

Subcontractor Obligations under the Building Code 2016

As a subcontractor, once you become a Code-covered entity there are a number of obligations and general requirements imposed on your business. It is important that you meet all these obligations in order to ensure compliance with the Building Code 2016.

Compliance with laws decisions, directions and orders

As a subcontractor you must comply with the *Building and Construction Industry (Improving Productivity) Act 2016* and all designated building laws, which includes the:

- *Independent Contractors Act 2006*;
- *Fair Work Act 2009*;
- *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; or
- Commonwealth industrial instruction (e.g. any applicable award or enterprise agreement).

You must also comply with the *Competition and Consumer Act 2010*, work health and safety laws, and the *Migration Act 1958*.

Security of payment compliance

You are required to:

- comply with all applicable laws and other requirements relating to the security of payments that are due
- ensure payments which are due and payable are made in a timely manner and not unreasonably withheld
- ensure disputes about payments are resolved in a reasonable, timely and cooperative way

Under the Building Code 2016 you must also have a documented dispute settlement process detailing how disputes about payments will be resolved. This process must include a referral process to an independent adjudicator for determination if the dispute cannot be resolved between the parties involved.

You also have an obligation to 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 is due.

Any illegal or fraudulent phoenix activities that are engaged in for the purpose of avoiding any payment due to a contractor or other creditor are prohibited.

Additionally, you must not take (or threaten to take) action in order to coerce or apply undue influence on a person to exercise or not exercise any rights arising under laws relating to security of payments.

Unregistered agreements

You are prohibited from bargaining in relation to an agreement or making an agreement that:

- deals with matters that would not be permitted by section 11 (prohibited content of enterprise agreements); or
- provides for terms, conditions or benefits of employment (which may include above-entitlements payments); or
- that restricts or limits the form or type of engagement that may be used to engage subcontractors.

This is to ensure no 'side deal' arrangements are made to circumvent section 11 of the Building Code 2016. However, it does not apply to common law agreements made between an employer and individual employee or to an individual flexible arrangement.

Prohibited content of enterprise agreements

Download the fact sheet on *Prohibited Clauses in Agreements* from our website.

Sham contracting

The engagement of individuals to perform work under a contractor for services (i.e. as independent contractors) must not be used to disguise the true character of the engagement, being that of employment. This is to prevent contractors from avoiding responsibility for entitlements that would otherwise be due to employees.

Collusive practices

The Building Code 2016 prohibits contractors from engaging in any collusive tendering practices in order to gain an unfair advantage. Collusive practices include:

- any agreements between tenderers as to who should be successful
- meetings of tenders to discuss tenders before the submission of tenders if the client is not present
- any exchange of information for the payment of money or the security of a benefit for unsuccessful tenderers by successful tenderers
- agreements to fix prices or conditions of contract without consent of the client

Above-entitlements payments

You must not engage in conduct for the purpose of forcing other contractors or consultants to make an above-entitlements payment in respect of building work. Additionally, no undue pressure or influence can be put on a person to contribute to a particular fund or scheme or support a particular product, service or arrangement (i.e. particular income protection or training services provided by particular providers).

Engagement of non-citizens or non-residents

If you are planning on employing a person that is not an Australian citizen or permanent resident (within the meaning of the *Migration Act 1958*) you must first ensure that:

- the position was first advertised in Australia
- the advertising was targeted in such a way that a significant proportion of suitably qualified Australian citizens and Australian permanent residents were likely to be informed about the position
- the skills or requirements set out in the advertising were appropriate to the position

You must also be able to demonstrate that no Australian citizen or permanent resident was suitable for the job.

Protecting freedom of association



You must adopt and implement policies and practices that protect freedom of association in respect of building work, which ensure that persons are:

- free to become, or not become, members of building associations
- free to be represented, or not represented, by building associations
- free to participate, or not participate, in lawful industrial activities
- not discriminated against in respect of benefits in the workplace because they are, or are not, members of a building association.

There are a number of specific obligations listed in section 13 of the Building Code 2016 that are placed on you with regards to protecting freedom of association. For example, you must ensure that:

- personal information is appropriately managed in accordance with the *Privacy Act 1988* and the *Fair Work Act 2009*
- there is no display of 'no ticket, no start' signs, or similar arrangements in place
- there is no display of signs that seek to vilify or harass employees to (or not to) participate in industrial activities
- 'show card' days do not occur
- there is no discrimination or disadvantage with respect to employee representatives
- forms are not used to require an employee or subcontractor to identify whether they are a member of a building association
- there are no practices that require a person to disclose membership of a building association, unless authorised by law
- individuals are not refused employment or engagement because they are, or are not, a member of a building association
- building association logos, mottos or indicia are not applied to clothing, property or equipment supplied by the employer or any other conduct which implies that membership of a building association is not an individual choice
- reasonable requests made by workplace delegate to represent an employee in respect to a workplace matter (e.g. grievance or dispute) is not refused
- Requirements are not imposed on you or a subcontractor engaged by you to employ a non-working shop steward or job delegate or to hire an individual nominated by a building association
- you do not employ a non-working shop steward or job delegate
- individuals are not required to pay a 'bargaining fee' to a building association of which the individual is not a member

- your employees are provided freedom of choice in deciding whether to be represented in a grievance or dispute procedures, and, if so, by whom
- officials, delegates, or other representatives of building associations do not undertake or administer induction processes

Right of entry

With regards to where building work is performed you must comply with applicable right of entry laws and allow entry to building sites by officials of a building association only pursuant to a properly exercised right of entry.

This means building association officials can access building sites for a purpose for which a right of entry could be exercised, and where the procedures have been complied with. You cannot invite persons onto site where that person is a member of a class of persons that could apply for a right of entry permit.

This obligation requires you to ensure compliance with right of entry laws so far that is reasonably practicable. This may include issuing policies and informing workers and subcontractors about when officials are permitted to enter a building site, and having appropriate processes in place to respond to unauthorised access.

Report and notification requirements

Breaches or suspected breaches to the building code

You have an obligation under the Building Code 2016 to notify the ABCC of a breach, or a suspected breach, of this code as soon as practicable. This cannot be later than 2 working days after you have become aware of the breach.

You will also be required to advise the ABCC of the steps proposed to be taken to rectify the breach within 14 days of providing the notification of the breach.

Industrial action

You must as soon as practicable (no later than 24 hours) after becoming aware of the threat or action report to the ABCC any actual or threatened protected or unprotected industrial action by your employees on either Commonwealth-funded building sites. With regards to privately funded building sites you still have an obligation to report to the ABCC any unprotected industrial action.

So far as reasonably practicable, you are required to take steps to prevent or bring to an end to unprotected industrial action taken by your employees.

Secondary boycotts

Secondary boycotts, as defined by the *Competition and Consumer Act 2010*, refers to conduct that hinders or prevents a third person from:

- Supplying goods and services to a fourth person (who is not an employer of the first person or second person); or
- Acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

that is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person supplies or acquires goods or services.

If a direct or indirect request or demand is made by a building association for you to engage in conduct that appears to be for the purposes of secondary boycott you must report it to the ABCC as soon as practicable, but no later than 24 hours after.

Managing drug and alcohol issues in the workplace

You must ensure that 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. The implementation and cost of any drug and alcohol testing cannot be passed on by the head contractor to you.