agreement(s) made or varied (in accordance with section 207 of the *Fair Work Act 2009*) on or after 25 April 2014 that cover the [Respondent/Tenderer] or its Related Entities in respect of building work?

**No -** The [Respondent/Tenderer] must attach Self-Declaration A

**Yes -** The [Respondent/Tenderer] must attach the ABCC Letter of Compliance or Self-Declaration that relates to the project being tendered; and

The [Respondent/Tenderer] must list all enterprise agreements made or varied (in accordance with section 207 of the *Fair Work Act 2009*) on or after 25 April 2014 that cover the [Respondent/Tenderer] or its Related Entities in respect of building work.

<b>Name of entity covered by the enterprise agreement</b>	<b>Title of enterprise agreement that covers the Tenderer/Respondent or its Related Entities in respect of building work</b>	<b>Date made or varied (in accordance with section 207 of the Fair Work Act 2009)</b>	<b>Fair Work Commission Reference</b>	<b>Does the entity have an ABCC Letter of Compliance (Determination*<sup>2</sup>) in relation to the agreement  YES/NO</b>	<b>If NO  Is the entity entitled to an exemption* outlined in Schedule 5 of the Building Code 2016 in relation to the enterprise agreement</b>

- Schedule 5(1)(1)(b) and (c) provide that subsection 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:
  - (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).

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<sup>2 2</sup> Transitional ABCC Letters of Compliance for enterprise agreements made before 2 December 2016 are no longer valid. Funding entities can identify when a Letter of Compliance is a transitional Letter of Compliance because it states the contractor is eligible to tender until 29 November 2018.

- Schedule 5(1)(1)(2)(a) provides that subsections 11(1) and 11(3) 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.

**Section Three – required for tender responses only** *(to be included in tender documentation (but not expression of interest documentation))*

9	To what extent does the Tenderer intend to use domestically sourced and manufactured building materials to undertake the Works?	Details:
10	What is the Tenderer's assessment of the whole-of-life costs of the project to which the Works relate?	Details:
11	What does the Tenderer consider the impact on jobs will be of the project to which the Works relate?	Details:
12	Does the Tenderer consider that the project to which the Works relate will contribute to skills growth?	Yes/No



## 5. Contract clauses - agreements with contractors

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The clauses below should be used by funding entities in contracts with Building Contractors or Building Industry Participants to undertake directly Commonwealth Funded Building Work:

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### COMPLIANCE WITH THE CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016

1.1.1. In these clauses:

<b>ABCC</b>	means the body referred to in subsection 29(2) of the Act.
<b>ABC Commissioner</b>	means the Australian Building and Construction Commissioner referred to in subsection 15(1) of the Act.
<b>Act</b>	means the <i>Building and Construction Industry (Improving Productivity) Act 2016</i> .
<b>Building Code</b>	means the <i>Code for the Tendering and Performance of Building Work 2016</i> , which is available at <a href="https://www.legislation.gov.au/Details/F2017C00668">https://www.legislation.gov.au/Details/F2017C00668</a> .
<b>Building Contractor</b>	has the same meaning as in the Act.
<b>Building Industry Participant</b>	has the same meaning as in the Act.
<b>Building Work</b>	has the same meaning as in subsection 3(4) of the Building Code.
<b>Commonwealth Funded Building Work</b>	means Building Work in items 1-8 of Schedule 1 of the Building Code.
<b>Enterprise Agreement</b>	has the same meaning as in the <i>Fair Work Act 2009</i> .
<b>Exclusion Sanction</b>	has the same meaning as in subsection 3(3) of the Building Code.
<b>Subcontractor</b>	means a Building Contractor or Building Industry Participant who the Contactor has entered, or proposes to enter, into a subcontract with to undertake any of the Works.
<b>Works</b>	means Commonwealth Funded Building Work that is the subject of this Contract.

1.1.2. The Contractor declares as at the date of commencement of this Contract in relation to the Works, that it:

- a. is not subject to an Exclusion Sanction;

- b. is not covered by, and does not have Related Entities covered by, an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code;
- c. has not 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 which has not been stayed or revoked and for which the period for compliance has expired without the Contractor having complied with the decision, direction or order; and
- d. unless approved otherwise by the ABC Commissioner, is not excluded from performing Building Work funded by a state or territory government.

1.1.3. The Contractor:

- a. declares that as at the date of commencement of this Contract in relation to the Works; and
- b. must ensure that during the term of this Contract in relation to the Works: that it and its Subcontractors:
  - c. comply with the Building Code; and
  - d. will only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia.

*To be included where: (1) the Commonwealth's contribution to the project that includes the Works is at least \$5,000,000 and represents at least 50% of the total construction project value proportion of that project; or (2) the Commonwealth's contribution to the project that includes the Works is at least \$10,000,000 (irrespective of its proportion of the total construction project value).*

- e. *comply with the Workplace Relations Management Plan approved by the ABCC in accordance with Part 6 of the Building Code that applies to the Works.*

- 1.1.4. Compliance with the Building Code does not relieve the Contractor from responsibility to perform this Contract, or from liability for any defect in the Works arising from compliance with the Building Code.
- 1.1.5. The Contractor must notify the ABCC of any breach or suspected breach of the Building Code as soon as practicable but no later than 2 working day after becoming aware of the breach or suspected breach and of the steps proposed to be taken to rectify the breach.
- 1.1.6. The Contractor acknowledges the powers and functions of the ABC Commissioner and the ABCC under the Act and the Building Code and will ensure that it and its Subcontractors comply with any requests made by the ABCC and the ABC Commissioner within those powers and functions, including but not limited to requests for entry under section 72 of the Act, requests to interview any person under section 74 of the Act, requests to produce records

or documents under sections 74 and 77 of the of the Act and requests for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.

- 1.1.7. The Contractor must only enter into a subcontract for any of the Works where:
- a. The Subcontractor is not subject to an exclusion sanction or excluded from undertaking work funded by a state or territory government unless approval to do so is provided by the ABC Commissioner; and
  - b. The Subcontractor is not covered by, and does not have Related Entities covered by, an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code; and
  - c. the Subcontractor has submitted a declaration of compliance, including the further information outlined in Attachment A to the declaration of compliance, in substantively the same form as the model declaration of compliance applicable to contractors and subcontractors in relation to the Building Code; and
  - d. the subcontract with the Subcontractor contains clauses in substantively the same form as the model contract clauses applicable to contractors and subcontractors in relation to the Building Code; and
  - e. the Subcontractor has advised, 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
  - f. the Subcontractor has agreed to update the advice referred to in 1.1.7(e) every six months for the duration of the contract between the Contractor and the Subcontractor.
- 1.1.8. The Contractor must provide the Commonwealth with any Subcontractor's declaration of compliance referred to in clause 1.1.7.a on request.
-