



Building Code 2016 - Funding Entity Compliance Process

Background

The *Code for the Tendering and Performance of Building Work 2016* (the Code) is established under the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act).

The Code sets out the Australian Government's expected standards for all building industry participants involved in Commonwealth-funded building work projects, and seeks to leverage Commonwealth funding to encourage the development of safe, healthy, fair, lawful and productive building sites for the benefit of all building industry participants, and the Australian economy as a whole. The BCIIP Act also re-established the Australian Building and Construction Commission (ABCC) which has responsibility for overseeing compliance with the Code.

Purpose

Funding arrangements for Commonwealth building projects are often complex and the ABCC is best placed and readily available to provide advice to agencies on the application of the Code, including advising the point at which Building Code requirements apply. Primary responsibility for compliance with the Code requirements, however, rests with funding entities. As such, each agency should ensure that it has appropriate procedures and processes in place to ensure compliance with the Code's requirements.

The ABCC monitors Commonwealth funding, tenders and contracts for building work as part of its business operations. The purpose of undertaking these activities is primarily to enable early education and advice to agencies to ensure obligations under the Code are met, and to ensure an accurate picture of Code projects is recorded for analysis and reporting purposes. The ABCC also conducts inspections and audits of building projects as part of monitoring compliance with the Code.

Through all of these activities, the ABCC identifies potential breaches of the Code by funding entities. This document sets out the framework of actions the ABCC will undertake where funding entity non-compliance is identified.

Breaches of the Code

The ABCC seeks to work collaboratively with Commonwealth funding entities to improve awareness of the Code and enhance understanding of responsibilities. The aim of this approach is to strengthen the internal processes of agencies which influence effective application of the Code.

When a potential breach has been identified, the ABCC will initiate contact with the funding entity, and will work with them to collect information, verify if there is non-compliance with the Code and identify the issues contributing to the non-compliance.

If a breach of the Code is confirmed, the ABCC will determine an appropriate response dependent on the severity and the nature of the breach.

Considerations

Where a breach is identified, the ABCC will consider the factors associated with the specific case, when determining the appropriate action/s to be taken in response.

These may include but are not limited to:

- the funding entity's historical compliance with the Code
- current due diligence processes
- any contributory circumstances
- the funding entity's responsiveness to identify and address issues
- the cooperation an agency provides in reviewing breaches
- the value of the procurement to which the breach relates
- any evidence of deliberate avoidance of requirements (eg contract splitting)
- whether the procurement contains matters of interest

Actions of the ABCC

The ABC Commissioner has a responsibility to maintain the integrity of the application of the Building Code. Non-compliance with Government policy is a serious issue and the Commissioner will respond in a manner appropriate to the non-compliance.

Section 29 of the Code provides that where the Commissioner considers a funding entity, or an official, is not complying with, or has not complied with, the Code, the ABC Commissioner may refer the matter or make a complaint to the Secretary of the Department of Finance for investigation or further action.

In all cases, communication between the ABCC and the relevant agency is the first step to identify reasons for the breach, potential remedies and appropriate actions to avoid recurrence. Specific action taken by the Commissioner in response to a breach will generally only occur where an appropriate response to the breach cannot be agreed between the ABCC and the agency, or where there are ongoing concerns about the agency's compliance with the Code. In all cases, the ABCC will determine an appropriate course of action, which may include but is not limited to the following:

- The ABCC working cooperatively with the agency to identify potential remedies and improve their internal processes and management.
- The ABCC seeking a formal response on proposed remedies to the breach and prevention of future breaches.
- The ABCC seeking a formal response from the relevant Departmental Secretary or Agency equivalent to draw their attention to the breach and to seek assurance as to what steps the Department/Agency will take to address the identified compliance concerns and prevent future breaches.
- The ABC Commissioner seeking a formal response from the relevant Departmental Secretary or Agency equivalent
- The ABC Commissioner writing to the Minister for Finance to make a complaint or refer the matter for further investigation and action.

Other potential implications of non-compliance

The implications of non-compliance are not solely about the failure of a funding entity to ensure Code requirements are met. There are also broader implications that can have far reaching impacts.

One consequence is the potential for increased cost of Commonwealth construction projects due to time delays and budget blowouts as a result of unlawful industrial action. This not only impacts the delivery of projects, but represents significant risk in the efficient and effective expenditure of taxpayer dollars.

Another serious consequence is where a failure of the funding entity's due diligence processes results in the engagement of a non-Code compliant builder, or the failure to include key Code requirements in relevant funding agreements/grants and building work contracts.

This can result in important obligations not being passed through the supply chain, resulting in breaches of the Code.

Significant delays, increased costs and visible industrial disputes on Commonwealth funded projects may have significant implications for the Government and the funding entity. These include:

- Reputation of the Government being damaged for perceived failure to implement legislation
- Reputation of the funding entity being damaged for failing to comply with legislation and having perceived poor procurement processes and practices in place
- Potential litigation against the Commonwealth
- Strong negative response from Industry, particularly Code –compliant builders, expressing concerns about the Government implementing double standards and damaging the credibility of the Code
- On an industry level, funding entity non-compliance also reduces the influence of Commonwealth spending to promote safe, healthy, fair, lawful and productive building sites which is a key objective of the Code.

ABCC Support

The ABCC can provide general and targeted information sessions to funding entities to ensure obligations under the Code are met. The ABCC has a Manager of Government Code Compliance who can be contacted by emailing governmentcodeenquiries@abcc.gov.au should you have questions relating to procurement of Commonwealth funded building work, or if you believe a breach may have occurred. Further information is also available on the [Funding entities page of the ABCC website](#).

Early identification, collaboration and rectification of issues is the emphasis of the ABCC funding entity compliance process and agencies are encouraged to engage with the ABCC in a transparent and collaborative manner to resolve any issues.