

# “Restoring the Rule of Law” through Commercial (Dis)incentives: The Code for the Tendering and Performance of Building Work 2016

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## *Abstract*

This article examines the Australian Coalition Government’s attempt to restore the rule of law in the building and construction industry, through the procurement requirements in the *Code for the Tendering and Performance of Building Work 2016* (Cth) (*‘2016 Code’*). It traces the evolution of the separate scheme of construction regulation adopted in 2005 following the Cole Royal Commission, the subsequent Labor Government changes to this scheme, and the initiatives of the Coalition Government since 2013. The article then considers the use of procurement guidelines to implement workplace reform in the construction industry since 1997, followed by a detailed explanation of the new procurement rules in the *2016 Code*. The concept of the rule of law is examined as a basis for analysis of arguments in support of its reinstatement in the Australian construction industry. The article concludes that the Government’s use of the procurement rules in the *2016 Code* is partly aimed at restoring the rule of law — narrowly conceived as ensuring compliance with the law — but is also a mechanism to reduce union power and enhance productivity in the Australian construction industry.

## **I Introduction**

This article examines the Australian Coalition Government’s attempt to bring back the rule of law in the building and construction industry, through the procurement requirements in the *Code for the Tendering and Performance of Building Work 2016* (Cth) (*‘2016 Code’*). Since coming to office in September 2013, the Coalition has

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repeatedly expressed its intention to ‘restore the rule of law’<sup>1</sup> in a sector where unlawful conduct is a significant problem (eg illegal industrial action, coercion and unlawful union entry onto sites).<sup>2</sup> The primary vehicle for achieving this objective is the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (‘*BCIIP Act*’), which was passed by Federal Parliament in late 2016. The *BCIIP Act* re-established the Howard-era regulator, the Australian Building and Construction Commission (‘ABCC’), and introduced stronger prohibitions on unlawful strikes, picketing and coercion in the construction sector along with higher penalties.

The *BCIIP Act* also includes a provision that facilitated the issuing of the *2016 Code*, which is another important instrument through which the Government is pursuing its ‘rule of law’ objective in the building industry. Construction companies and contractors must comply with the *2016 Code* in order to remain eligible to tender for, and be awarded, Commonwealth-funded building work. This includes ensuring that there are no provisions in a bidding company’s enterprise agreements that infringe a wide range of new prohibitions on agreement content under the *2016 Code*. The Code therefore holds considerable potential to influence the practices of construction companies and their relationships with unions (particularly the Construction, Forestry, Mining and Energy Union (‘CFMEU’)), and to achieve the kind of cultural change in the building industry sought by the Government. In 2003, the Cole Royal Commission into the Building and Construction Industry saw the opportunity for procurement guidelines to drive workplace reform, stating in its Final Report that:

Because governments provide significant funds for building and construction activity, including on the occasions when they are the clients directly commissioning the work, they have the capacity through their purchasing power to influence the behaviour of participants in this industry.<sup>3</sup>

The Productivity Commission put this a little more bluntly, describing the role of the 2013 iteration of the Code as being ‘purely to use government procurement as a carrot and stick for improved workplace relations and [health and safety]’.<sup>4</sup> According to Howe, this approach is one of several forms of the dispensation of ‘money and favours’ by governments ‘to promote desired labour relations practices’, a regulatory technique that contrasts with traditional forms of direct regulation of the labour market.<sup>5</sup> Creighton has observed that procurement instruments dating as far back as the *Fair Wages Resolution 1891* (UK) had traditionally been utilised to protect workers from exploitation and to promote collective bargaining. In contrast,

<sup>1</sup> See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 84 (Malcolm Turnbull, Prime Minister), introducing the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) into Parliament.

<sup>2</sup> Productivity Commission (Cth), *Public Infrastructure: Inquiry Report* (Report No 71, Productivity Commission (Cth), 27 May 2014) vol 2, 530–1.

<sup>3</sup> Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 7, 49 [3.2] (‘Cole Royal Commission’).

<sup>4</sup> Productivity Commission (Cth), above n 2, vol 2, 503.

<sup>5</sup> John Howe, “‘Money and Favours’”: Government Deployment of Public Wealth as an Instrument of Labour Regulation’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 167, 167; other government initiatives discussed by Howe include financial incentives, subsidies, administrative guidelines, and ‘quasi-contracts’/other devices to achieve contracting out of government functions: at 169–70.

the forerunner to the *2016 Code* adopted by the Howard Government was used mainly ‘to constrain the industrial behaviour of workers and unions in the construction industry’, and thus amounted to ‘a perversion of the logic of using public procurement as a vehicle for workplace relations reform’.<sup>6</sup>

This article seeks to assess the deployment of the *2016 Code* to achieve the Turnbull Government’s aim of returning to the rule of law in the Australian building industry. Respect for the rule of law became a subject of heated debate in March 2017, when the new Secretary of the Australian Council of Trade Unions (‘ACTU’), Sally McManus, stated (in response to a question about the CFMEU’s alleged flouting of legal restrictions on industrial action) that: ‘I believe in the rule of law where the law is fair, where the law is right. But when it’s unjust, I don’t think there’s a problem with breaking it.’<sup>7</sup> Her comments were strongly criticised by Coalition politicians,<sup>8</sup> and were even repudiated by Federal Labor leader Bill Shorten.<sup>9</sup> McManus’s position also gave the Coalition Government another opportunity to mount its arguments as to the ‘lawlessness’ of the construction sector and the need for its reforms.<sup>10</sup>

Part II of the article outlines key elements of the concept of the rule of law, focusing, in particular, on the notions of compliance with legal rules and equal treatment before the law. Part III traces the evolution of the separate scheme of construction regulation adopted in 2005 following the recommendations of the Cole Royal Commission, the subsequent Labor Government changes to this scheme, and the initiatives of the Coalition Government since 2013. Part IV discusses the use of procurement guidelines to implement workplace reform in the construction industry since 1997, and is followed by a detailed explanation in Part V of the new procurement rules set out in the *2016 Code*. Part VI analyses the arguments in support of the need to reinstate the rule of law in the Australian construction industry. The analysis also considers whether the *2016 Code* is really intended to achieve

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<sup>6</sup> Breen Creighton, ‘Government Procurement as a Vehicle for Workplace Relations Reform: The Case of the National Code of Practice for the Construction Industry’ (2012) 40(3) *Federal Law Review* 349, 383–4. See also John Howe and Ingrid Landau, ‘Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design’ (2009) 51(4) *Journal of Industrial Relations* 575; Catherine Barnard, ‘To Boldly Go: Social Clauses in Public Procurement’ (2017) 46(2) *Industrial Law Journal* 208 (exploring recent European Union public procurement directives and their implementation in the United Kingdom).

<sup>7</sup> ABC, ‘New ACTU Boss Says It’s Ok for Workers to Break “Unjust Laws”’, 7.30, 15 March 2017 (Sally McManus).

<sup>8</sup> David Marin-Guzman, ‘Malcolm Turnbull Says He Can’t Work With New ACTU Boss Sally McManus’, *Australian Financial Review* (online), 17 March 2017 <<http://www.afr.com/news/policy/industrial-relations/malcolm-turnbull-says-he-cant-work-with-new-actu-boss-sally-mcmanus-20170316-gv06gu>>.

<sup>9</sup> Latika Bourke, ‘Bill Shorten Rejects ACTU Leader Sally McManus’ View on Breaking “Unjust Laws”’, *The Sydney Morning Herald* (online), 16 March 2017 <<http://www.smh.com.au/federal-politics/political-news/bill-shorten-rejects-actu-leader-sally-mcmanus-view-on-breaking-unjust-laws-20170315-guz1vp.html>>.

<sup>10</sup> See, eg. Tom McLroy and Amy Remeikis, ‘Breaking the Law an Australian Worker Tradition: ACTU Boss Sally McManus’, *The Sydney Morning Herald* (online), 16 March 2017 <<http://www.smh.com.au/federal-politics/political-news/anarchomarxist-claptrap-liberals-slam-actu-boss-sally-mcmanus-over-law-breaking-comments-20170315-guz3sh.html>>; Australian Associated Press, ‘Turnbull Stands Up to Union Secretary’, *SBS News* (online), 17 March 2017 <<https://www.sbs.com.au/news/turnbull-stands-up-to-actu-secretary>>.

broader workplace reform objectives of the Coalition Government, and how it has been argued that the separate scheme of building industry regulation offends the rule of law. Some concluding observations are made in Part VII.

## II The Concept of the Rule of Law

Bingham observed that the modern concept of ‘the rule of law’ is generally credited to the English constitutional law professor, A V Dicey,<sup>11</sup> who devoted a large part of his seminal 1885 work to defining and examining the application of the rule of law.<sup>12</sup> Dicey referred to ‘the supremacy or the rule of law’ as ‘a characteristic of the English constitution’, with three defining features: first, that no person should be punished ‘except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land’;<sup>13</sup> second, not only that ‘no man is above the law’, but also that ‘every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’ — ‘the idea of legal equality’;<sup>14</sup> and third, that general constitutional principles such as the right to personal liberty are ‘the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts’.<sup>15</sup>

Bingham sought to encapsulate Dicey’s conception of the rule of law as follows:

The core of the existing principle is ... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.<sup>16</sup>

Bingham then set out eight principles that are ‘ingredients of the rule of law’.<sup>17</sup> These ingredients include: that the law must be accessible, clear and predictable; that laws should apply equally to all (except where objective differences justify differentiation); that government officials must exercise their powers in good faith, for proper purposes, within power and not unreasonably; and that adjudicative procedures provided by the State must be fair.<sup>18</sup> The notion of equality before the law has been further expounded, for example by Gowder, as requiring *regularity* in the application of the law; *publicity* as to what the law is and what it requires of subjects; and *generality* (‘[n]either the rules under which officials exercise coercion nor officials’ use of discretion under those rules make irrelevant distinctions between subjects of

<sup>11</sup> Baron Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 3.

<sup>12</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (LibertyClassics, 8<sup>th</sup> ed, 1982) 104–273. See further Mark D Walters, ‘Dicey on Writing the Law of the Constitution’ (2012) 32(1) *Oxford Journal of Legal Studies* 21. On the much earlier antecedents of the rule of law, see James Spigelman, ‘Magna Carta: The Rule of Law and Liberty’ (2015) 31(2) *Policy: A Journal of Public Policy and Ideas* 24; on the various philosophical foundations of the concept over time, see Judith Shklar, ‘Political Theory and the Rule of Law’ in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, ch 1.

<sup>13</sup> Dicey, above n 12, 110.

<sup>14</sup> *Ibid* 114. See also 120.

<sup>15</sup> *Ibid* 115.

<sup>16</sup> Bingham, above n 11, 8.

<sup>17</sup> *Ibid* 37. See chs 3–10.

<sup>18</sup> *Ibid* 37, 55, 60, 90.

law’).<sup>19</sup> Importantly for purposes of this article, Gowder goes on to mount the proposition that: ‘when a law or exercise of official discretion treats people differently from one another, there must be public reasons to justify the different treatment’.<sup>20</sup>

Bottomley and Bronitt contend that: ‘For the liberal theorist, the rule of law is more to do with the duties on *governments* than on citizens. It obliges governments to rule only by way of laws.’<sup>21</sup> On this view, the rule of law is valuable because it constrains the absolute power of government and protects the liberties of citizens. Allan has argued, though, that while the rule of law stands against the arbitrary or discriminatory exercise of power, it ‘does not itself afford a complete protection of liberty: it does not identify spheres of personal conduct which should be immune from legislative or governmental interference, or specify all the liberties essential to an effective democracy’.<sup>22</sup> This is consistent with Hayek’s conception of the rule of law as a safeguard of individual freedom, but ‘[restricting] government only in its coercive activities’.<sup>23</sup> Hayek also addressed the issue recently raised by Sally McManus’s view that unjust laws can be broken,<sup>24</sup> as follows:

It is sometimes said that, in addition to being general and equal, the law of the rule of law must also be just. But though there can be no doubt that, in order to be effective, it must be accepted as just by most people, it is doubtful whether we possess any other formal criteria of justice than generality and equality — unless, that is, we can test the law for conformity with more general rules which, though perhaps unwritten, are generally accepted, once they have been formulated.<sup>25</sup>

The centrality, to the rule of law’s purpose, of an expectation of compliance with the law is contested. Bottomley and Bronitt maintain that: ‘in everyday use “the rule of law” is often taken to mean simply “law and order”, that is, people should obey the law. While law and order might be an aspect of some versions of the rule of law, it is not really at the heart of it’.<sup>26</sup> For theorists like Fuller, however, the rule of law notion is more nuanced and reflects a kind of balance between government and

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<sup>19</sup> Paul Gowder, ‘The Rule of Law and Equality’ (2013) 32(5) *Law and Philosophy* 565, 566. See also Christopher Nathan, ‘What is Basic Equality?’ in Uwe Steinhoff (ed), *Do All Persons Have Equal Moral Worth?: On ‘Basic Equality’ and Equal Respect and Concern* (Oxford University Press, 2014) 1.

<sup>20</sup> Gowder, above n 19, 602 (citations omitted). See also 603–11; and below Part VID the discussion of how the specialist scheme of construction industry regulation may offend the equality objective of the rule of law.

<sup>21</sup> Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4<sup>th</sup> ed, 2012) 42 (emphasis in original). See also, eg, Mortimer N S Sellers, ‘What is the Rule of Law and Why is it so Important?’ in James R Silkenat, James E Hickey Jr and Peter D Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer, 2014) 3; Allan C Hutchinson and Patrick J Monahan, ‘Democracy and the Rule of Law’ in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 97, 100–1.

<sup>22</sup> T R S Allan, ‘The Rule of Law as the Rule of Reason: Consent and Constitutionalism’ (1999) 115 (April) *Law Quarterly Review* 221, 225.

<sup>23</sup> Friedrich A Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul, 1960) 206 (citations omitted). See also *ibid* 225.

<sup>24</sup> See nn 7–10 above and accompanying text.

<sup>25</sup> Hayek, above n 23, 210.

<sup>26</sup> Bottomley and Bronitt, above n 21, 42. See further Alois Troller, *The Law and Order: An Introduction to Thinking about the Nature of Law* (A J Sijthoff, 1969) [trans of: *Rechtserlebnis und Rechtspflege; ein Fussweg zur Jurisprudenz für Ungeübte begehbar* (first published 1962)].

citizen, or as he put it: ‘a relatively stable reciprocity of expectations between law-giver and subject’.<sup>27</sup> Allan articulates this sort of approach in the following terms:

The idea that adherence to the rule of law is intended to enable the law’s subjects to obey it ... is too closely related to an underlying assumption that the law is primarily a means for achieving governmental objectives and overlooks the role of law as a set of constraints and limitations on the pursuit of such objectives. Properly understood, the rule of law is quite as much concerned with ensuring that state officials — both executive and judiciary — are able to obey the law, and required to do so, as with affording guidance to the private citizen.<sup>28</sup>

However, it is the arguably narrower understanding of the rule of law as requiring that the law must be *observed*, which has generally informed the debate about building industry regulation in Australia over the last 30 years. In 1988, Walker wrote of ‘the construction industry as a no-law state’, where the report of the 1981–82 Royal Commission into Activities of the Australian Building Construction Employees’ and Builders’ Labourers’ Federation had exposed ‘an organized group that succeeded in placing itself above the law and indeed suppressing the rule of law throughout the construction industry’.<sup>29</sup> For Walker, these activities offended his conception of the rule of law, which included the need for ‘institutions and procedures that are capable of speedily enforcing’ substantive laws ‘which prohibit violence, coercion, general lawlessness and anarchy’.<sup>30</sup> The notion that the law must be complied with lies behind the development of the specialist scheme of building industry regulation in Australia since the early 2000s, and continues to be foundational to the case in support of that scheme due to the ‘lawlessness’ of the principal construction union, the CFMEU.<sup>31</sup>

### III The Evolution of Construction Industry Regulation in Australia

#### A *The Cole Royal Commission and Howard Government Legislation*

Generally, workplace and employment relations in Australia are regulated by the *Fair Work Act 2009* (Cth) (*FW Act*). This legislation applies to most Australian private sector employers and employees,<sup>32</sup> setting minimum employment standards

<sup>27</sup> Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969) 209.

<sup>28</sup> Allan, above n 22, 229. See also Krygier’s contrasting notions of the rule of law as ‘thin’ (‘formal, institution-focused’) and ‘thick’ (‘substantive, or material’): Martin Krygier, ‘The Rule of Law: Pasts, Presents, and Two Possible Futures’ (2016) 12(1) *Annual Review of Law and Social Science* 199, 213–14.

<sup>29</sup> Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 222. See further 222–8.

<sup>30</sup> *Ibid* 28 (although note that Walker did not wish this view to be equated with ‘mere “law and order”’: at 29). See also ch 7.

<sup>31</sup> See, eg, Alan Colman, ‘The ABCC Bill is About Fairness and the Rule of Law’, *Australian Financial Review* (online), 18 April 2016 <<http://www.afr.com/opinion/the-abcc-bill-is-about-fairness-and-the-rule-of-law-20160418-go8orl>>.

<sup>32</sup> On the coverage of the national workplace relations system, see further Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016) ch 6.

and providing for the making of industry-level awards and enterprise agreements (including rules relating to enterprise bargaining and ‘protected’ industrial action in support of bargaining claims).<sup>33</sup> The *FW Act* also provides employees with protection from unfair dismissal and various forms of ‘adverse action’ by employers (related to an employee’s exercise of defined ‘workplace rights’ or engagement in ‘industrial activity’).<sup>34</sup> The national workplace relations system is overseen by the Fair Work Commission (‘FWC’), which makes awards, approves agreements and resolves a wide range of claims and disputes arising under the *FW Act*;<sup>35</sup> and the Fair Work Ombudsman, which has responsibility for enforcement and ensuring compliance with the legislation and instruments made under it.<sup>36</sup>

However, since 2005 an additional regulatory framework has applied to industrial relations in the building and construction industry, along with various iterations of a specialist regulator for that sector. The origins of this separate system of regulation can be traced to the Howard Government’s establishment of a Royal Commission into the Building and Construction Industry in 2001, headed up by former New South Wales judge Terence Cole QC. In its 2003 Final Report, the Cole Royal Commission made extensive findings as to the ‘lawlessness’ of the construction sector, including breaches of relevant criminal laws, the *Workplace Relations Act 1996* (Cth) (the predecessor to the *FW Act*), state occupational health and safety (‘OHS’) laws and court/tribunal orders.<sup>37</sup> Commissioner Cole made observations that the rule of law had ceased to apply in the construction industry, particularly in Western Australia and Victoria, and had been supplanted by ‘commercial expediency’ in New South Wales.<sup>38</sup> In his view, the widespread lawless conduct in the industry arose from:

a clash between the short term project profitability focus of the providers of capital, clients, head contractors and subcontractors on the one hand, and the long term aspirations of the union movement, especially the CFMEU, to dominate, control and regulate the industry for its benefit, and what it perceives to be the benefit of its members, on the other hand.<sup>39</sup>

The key recommendation of the Cole Royal Commission was for the establishment of a specialist agency to enforce applicable laws in the construction industry, and to effect a cultural shift towards respect for the rule of law.<sup>40</sup> In response, the Howard Government established the ABCC under the *Building and Construction Industry Improvement Act 2005* (Cth), which also gave this body

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<sup>33</sup> *FW Act* pts 2-2, 2-3, 2-4, 3-3.

<sup>34</sup> *Ibid* pts 3-2, 3-1.

<sup>35</sup> *Ibid* pt 5-1.

<sup>36</sup> *Ibid* pt 5-2.

<sup>37</sup> Cole Royal Commission, above n 3, vol 1, 5–6 [1.15]–[1.17].

<sup>38</sup> *Ibid* vol 12, 37 [94], 89–94 [5–28], 279–82 [5–28]. See also ‘Cole’s State Findings Prepare Ground for Reform Push’, *Workplace Express* (online), 26 March 2003 <<https://www.workplaceexpress.com.au>>.

<sup>39</sup> Cole Royal Commission, above n 3, vol 1, 11 [1.20]. See also ‘Unions to Seek Senate Veto on Cole Changes’, *Workplace Express* (online), 27 March 2003 <<https://www.workplaceexpress.com.au>>.

<sup>40</sup> Cole Royal Commission, above n 3, vol 1, 4 [1.10], 13–14 [1.33]–[1.34]. See also vol 11, titled ‘Reform — Achieving Cultural Change’. Note also the critical accounts of the Cole Royal Commission (from the unions’ perspective) in Jim Marr, *First the Verdict: The Real Story of the Building Industry Royal Commission* (Pluto Press, 2003); Liz Ross, ‘Building Unions and Government “Reform”: The Challenge for Unions’ (2005) 56 *Journal of Australian Political Economy* 172.

compulsory evidence-gathering powers<sup>41</sup> and imposed new restrictions on unlawful industrial action with significant penalties (among other reforms).<sup>42</sup> The ABCC's role was to increase the level of compliance with laws applicable to workplace relations in the construction industry, predominantly through investigation of suspected breaches and bringing enforcement proceedings.<sup>43</sup>

## **B The Rudd/Gillard Governments' Changes to Construction Regulation**

The Labor Opposition went to the 2007 Federal Election promising to retain the ABCC (despite the union movement's concerns about the separate regulatory regime for the building industry), but to transfer its functions to a specialist division of the national industrial tribunal after a two-year transition period.<sup>44</sup> Ultimately, the Rudd Labor Government did not implement that proposal. It commissioned former Federal Court Justice the Honourable Murray Wilcox QC to engage in public consultation on options for construction industry regulation, but then ignored his recommendation to house the construction regulator within the FWO.<sup>45</sup> Instead, under the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth), the ABCC was replaced by the Fair Work Building Industry Inspectorate, which operated under the name 'Fair Work Building and Construction' ('FWBC'). The 2012 building industry legislation replaced the *Building and Construction Industry Improvement Act 2005* (Cth) with the *Fair Work (Building Industry) Act 2012* (Cth),<sup>46</sup> under which some safeguards were imposed on the FWBC's exercise of its compulsory examination powers<sup>47</sup> and the strictures on unlawful industrial action in the construction sector were removed.

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<sup>41</sup> Since their introduction, these powers have been a particularly controversial aspect of construction industry regulation: see George Williams and Nicola McGarrity, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21(3) *Australian Journal of Labour Law* 244; Stewart et al, above n 32, 1010–15.

<sup>42</sup> See further Anthony Forsyth et al, *Workplace Relations in the Building and Construction Industry* (LexisNexis Butterworths, 2007), chs 1–2, 7, 9; John Howe, "'Deregulation" of Labour Relations in Australia: Towards a More "Centred" Command and Control Model', in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 147, 159–65.

<sup>43</sup> Howe, above n 42, 159–60.

<sup>44</sup> Kevin Rudd and Julia Gillard, 'Forward with Fairness — Policy Implementation Plan' (Statement, 28 August 2007) 4.

<sup>45</sup> Murray Wilcox, 'Transition to Fair Work Australia for the Building and Construction Industry' (Report, Australian Government, March 2009) ('Wilcox Review'). Wilcox noted that: 'The *BCII Act* provisions have always been, and remain, highly controversial': at 1 [1.5]. However, he concluded that: 'the ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain': at 14 [3.23]. See also 55–6 [5.77]–[5.83]. More generally, see Emma Goodwin, 'Constructing Fair Work for the Australian Building and Construction Industry: The Honourable Murray Wilcox QC's Report *Transition to Fair Work Australia for the Building and Construction Industry*' (2009) 22(2) *Australian Journal of Labour Law* 173.

<sup>46</sup> See further Emma Goodwin, 'Building on Shifting Sands: From the *Fair Work (Building Industry) Act 2012* (Cth) to the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)' (2014) 27(1) *Australian Journal of Labour Law* 97, 100–105.

<sup>47</sup> Wilcox Review, above n 45, chs 5–6. See also Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) 868–9.

## C *Winding Back Labor's Changes: The Coalition Government's Construction Reforms*

Continuing the pattern of incoming governments changing construction industry regulation, after the 2013 Election, the Abbott Coalition Government quickly sought to implement its policy commitment to bring back the ABCC and maintain the rule of law in the construction industry.<sup>48</sup> However, it took the Government (by then, led by Prime Minister Turnbull) three years to gain Parliament's support for the *BCIIP Act*.<sup>49</sup> In the meantime, the Government-initiated Royal Commission on Trade Union Governance and Corruption had made extensive findings (similar to those of the Cole Royal Commission) as to the extent of lawless conduct in the industry and the CFMEU's '[habitual] contempt for the rule of law'.<sup>50</sup> Commissioner the Honourable Dyson Heydon QC AC recommended 'that there continue to be a separate industry-specific regulator for the building and construction industry.'<sup>51</sup>

As indicated earlier, the *BCIIP Act* re-established the ABCC (with effect from 2 December 2016), although with a number of new constraints on its powers, which formed part of a series of amendments agreed to by the Government in order to secure passage of the legislation by crossbench senators.<sup>52</sup> In addition, the *BCIIP Act* re-introduced prohibitions on unlawful industrial action and coercion (similar to those that operated under the *Building and Construction Industry Improvement Act 2005* (Cth), and created a new prohibition on unlawful picketing.<sup>53</sup> The Turnbull Government had staked a great deal on getting this legislation enacted, first calling a special sitting of Federal Parliament in April 2016 to consider it (following repeated rejection of the Bill for the *BCIIP Act* by the Senate);<sup>54</sup> then (once it was rejected again at the special sitting) calling a double dissolution Election for 2 July 2016.<sup>55</sup> Prime Minister Turnbull invoked the need to 'restore the rule of law' in the construction industry through the ABCC as a vital economic reform, both when calling the Election<sup>56</sup> and when claiming victory on Election night<sup>57</sup> (albeit with a substantially reduced majority in the House of Representatives). The Election result

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<sup>48</sup> Liberal Party of Australia and The Nationals, 'The Coalition's Policy to Improve the Fair Work Laws' (Policy Statement, May 2013).

<sup>49</sup> On the earliest of the several Bills ultimately enacted as the *BCIIP Act*, see Goodwin, above n 46, 105–10.

<sup>50</sup> Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) vol 5, 401 [8.23].

<sup>51</sup> *Ibid* vol 5, 435 [8.109].

<sup>52</sup> For example, the Government abandoned plans to remove the framework of administrative law oversight applying to the ABCC's exercise of its powers to obtain evidence compulsorily (see *BCIIP Act* ss 61A–5). See further David Marin-Guzman, 'Michaelia Cash's Concessions on Australian Building and Construction Commission', *Australian Financial Review* (online), 30 November 2016 <<http://www.afr.com/news/explainer-what-is-left-of-the-australian-building-and-construction-commission-20161129-gt0ihe>>.

<sup>53</sup> See *BCIIP Act* chs 5–6 (ss 44–58).

<sup>54</sup> 'Turnbull Bringing on IR Bill Votes Next Month', *Workplace Express* (online), 21 March 2016 <<https://www.workplaceexpress.com.au>>.

<sup>55</sup> 'Turnbull Confirms ABCC Bills' Rejection to Trigger Election', *Workplace Express* (online), 19 April 2016 <<https://www.workplaceexpress.com.au>>.

<sup>56</sup> 'Turnbull Calls Double Dissolution Election', *Workplace Express* (online), 8 May 2016 <<https://www.workplaceexpress.com.au>>.

<sup>57</sup> 'PM Defends Double Dissolution as Doubts Raised about Joint Sitting', *Workplace Express* (online), 3 July 2016 <<https://www.workplaceexpress.com.au>>.

also produced a more workable Senate,<sup>58</sup> which led to the passage not only of the *BCIIP Act*, but also the other election trigger, legislation implementing the Government's enhanced framework for trade union regulation (in response to corruption and financial mismanagement within several unions).<sup>59</sup>

## IV Reform through Procurement Requirements: From the 1997 Code to the 2016 Code

### A Increasing Use of Procurement as a Policy Lever 1997–2009

The use of procurement requirements to achieve workplace reform objectives commenced under the Howard Government, through its *National Code of Practice for the Construction Industry*, which was agreed to by the Federal, state and territory governments in 1997 ('1997 Code').<sup>60</sup> This instrument established a series of general principles to which companies seeking to work on government construction projects were required to adhere, including industrial relations principles dealing with freedom of association and the right not to associate (among other matters). Accompanying the 1997 Code were various versions of the *Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry* ('Code Guidelines'), which specified more detailed industrial relations requirements and made compliance with those requirements a condition of eligibility to bid for and be awarded federally-funded building work.<sup>61</sup> In addition to bolstering freedom of association and limiting union right of entry,<sup>62</sup> the *Code Guidelines* sought to preclude 'pattern bargaining' (a practice whereby unions obtain common outcomes across more than one enterprise agreement) and the imposition of construction industry awards on subcontractors.<sup>63</sup>

The Cole Royal Commission recommended that the Federal Government make greater use of the 1997 Code and *Code Guidelines* 'as a vehicle for reform' in the building and construction industry.<sup>64</sup> Commissioner Cole found that the 1997 Code was not being applied consistently across all Commonwealth-funded projects, and there was neither adequate monitoring of compliance, nor imposition of

<sup>58</sup> See, eg, Phillip Coorey, 'One Nation Boosts Govt's Chances on IR Bills', *Australian Financial Review* (online), 10 October 2016 <<http://www.afr.com/news/politics/one-nation-boosts-govts-chances-on-ir-bills-20161009-gryhh5>>.

<sup>59</sup> *Fair Work (Registered Organisations) Amendment Act 2016* (Cth). See also Royal Commission into Trade Union Governance and Corruption, above n 50.

<sup>60</sup> Australian Procurement and Construction Council ('APCC'), 'National Code of Practice for the Construction Industry' (1997). See Forsyth et al, above n 42, 20–1. Note that at various times, some state governments have also adopted construction industry codes to further workplace reform objectives. These state codes are not examined in this article, for discussion see Creighton, above n 6, 361; Productivity Commission (Cth), above n 2, vol 2, 547, 550; Stewart et al, above n 32, 1026. See also *Victoria v CFMEU* (2013) 218 FCR 172.

<sup>61</sup> Compliance with the 1997 Code and *Code Guidelines* was also made a condition of state governments obtaining federal funding for state infrastructure projects, such as the redevelopment of the Melbourne Cricket Ground in preparation for the 2006 Commonwealth Games: see Howe, above n 5, 176–7.

<sup>62</sup> Forsyth et al, above n 42, 31, 33–4.

<sup>63</sup> Howe, above n 5, 177.

<sup>64</sup> Cole Royal Commission, above n 3, vol 11, 12–14 [48].

sanctions for breaches of the Code and *Code Guidelines*.<sup>65</sup> Highlighting the benefits of application of the *1997 Code* on the Alice Springs to Darwin Railway Project,<sup>66</sup> Commissioner Cole recommended that the Code and Guidelines apply to all projects where the Commonwealth directly or indirectly provides funds for construction; and that parties contracting with the Commonwealth for government-funded work also be required to comply with the Code and Guidelines on their privately-funded projects.<sup>67</sup> In 2005, the *Code Guidelines* were changed to require tenderers for Commonwealth-funded building work to be Code-compliant on all their privately-funded work as well, and for all their related entities to be Code-compliant.<sup>68</sup>

## **B     *The Labor Government and the Code 2009–13***

The 2009 Wilcox Review essentially endorsed continued application of the *1997 Code* and *Code Guidelines*, stating that:

There is widespread support for the idea behind the Guidelines. They are seen as ‘raising the stakes’ on employer misbehaviour; it is one thing to expose oneself to a relatively small monetary penalty, another thing to render oneself ineligible to tender for a project that is funded, even indirectly, by the Commonwealth.<sup>69</sup>

The Wilcox Review recommended that the *Code Guidelines* be retained (with some changes), and that they be transformed from an administrative policy to a legislative instrument subject to scrutiny by Parliament (with the capacity for judicial and administrative review of any adverse decision made under that instrument).<sup>70</sup> The Labor Government made several changes to the *Code Guidelines*, in 2009 and again in 2012,<sup>71</sup> before taking the more significant step of replacing the *1997 Code* with the *Building Code 2013* (Cth) (*‘2013 Code’*). This placed into effect the Wilcox Review recommendation noted above: whereas previously the federal construction procurement rules operated as policy instruments, the *2013 Code* was made as a legislative instrument under s 27 of the *Fair Work Building Industry Act 2012* (Cth). The Code thereby obtained greater legal force and certainty, making it less amenable to change at the discretion of government and subjecting it to possible disallowance in either House of Parliament.<sup>72</sup> Further, decisions taken under the Code became subject to a range of potential review processes.<sup>73</sup> Accompanying the *2013 Code* were the *Supporting Guidelines for Commonwealth-Funded Entities*.

<sup>65</sup> Ibid vol 7, 49 [3.4]. See further 65–71 [3.65]–[3.84].

<sup>66</sup> Ibid 69–71 [3.71]–[3.84], 73 [3.85], 81 [3.117].

<sup>67</sup> Ibid 79–81 [3.106]–[3.117]. See also ‘Cole Code Push to Drive Change in Private Sector’, *Workplace Express* (online), 15 April 2003 <<https://www.workplaceexpress.com.au>>.

<sup>68</sup> Forsyth et al, above n 42, 21–2.

<sup>69</sup> Wilcox Review, above n 45, 4 [1.29].

<sup>70</sup> Ibid 4–5 [1.27]–[1.33], 87–9 [7.32].

<sup>71</sup> The *1997 Code*, and *Code Guidelines* as in place following the 2012 changes, are examined in Creighton, above n 6, 364–77.

<sup>72</sup> Stewart et al, above n 32, 1021. However, it should be noted that in terms of content, the *2013 Code* was essentially the same as the *2012 Code Guidelines*.

<sup>73</sup> See further below Part VC.

### C *The Slow Road to Reform: From the 2014 Proposed Code to the 2016 Code*

Consistent with its commitment to restore the rule of the law in the construction industry through the legislation re-establishing the ABCC, in April 2014 the Coalition Government released a proposed new instrument to replace the *2013 Code*. The advance release of the Building and Construction Industry (Fair and Lawful Building Sites) Code ('2014 Proposed Code') sought to impose similar procurement requirements to those that had applied under the Howard Government, including support for freedom of association and restrictions on union entry rights.<sup>74</sup> When releasing the 2014 Proposed Code, then Minister for Employment Senator Eric Abetz indicated that it was 'designed to restore the rule of law and fairness to Australia's construction sector'.<sup>75</sup> The Minister further stated that:

Fair, productive and lawful building sites are critical to Australia's competitiveness, and job creation potential. ... For too long, the building and construction sector has provided the worst examples of industrial relations lawlessness. The new code emphasises the importance of compliance with the law and freedom of association on building sites. ... Our new code, together with a stronger ABCC, will help get the building and construction industry back on track.<sup>76</sup>

Importantly, the 2014 Proposed Code also sought to re-introduce a wide range of restrictions on the content of enterprise agreements, primarily aimed at precluding agreement clauses that provide support for the role of unions or impinge on workplace flexibility or efficiency. While the 2014 Proposed Code could not take effect until the Bill for the *BCIIP Act* was passed by Parliament, the new Code's agreement prohibitions were stated to apply to enterprise agreements made after 24 April 2014.<sup>77</sup> According to the Minister, this meant

that from commencement of the [2014 Proposed Code], contractors covered by agreements that were made after 24 April 2014 that do not comply with the code's content requirements for enterprise agreements, will not be eligible to tender for and be awarded Commonwealth-funded building work.<sup>78</sup>

This led to a lengthy period of confusion and uncertainty for all parties involved in the construction industry,<sup>79</sup> which continued through to the passage of the *BCIIP Act* in late 2016 and the issuing of the *2016 Code*. To secure support for the legislation

<sup>74</sup> Much of the content of the 2014 Proposed Code is reflected in the *2016 Code*, which is examined in detail below in Part V. For a critique, see The McKell Institute, 'Unfounded and Unfair: An Analysis of the Building and Construction Code (2014)' (Report, October 2016).

<sup>75</sup> Eric Abetz, 'Building and Construction Industry Code 2014 Released' (Media Release, 17 April 2014).  
<sup>76</sup> *Ibid.*

<sup>77</sup> 2014 Proposed Code s 11(2).

<sup>78</sup> Abetz, above n 75.

<sup>79</sup> See, eg, "'Uncertain' Draft Building Code Fails BOOT: Bench', *Workplace Express* (online), 26 June 2015 <<https://www.workplaceexpress.com.au>>; relating to a decision by the FWC to refuse approval of an enterprise agreement that incorporated the terms of the 2014 Proposed Code (*CFMEU v CSR Ltd* (2015) 250 IR 16); 'Code Sparked Major Construction Dispute, Says ETU', *Workplace Express* (online), 11 May 2016 <<https://www.workplaceexpress.com.au>>; *Australian Building and Construction Commissioner v CFMEU* (2017) 267 IR 130 (where it was found that the union had breached ss 343 and 348 of the *FW Act* by organising a series of meetings with employees of contractors in a dispute over agreement negotiations, which involved the principal contractor's refusal to enter into an agreement that would not comply with the *2013 Code* or the 2014 Proposed Code).

from crossbench senators, the Government compromised on the retrospective application of the new Code prohibitions on agreement content, instead striking a deal for a two-year transition period (which was altered in early 2017 following a change of position by Senator Derryn Hinch).<sup>80</sup>

## V *The Code for the Tendering and Performance of Building Work 2016*

### A *Purposes and Scope of the 2016 Code*

The *2016 Code* was issued by the Employment Minister, Senator Michaelia Cash, on 2 December 2016, under s 34(1) of the *BCIIP Act* (which provides for the Code to be issued as a legislative instrument).<sup>81</sup> On that date, referring to the commencement of both the new legislation and the *2016 Code*, the Minister stated that: ‘A new era for Australia’s building and construction industry has started from today. An era in which law and order is restored and respected.’<sup>82</sup> Among other aims, the new Code seeks to:<sup>83</sup>

- ‘promote an improved workplace relations framework for building work and promote compliance’ with applicable laws;<sup>84</sup>
- ‘encourage the development of safe, healthy, fair, lawful and productive building sites for the benefit of all building industry participants’;<sup>85</sup>
- ‘increase the likelihood of timely, predictable, and cost-efficient delivery of Commonwealth funded building work’;<sup>86</sup> and
- ‘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 the *2016 Code*.<sup>87</sup>

These objectives clearly signal a desire to ensure that all relevant laws are complied with in the construction sector, and must be read in conjunction with the objects of the *BCIIP Act*, which now explicitly include ‘promoting respect for the rule of law’ (s 3(2)(b)) and ‘ensuring that building industry participants are accountable for their unlawful conduct’ (s 3(2)(e)).

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<sup>80</sup> On the complex transitional arrangements for the *2016 Code*, see below Part VB.

<sup>81</sup> Note that a motion for disallowance of certain provisions of the *2016 Code* was moved in the House of Representatives on 29 March 2017 by the Shadow Minister for Employment and Workplace Relations, Brendan O’Connor, but did not succeed. Another motion, for disallowance of the entire *2016 Code*, was moved in the Senate by Senator Doug Cameron on 9 August 2017, and was also voted down: see David Marin-Guzman, ‘Nick Xenophon Defies CFMEU Threats of “Armageddon” Over Building Code’, *Australian Financial Review* (online), 9 August 2017 <<http://www.afr.com/news/policy/industrial-relations/nick-xenophon-defies-cfmeu-threats-of-armageddon-over-building-code-20170809-gxss5h>>.

<sup>82</sup> Michaelia Cash, Minister for Employment, ‘New Building Code to Improve Conduct and Boost Productivity on Building Sites’ (Media Release, 2 December 2016).

<sup>83</sup> *2016 Code* s 5.

<sup>84</sup> *Ibid* s 5(a).

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid* s 5(d).

<sup>87</sup> *Ibid* s 5(g).

The potential application of the *2016 Code* is established by the *BCIIP Act*, which provides in s 34(3) that compliance with the Code can only be required of ‘building contractors’ that are constitutional corporations, ‘building industry participants’ carrying out work in a Territory or Commonwealth place, and Commonwealth bodies or authorities.<sup>88</sup> The *2016 Code* mostly adopts<sup>89</sup> the broad definition of ‘building work’ in s 6 of the *BCIIP Act*, which includes ‘the construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land’,<sup>90</sup> as well as ‘transporting or supplying goods to be used’ in that work ‘directly to building sites (including any resources platform)’.<sup>91</sup>

Generally, the *2016 Code* applies to a building contractor or building industry participant ‘from the first time they submit an expression of interest or tender (howsoever described) for Commonwealth funded building work’ on or after 2 December 2016.<sup>92</sup> From that point on, the contractor or participant becomes a ‘code covered entity’, which also means that each of its related entities then become subject to the *2016 Code*;<sup>93</sup> and that the code covered entity must be compliant with the Code on all of its privately funded projects.<sup>94</sup> The ‘Commonwealth funded building work’ to which the Code applies is defined to include a range of projects with varying levels of direct or indirect Federal Government financial contribution or involvement.<sup>95</sup>

## B Principal Obligations Imposed by the *2016 Code*

The *2016 Code* imposes a wide range of restrictions and conditions on building contractors and building industry participants, which apply once they become code covered entities. The following discussion highlights the key obligations imposed by the Code, with particular attention given to new or different rules introduced by the Coalition Government in its replacement of the *2013 Code*,<sup>96</sup> and those aspects of the *2016 Code* that arose from crossbench amendments to the Bill for the *BCIIP Act*.

<sup>88</sup> In turn, *BCIIP Act* s 5 defines the terms ‘building contractor’ (a person who has entered into/offered to enter into a contract for services for carrying out building work or arranging for such work to be carried out); and ‘building industry participant’ (a building employer, building employee, building contractor, person who enters into a contract with a building contractor (for carrying out of building work), building association, and officers, delegates and other representatives of building associations). ‘Building associations’ are industrial associations of building employers, employees or contractors: *BCIIP Act* s 5.

<sup>89</sup> See *2016 Code* Notes to s 3(1) ‘code covered entity’; *2016 Code* s 3(4).

<sup>90</sup> *BCIIP Act* s 6(1)(a).

<sup>91</sup> *Ibid* s 6(1)(e). On the addition of transport and supply to building sites to the definition of building work through the 2016 legislation, see Goodwin, above n 46, 105–6, 110.

<sup>92</sup> *2016 Code* s 6(1). Note that the *2013 Code* and *Supporting Guidelines for Commonwealth-Funded Entities* continue to apply to Commonwealth funded projects that were the subject of expressions of interest or tenders prior to 2 December 2016.

<sup>93</sup> *2016 Code* ss 6(2), 8(8).

<sup>94</sup> *Ibid* sch 1 item 9. Note also the obligations of code covered entities in relation to compliance with the *2016 Code* by their subcontractors: ss 8(3)–(7).

<sup>95</sup> *Ibid* s 3 (definition of ‘publicly funded building work’), sch 1 items 1–8.

<sup>96</sup> This article does not examine the OHS or drug and alcohol management/testing provisions of the *2016 Code* (see, eg, s 16A, sch 4), other than to note that the *2013 Code* requirements relating to ‘work health safety and rehabilitation’ management systems/plans have been removed: *2013 Code* s 20.

First and foremost, code covered entities are required to comply with the Code,<sup>97</sup> and with the *BCIIP Act*, designated building laws (eg the *FW Act*, modern awards and enterprise agreements), the *Competition and Consumer Act 2010* (Cth) (*'Competition Act'*), OHS laws, the *Migration Act 1958* (Cth), and applicable court and tribunal decisions, orders, etc.<sup>98</sup> In addition, code covered entities are subject to more extensive reporting requirements than applied under the *2013 Code*. For example, they must report actual or threatened industrial action to the ABCC within 24 hours of becoming aware of the action (or threat); take reasonable steps to prevent or end any unprotected industrial action (such as seeking an order from the FWC or a court); and report any unlawful secondary boycott activity to the ABCC within 24 hours.<sup>99</sup>

Second, a major concern of the Coalition Government in introducing the *2016 Code* has been to subject building contractors/participants to comprehensive limits on enterprise agreement clauses that impede managerial prerogative or improvements to productivity, are discriminatory, or are inconsistent with a broader set of freedom of association principles than applied under the *2013 Code*.<sup>100</sup> To that end, s 11(3) provides an extensive list of provisions that 'are not permitted to be included in enterprise agreements', such as: any restriction on the types of workers that may be engaged (eg casuals); a requirement to consult with a union over the number or types of workers or subcontractors to be engaged; any prescription of the terms and conditions of engagement of subcontractors or their employees (eg 'jump up' clauses); a requirement to apply union logos or mottos to company property/equipment (eg union flags on cranes); or any form of encouragement (or discouragement) of union membership.<sup>101</sup> The prohibitions on agreement content are bolstered by a number of anti-avoidance provisions: s 11(4) precludes engagement in conduct or practices (outside the terms of an enterprise agreement) that would have the same effect as that prohibited by ss 11(1) and (3);<sup>102</sup> s 11A prohibits agreement clauses which purport to remedy clauses otherwise in breach of s 11; while s 10 prohibits unregistered written agreements (eg 'side deals' that seek to circumvent the s 11 limits on agreement content).<sup>103</sup>

It was noted earlier in the article that these agreement prohibitions were to apply, under the 2014 Proposed Code, to agreements made after 24 April 2014, but that the Government compromised on this proposal to ensure passage of the *BCIIP Act* through Parliament.<sup>104</sup> Under the arrangements for this compromise as originally

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<sup>97</sup> *Ibid* s 7(a).

<sup>98</sup> *Ibid* s 9. This is a broader range of laws than was specified in the equivalent provision of the *2013 Code*: s 9.

<sup>99</sup> *2016 Code* s 16. On protected and unprotected industrial action under the *FW Act*, remedies for unprotected action, and secondary boycotts under the *Competition Act*, see Stewart et al, above n 32, chs 26, 27; Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) chs 5–7.

<sup>100</sup> *2016 Code* s 11(1); the freedom of association provisions in s 13 are discussed below.

<sup>101</sup> For a full explanation of the types of agreement clauses prohibited by s 11(3), see Explanatory Statement, Code for the Tendering and Performance of Building Work 2016 (Cth) 9–13 [51]–[71] (*'2016 Code Explanatory Statement'*).

<sup>102</sup> See also *2016 Code* s 11(5).

<sup>103</sup> *2016 Code Explanatory Statement* 7 [41]. On s 10 of the *2016 Code*, see below nn 136–8 and accompanying text.

<sup>104</sup> See above Part IVC.

enacted in late 2016, companies that had entered into enterprise agreements with unions (before 2 December 2016) that would not comply with the new prohibitions on agreement content were to remain eligible to bid for and be awarded Commonwealth funded work until 29 November 2018.<sup>105</sup> In effect, this gave companies that had entered into non-compliant agreements two years to ‘get their house in order’ (this outcome benefited, for example, a group of companies that had made agreements earlier in 2016 against the advice of the Master Builders Association).<sup>106</sup>

However Senator Hinch, who had been instrumental in securing this compromise,<sup>107</sup> reversed his position in early 2017<sup>108</sup> — paving the way for the Government to introduce an amendment implementing new transitional arrangements. The amendment was passed by Parliament on 16 February 2017,<sup>109</sup> essentially reducing the two-year ‘grace period’ for application of the 2016 Code agreement restrictions to nine months, and prohibiting tenderers for Commonwealth funded work from being awarded a contract during that nine-month period, unless they had a Code-compliant agreement.<sup>110</sup> Minister Cash then issued a new legislative instrument amending the 2016 Code,<sup>111</sup> setting out further (complex) transitional rules dealing with the application of the Code agreement prohibitions and the eligibility of companies to bid for, and be awarded, Commonwealth funded work.<sup>112</sup>

<sup>105</sup> *BCIIP Act* s 34(2E), later amended by *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (Cth) sch 1 ss 1–2. See also *2016 Code* s 11(2), later amended by *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (Cth).

<sup>106</sup> Ewin Hannan, ‘Election 2016: Master Builders Slams Contractors over CFMEU Pay Deal’, *Australian Financial Review* (online), 18 May 2016 <<http://www.afr.com/news/politics/election/election-2016-master-builders-slams-contractors-over-cfmeu-pay-deal-20160518-goy8cc>>; ‘CFMEU Branch Secures “Unsustainable” Pay Rises’, *Workplace Express* (online), 13 July 2016 <<https://www.workplaceexpress.com.au>>. See also Paul Karp, ‘Turnbull Vows to Stop “Excessive” Pay Rises for Construction Workers’, *The Guardian* (online), 1 June 2016 <<https://www.theguardian.com/australia-news/2016/jun/01/election-2016-malcolm-turnbull-above-inflation-pay-rise-construction-workers-union>>; ‘Threat to Construction Deals if ABCC Legislation Passes’, *Workplace Express* (online), 26 April 2016 <<https://www.workplaceexpress.com.au>> (including discussion of Master Builders Association allegations that building unions were pressuring subcontractors to sign agreements that would not comply with the 2014 Proposed Code); David Marin-Guzman, ‘Major Contractors Revolt Against Master Builders Association’, *Australian Financial Review* (online), 26 January 2017 <<http://www.afr.com/news/policy/industrial-relations/major-contractors-revolt-against-master-builders-association-20170126-gtz1e3>>.

<sup>107</sup> Ewin Hannan, ‘Derryn Hinch Proposes ABCC Changes’, *The Australian* (online), 30 November 2016 <<http://www.theaustralian.com.au/national-affairs/industrial-relations/derryn-hinch-proposes-abcc-changes/news-story/6fc26ebf9efeed23bfecf9d4eba39486>>.

<sup>108</sup> ‘Construction Code Holiday to Be Cut, After Hinch Volte-Face’, *Workplace Express* (online), 8 February 2017 <<https://www.workplaceexpress.com.au>>.

<sup>109</sup> *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (Cth).

<sup>110</sup> See now *BCIIP Act* s 34(2E), as amended by *2017 Act*. The effect of the amendment was that companies with an agreement that did not comply with the 2016 Code could tender for Commonwealth work until 31 August 2017, but could not be awarded the work until they complied (see Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Amendment Bill 2017*). Since 1 September 2017, companies have been required to be fully compliant with the 2016 Code in order to tender for, and be awarded, Commonwealth funded work.

<sup>111</sup> *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (Cth).

<sup>112</sup> These rules vary depending on when the relevant enterprise agreement was made and when the company submitted its tender: see now *2016 Code* s 11(2), sch 5; as amended by the *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (Cth). See also ABCC, *Transitional Arrangements — Interaction between Building Code 2013 and Building Code 2016*

These new arrangements were justified by the Employment Minister on the basis that small and medium construction businesses could not wait two years (the original transitional period for Code 2016 compliance) while having to compete with those companies that had struck non-compliant enterprise agreements:

They cannot stand up to the CFMEU, they cannot stand up to Lendlease; they cannot stand up to Probuild. That is why we are moving this amendment with the crossbench, because we are here today to say to the big end of town and to say to the CFMEU ... 'The reason we are doing this is to stop your cartel-like behaviour'.<sup>113</sup>

However, it must be noted that the *2016 Code* transitional rules for enterprise agreement content, particularly the 1 September 2017 deadline for having fully Code-compliant agreements, led to ongoing confusion and uncertainty in the industry. The CFMEU adopted a general position that it would not renegotiate existing agreements to make them Code-compliant.<sup>114</sup> Other unions, such as the Australian Manufacturing Workers' Union, took a more cooperative approach to renegotiation. At least one employer, Boral subsidiary De Martin & Gasperini, raised the prospect of redundancies after employees voted down changes to their enterprise agreement to ensure Code compliance.<sup>115</sup> Another employer, Lendlease Engineering Pty Ltd, obtained FWC approval of a Code-compliant agreement despite opposition from the CFMEU and the Australian Workers' Union.<sup>116</sup>

Third, the *2016 Code* carries over similar obligations regarding freedom of association to those found in the *2013 Code*, while adding a number of further requirements. As before, code covered entities 'must protect freedom of association in respect of building work' through policies and practices that ensure people are free: to become, or not become, members of building unions; to be represented (or not) by unions; to participate (or not) in lawful industrial activities; and to not be discriminated against in terms of workplace benefits because they are, or are not,

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<<https://www.abcc.gov.au/building-code/transitional-arrangements-%E2%80%93interaction-between-building-code-2013-and-building-code-2016>>. Reportedly, the new transitional rules arose following lobbying by the Australian Industry Group: 'CFMEU Finalises Day for National Protest against ABCC', *Workplace Express* (online), 28 February 2017 <<https://www.workplaceexpress.com.au>>.

<sup>113</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 February 2017, 1051 (Michaelia Cash, Minister for Employment). Note that the new arrangements presented many construction companies with the dilemma of having to renegotiate existing agreements, or make new ones, to ensure *2016 Code* compliance in the face of the CFMEU refusing to relinquish conditions in existing agreements: see Paul Karp, "'We're Not Bluffing': Construction Union on Collision Course Over Building Code", *The Guardian* (online), 3 April 2017 <<https://www.theguardian.com/australia-news/2017/apr/03/were-not-bluffing-construction-union-on-collision-course-over-building-code>>. For a further illustration of the threat to widespread industry practices, see 'Code Outlaws RDO Calendar: ABCC', *Workplace Express* (online), 10 March 2017 <<https://www.workplaceexpress.com.au>>.

<sup>114</sup> Nick Toscano, 'Tensions Rise in Building Industry as Blacklist Looms', *The Sydney Morning Herald* (online), 5 June 2017 <<http://www.smh.com.au/business/workplace-relations/tensions-rise-in-building-industry-as-blacklist-looms-20170602-gwjfi5.html>>.

<sup>115</sup> Jenny Wiggins, 'Construction Firms Do Deals with Unions over Building Code', *Australian Financial Review* (online), 5 July 2017 <<http://www.afr.com/business/construction-firms-do-deals-with-unions-over-building-code-20170705-gx4wua>>.

<sup>116</sup> *Re Lendlease Engineering Pty Ltd* [2017] FWC 3080 (6 June 2017), and *CFMEU v Lendlease Engineering Pty Ltd* [2017] FWC 4001 (15 August 2017). In another case, the FWC granted an employer's application to terminate an existing enterprise agreement (under *FW Act* ss 222–3) for reasons including the employer's view that the agreement did not comply with the *2016 Code*: see *Re Grandstand Scaffold Services Pty Ltd* [2017] FWCA 3980 (28 July 2017).

union members.<sup>117</sup> Section 13(2) of the *2016 Code* sets out an expanded list of practices that must, or must not, be engaged in to ensure the observance of freedom of association on building sites. For example, personal information must be handled in accordance with the *Privacy Act 1988* (Cth);<sup>118</sup> ‘no ticket, no start’ signs cannot be displayed, nor signs which seek to vilify employees who participate in industrial activities (or do not);<sup>119</sup> ‘show card’ days must not occur;<sup>120</sup> forms that require employees or subcontractors to identify union membership cannot be used;<sup>121</sup> employment cannot be refused or terminated based on union status;<sup>122</sup> union logos or mottos must not be applied to company property etc;<sup>123</sup> non-working shop stewards must not be engaged, nor other individuals nominated by a union;<sup>124</sup> employees must be provided free choice about whether to be represented in dispute processes and by whom;<sup>125</sup> and union officials or delegates must not be involved in induction processes.<sup>126</sup>

Many of these practices would be unlawful under pt 3-1 of the *FW Act*, which preserves the right of employees to join and be involved in unions or not to do so.<sup>127</sup> However, practices through which *encouragement* is provided to union membership or presence in the workplace (as opposed to pressure to join the union) would not necessarily offend pt 3-1.<sup>128</sup> In contrast, s 13(2) of the *2016 Code* exhibits a stronger determination to ensure that union membership (or non-membership) is a matter for individual choice. For example, the prohibition on display of union signs and mottos on building sites is considered necessary by the Government

because such practices can result in an implication that membership of a building association is a mandatory requirement of employment with the particular employer or at a particular site. These practices are inconsistent with the proposition that membership of a building association is a matter for individual choice.<sup>129</sup>

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<sup>117</sup> *2016 Code* s 13(1).

<sup>118</sup> *Ibid* s 13(2)(a).

<sup>119</sup> *Ibid* s 13(2)(b)–(c).

<sup>120</sup> *Ibid* s 13(2)(d).

<sup>121</sup> *Ibid* s 13(2)(f).

<sup>122</sup> *Ibid* s 13(2)(h)–(i).

<sup>123</sup> *Ibid* s 13(2)(j).

<sup>124</sup> *Ibid* s 13(2)(l).

<sup>125</sup> *Ibid* s 13(2)(o).

<sup>126</sup> *Ibid* s 13(2)(p).

<sup>127</sup> See especially *FW Act* ss 50, 346–7. These general protections are reinforced by ss 12 (definition of ‘objectionable term’) and 194(b), which make enterprise agreement provisions that would breach pt 3-1 ‘unlawful terms’ that cannot be included in an agreement. On pt 3-1 generally, see Breen Creighton, ‘Individualization and the Protection of Worker Voice in Australia’, in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 232.

<sup>128</sup> See, eg, *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339, 369–70 [85]–[89] (the Court); *United Firefighters’ Union of Australia v Country Fire Authority* (2015) 228 FCR 497.

<sup>129</sup> *2016 Code Explanatory Statement* 18 [98]. See also 19 [99]. FWBC had taken the view that the application of union stickers on employees’ clothing breached the freedom of association provisions of the *2013 Code*, leading in one instance to the dismissal of three construction workers (and warnings being issued to 130 more) who refused a management directive to remove their stickers, see: ‘Workers Let Go After FWBC Declares Union Stickers Breach Building Code’, *Workforce* (Sydney), 8 June 2016; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia — Electrical, Energy and Services Division —*

In February 2018, the ABCC took this view even further, issuing a ‘fact sheet’, which states that the prohibited union logos, mottos and indicia under s 13(2)(j) of the *2016 Code* include: ‘images generally attributed to, or associated with a [building union], such as the iconic symbol of the five white stars and white cross on the Eureka Stockade flag’.<sup>130</sup>

Fourth, related to the freedom of association provisions, s 14 of the *2016 Code* tightens the requirements relating to union right of entry. The intent of s 14 is to ‘[recognise] that legislative right of entry is a privilege that only a select class of persons can apply to access’;<sup>131</sup> namely, building union officials with the appropriate permit who meet the applicable statutory requirements for entry. As before, code covered entities are required to comply with federal, state and territory laws (as applicable) that provide permit-holders with a right to enter premises where building work is performed, such as OHS statutes and pt 3-4 of the *FW Act*.<sup>132</sup> In addition, however, a code covered entity must (as far as reasonably practicable) ensure that entry by a union official is for a purpose permitted by pt 3-4 or the applicable OHS legislation; and that the union official complies with all requirements of the relevant legislation (including permit and notice requirements).<sup>133</sup> This would preclude, for example, a union official from being invited onto a building site for purposes of involvement in a dispute resolution process under an award or enterprise agreement, because this is not a purpose contemplated by any right of entry legislation — although workplace delegates may represent employees in those processes under s 13(k) of the *2016 Code*.

Fifth, as was the case under the *2013 Code*, code covered entities must not enter into unregistered written agreements in relation to building work, such as an unregistered site agreement between a head contractor and the relevant union.<sup>134</sup> This prohibition covers any agreement that will not be registered or approved under the *FW Act* (or where the code covered entity reasonably believes this to be the case) and: deals with matters that would be prohibited by s 11 of the *2016 Code*<sup>135</sup>; or provides for terms and conditions of employees or subcontractors; or restricts the type or form of engagement used to engage subcontractors.<sup>136</sup> However, the prohibition does not extend to ‘a common law agreement made between an employer

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*Queensland Divisional Branch v Laing O’Rourke Australia Construction Pty Ltd* [2016] FWC 3699 (8 June 2016) (a failed attempt by the unions to address the issue through the dispute resolution clause of the applicable enterprise agreement). See also *Harrison v P & T Tube Mills Pty Ltd* (2009) 181 IR 162 (relating to dismissal of an employee following a ‘union sticker dispute’, although not in the construction industry).

<sup>130</sup> ABCC, *Freedom of Association – Logos, Mottos and Indicia: Differences between the 2013 and 2016 Codes* (30 January 2018) <<https://www.abcc.gov.au/resources/fact-sheets/building-code-2016/freedom-association-%E2%80%93-logos-mottos-and-indicia>>.

<sup>131</sup> *2016 Code Explanatory Statement* 19 [101].

<sup>132</sup> *2016 Code* s 14(1).

<sup>133</sup> *Ibid* s 14(2). On the need to meet the requirements of both pt 3-4 and the applicable OHS legislation (where entry is sought for OHS purposes), see *Australian Building and Construction Commissioner v Powell* (2017) 268 IR 113.

<sup>134</sup> *2016 Code* s 10.

<sup>135</sup> See above nn 100–103 and accompanying text.

<sup>136</sup> *2016 Code* s 10(1).

and an individual employee'.<sup>137</sup> In addition to circumvention of the s 11 prohibitions, a concern underlying the prohibition of unregistered agreements seems to be that, frequently, such agreements provide superior terms and conditions to those in the applicable award or enterprise agreement.<sup>138</sup> Linked to the unregistered agreements prohibition is the *BCIIP Act's* revival of an earlier prohibition (recommended by the Cole Royal Commission and introduced by the *Building and Construction Industry Improvement Act 2005* (Cth)) upon project agreements. Typically, these are agreements negotiated with relevant unions by a head contractor for a specific site or project, which is then applied to all contractors/subcontractors engaged on the site (although they may not be in a position to apply the generous terms and conditions of the agreement).<sup>139</sup> Subsections 59(1)(a)–(b) of the *BCIIP Act* therefore makes unenforceable an agreement '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', where 'not all the employees are employed in a single enterprise'.<sup>140</sup>

Sixth, a number of new requirements were introduced under the *2016 Code* as part of the Government's agreement with crossbench senators to secure passage of the *BCIIP Act*. These include:

- provisions requiring code covered entities to comply with applicable laws relating to security of payments due to persons engaged to perform building work for the entity, and to ensure that disputed payments are resolved through reasonable, timely and cooperative processes;<sup>141</sup>
- a requirement that the preferred tenderer for Commonwealth funded building work provide a range of information about the proposed work, such as 'the extent to which domestically sourced and manufactured building materials will be used',<sup>142</sup> compliance of building materials with Australian standards, and the project's impact on jobs and contribution to skills growth;<sup>143</sup>

<sup>137</sup> *Ibid* s 10(2). The Government contends that for the exclusion of individual common law agreements from the s 10 prohibition to apply, the relevant common law agreement must be 'genuine'. According to the *2016 Code Explanatory Statement* 8 [45], this is intended to address the following kind of situation:

An agreement negotiated collectively between an employer and the employer's employees to, for example, give a general pay rise to employees through individual common law employment agreements while the employees are covered by an enterprise agreement would not be a genuine common law agreement.

However, this appears to be an attempt to read into the terms of the *2016 Code* language that is not there. This is unlikely to be effective in practice, as extrinsic materials cannot be used 'to place upon words [in a statute or delegated legislation] a meaning they cannot reasonably bear': Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (Lawbook, 2014) 207.

<sup>138</sup> See Stewart et al, above n 32, 1024. Note also the prohibition of coercion, undue influence etc to make 'an above-entitlements payment' in s 12 of the *2016 Code*; and the imposition of several prohibitions of various types of coercive activity under the *BCIIP Act* ss 51–5.

<sup>139</sup> Stewart et al, above n 32, 1019–20.

<sup>140</sup> Unless the agreement takes the form of a Commonwealth industrial instrument, such as an enterprise agreement made under the *FW Act: BCIIP Act* s 59(1)(d). Note also that *BCIIP Act* s 59(2) defines the term 'single enterprise'.

<sup>141</sup> *2016 Code* ss 11D–11E. See also *BCIIP Act* ch 2 pt 4 (establishing a federal 'Security of Payments Working Group').

<sup>142</sup> *2016 Code* s 25A(1)(a).

<sup>143</sup> *Ibid*; *BCIIP Act* s 34(2A)(a). See also *BCIIP Act* s 34(2A)–(2C).

- a prohibition on the engagement of non-Australian citizens/permanent residents to undertake building work, unless the position is first advertised in Australia (with specified requirements as to the terms of the advertisement) and ‘the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job’;<sup>144</sup> and
- prohibitions on various collusive practices between tenderers for Commonwealth funded work.<sup>145</sup>

### C *Enforcement of the 2016 Code*

The ABCC has primary responsibility for monitoring compliance with, and enforcing, the *2016 Code*.<sup>146</sup> The ABCC has power under s 35 of the *BCIIP Act* to issue a written notice to a person required to comply with the Code, directing that person to provide information, within 14 days, about the extent of their compliance in respect of particular building work. ABCC Inspectors may use their compliance powers (such as powers of entry and investigation) for the purposes of ensuring compliance with the *2016 Code*,<sup>147</sup> and may also issue compliance notices under s 99 of the *BCIIP Act*. Further, code covered entities must notify the ABCC of a breach or suspected breach of the *2016 Code* within two working days (previously 21 days), and advise the ABCC of the steps that have been or will be taken to rectify the breach.<sup>148</sup>

The process for dealing with non-compliance with the *2016 Code*, and possible sanctions, are as follows. The Australian Building and Construction Commissioner may refer to the Employment Minister any matter involving an entity’s failure to comply with the Code (or a s 99 compliance notice relating to the Code), with recommendations as to the proposed sanction.<sup>149</sup> The Minister may then issue a formal warning to the code covered entity,<sup>150</sup> or impose an ‘exclusion sanction’<sup>151</sup> — namely, a period (no longer than one year) during which the entity cannot tender for or be awarded Commonwealth funded building work.<sup>152</sup> An exclusion sanction must be imposed ‘unless the Minister is satisfied that it would not be appropriate in the circumstances because of the nature of, or factors contributing to, the failure to comply’.<sup>153</sup> An entity that may be subject to an exclusion sanction is entitled: to be provided with written notice, by the Minister, of the alleged Code breach; and to make a submission in relation to the proposed sanction by a specified date.<sup>154</sup> The entity must subsequently be provided with

<sup>144</sup> *2016 Code* s 11F(1)(a). See also *2016 Code* s 11C(1); *BCIIP Act* s 34(2D)(d).

<sup>145</sup> *2016 Code* s 11C.

<sup>146</sup> See further Stewart et al, above n 32, 1029–30. Until April 2016, these functions under the *2013 Code* were performed by the Code Monitoring Group, the Department of Employment and the FWBC.

<sup>147</sup> *BCIIP Act* s 70(1)(a)–(b). On the extent of ABCC Inspectors’ powers, see ss 71–9.

<sup>148</sup> *2016 Code* s 17.

<sup>149</sup> *Ibid* s 18(1).

<sup>150</sup> *Ibid* s 18(1A)(b).

<sup>151</sup> *Ibid* s 18(1A)(a).

<sup>152</sup> *Ibid* s 3(3) (definition of ‘exclusion sanction’).

<sup>153</sup> *Ibid* s 18(1B).

<sup>154</sup> *Ibid* s 19(1).

written notice of any decision to impose an exclusion sanction, and the reasons for it, within 14 days of the decision being made.<sup>155</sup>

In March 2017, the Employment Minister imposed the first ever sanction for Code breaches upon J Hutchinson Pty Ltd, precluding the company from bidding for federally-funded building work from 1 April to 30 June 2017.<sup>156</sup> Across several projects, Hutchinson had breached the *2013 Code* requirements (reflected in the *2016 Code*) to ensure Code compliance by its subcontractors, by influencing subcontractors to have a particular workplace arrangement, and by failing to ensure its workers were free to join or not join a union (including through display of a ‘no ticket, no start’ sign at one site).<sup>157</sup> The ABCC indicated in late May 2017 that a further three building companies had been sent ‘show cause’ letters, seeking responses as to why sanctions should not be imposed for Code breaches.<sup>158</sup>

While the *2016 Code* itself is silent on whether there is any right of review or appeal against the imposition of an exclusion sanction, it is likely that a complaint could be made to the Commonwealth Ombudsman, review could be sought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and/or an application for judicial review could be made under s 39B of the *Judiciary Act 1903* (Cth).<sup>159</sup> The second and third of those avenues — *Administrative Decisions (Judicial Review) Act 1977* (Cth) review and judicial review — formed the basis for a legal challenge brought by the Communications, Electrical and Plumbing Union, against the ABCC’s decision under another part of the *2016 Code* (not to exempt South Australian Power Networks from the operation of the Code as an ‘essential service’ under s 6A).<sup>160</sup>

The ABCC also plays an important role in assessing enterprise agreements for compliance with the *2016 Code*. Under s 22 of the *2016 Code*, the ABCC may issue a determination that an agreement meets the requirements of s 11 (as discussed above in Part VB), and may provide preliminary advice on agreement compliance with the Code. The ABCC requires tenderers for Commonwealth funded building work to conduct a preliminary self-review of their agreement, using extensive guidance material provided by the ABCC (including sample agreement clauses); then to submit the agreement for an assessment of Code compliance.<sup>161</sup> An

<sup>155</sup> *Ibid* s 19(3)(c).

<sup>156</sup> Australian Building and Construction Commission, *Notification of Sanction under Building Code* (31 March 2017) <<https://www.abcc.gov.au/notification-sanction-under-building-code>>.

<sup>157</sup> ‘Cash Imposes Sanction on Hutchinson, as CFMEU Refuses to Change Deals’, *Workplace Express* (online), 3 April 2017 <<https://www.workplaceexpress.com.au>>.

<sup>158</sup> ‘Code Bites as More Builders Face Commonwealth Project Bans’, *Workplace Express* (online), 31 May 2017 <<https://www.workplaceexpress.com.au>>.

<sup>159</sup> See further Stewart et al, above n 32, 1030–1.

<sup>160</sup> See ‘Power Supply Potential Pawn as Building Code Faces First Legal Challenge’, *Workplace Express* (online), 19 June 2017 <<https://www.workplaceexpress.com.au>>; ‘Roe Leaving FWC; Individual Workers Facing Strike Fines; and More’, *Workplace Express* (online), 30 June 2017 <<https://www.workplaceexpress.com.au>>. The union’s application was ultimately discontinued, following an amendment in August 2017 to relevant provisions of the *2016 Code*: see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Building and Construction Commissioner* [2017] FCA 1062 (5 September 2017).

<sup>161</sup> ABCC, *Preliminary Review* <<https://www.abcc.gov.au/building-code/eligibility-tender/preliminary-review>>. For further detail on the agreement assessment process within the overall framework of tendering for Commonwealth work, see Stewart et al, above n 32, 1029–30; ‘FWBC Expands its Role’ *Workplace Express* (online), 16 May 2016 <<https://www.workplaceexpress.com.au>>.

assessment of compliance with s 11 of the *2016 Code* is one of the key criteria for eligibility to be awarded Commonwealth funded work.<sup>162</sup>

## **VI Analysis: The 2016 Code as an Instrument for Restoring the Rule of Law**

### **A Introduction**

This Part of the article examines the arguments mounted by proponents of restoring the rule of law in the Australian construction industry, and the ways in which it is said that the CFMEU's conduct has led to a breakdown of law and order. This is followed by an analysis of the extent to which the *2016 Code* is really a mechanism for addressing those issues, or whether it seeks to achieve other workplace reform objectives of the Coalition Government. Attention then turns to contentions that the specialist scheme of construction industry regulation offends rule of law principles, primarily the concern to ensure equal treatment before the law.

### **B The Case for Restoring the Rule of Law in the Construction Industry**

When reintroducing the Bill for the *BCIIP Act* following the 2016 Election, Prime Minister Turnbull stated the Government's argument as to the need to restore the rule of law in the construction industry as follows:<sup>163</sup>

The Coalition Government will always stand up for the rule of law. ...

[The Bill to re-establish the ABCC] will ensure the rule of law prevails on building sites across the country. ...

Two royal commissions have now identified systemic unlawful behaviour in the construction industry. ...

The industry is still marred by illegal strikes, constant bullying, intimidation and thuggery. ...

The Bill upholds and promotes respect for the rule of law and ensures respect for the rights of all building industry participants. ...

A re-established ABCC will also administer a building code that will govern industrial relations arrangements for government-funded projects. ...

No person in Australia ... should have to work in an industry where the rule of law is routinely defied. ...

This Bill will ensure our construction industry is safe, productive and free of intimidation and harassment. This will create the conditions for Australians to get the infrastructure they need at a price we can afford.

The Royal Commissions referred to by the Prime Minister were the Cole Royal Commission<sup>164</sup> and the more recent Heydon Royal Commission on Trade Union Governance and Corruption, which made similar findings about the continued

<sup>162</sup> *2016 Code* s 23(1)(a).

<sup>163</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 81–5 (Malcolm Turnbull, Prime Minister).

<sup>164</sup> Cole Royal Commission, above n 3. See also above nn 37–40, 64–7 and accompanying text for a discussion of the main findings.

lawlessness of the building industry.<sup>165</sup> Commissioner Heydon dealt extensively with the conduct of the CFMEU in his Final Report, pointing to its ‘repeated unlawful conduct’ including breaches of the law and court orders,<sup>166</sup> and to judicial criticism of the union and its officials due to their ‘disregard for the law’.<sup>167</sup> For example, the Commissioner stated that: ‘The concept of the rule of law has been described as an anathema to the CFMEU.’<sup>168</sup> He went so far as to suggest that

[t]here is a longstanding malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. ... Another symptom of the disease is that CFMEU officials habitually show contempt for the rule of law.

What can be done to cut out the malignancy and cure the disease?<sup>169</sup>

Commissioner Heydon’s solutions included the possibility of special legislation disqualifying CFMEU officials considered not to be fit and proper persons to hold union office.<sup>170</sup> He also recommended that the specialist building industry regulator continue to operate, with investigatory and enforcement functions relating to then-existing laws<sup>171</sup> along with enhanced penalties for unlawful industrial action, coercion and a new prohibition of industrially motivated picketing<sup>172</sup> (along the lines of the provisions eventually enacted in the *BCIIP Act*).

The principal concerns of Commissioner Heydon, the Coalition Government, the courts and the construction industry regulator have been about the CFMEU’s propensity for taking unlawful industrial action, then ignoring court orders and injunctions intended to address that action, as well as various types of coercive conduct. Perhaps the starkest illustration of the combination of these illegal activities is provided by the Grocon Emporium project dispute in 2012, in which the CFMEU maintained an unlawful blockade of the site in central Melbourne for more than two weeks. The dispute originated over union demands relating to the role of safety representatives on the site<sup>173</sup> and gave rise to various legal proceedings, including a criminal contempt action following the union’s refusal to comply with an injunction

<sup>165</sup> Royal Commission into Trade Union Governance and Corruption, above n 50. See also above nn 50–51 and accompanying text.

<sup>166</sup> *Ibid* vol 5, 397 [8.12]. See also 396–7 [8.7]–[8.12], appendix A 487–574 (a summary table of 147 construction industry cases involving successful proceedings against building industry participants for industrial law breaches and contempt over the period 2000–15).

<sup>167</sup> *Ibid* vol 5, 397 [8.13]. See also vol 5, 398–401 [8.14]–[8.22].

<sup>168</sup> *Ibid* vol 5, 398 [8.14], citing *Director, Fair Work Building Industry Inspectorate v CFMEU (No 2)* [2015] FCA 407 (1 May 2015), [103] (Tracey J). For another example, see the reference by Mortimer J to the ‘contumelious disregard for the restrictions the law imposes on industrial activities shown by those who control the CFMEU’: *Director, Fair Work Building Industry Inspectorate v CFMEU (No 2)* [2016] FCA 436 (13 May 2016) 49 [196].

<sup>169</sup> Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 401 [8.23]–[8.24].

<sup>170</sup> *Ibid* vol 5, 408 [8.44]. The Government has indicated that it will not implement this recommendation because it is not the role of Parliament to ban union officials: ‘Coalition Confirms Adoption of 48 TURC Recommendations’, *Workforce* (Sydney), 24 June 2016. Instead, however, see the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (Cth); David Marin-Guzman, ‘New Laws Threaten CMFEU with Deregistration’, *Australian Financial Review* (online), 16 August 2017 <<http://www.afr.com/news/policy/industrial-relations/new-laws-threaten-cfmeu-with-deregistration-20170816-gxx6wp>>.

<sup>171</sup> Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 436 [8.112].

<sup>172</sup> *Ibid* vol 5, 478 [8.192].

<sup>173</sup> ABC, ‘CFMEU Clashes with Grocon Over Safety Officials’, *Lateline*, 28 August 2012.

to lift the picket, and civil penalty proceedings for unlawful coercion in respect of the ‘safety rep’ demands. The CFMEU was fined \$1.25 million in the criminal contempt case,<sup>174</sup> while penalties of over \$150 000 were imposed on the union and eight of its officials in the coercion proceedings brought by FWBC.<sup>175</sup> The union also settled a common law claim for damages brought by Grocon in respect of the Emporium site blockade,<sup>176</sup> and had to defend a number of civil and criminal proceedings arising from an alleged secondary boycott of concrete supplier Boral on Melbourne building sites in the wake of the Grocon dispute.<sup>177</sup>

There are many other reported cases in which the CFMEU, its officials and/or members have been found to have engaged in unlawful industrial action.<sup>178</sup> For its part, the CFMEU argues that it is sometimes necessary to engage in such action — for example, to protest against what it sees as unjust laws (like the *BCIIP Act* and the *2016 Code*) and problems with safety issues on building sites which have led to the deaths of construction workers.<sup>179</sup> This was also the basis for the incoming ACTU Secretary’s comments defending the right of unions to ignore the rule of law in March 2017,<sup>180</sup> although it has been pointed out that many instances of unlawful CFMEU industrial action do not involve safety concerns.<sup>181</sup> Sally McManus also highlighted the unfairness of restrictions on union entry rights: ‘When union officials

<sup>174</sup> *Grocon v CFMEU (No 2)* (2014) 241 IR 288, and *CFMEU v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527.

<sup>175</sup> *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 225 (17 March 2015); *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 1213 (11 November 2015).

<sup>176</sup> ‘CFMEU to Pay \$3.6 Million to Settle Grocon Case’, *Workplace Express* (online), 22 June 2015 <<https://www.workplaceexpress.com.au>>.

<sup>177</sup> ‘CFMEU to Pay Up to \$9 Million to Settle Boral Action’, *Workplace Express* (online), 18 September 2016 <<https://www.workplaceexpress.com.au>>; ‘CFMEU Loses Appeal Over “Boral Bans”’, *Workplace Express* (online), 19 July 2016 <<https://www.workplaceexpress.com.au>>; ‘Boral Lost Customers From CFMEU Boycott, Court Hears’, *Workplace Express* (online), 3 October 2016 <<https://www.workplaceexpress.com.au>>; ‘CFMEU’s Setka Asks Supreme Court to Axe Blackmail Case’, *Workplace Express* (online), 2 December 2016 <<https://www.workplaceexpress.com.au>>; *Setka v Magistrates Court of Victoria* (2017) 323 FLR 108.

<sup>178</sup> See, eg, *Director, Fair Work Building Industry Inspectorate v Abbott (No 6)* [2013] FCA 942 (18 September 2013); *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 226 (17 March 2015); *Director, Fair Work Building Industry Inspectorate v Vink* [2016] FCCA 488 (9 March 2016); *Australian Building and Construction Commissioner v McCullough (No 2)* [2017] FCA 295 (22 March 2017); *Australian Building and Construction Commission v CFMEU* (2017) 268 IR 178 (‘*Kane Constructions Case*’).

<sup>179</sup> See, eg, ‘Building Industry Will Stop, Enough is Enough, CFMEU Warns’, *Workplace Express* (online), 15 February 2017 <<https://www.workplaceexpress.com.au>>; ‘Victorian CFMEU Leader Vows to Defy IR Construction Laws’, *Workplace Express* (online), 9 March 2017 <<https://www.workplaceexpress.com.au>>.

<sup>180</sup> See nn 7–10 above and accompanying text. Support can be found for McManus’s position on defying unjust laws: see, eg, Bottomley and Bronitt’s reference to Fuller, above n 27, ‘ch 2, suggesting that there is no obligation to obey legal rules that violate the rule of law as they are not laws at all. Bottomley and Bronitt, above n 21, 42; cf Hayek, above n 23, 210.

<sup>181</sup> Matthew Dunkley, ‘New Union Chief Sally McManus has a Problem with Facts’, *The Sydney Morning Herald* (online), 23 March 2017 <<http://www.smh.com.au/business/workplace-relations/new-union-chief-sally-mcmanus-has-a-problem-with-facts-20170319-gv1rn6.html>>. See further cases such as *Director, Fair Work Building Industry Inspectorate v Merx* [2015] FCA 316 (2 April 2015); *Kane Constructions Case* (2017) 268 IR 178.

are prevented from going onto a worksite because they need to give 24 hours' notice and they know that someone's life is at risk, I think that is an unjust law.<sup>182</sup>

As well as the inaccuracy of that description of the legal position,<sup>183</sup> there have been many judicial findings of entry onto building sites by CFMEU officials in breach of applicable restrictions under the *FW Act* and/or OHS legislation.<sup>184</sup> Further, the Heydon Royal Commission considered evidence of the misuse of entry rights for OHS purposes to address industrial issues,<sup>185</sup> while alleged breaches of right of entry laws have become an increasing focus of compliance activity on the part of the construction industry regulator.<sup>186</sup> The CFMEU has also, on occasions, demonstrated a belligerent approach to interactions with ABCC inspectors. This was most clearly exemplified by Victorian CFMEU Secretary John Setka's warning (at a public rally held in Melbourne on 19 June 2017) that the union would expose ABCC inspectors in their communities so that they would 'not be able to show their faces anywhere'.<sup>187</sup> These comments were condemned by both the Government and Opposition.<sup>188</sup> Although Setka later apologised for his remarks,<sup>189</sup> they served to entrench a perception that the union regards itself as 'above the law'.

### C *Is the 2016 Code about Restoring the Rule of Law or Something Else?*

The discussion in the preceding section illustrates that there is a persuasive basis for the notion of restoring the rule of law in the building industry, if one accepts the

<sup>182</sup> 'I Will Not Keep My Head Down: ACTU's McManus', *Workplace Express* (online), 29 March 2017 <<https://www.workplaceexpress.com.au>>.

<sup>183</sup> The requirement to give 24 hours' notice of entry for OHS purposes only applies to entry for purposes of accessing employment records (*FW Act* s 495; *Work Health and Safety Act 2011* (Cth) s 120) and for consulting with employees on safety matters (*Work Health and Safety Act 2011* (Cth) ss 121–2); it does not apply for purposes of entry to investigate a suspected OHS contravention under *Work Health and Safety Act 2011* (Cth) ss 117–19. This is also the position in those states and territories that have adopted the model *Work Health and Safety Act* (ie all but Victoria and Western Australia).

<sup>184</sup> See, eg, *Director, Fair Work Building Industry Inspectorate v CFMEU* [2016] FCA 413 (22 April 2016); *Director, Fair Work Building Industry Inspectorate v CFMEU* [2016] FCA 414 (22 April 2016); *Director, Fair Work Building Industry Inspectorate v O'Connor* [2016] FCA 415 (22 April 2016); *Director, Fair Work Building Industry Inspectorate v Bolton (No 1)* [2016] FCA 816 (19 July 2016); *Director, Fair Work Building Industry Inspectorate v Bolton (No 2)* (2016) 261 IR 452. See also *Fair Work Commission v Roberts* [2016] FWC 4052 (29 June 2016), relating to the suspension of a CFMEU official's right of entry permit; *Australian Building and Construction Commissioner v Powell* (2017) 268 IR 113, dealing with the inability of an official (without a federal entry permit) to obtain entry onto a site to assist a safety representative under Victorian OHS legislation.

<sup>185</sup> Royal Commission into Trade Union Governance and Corruption, above n 50, vol 2, ch 3.2; vol 3, ch 6.3; vol 5, 578 [9.5].

<sup>186</sup> 'Entry Permit Breaches Dominating FWBC Actions', *Workplace Express* (online), 18 August 2015 <<https://www.workplaceexpress.com.au>>. See also Nigel Hadgkiss, 'The Rule of Law — One Year On' (Speech delivered at the IRSWA State Conference, Rottneest Island, Western Australia, 22 November 2014).

<sup>187</sup> 'CFMEU Official Threatens to Expose Inspectors' "Secret Lives", *Workplace Express* (online), 20 June 2017 <<https://www.workplaceexpress.com.au>>.

<sup>188</sup> David Marin-Guzman, 'Bill Shorten "Repudiates" CFMEU Boss John Setka's Threats to ABCC Officials', *Australian Financial Review* (online), 21 June 2017 <<http://www.afr.com/news/policy/industrial-relations/bill-shorten-repudiates-cfmeu-boss-john-setkas-threats-to-abcc-officials-20170621-gwvc4d>> (noting also that the Federal Employment Minister would be referring the matter to police).

<sup>189</sup> 'CFMEU Leader Apologises for "Heat of the Moment" Comments', *Workplace Express* (online), 23 June 2017 <<https://www.workplaceexpress.com.au>>.

narrow view of the rule of law as necessitating compliance with legal rules.<sup>190</sup> To what extent, then, is the *2016 Code* oriented towards achieving that objective? Clearly there are elements of the Code that aim to promote respect for the law by construction industry participants, such as the requirements to comply with the Code itself and other applicable laws, as well as the rulings of courts and tribunals. The goal of compliance can also be seen in the reporting requirements about industrial action — although notably, *any* industrial action must be reported to the ABCC, not just unlawful industrial action. Similarly, the *2016 Code* seeks to ensure observance of the *FW Act* provisions relating to freedom of association and union right of entry, and compliance with various laws dealing with security of payments.

However in many more respects, the *2016 Code* has nothing at all to do with the rule of law. Rather, it seeks to promote other aspects of the Government's workplace relations agenda, particularly its desire to dilute the power and influence of trade unions. This is no longer the explicitly articulated feature of Coalition policy that it was in the Howard era (particularly through the 2005 'Work Choices' legislation).<sup>191</sup> However, it is evident, for example, in the Government's attempts to limit union entry rights under pt 3-4 of the *FW Act*,<sup>192</sup> and in its robust posturing in agreement negotiations in the federal public sector.<sup>193</sup> Unions are also being subjected to higher standards of governance and accountability, particularly in relation to financial management, although this is largely a necessary response to the corruption issues identified by the Heydon Royal Commission.<sup>194</sup>

Arguably, the *2016 Code* is the Coalition Government's most potent statement of anti-union intent — especially the extensive attempts to preclude union involvement in the workplace through the agreement content restrictions and freedom of association requirements. These provisions of the *2016 Code* go well beyond ensuring *neutrality* in the choice presented to employees as to whether they should join a union or become involved in union activities (or not).<sup>195</sup> Rather, the *2016 Code* restrictions seek to prevent employers from offering any support for, or tolerance of, union involvement in the workplace — right down to prohibiting the display of union flags or symbols and union involvement in employee inductions — under the pain of possible ineligibility for Commonwealth-funded building work.

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<sup>190</sup> See above Part II.

<sup>191</sup> Anthony Forsyth and Carolyn Sutherland, 'From "Uncharted Seas" to "Stormy Waters": How Will Trade Unions Fare under the Work Choices Legislation?' (2006) 16(2) *Economic and Labour Relations Review* 215.

<sup>192</sup> See Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (Cth), discussed in Stewart et al, above n 32, 870.

<sup>193</sup> 'Abbott Government Tightens Screws with New APS Bargaining Policy', *Workplace Express* (online), 2 April 2014 <<https://www.workplaceexpress.com.au>>; Sue Williamson, Michael O'Donnell and Cameron Roles, 'Bargaining over Australian Public Service Cuts: Do Forcing Strategies Work?' (2016) 27(1) *Economic and Labour Relations Review* 46.

<sup>194</sup> See n 59 above and accompanying text; *Fair Work Amendment (Corrupting Benefits) Act 2017* (Cth); Anthony Forsyth, 'Law, Politics and Ideology: The Regulatory Response to Trade Union Corruption in Australia' (2017) 40(4) *University of New South Wales Law Journal* 1336.

<sup>195</sup> The notion of state neutrality in the legal rules for union activity such as collective bargaining is explored in the United States and United Kingdom contexts in (respectively): Benjamin I Sachs, 'Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing' (2010) 123(3) *Harvard Law Review* 655; Ruth Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37(3) *Industrial Law Journal* 236.

As indicated earlier in the article, the reach of the Code's prohibitions extend to preclude certain forms of employer activity (that is, encouragement or facilitation of union involvement) that are more than likely permissible under the *FW Act*.<sup>196</sup> The *2016 Code* is therefore as much an instrument to drive an ideological view antipathetic to trade unions, as it is a vehicle to restore the rule of law.

The enterprise agreement restrictions in the *2016 Code* also point to another of the Coalition's policy objectives: enhancing productivity and competitiveness.<sup>197</sup> In its first term in office, the Government largely left it to the Productivity Commission to examine how the workplace relations system could be improved, and ensure that businesses can 'grow, prosper and employ'.<sup>198</sup> The Commission's reform recommendations were more moderate than many observers expected,<sup>199</sup> but have still not been acted upon by the Government.<sup>200</sup> As indicated earlier, the *2016 Code* precludes agreement clauses that limit management decision-making or productivity gains. Of particular note in that context are the prohibitions on clauses restricting the utilisation of flexible forms of labour (for example, contractors or labour hire), and on 'jump up'-type provisions. Through the *2016 Code*, therefore, the Government has implemented (in the construction industry) a recommendation of the Productivity Commission to restrict the permissible content of agreements,<sup>201</sup> which it has not yet been prepared to pursue more broadly.

#### **D Rule of Law Concerns about Construction Industry Regulation**

While it has been shown that the *2016 Code* is only partly aimed at rule of law concerns, the *BCIIP Act* is certainly more squarely focused on ensuring compliance with prohibitions on unlawful industrial action, picketing and coercion through stiff penalties and a vigilant regulator (the ABCC). Yet this only addresses one element — enforcement of existing laws — of some (but not all) perspectives of what the rule of law means. At the same time, the specialist scheme of construction industry regulation that has operated in Australia since 2005 has raised a number of concerns, particularly regarding its incursion on a principle that (as discussed earlier in this article)<sup>202</sup> is another foundational component of the rule of law in Dicey's terms: equality before the law.<sup>203</sup>

<sup>196</sup> See above nn 117–129 and accompanying text.

<sup>197</sup> Liberal Party of Australia and The Nationals, *The Coalition's Policy to Create Jobs by Improving Productivity* (Policy Statement, 4 September 2013). See also Liberal Party of Australia and The Nationals, above n 48.

<sup>198</sup> Productivity Commission (Cth), 'Workplace Relations Framework' (Inquiry Report, Australian Government, 30 November 2015) vol 1, vi. See also v–vii.

<sup>199</sup> Ibid. See also Stewart et al, above n 32, 75–6. More generally, see David Peetz, 'The Productivity Commission and Industrial Relations Reform' (2016) 27(2) *Economic and Labour Relations Review* 164.

<sup>200</sup> Ewin Hannan, 'Election 2016: Coalition Silent on Promised Productivity Commission Response', *Australian Financial Review* (online), 29 June 2016 <<http://www.afr.com/news/policy/industrial-relations/election-2016-coalition-silent-on-promised-productivity-commission-response-20160629-gpulge>>.

<sup>201</sup> Productivity Commission (Cth), above n 198, vol 2, 815–20.

<sup>202</sup> See above Part II.

<sup>203</sup> Another significant rule of law issue raised about the system of construction industry regulation has been its abrogation of individual liberties through the coercive investigatory powers of the ABCC (see above nn 41, 47, 52 and accompanying text). Space does not permit further examination of those issues here; see further Williams and McGarrity, above n 41, 247, 276–7.

The ACTU has maintained that the imposition of special laws for workers in the construction industry is unnecessary and discriminatory, and that the ABCC (as it operated under the *Building and Construction Industry Improvement Act 2005* (Cth)) was ‘aggressive, coercive and biased’ in its overwhelming focus on the activities of workers and unions.<sup>204</sup> For the CFMEU: ‘principles of equal treatment before the law demand that there be no separate regulator for the building industry and no accompanying laws directed at the participants of that industry’.<sup>205</sup> It was noted earlier that according to Bingham and Gowder, laws should generally apply equally to everyone unless there are objective or public differences justifying different treatment.<sup>206</sup> According to Gowder, reasons for such differential application of the law that ‘appeal to plausible conceptions of the public good will always count’, while reasons ‘based on patronizing or disdainful attitudes toward classes of individuals will never count’.<sup>207</sup> Clearly, perceptions of ‘the public good’ will always be in the eye of the beholder. Nevertheless, it is strongly arguable that the ‘justification’ test for differential treatment is satisfied in respect of the Australian building industry, based on the lawlessness discussed in Part VIB above. Even the Labor Party, when last in government<sup>208</sup> and leading up to the 2016 Election,<sup>209</sup> has supported a (less restrictive) separate system of regulation for this industry.

However, in at least one case a court has criticised the construction regulator for bringing an unsuccessful enforcement proceeding against the CFMEU.<sup>210</sup> Commissioner Heydon found no evidence of anti-union bias on the part of the ABCC.<sup>211</sup> Nevertheless, the concerns of the ACTU and CFMEU have, to some extent, been validated by the inclusion in the *BCIIP Act* of a provision requiring the ABCC to carry out its functions in a way that ensures

the policies and procedures adopted and resources allocated for protecting and enforcing rights and obligations arising under [applicable building industry laws] are, to the greatest extent practicable having regard to industry conditions based on complaints received by the [ABCC], applied in a reasonable and proportionate manner to each of the categories of building industry participants.<sup>212</sup>

Union concerns about the ABCC’s lack of impartiality were further reinforced in September 2017, when Australian Building and Construction Commissioner Nigel Hadgkiss resigned following revelations that he had breached the *FW Act* by

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<sup>204</sup> See Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 420 [8.75]. See also vol 5, 419–21 [8.72]–[8.77].

<sup>205</sup> Ibid vol 5, 422 [8.78]. See also the Wilcox Review’s consideration of the justification for a special scheme of regulation in Wilcox Review, above n 45, ch 4.

<sup>206</sup> See above nn 18, 20 and accompanying text.

<sup>207</sup> Gowder, above n 19, 607–8 (citations omitted).

<sup>208</sup> See nn 44–7 above and accompanying text.

<sup>209</sup> Ewin Hannan, ‘Why Voters are Not Getting the Full Picture on the ABCC’, *Australian Financial Review* (online), 23 March 2016 <<http://www.afr.com/news/politics/why-voters-are-not-getting-the-full-picture-on-the-abcc-20160322-gnot1r>>.

<sup>210</sup> See, eg, *Director, Fair Work Building Industry Inspectorate v Ingham* [2016] FCA 328 (7 April 2016).

<sup>211</sup> Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 433–4 [8.103]–[8.107].

<sup>212</sup> *BCIIP Act* s 16(2), which was inserted as part of the crossbench amendments to the legislation in the Senate.

publishing incorrect information about union entry rights.<sup>213</sup> Based on his admissions of wrongdoing, a civil penalty of \$8500 was subsequently imposed upon Hadgkiss by the Federal Court, for breaching the legislation he was required to police.<sup>214</sup>

## VII Conclusion

This article has concluded that the Coalition Government's use of the procurement rules in the *2016 Code* is partly aimed at restoring the rule of law in the Australian construction industry, with the rule of law narrowly conceived as ensuring compliance with the law. In addition, though, it has been shown that the *2016 Code* is intended to achieve certain other workplace reform objectives, including reducing union power and enhancing productivity and competitiveness. These conclusions were reached following a detailed examination of: the evolution of the specialist framework of building industry regulation since the Cole Royal Commission in 2003; the use of commercial (dis)incentives through procurement policy to drive workplace reform in this sector since 1997; and the obligations imposed under the *2016 Code*.

In the course of the above analysis, it was observed that the CFMEU's wilful defiance of legal restrictions on industrial action, coercion and right of entry — and court orders and injunctions enforcing those limitations — means that there is a need to reimpose 'law and order' in the building industry. However, this is only one aspect of the rule of law, and the separate scheme of construction regulation has raised significant concerns over the years in relation to compliance with another central feature of the liberal conception of the rule of law: equal treatment before the law.

In the end, there must be some doubt as to the likely effect of the *2016 Code* (and the *BCIIP Act*) to effect the cultural change the Australian Government is seeking to bring about. Imposing commercial 'carrots and sticks' on construction companies has some capacity to influence behaviour, because most larger players will want to tender for Commonwealth funded projects — and many smaller companies will seek to be engaged on those projects.<sup>215</sup> On the other hand, similar obligations have applied previously (under the Howard Government) and the special scheme of construction regulation has been in place for almost 15 years without any real change in the nature of industrial relations practices on building sites.<sup>216</sup> It is, therefore, far from certain that the Government can turn the mantra of 'restoring the rule of law' in the Australian construction industry into reality.

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<sup>213</sup> 'ABCC's Hadgkiss Admits Contravening Act', *Workplace Express* (online), 12 September 2017 <<https://www.workplaceexpress.com.au>>.

<sup>214</sup> *CFMEU v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166 (29 September 2017).

<sup>215</sup> Stewart et al, above n 32, 1023.

<sup>216</sup> See, eg, Nigel Hadgkiss, 'Plans and Priorities of the Construction Industry Regulator' (Speech delivered at the Australian Industry Group National PIR Group Conference, Canberra, 2 May 2016); 'FWBC Needs Bigger Stick to Force Compliance: Hadgkiss', *Workplace Express* (online), 14 October 2016 <<https://www.workplaceexpress.com.au>>.