Australian Government

Implementation Guidelines for the National Code of Practice for the Construction Industry

Revised September 2005
Reissued June 2006

Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry
Reissued June 2006

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Australian Government

Department of Education, Employment and Workplace Relations

Please note the following amendments to the "Implementation Guidelines for the National Code of Practice for the Construction Industry (revised September 2005, reissued June 2006)" to reflect the recent Machinery of Government Changes as a result of the last Federal election.

The following references as highlighted in the table below will now replace any reference as indicated.

Please insert:	In place of:
1 Department of Education, Employment and Workplace Relations (DEEWR)	Department of Employment and Workplace Relations (DEWR)
2 Department of Infrastructure, Transport, Regional Development and Local Government	Department of Transport and Regional Services (DOTARS)
3 Department of Finance and Deregulation (Finance)	Department of Finance and Administration (Finance)
4 Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (Forward with Fairness)	Workplace Relations Amendment (Work Choices) Act 2005 (WorkChoices)
5 For any queries about workplace relations contact: the Workplace Authority Infoline: 1300 363 264 or visit the Workplace Authority website www.workplaceauthority.gov.au	For any queries about WorkChoices contact: the WorkChoices Infoline: 1300 363 264 or visit the WorkChoices website www.workchoices.gov.au

Foreword

The construction industry plays a vital part in the economic health of Australia. The Australian Government is committed to ensuring that the industry continues to strive to attain its maximum potential in ways that are productive, flexible and fair.

With this outcome in mind, the Australian Government agreed in 1997 that the National Code of Practice for the Construction Industry (the Code) would apply to all construction projects funded by the Australian Government.

The Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (the Guidelines) reflect the commitment of the Australian Government to establish higher standards of workplace relations behaviour, and greater flexibility and productivity within the building and construction industry.

In July 2005 the Australian Government announced further extensions to the application of the Code to all privately funded Australian-based construction activities of entities that receive Australian Government funded, or partly funded, construction contracts.

This version of the Guidelines, which took effect on 1 November 2005 after being publicly released in September 2005, takes into account amendments to the *Workplace Relations Act 1996* (WR Act) arising from the Workplace Relations Amendment (Work Choices) Act 2005 (WorkChoices). It also clarifies several requirements of the Guidelines, including when material suppliers need to apply the Code and Guidelines and when the Code and Guidelines apply to privately funded construction projects.

Adoption of the Code by the Australian Government expresses a commitment to deal only with organisations and personnel in the construction industry whose standards and behaviour conform to the principles expressed in the Code. The Government has agreed to use its purchasing power to promote best practice workplace relations and standards of honesty and integrity in the construction industry. As a significant client of the construction industry, the Australian Government is committed to promoting reform of the industry and the development of the highest ethical standards.

From 1 November 2005, any party wishing to do business with the Australian Government or work on Australian Government funded construction projects will be required to comply with the Code and Guidelines on all their construction projects, including Australian-based privately funded construction activities.

Adoption of the Code and the Guidelines by Australian Government agencies and *Commonwealth Authorities and Companies Act 1997* (CAC Act) bodies will ensure that the Australian Government's reform agenda for the construction industry is significantly advanced.

The continuation of the Guidelines signifies the Government's commitment to using its purchasing power to promote best practice. The ongoing operation of the Code and Guidelines will ensure that the momentum behind the reform of the building and construction industry continues.

The reforms available to industry include:

- industry specific legislation through the *Building and Construction Industry Improvement Act 2005* (BCII Act). The Act seeks to address unlawful industrial action, and importantly provide a means to ensure that those affected by unlawful industrial action can access compensation for any loss suffered;
- the Office of the Australian Building and Construction Commissioner (ABCC) which will act as a 'one stop shop' to provide advice and to enforce the law on building sites; and
- the Federal Safety Commissioner (FSC) to improve occupational health and safety (OHS) standards on Australian Government building and construction projects.

Foreword

Together with the Code and Guidelines, the reforms form a robust enforcement regime to combat the industry's lawlessness, and aim to significantly improve current patterns of conduct and establish the rule of law in the industry.

In addition to the industry specific reforms, the WR Act enhances the objectives of building industry reform by ensuring that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants. The WR Act provides remedies for unlawful right of entry, infringements of freedom of association and restraints on freedom of choice in workplace arrangements.

These Guidelines will continue to operate administratively in addition to any requirements of Commonwealth legislation.

Ultimately, reform of the building and construction industry can only be achieved when Government and industry work together in pursuit of this common objective. The Australian Government will continue to work with industry to ensure these reforms deliver a more efficient, productive, safe industry that operates within the law. Reform will only be possible, however, if industry grasps the opportunities the Australian Government has provided.

Building Industry Branch
www.workplace.gov.au/building
Building Industry Hotline: 1300 731 293

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Section 1

Introduction

1.1 The National Code of Practice for the Construction Industry (the Code) was developed jointly by the Australian Procurement and Construction Council and the Department of Workplace Relations Advisory Committee. The Code has been endorsed and adopted by the Australian Government and State and Territory Governments through the Procurement and Construction Ministers' Council and the Workplace Relations Ministers' Council.

1.2 The Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (Guidelines) are intended to assist Australian Government agencies and *Commonwealth Authorities and Companies Act 1997* (CAC Act) bodies to interpret and implement aspects of the Code in relation to construction projects.

1.3 These Guidelines also detail the extra-agency processes that the Government has set up to:

- monitor and report on the Code; and
- determine whether a sanction should be imposed on a party for a breach of the Code.

1.4 These measures include a Code Monitoring Group (CMG), which has oversight of Code implementation and compliance matters, including consideration of further action on issues referred to it by Australian Government departments and agencies and CAC Act bodies.

1.5 In August 2001, a Royal Commission was launched into the building and construction industry. Its commission was to inquire into and report on 'the nature, extent and effect of any unlawful or otherwise inappropriate industrial or workplace practice or conduct in the building and construction industry'. The terms of reference asked the Royal Commissioner to make recommendations to improve practices or conduct in, or to deter unlawful or inappropriate practices or conduct in relation to, that industry.

1.6 The Royal Commissioner's final report was tabled in Parliament in March 2003. The report included a range of recommendations for reform of the building and construction industry, including improvements to the effectiveness of the Code and Guidelines.

1.7 These Guidelines were revised in December 2003 due to the Australian Government's decision to transfer responsibility for investigating alleged breaches of the workplace relations provisions of the Code from the Office of the Employment Advocate to the Building Industry Taskforce (BIT). BIT was established following a recommendation in the Royal Commissioner's first report. That report concluded that an interim body was required to enforce industrial, criminal and civil laws in the building and construction industry. *The Building and Construction Industry Improvement Act 2005* (BCII Act) establishes the role of the Office of the Australian Building and Construction Commissioner (ABCC). The ABCC assumed the role previously performed by the BIT on 1 October 2005.

1.8 The December 2003 revision included changes resulting from the Australian Government's response to the recommendations of the Royal Commission. This included the extension of the Code and Guidelines to all construction projects to which the Australian Government contributes funding, including indirectly through grants and Australian Government programmes. The Code and Guidelines apply to indirectly funded projects according to the financial thresholds outlined in section 2.4 of these Guidelines. The Australian Government extended the Code and Guidelines to those authorities and businesses covered by the CAC Act.

1.9 In September 2005 the Guidelines were revised following an Australian Government review to progress the implementation of the Royal Commission recommendations and to ensure the Guidelines remain contemporary and continue to act as a catalyst for reform in the building and construction industry.

1.10 Changes in the Guidelines in 2005 included:

- a requirement for Australian Government and State and Territory agencies to only accept tenders or expressions of interest from contractors for Australian Government funded construction projects that are compliant with the Code and Guidelines at the time they lodge their tender or expression of interest;
- contractors interested in undertaking Australian Government construction work being required to agree to apply the Code and Guidelines to privately funded projects that commence after they first lodge an expression of interest or tender for Australian Government projects if the tender or expression of interest occurs on or after 1 November 2005;
- all related entities for companies interested in undertaking Australian Government construction work being required to have Code compliant workplace arrangements after a company lodges a tender or expression of interest for Australian Government projects if the tender or expression of interest occurs on or after 1 November 2005;
- revisions to the sanction regime and strengthening of the CMG; and
- additional workplace relations reform provisions to facilitate greater flexibility and productivity on Australian Government construction sites.

1.11 These changes to the Guidelines took effect from 1 November 2005.

1.12 This version of the Guidelines has been updated to reflect the introduction of WorkChoices. It also clarifies several pre-existing requirements of the Guidelines, including when material suppliers need to apply the Code and Guidelines and when the Code and Guidelines apply to privately funded projects. There are no substantial new requirements introduced by the reissued Guidelines, except those required through the amendments made to the WR Act by WorkChoices.

1.13 The Guidelines provide a clear statement of Australian Government policy and set out the workplace relations and administrative requirements of those parties with whom the Australian Government wishes to do business.

Application and scope

The Code is to be applied to the maximum practicable extent to all building and construction work undertaken for and on behalf of the Australian Government and to construction projects to which the Australian Government has contributed funding. The following sections elaborate on the types of activities covered by the Code.

2.1 Construction activity covered by the Code and Guidelines

2.1.1 The Code defines construction as all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining (excluding mining operations) and heavy engineering.

2.1.2 Activity which falls within the scope of the Code includes building refurbishment or fit out, installation of building security systems, fire protection systems, air-conditioning systems, computer and communication cabling, building and construction of landscapes.

2.1.3 Activity that does not fall within the scope of the Code includes ongoing maintenance of building systems. This includes maintenance of fire protection and air-conditioning systems, and computer and communication cabling. The Code also does not cover landscaping such as lawn mowing, pruning and other horticultural activities, and cleaning buildings.

2.1.4 The Code covers material supply contracts where the supplied material is integral to the construction of the project or to the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on site or off site. Material suppliers whose principal activity or purpose is specifically or exclusively to manufacture and/or supply construction components are required to apply the Code and Guidelines.

2.1.5 The Department of Employment and Workplace Relations (DEWR) (see Section 10 for contact details) will be able to confirm whether particular material suppliers need to comply with the Code and Guidelines. DEWR's decision will be binding on all parties with an interest in the Code and Guidelines.

2.2 Construction activity undertaken by departments and agencies

2.2.1 The Code and Guidelines apply to all construction activity undertaken by or on behalf of Australian Government departments, agencies and budget-funded statutory authorities subject to the *Financial Management and Accountability Act 1997* (FMA Act). This applies to all activities irrespective of the value of a project.

2.3 Australian Government authorities and companies

2.3.1 Since 1 January 2004, the Code and Guidelines apply to all construction related activity undertaken by, and on behalf of, all authorities and companies covered by the CAC Act. Responsible ministers have been required to consult CAC Act bodies within their portfolios with a view to those bodies applying the Code and Guidelines to all construction related activity undertaken by them and on their behalf.

2.3.2 This includes Government authorities and wholly-owned Government companies to which the CAC Act applies. All the provisions of the Code and Guidelines, including compliance monitoring, apply with the exception of those authorities and companies which have secured an exemption from the Code under the CAC Act.

2.4 Indirectly funded projects

2.4.1 Since 1 January 2004, the Code and Guidelines has also applied to all construction projects indirectly funded by the Australian Government through grant and other programmes where:

- the value of Australian Government contribution to a project is at least $5 million and represents

at least 50 per cent of the total construction project value; or

- the Australian Government contribution to a project is $10 million or more, irrespective of the proportion of Australian Government funding.

2.4.2 The application of the Code and Guidelines to indirectly funded projects requires funding recipients, contractors and subcontractors to comply with the Code and these Guidelines. This includes agreeing to Australian Government monitoring of compliance through site visits and inspection of documents by a person occupying a position in the ABCC.

2.4.3 Where the Australian Government provides a package of assistance measures in advance of construction commencing, for a project that has an identified capital component, the Code and Guidelines apply.

2.4.4 The Code and Guidelines do not apply to Australian Government funded projects where funding for construction is not an explicit component of the grant, for example industry development programmes with a legislated entitlement administered by the Department of Industry, Tourism and Resources.

2.5 Privately funded construction projects

2.5.1 'Privately funded construction projects' are all projects that do not meet the criteria for Australian Government directly funded or indirectly funded projects as defined above.

2.5.2 Parties interested in undertaking Australian Government construction work must comply with the Code and these Guidelines on all of their privately funded Australian-based construction projects where expressions of interest or tenders are called for on or after the date that the contractor first submits a tender or expression of interest for an Australian Government funded construction project on or after 1 November 2005.

2.5.3 This applies to Australian Government funded construction projects that are:

- directly funded by the Australian Government and administered by Australian Government agencies; or
- indirectly funded by the Australian Government and administered by State Government agencies or other funding recipients, such as through grant funding.

2.5.4 This requirement applies to all parties such as a head contractor, subcontractor, consultant or material supplier interested in undertaking Australian Government construction work.

2.5.5 Entities do not need to ensure the Code compliance of construction parties they contract to perform work on privately funded projects.

2.6 Related Entities

2.6.1 Entities related to a contractor seeking or engaged in Australian Government construction activity are also required to comply with the Code and these Guidelines in respect of any building and construction activities they undertake.

2.6.2 This is to ensure that:

- entities, whether incorporated or unincorporated, created specifically for the purpose of tendering for construction projects funded by the Australian Government (for example, special purpose vehicles) cannot be used to avoid the requirement to be Code compliant;
- private construction work within Australia for a tenderer's related entities can be captured; and
- all related entities in complex corporate structures, including specific purpose or joint venture entities, will be required to have all their building and construction-related industrial instruments Code compliant.

2.6.3 For the purposes of the above, an entity is a related entity of a tenderer if it is engaged in building and construction work and:

- the entity is connected with the tenderer as defined below; or
- it is a body corporate which is related to the tenderer as defined below.

2.6.4 'Connected' means the entity:

(a) can control, or materially influence, the tenderer's activities or internal affairs; or

(b) has the capacity to determine, or materially influence, the outcome of the tenderer's financial and operating policies; or

(c) is a member of the tenderer; or

(d) is financially interested in the tenderer's success or failure or apparent success or failure.

2.6.5 'Related' means the body corporate—within the meanings in the *Corporations Act 2001* (Cth):

(a) is a holding company of the tenderer; or

(b) is a subsidiary of the tenderer; or

(c) is a subsidiary of a holding company of the tenderer; or

(d) has one or more directors who are also directors of the tenderer; or

(e) without limiting clauses (a) to (c) of this paragraph, controls the tenderer.

2.7 Pre-commitment lease projects

2.7.1 Australian Government agencies negotiating pre-commitment lease arrangements with a private sector developer must make the application of the Code to the project by the developer a condition of their agreement to lease.

2.8 Build Own Operate Transfer/Build Own Operate

2.8.1 The Code and Guidelines must also be applied to Build, Own, Operate, Transfer (BOOT) and Build, Own, Operate (BOO) projects initiated by an Australian Government agency for the delivery of Australian Government functions or services. In many cases an Australian Government entity will be the subsequent tenant of such projects and can request Code compliance in accordance with section 2.7 of these Guidelines.

2.9 Public Private Partnerships and Private Finance Initiatives

2.9.1 The Code also applies to both Public Private Partnerships (PPPs) and Private Finance Initiatives (PFIs). Both PPPs and PFIs involve the creation of an asset through financing and ownership control by a private party and private sector delivery of related services that may normally have been provided by Government. An Australian Government agency may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Australian Government or directly by the end user. The Code applies to any construction initiated by an Australian Government agency for the delivery of Australian Government functions or services.

Date of effect

3.1 All contracts, tendering processes, expressions of interest or market testing proposals entered into after 22 September 1997 must comply with all elements of the Code (note that application of the industrial relations elements commenced with effect from 1 July 1997).

3.2 As noted in section 2, from 1 November 2005 all entities tendering for or expressing interest in construction projects directly or indirectly funded by the Australian Government must:

- be compliant with the Code and these Guidelines at the time they lodge an expression of interest or tender for Australian Government funded construction projects; and
- comply with the Code and these Guidelines on all of their new privately funded Australian-based construction activities from the date they first lodge an expression of interest or tender for Australian Government construction work.

3.3 This version of the Guidelines does not apply to projects where expressions of interest or tenders were called for before 1 November 2005. The Code and Guidelines as at the date of commencement of those projects will continue to apply for the life of the project.

3.4 This version of the Guidelines does not apply to indirectly funded projects where funding agreements or bilateral/multilateral funding agreements were signed before 1 November 2005. The Code and Guidelines as at the date of signing of the funding agreements or bilateral/multilateral funding agreements will continue to apply for the life of the project.

3.5 Since 1 January 2004, the Code and Guidelines have applied to:

- all construction related activity undertaken by and on behalf of all authorities and companies under the CAC Act following the appropriate consultative process in the CAC Act; and
- all construction projects indirectly funded by the Australian Government through grant and other programmes, subject to the financial thresholds in section 2.4 of these Guidelines.

3.6 Agreements previously assessed by DEWR as consistent with the version of the Code and Guidelines which took effect from 1 November 2005 will be deemed to be consistent with these reissued Guidelines.

Documentation

4.1 All parties to be advised of requirement to comply

4.1.1 All parties invited to express interest in Australian Government construction projects or projects to which the Australian Government contributes funding must be informed of the application of the Code to the project. Advertisements calling for expressions of interest, requests for tenders, submissions, invitations to join Common Use Arrangements etcetera, must incorporate the following statement:

> *The National Code of Practice for the Construction Industry, in accordance with the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, reissued June 2006, applies to this project.*

4.2 Tender documents to incorporate Code and requirement to comply

4.2.1 Compliance with the Code and these Guidelines must be made a condition of tender for Australian Government funded construction work. Agencies and CAC Act bodies must ensure the requirements of sections 5 and 6 of these Guidelines are met for directly and indirectly funded projects respectively. The Code and Guidelines must be included as an attachment to tender documents and should be made available on request to all interested parties. Alternatively, the conditions of tender may include advice that those documents can be viewed at the Australian Workplace website at www.workplace.gov.au/building.

4.2.2 Prospective tenderers must be advised that they are required to be compliant with the Code and Guidelines at the time they lodge their expression of interest or tender. Additionally, tenderers are to be advised that they must be compliant on all of their new privately funded Australian-based construction activities from the date they first lodge an expression of interest or tender for Australian Government construction work where the expression of interest or tender was called for on or after 1 November 2005. (Refer to section 2.5 for further details on privately funded projects).

4.2.3 Prospective tenderers must also be advised that compliance with the Code and these Guidelines is to extend to all subcontractors, consultants and material suppliers who may be engaged by the tenderer on the project. Agencies and CAC Act bodies are expected to actively assist parties to ensure they can readily access and understand the Code and Guidelines.

4.2.4 Contractual documents concerning Australian Government funded projects (directly and indirectly funded) must allow for a person occupying a position in the ABCC to access sites, documents and personnel to monitor compliance with the Code and Guidelines, including privately funded project sites.

4.2.5 Agencies covered by the FMA Act must undertake procurement in a manner consistent with the principles contained in the Commonwealth Procurement Guidelines. Bodies subject to the CAC Act are not subject to the Commonwealth Procurement Guidelines, however they may give due regard to them in conducting procurement. The procurement and tender methods adopted may vary according to the complexity of the procurement, the size of the expenditure and the requirements of the department or agency. DEWR can provide advice to agencies and CAC Act bodies on compliance with the Code and Guidelines in the context of their preferred tendering process.

4.2.6 A two-stage tender process can assist in the selection of tenders by providing an initial assessment of the suitability of tenders for larger projects. Where a two-stage tender process is used, the first stage or expression of interest documents issued should clearly state that the Code and Guidelines apply. The documents should also state that entities must have Code compliant workplace arrangements in place at the time of lodging their first stage expression of

interest or tender. An undertaking to apply the Code, and an undertaking to apply the Code to private construction activity, must be included in the tender schedules to be submitted. An assessment on the previous performance of the entity on applying the Code to projects funded by the Australian Government should also be included as a separate tender schedule.

4.2.7 It may be useful for agencies to obtain a completed and signed undertaking to apply the Code and Guidelines, including to private construction activity, at the assessment stage before an entity can proceed to tender. All applicants must be compliant with the Code and Guidelines at the time they lodge expressions of interest in a two-stage tender process. Previous compliance performance in applying the Code to projects can be included in the weighted assessment of the tenderer's ability to satisfy the mandatory criteria.

4.2.8 Further information on tender procedures can be obtained from the Department of Finance and Administration (Finance) (see section 10 of these Guidelines for contact details).

4.2.9 Model contract clauses are available at the Australian Workplace website at www.workplace.gov.au/building. These model clauses will be updated from time to time to reflect changes in Australian Government contractual practice.

4.3 Contract documents and project management procedures to incorporate requirement to comply

4.3.1 While the form of wording will vary according to the contract form and the type of service supplied, the contract must incorporate the requirement for the contractor to comply with all aspects of the Code and Guidelines, and for all subcontractors, material suppliers and consultants associated with the project to comply.

4.3.2 Clauses to achieve compliance must be incorporated into the general or special conditions of the contract, associated statements of compliance, statutory declarations required of contractors or project procedures as appropriate.

4.4 Minor works and very small contracts

4.4.1 Australian Government departments, agencies and CAC Act bodies are required to ensure that the Code and Guidelines are applied to minor works contracts. Departments, agencies and CAC Act bodies are encouraged to use the model contract clauses available on the Australian Workplace website www.workplace.gov.au/building for tenders and contracts relating to minor works.

4.4.2 Agencies and CAC Act bodies may determine whether the model contract clauses are appropriate for minor works projects based on the value and complexity of projects and their own operational requirements.

4.4.3 In relation to very small contracts (where the value of the contract is $25 000 or less), agencies and CAC Act bodies may consider including the following clause in tender or contractual documentation rather than the model contract clauses:

> *The National Code of Practice for the Construction Industry (the Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, reissued June 2006 (the Guidelines), apply to this project. By agreeing to undertake the works, you will be taken to have read and to agree to comply with the Code and Guidelines.*

4.4.4 Contractors, subcontractors and consultants raising purchase orders or minor contracts of $25 000 or less must ensure the above clause is included within purchase orders.

4.4.5 In circumstances where minor works or very small contracts are undertaken without tendering, the organisation performing the minor works or very small contract must commit to the requirement to comply with the Code and Guidelines. They should also be provided with copies of the Code and Guidelines.

4.4.6 Agencies must only offer work to entities that comply with all aspects of the Code and these Guidelines.

4.4.7 Agencies are also required to report to DEWR through e-CODE on minor works. (Section 5.1 of these Guidelines sets out client agency requirements in more details.)

4.5 Consultant contracts.

4.5.1 The model contract clauses are also appropriate for consultant contracts for construction related activities. These include contract management contracts, project management contracts, and design and supervision contracts. Agencies and CAC Act bodies should incorporate the model clause, or a clause based on the model, in all consultant tenders and contract documents and ensure that advertisements calling for expressions of interest from consultants include the statement:

> *The National Code of Practice for the Construction Industry, in accordance with the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, reissued June 2006, applies to this project.*

4.6 Projects funded under Australian Government grants and programmes

4.6.1 Agencies acting as funding administrators must ensure that funding recipients include the requirement to apply the Code and these Guidelines to their projects in their deeds of agreement, grant documents or other documentation. Model clauses for inclusion in deeds of agreement, grant documents and other legal instruments are also included at the Australian Workplace website www.workplace.gov.au/building. These model clauses can be used by departments and agencies for projects where the Code and these Guidelines apply, when effecting the transfer of funds from the Australian Government to State/Territory and local Governments and private sector organisations. Advice should be sought from DEWR where significant modifications to these model clauses are proposed for particular projects.

4.6.2 Departments, agencies and CAC Act bodies responsible for managing the transfer of funds or grants should ensure that any Guidelines or administrative procedures governing funding require funding recipients to include these model clauses, or a modified version of these model clauses, in all contracts relating to the construction projects concerned.

Australian Government directly funded construction

This section applies to Australian Government departments, agencies and CAC Act bodies that undertake construction activity as clients of the building and construction industry.

5.1 Australian Government departments and agencies as clients of the building and construction industry

5.1.1 Australian Government departments, agencies and authorities that are subject to the FMA Act and the CAC Act and are acting as clients of the building and construction industry are expected to apply the Code and these Guidelines in the same manner as any other Australian Government policy.

5.1.2 The Australian Government approach to implementation is also intended to ensure that client agencies have the support necessary to effectively apply the Code without detriment to their principal focus on successful project management.

5.1.3 As a client, it is important to take all reasonable steps to ensure that all parties in a contractual relationship with the Australian Government, and in relevant subcontracts, discharge their contractual obligations to comply with the Code and Guidelines on Australian Government construction projects.

5.1.4 The client is responsible for ensuring that:

- the application of the Code and these Guidelines are included as an integral component of construction project and contract management procedures within their organisations;
- all planned and current construction activities including minor works (see section 4.4 for details on minor works) are reported to DEWR through e-CODE;
- all expressions of interest, tender and contractual documents clearly set out the requirements specified in these Guidelines;
- commitments are obtained that the Code and Guidelines will be complied with, and that contractual obligations are met as specified in section 4 of these Guidelines;
- they do not consider expressions of interest or tenders from, or provide work to, entities on the exclusion list due to previous breaches of the Code (this information is available from CMG);
- parties are aware of the need for agencies and CAC Act bodies to evaluate whether to authorise a project agreement if applicable (project agreements are only appropriate for major contracts valued above $25 million);
- if a project agreement is proposed, there is a demonstrable benefit to the Australian Government in having such an agreement on the project;
- application of the Code and Guidelines is a standing item on the agenda for site or project meetings;
- issues which may arise in relation to a project are responded to with initial actions designed to encourage the voluntary modification or cessation of non-compliant behaviour. A client may write to a party to request clarification of behaviour which is considered a Code breach, or request that the behaviour cease or be modified. In some cases clients may wish to advise relevant parties that the matter has been referred to CMG secretariat for further action;
- CMG secretariat is notified of all allegations of breaches of the Code and Guidelines within 21 days of the client becoming aware of the alleged breach;
- sanctions applied under the Code are enforced, including the exclusion of identified parties from work opportunities in accordance with CMG decisions; and
- they respond to requests for information concerning Code-related matters made on behalf of CMG.

5.2 Contractors, subcontractors, consultants, project managers and employees

5.2.1 Project managers, contractors, subcontractors, consultants and all employees undertaking work on the project must:

- comply with the Code and Guidelines;
- require compliance with the Code and Guidelines from all subcontractors and relevant material suppliers (see section 2.1 on material suppliers) before doing business with them—all contracts must specifically require the Code and Guidelines be complied with at the time of lodgement of an expression of interest or tender, or in the absence of an expression of interest or tender process, prior to entering into a contract;
- apply the Code and Guidelines to privately funded projects that commence after they first lodge an expression of interest or tender for Australian Government projects if the expression of interest or tender occurs on or after 1 November 2005 (see section 2.5 for further information on privately funded projects);
- ensure that contractual documents allow for a person occupying a position in the ABCC to access sites, documents and personnel to monitor compliance with the Code and Guidelines, including privately funded construction sites;
- project managers or head contractors must establish appropriate processes to ensure freedom of association and union right of entry to premises in accordance with the law;
- ensure there is an occupational health safety and rehabilitation (OHS&R) plan for the project;
- ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action to the client agency;
- respond to requests for information concerning Code-related matters made on behalf of CMG;
- where practicable, ensure contractors or subcontractors initiate voluntary remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention;
- ensure that CMG secretariat is notified of any alleged breaches, voluntary remedial action taken or other Code-related matters within 21 days of the party becoming aware of the alleged breach; and
- be aware that and ensure that sanctions applied under the Code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by CMG.

Australian Government indirectly funded construction

This section applies to Australian Government departments and agencies that fund construction activity through grants or programme expenditure to other organisations or to State and Territory Government bodies. This section also applies to CAC Act bodies in circumstances where such bodies are providing grants or funding.

6.1 Departments and agencies as funding administrator

6.1.1 The Code and Guidelines apply to indirectly funded Australian Government projects as set out in section 2.4 of these Guidelines. In situations where departments and agencies are not the client, but are responsible for administering Australian Government programme expenditure involving construction, the department or agency is responsible for ensuring the grantee or recipient of the Australian Government funding applies the Code and Guidelines to all projects funded with Australian Government funds, as per the thresholds described in section 2.4.

6.1.2 Agencies acting as funding administrators are responsible for ensuring there is a provision in any relevant funding agreement with a recipient organisation which requires the recipient organisation to ensure that all parties involved in the project comply with the Code and Guidelines.

6.1.3 Departments and agencies that administer funding must ensure that:

- all planned and current construction activity is reported to DEWR through e-CODE;
- funding recipients that are involved with developing proposals, tendering or undertaking work are informed of their responsibility to comply with the Code and Guidelines and provide an assurance that they have met and will continue to meet their obligations as set out in section 6.2 below;
- tenders and contractual documents include the requirements as specified in these Guidelines;
- all expression of interest, tender and contractual documents clearly set out the requirements specified in section 6.3 of these Guidelines;
- CMG secretariat is notified of all allegations of breaches of the Code and Guidelines within 21 days of the agency becoming aware of the alleged breach; and
- sanctions applied under the Code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by CMG

6.2 Responsibilities of grant and funding recipients

6.2.1 Recipients of grants or funds from Australian Government departments and agencies have a responsibility to ensure projects involving Australian Government programme expenditure are bound by the Code and Guidelines.

6.2.2 Grant and funding recipients, including State and Territory agencies, must ensure that:

- they provide a commitment to the funding agency that the Code and Guidelines will be complied with and that contractual obligations will be met as specified in section 4 of these Guidelines;
- all expression of interest, tender and contractual documents clearly set out the requirements specified in section 6.3 below;
- the workplace relations arrangements proposed for the project are consistent with the Code and Guidelines ;
- there is an adequate mechanism for consultation with the funding agency regarding the suitability of a project agreement on a particular project (project agreements are only appropriate for major contracts valued above $25 million);

- they do not consider expressions of interest or tenders or provide work to entities on the exclusion list due to previous breaches of the Code (this information is available from CMG);
- there is a reporting mechanism on the project and that the Code is a standing item on the agenda for site and/or project meetings;
- they respond to requests for information concerning Code-related matters made on behalf of the funding agency, CMG and the ABCC;
- contractors or subcontractors initiate voluntary remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention and notify CMG secretariat of non-compliance and any remedial action taken;
- all parties involved in the project are aware of the requirement to report any alleged breaches or other Code-related matters to the CMG secretariat within 21 days of the funding recipient becoming aware of the alleged breach; and
- sanctions applied under the Code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by CMG.

6.3 Contractors, subcontractors, consultants, project managers and employees

6.3.1 Project managers, contractors, subcontractors, consultants and all employees undertaking work on the project must:

- comply with the Code and Guidelines;
- require compliance with the Code and Guidelines from all subcontractors and material suppliers—all contracts must specifically require compliance with the Code and Guidelines at the time of lodgement of an expression of interest or tender;
- ensure contractual documents allow for a person occupying a position in the ABCC to access sites, documents and personnel to monitor compliance with the Code and Guidelines, including privately funded construction sites;
- ensure that contractual documents require parties to apply the Code and Guidelines to privately funded projects that commence after they first lodge an expression of interest or tender for Australian Government projects if the expression of interest or tender is called on or after 1 November 2005 (see section 2.5 for further information on privately funded projects);
- establish appropriate processes to support freedom of association and ensure that union right of entry to premises is in accordance with the law;
- ensure there is an OHS&R plan for the project;
- ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action to the client agency;
- respond to requests for information concerning Code-related matters made on behalf of the funding agency, CMG and the ABCC;
- ensure contractors or subcontractors initiate voluntary remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention;
- ensure that CMG secretariat is notified of any alleged breaches, remedial action taken or other Code-related matters within 21 days of the party becoming aware of the alleged breach; and
- ensure that sanctions applied under the Code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by CMG.

Australian Government administration of the Code and Guidelines

This section sets out some of the responsibilities of DEWR, CMG secretariat and Finance in relation to the implementation of the Code and Guidelines.

7.1 Department of Employment and Workplace Relations (DEWR)

7.1.1 DEWR has the following Code-related responsibilities:

- advise agencies, CAC Act bodies and other interested parties about the workplace relations and OHS&R aspects of the Code; and
- assist in monitoring and promoting compliance with the workplace relations aspects of the Code on behalf of the Australian Government.

7.2 Code Monitoring Group (CMG) secretariat

7.2.1 CMG deals with Code issues, including breaches which have come to its attention from client agencies, CAC Act bodies or departments, by ministers or by other parties.

7.2.2 CMG consists of a senior representative from each of Finance, DEWR, the ABCC, the Department of Prime Minister and Cabinet, the Department of Defence and the Department of Transport and Regional Services (DOTARS).

7.2.3 A working party of CMG, comprising senior officers from DEWR, the ABCC, the Office of the FSC, the Department of Defence, Finance, DOTARS and other spending agencies as necessary, provides operational support to CMG and CMG Secretariat.

7.2.4 The secretariat of CMG is drawn from the Workplace Relations Implementation Group of DEWR. The secretariat is responsible for:

- informing and advising agencies, departments and CAC Act bodies about the Code and related issues, including the imposition of sanctions;
- receiving reports from agencies and CAC Act bodies about the Code, especially in relation to alleged breaches, and maintaining a register of information concerning alleged and proven breaches and sanctions;
- referring matters for investigation by appropriate bodies;
- servicing meetings of CMG;
- reporting to the Australian Government on Code matters through the Minister for Employment and Workplace Relations; and
- liaising with other jurisdictions at officer level about Code matters.

The functions of CMG are detailed separately in section 9.3 of these Guidelines.

7.3 Department of Finance and Administration (Finance)

7.3.1 Finance is responsible for monitoring compliance with the non-workplace relations aspects of the Code on behalf of the Australian Government, including competitive behaviour, continuous improvement and best practice. Finance is responsible for Australian Government procurement policy, including the Commonwealth Procurement Guidelines.

7.4 Office of the Australian Building and Construction Commissioner (ABCC)

7.4.1 The ABCC has primary responsibility for conducting inspections for compliance with, and investigating alleged breaches of, the workplace relations provisions of the Code. The ABCC will report the results of its investigations to CMG for handling in accordance with section 9.3 of the Guidelines.

Further information about the ABCC is available at www.abcc.gov.au.

Workplace relations and occupational health and safety (OHS) components

8.1 Awards and legal obligations relating to employment

> *The Code states*
>
> All parties must comply with the provisions of applicable:
>
> - awards and workplace arrangements which have been certified, registered or otherwise approved under the relevant industrial relations legislation; and
> - legislative requirements.

8.1.1 Section 8.1 requires compliance with:

- relevant legislation;
- applicable court and tribunal orders, directions and decisions; and
- industrial instruments.

An 'industrial instrument' is an award or agreement, however designated, that:

- is made under or recognised by an industrial law; and
- concerns the relationship between an employer and the employer's employees.

8.1.2 For the purposes of the Code and these Guidelines, an industrial instrument also means an unregistered agreement, including but not limited to 'side deals' and common law agreements. An unregistered agreement is a written individual or collective agreement that has not been certified, registered or lodged under an industrial law, but is concerned with the relationship between an employer and its employees and/or registered or unregistered industrial associations. Please note where unregistered agreements apply, these must comply with the workplace relations requirements of the Code and Guidelines. Additionally, an unregistered agreement must not provide for a site allowance or contain matters that would be, if they were included in a workplace agreement, prohibited content (as specified in the Workplace Relations Regulations 2006).

<u>Note (added on 3 November 2006):</u> the requirement that unregistered agreements may not contain matters that would be, if they were included in a workplace agreement, prohibited content took effect from 3 November 2006.

8.2 Workplace arrangements

> *The Code states*
>
> Workplace arrangements which reflect the needs of the enterprise are important elements in achieving continuous improvement and best practice. The contents of the workplace arrangements are a matter for the parties to those arrangements, subject to them meeting legislative requirements. However, they may encompass:
>
> - improved OHS and rehabilitation practices;
> - training and skill formation strategies;
> - multi skilling; or
> - flexible work practices, for example in relation to working time.
>
> A party must not, directly or indirectly, pressure or coerce another party to enter into, or to vary or to terminate a workplace arrangement. Nor may they pressure or coerce them about the parties to, and/or the contents, or the form of their workplace arrangements. This does not prevent action sanctioned by relevant industrial relations legislation.

8.2.1 The Australian Government's workplace relations policies emphasise the importance of relationships at the workplace level. The

Government's legislation provides a framework for cooperative workplace relations enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances.

8.2.2 Parties must ensure that implementation of the Code supports a direct relationship between employees and employers and contractors/ subcontractors, with a reduced role for third party intervention in workplace arrangements.

8.2.3 The Code prohibits head contractors or clients requiring or attempting to unduly influence (either through the tendering process or otherwise) subcontractors or material suppliers to have particular workplace arrangements in place, whether that be in the form of a CA, AWAs, or a State enterprise agreement. It is up to each employer to negotiate with their employees what form of workplace arrangement, if any, should apply.

8.3 Pressure to make over-award payments

The Code states

Over-award payment is defined to mean any payment and/or benefit above that set out in the relevant award, registered agreement and/or legislation. This includes payments provided for in workplace arrangements. Decisions on over-award payments, including superannuation, redundancy and workers' compensation insurance, shall be made by the individual employer to suit the needs of the enterprise. No employer may be compelled to pay benefits above that prescribed in the relevant workers' compensation legislation. A party must not, directly or indirectly, coerce or pressure another party to make over-award payments. No employer may be compelled to contribute to any particular redundancy or superannuation fund, or similar body unless there is an award or legal requirement to do so. This does not prevent action sanctioned by relevant industrial relations legislation.

8.3.1 The Code prohibits direct or indirect coercion or pressure being applied by a contractor, subcontractor, consultant or supplier to make over-award payments. Further, no contractor, subcontractor, consultant or supplier is allowed to unduly influence, enter into any agreement or issue a contract or subcontract or 'industrial instruction' that directly or indirectly binds or otherwise pressures or coerces another contractor, subcontractor, consultant or supplier into making over-award payments.

8.3.2 Payments to industry superannuation, redundancy and sick leave funds which provide for contributions in excess of award and legislative requirements are matters to be decided by each employer. Provisions in industrial instruments or contracts should not require, or have the effect of coercing or pressuring, a group apprenticeship scheme or similar provider to set particular terms and conditions, including the making of an over-award payment.

8.4 Project agreements and project awards

> *The Code states*
>
> Project agreements will only be appropriate for major contracts. Accordingly project agreements incorporating site-wide payments, conditions or benefits may be negotiated where the strategy has first been authorised by the principal. The integrity of individual enterprise agreements must be maintained. This means project agreements cannot override the workplace arrangements of individual contractors, subcontractors, consultants and suppliers, nor may they provide conditions which by their nature have effect beyond the duration of the project, such as, for example, redundancy pay and superannuation contributions. While there may be provisions in a relevant workplace arrangement that enables the parties to the arrangement to encompass provisions in a project agreement, there shall be no double counting of 'over-award' provisions.
>
> There shall be no flow on of the provisions of project agreements.
>
> Such agreements should be developed, where possible, in consultation with the subcontractors working on the project. The agreements shall be certified or otherwise approved under the relevant industrial relations legislation.

8.4.1 The Code is based on the primacy of enterprise-level determination of pay and conditions. Nevertheless, the Code does recognise that there may be some situations where project agreements may be appropriate but only under the following strict conditions.

1. The principal (that is, the Australian Government agency responsible for the project, initiative or scheme, regardless of the agency not being the nominated principal in the construction contract such as with BOOT contracts) must agree to the project agreement. In respect of indirectly funded projects, agreement is required from both the funding agency (Australian Government agency) and the funding recipient (State agency).

Australian Government clients, and funding recipients in respect of indirectly funded projects, must not agree to project agreements or project awards unless there is a clear and demonstrable benefit to the Australian Government in doing so. This is most likely to take the form of improved time or cost performance compared to what might reasonably be expected in the absence of a project agreement or project awards.

In deciding whether to approve the use of a project agreement, the principal—in respect of indirectly funded projects this means both the funding agency and funding recipient—must consider:

- the degree of commitment demonstrated by the parties to the proposed agreement to improving productivity and workplace relations;
- past performance and the parties' history of maintaining and abiding by agreements; and
- whether there is anything in the proposed agreement or project which is inconsistent with the Code, awards or other legislation. Project agreements shall be certified or registered under relevant legislation.

Principals are free to not agree to the creation of project agreements.

2. The principal, or funding agency and funding recipient for indirectly funded projects, are accountable for decisions to approve project agreements and must state their reasons for doing so in writing to the relevant portfolio minister. The reasons must include objective and detailed grounds and clearly demonstrate the benefit to the project.

3. Project agreements must be reviewable against performance benchmarks over the construction period and be able to be terminated or varied if those benchmarks are not met.

4. Project agreements will only be appropriate for major contracts as defined from time to time by the principal, funding agency and funding recipient (for indirectly funded projects). Other than in exceptional cases, project agreements will not be permitted on projects worth less than $25 million.

5. Subcontractors will be involved in the process of developing a project agreement before it is finalised.

A project agreement or project award must be either:

- a multi-business agreement as defined in section 331 of the WR Act; or
- a project agreement or award made under a State industrial law.

8.4.2 A State project agreement or project award cannot, as a matter of law, legally bind an employer who is in the federal system. Any State agreement or State project award that purports to bind such an employer, or any attempt to enforce a State project agreement or State project award against a federal employer, will be inconsistent with these Guidelines.

8.4.3 Mirror pattern agreements and agreements that seek to apply common terms and conditions across a site are inconsistent with the Code and Guidelines.

8.5 Freedom of association and right of entry

> *The Code states*
>
> All parties have the right to freedom of association. This means that parties are free to join or not join industrial associations of their choice and that they are not to be discriminated against or victimised on the grounds of membership or non membership of an industrial association. A person cannot be forced to pay a fee to an organisation if not a member.

8.5.1 Fundamental principles underpinning the Australian Government's workplace relations policy include:

- freedom of choice;
- freedom of association—the choice to be or not to be in a union or employer association, and the choice of which union or employer organisation; and
- all Australians must be treated equally before the law.

8.5.2 Contractors must adopt policies that are consistent with Part 16 of the WR Act to ensure that all those working on projects covered by the Code have a right to choose whether or not to join a union or an employer association properly respected.

8.5.3 In particular, the following practices are inconsistent with the Code:

- employers providing the names of new staff or job applicants to unions;
- supplying the names of contractors or subcontractors to unions;
- 'no ticket, no start' signs, or other notices such as posters, helmets, stickers or union logos or flags etcetera that imply that union membership is anything other than a matter for individual choice;

- 'show card' day;
- employers encouraging or discouraging employees to join a union;
- the imposition, or attempted imposition, of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate to hire an individual nominated by a union;
- pressuring subcontractors to join employer associations;
- using site delegates to undertake or administer site induction processes. This process should be undertaken by site management;
- using induction forms requiring the employee to identify their union status;
- using forms requiring employers and contractors to identify the union status of employees or subcontractors;
- a requirement for an employer to apply union logos, mottos or other indicia to company-supplied property or equipment, including clothing;
- a requirement for an employee to be exclusively represented by a union in a dispute settlement; and
- the existence in an industrial instrument of any requirement for any person or enterprise to pay a fee to a registered organisation of which he or she is not a member including, but not limited to, any requirement that a person pay a 'bargaining fee' however described, to an industrial association in respect of services provided by it regarding any workplace arrangements that might regulate that person's employment by that enterprise.

8.5.4 Please note that a large number of these practices are also prohibited by the WR Act.

8.5.5 Employers must not cooperate with or act to facilitate these practices. Such conduct will be a breach of the code.

Parties must report any alleged or suspected breaches of the freedom of association provisions of the Code or WR Act of which they are aware to the ABCC within 21 days.

8.6 Right of entry

8.6.1 The Code and Guidelines require that parties operating under federal agreements that took effect prior to 27 March 2006 are to be assessed against the right of entry provisions in the WR Act prior to the WorkChoices amendments.

8.6.2 No employer or employee is to grant admission to a site by an employee or official of an industrial association other than in strict compliance with the procedures governing entry of these representatives under the WR Act and any relevant and applicable OHS or State legislation. These procedures govern access to employer and employee records and/or the holding of discussions with employees.

8.6.3 Attempts to avoid right of entry requirements for union officials by allowing delegates or shop stewards to perform a similar function are inconsistent with the Guidelines.

8.6.4 An industrial instrument must not provide for a person or entity that is not a party to the instrument to monitor its operation. 'Monitoring' for this purpose does not include activity required or permitted under Commonwealth or State law, or monitoring by an Australian Government or State Government agency to ensure compliance with the Code.

8.6.5 Constitutional corporations operating under a State award that came into operation prior to 27 March 2006 will move into the federal workplace relations jurisdiction with that award becoming a Notional Agreement Preserving State Award (NAPSA). Constitutional corporations operating under a State agreement prior to 27 March 2006 will move into the federal workplace relations jurisdiction with that agreement becoming a Preserved State Agreement (PSA). NAPSAs and PSAs must not provide for right of entry provisions greater than those provided in State legislation.

8.7 Dispute settlement

The Code states

All parties are required to make every effort to resolve grievances or disputes with their employees and applicable unions at the enterprise level, in accordance with the procedure outlined in the relevant award or workplace arrangements.

8.7.1 Grievances or matters under dispute are to be dealt with at the workplace between the appropriate level of management, employees and where applicable, union representatives.

8.7.2 Agreements should contain arrangements providing graduated steps for discussion of disputes involving higher levels of authority to which the matter in dispute can be referred if it cannot be resolved.

8.7.3 Reasonable time limits should be allowed for each stage of relevant dispute settlement processes. While dispute settlement procedures are being followed the parties are to ensure that:

- industrial action does not occur;
- the circumstances that existed prior to the dispute prevail; and
- work continues as normal without detriment to any of the parties.

8.7.4 Dispute settlement provisions must allow an employee to have freedom of choice in deciding whether to be represented, and, if so, by whom. Accordingly, dispute settlement provisions must allow for an employee to raise an issue either directly with their employer or through a representative of their choice.

8.7.5 A workplace agreement may contain its own dispute settlement process that gives a third party the ability to arbitrate or otherwise impose an outcome to settle the dispute. In such cases, and where the agreement is made on or after 1 June 2006, the clause must contain an express limitation that any outcome determined by the third party cannot be inconsistent with the Code and Guidelines or inconsistent with legislative obligations.

8.7.6 Where a dispute relates to OHS&R issues, the procedures contained in the relevant State or Territory OHS&R legislation should be observed.

8.8 Strike pay

The Code states

No payment shall be made to employees for time spent engaged in industrial action unless payment is legally required or properly authorised by an industrial tribunal (where this is permitted by relevant industrial legislation).

8.9 Industrial impacts

The Code states

The client of the principal contractor shall be advised during the progress of the work, and at the earliest opportunity, of any industrial relations or OHS&R matter which may have an impact on the construction programme, the principal contract, other related contracts or project costs.

8.9.1 Any disputes or disagreements relating to workplace relations or OHS&R matters must be reported to the principal at the earliest opportunity. To ensure the principal is appropriately advised, project managers are to be encouraged to establish an effective and clear reporting structure for construction projects.

8.9.2 Such reporting structures should enable funding agencies to:

- identify at an early stage any disputes or disagreements and, in particular, determine whether these have arisen through the failure to

apply the Code by any of the parties to the dispute; and

- assist with better managing their overall work programmes.

8.9.3 Any actual or threatened industrial action flowing from implementation of the Code is to be reported by the relevant Australian Government agency to CMG. Australian Government agencies and CAC Act bodies are strongly encouraged to establish internally coordinated arrangements which will ensure effective communication with CMG.

8.10 Workplace reform

> *The Code states*
>
> Industry participants are encouraged to adopt a broad-based agenda to improve productivity through the development of workplace and management practices that are flexible and responsive to the business demands of the enterprise and its clients' requirements. An enterprise with this focus will achieve a workplace culture that is recognised for value, quality, innovation and competitiveness and will be a preferred partner for clients' projects.

8.10.1 Workplace reform is a key component of the Australian Government's reform strategies for the building and construction industry. Contractors, subcontractors, consultants and material suppliers are encouraged to pursue and implement workplace reform strategies appropriate to the nature, size and capacity of the individual workplace.

8.10.2 Workplace reform is by nature a dynamic and evolving change process and requires the commitment of employers and their employees. Workplace reform covers innovations and complementary approaches to workplace behaviour including:

- workplace relations and work practices;
- management practice;
- training and skill formation;
- quality management; and
- OHS&R.

8.10.3 Workplace reform has the potential to strengthen the building and construction industry's viability through workplace and productivity improvements. Such improvements can foster positive changes for individual workplaces including:

- lower production costs;
- reduced waste and time lost;
- better quality products and services;
- a more flexible and adaptive workforce;
- improved motivation, morale and commitment;
- higher standards in OHS&R performance; and
- improved remuneration and working conditions for the workforce.

8.10.4 The Code seeks to provide an environment conducive to the pursuit of workplace reform strategies. The parties shall not negotiate or implement arrangements or agreements that restrict the efficient performance of work or contain provisions that restrict productivity improvement. Without limiting the foregoing, industrial instruments that contain the following kinds of provisions will be non-compliant with the Code and Guidelines, if the provision is not otherwise required by a relevant Commonwealth or State law:

- No ratios of employees. An industrial instrument, or workplace practices, must not prescribe the number of employees a company may engage on a particular site, work area or within their company in general. This includes permanent, temporary and casual employees;
- No 'one-in-all-in' arrangements. An industrial instrument, or workplace practices, must not allow for situations where 'one-in-all-in' practices occur, such as in relation to overtime;

- No 'last on, first off' clauses. An industrial instrument must not contain selection criteria for redundancy that ignores the employer's operational requirements, such as 'last on, first off' clauses. Similarly, an industrial instrument should not contain clauses that determine redundancy solely by reference to the seniority of employees;
- No restrictions on labour. An industrial instrument must not contain a provision that restricts an employer's short- or long-term labour requirements, nor provisions that stipulate the terms and conditions for the labour of any person not a party to the industrial instrument. Accordingly, an industrial instrument must not include provisions that require an employer to consult or seek the approval of a union over the number, source, type (for example casual, contract) or payment of labour required by the employer;
- No prohibiting of 'all-in payments'. An industrial instrument must not preclude the employer from making 'all-in payments'. For this purpose, 'all-in payments' mean payment to an employee for work done that is made on an hourly, daily or weekly basis and which is in lieu of payment for all or some entitlement specifically provided for by legislation or awards, such as annual leave loading or overtime. A payment to a subcontractor is not an all-in payment for the purpose of this definition. All-in payments are not to include statutory obligations, such as superannuation contributions. Arrangements where the intended outcome is to avoid employer/employee obligations are illegal and inconsistent with these Guidelines;
- Clauses that attempt to negate or render ineffective the application of the Code and Guidelines are inconsistent with these Guidelines. Such clauses may include wording such as: 'nothing shall be contrary to law…', 'clauses that are inconsistent with Commonwealth law…' and 'clauses that are inconsistent with the Code and Guidelines will have no effect…' (or similar wording). This also includes attempts to render clauses in agreements ineffective that may otherwise have been inconsistent with legislative requirements and/or the Code and Guidelines;
- If an industrial instrument provides for a site allowance (that is an allowable award matter), the amount must be specified in an industrial instrument certified or registered under the WR Act or otherwise approved under relevant State legislation, or in a project agreement or project award. Additionally, an unregistered agreement must not provide for a site allowance; and
- An industrial instrument must not make provision for project agreements or project awards to apply in whole or in part, other than for major contracts. (See Section 8.4 for further details on project agreements and project awards).

8.11 Occupational health safety and rehabilitation (OHS&R)

The Code states

OHS&R obligations must be actively addressed by all industry participants. Unequivocal commitment to OHS&R management must be demonstrated in systems that address responsibilities, policies, procedures and performance standards to be met by all parties involved in a project and are directly linked to quality OHS&R outcomes.

8.11.1 Federal and State/Territory Governments have given the highest priority to improving the management of OHS&R in the construction industry.

8.11.2 All contractors must meet their obligations under relevant laws when working on Australian Government projects and sites. The principal contractor must establish a site-specific OHS&R management plan before work commences. A comprehensive management plan aims for the prevention and elimination of hazards that cause injuries and illnesses at the workplace.

8.11.3 A comprehensive management plan will include:

- explicit management commitment;
- employee involvement;
- rigorous work practices analysis;
- proactive worksite analysis that anticipates and assigns roles and responsibilities and defines efficient procedures while on site;
- hazard identification, prevention and control;
- induction and task training;
- appropriate case management and rehabilitation;
- efficient maintenance of records.

8.11.4 It is essential that an OHS&R management system is fully documented and clearly communicated to people in an enterprise. It should systematically cover the ways a contractor's own people are expected to work safely, the way the contractor will ensure others work safely and the ways they intend to improve their practices over time. This will also entail defining roles, duties and responsibilities so that everyone knows what they have to do, when and in what circumstances.

8.11.5 Improving the industry's OHS&R performance requires positive measures that aim for prevention rather than correcting things when they go wrong. This initiative is directed at making OHS&R management an integral part of the organisational culture of companies and enterprises.

8.11.6 The Australian Government is committed to being both a model client and to influence the OHS&R outcomes for the industry. The Australian Government has introduced the Australian Government Building and Construction OHS Accreditation Scheme (the Scheme) to be administered by the Federal Safety Commissioner (FSC) in accordance with the BCII Act. The Scheme is not a requirement of, or administered under, the Code or these Guidelines.

8.11.7 Further information about the Scheme is available at www.fsc.gov.au.

Compliance and monitoring provisions for the Code and Guidelines

9.1 Code Monitoring Group (CMG)

9.1.1 Once an agency or another party has advised CMG Secretariat or DEWR of an alleged breach, a course of action appropriate to the referral will be taken. This includes:

- referral of the matter for investigation by the ABCC if the alleged breach is related to workplace relations aspects of the Code and Guidelines;
- referral of the matter to Finance if the alleged breach relates to non-workplace relations aspects of the Code and these Guidelines; and
- for breaches of State and Territory OHS legislation, referral of the matter to the relevant State/Territory OHS regulatory authority.

9.1.2 CMG will be guided by administrative law principles including the right of parties to be aware of allegations of breaches of the Code and Guidelines and to be given the right to respond to such allegations.

9.1.3 Where an alleged breach is sustained the client agency or funding recipient will be responsible for seeking voluntary rectification of a breach, and advise on what remedial action has been taken.

9.2 Sanctions

9.2.1 Sanctions will be considered where a party has failed to meet their obligations under the Code and these Guidelines, and the breach is not voluntarily rectified. Sanctions will be considered for all construction work covered by the Code and Guidelines, including privately funded projects.

9.2.2 CMG may issue a formal warning if a breach occurs. In such cases the warning will indicate that future breaches may lead to sanctions such as preclusion from tendering for Government construction work.

9.2.3 If a first breach is of a serious nature, such as a breach of the WR Act or the *Trade Practices Act 1974,* a more serious sanction will be considered, such as preclusion from tendering.

9.2.4 CMG will report breaches to relevant ministers and may recommend that a party be precluded from tendering for a period of up to six months. The period of preclusion may be extended a further six months for each breach thereafter.

9.2.5 Alleged breaches may be reported to an appropriate statutory body or law enforcement agency.

9.2.6 The Minister for Employment and Workplace Relations will consult with the Minister for Finance and Administration and the client agency's minister before requiring that a significant sanction be imposed.

9.2.7 Once a decision is made regarding a breach the CMG will set out their decision and reasons in writing. If a sanction is to be applied, the party will be advised of its right of review. The appeals procedure is outlined at section 9.5 of these Guidelines.

9.2.8 The Workplace Relations Ministers' Council and the Australian Procurement and Construction Ministers' Council will also be advised of the imposition of a sanction. This advice will identify the party concerned, the nature of the breach and sanction. The advice will be communicated to all Australian Government agencies to ensure a 'whole-of-government' approach. An appropriate industry association may also be notified.

9.2.9 Details of the process for considering imposing a sanction are available at www.workplace.gov.au/building.

9.3 Complaints concerning private sector breaches of the Code

9.3.1 Sanctions can be applied to a private sector entity contracted to a client agency, and/or to subcontractors and suppliers that form part of the contractual chain. The head contractor is responsible for ensuring subcontractors comply with the Code and these Guidelines. This should be reflected in contracts between the parties.

9.3.2 A sanction can also be applied to a division of a company operating in a particular state or territory, or to a company as a whole when it operates as a single entity. CMG will consider the application of such sanctions on a case by case basis.

9.3.3 CMG will deal on a case by case basis with situations where a company that has incurred a sanction, or is subject to an allegation of a Code or Guidelines breach:

- is taken over by another company; or
- reconstitutes itself as another legal entity.

9.3.4 If a party is sanctioned CMG may also consider, on a case by case basis, applying sanctions to closely related parties. In determining whether the parties are closely related, CMG may refer to the definition of 'related body corporate' in s.9 of the *Corporations Act 2001* (Cth) and any legal principles CMG considers relevant.

9.3.5 Funding agreements between the Australian Government and State and Territory Governments must provide for the application of the Code and these Guidelines or the Code and any joint bilateral guidelines negotiated between the Australian Government and the relevant State or Territory Government.

9.3.6 Contractual arrangements between State funding recipients and contractors should explicitly require compliance with the Code and Guidelines or joint bilateral guidelines. Breaches and sanctions will be considered in accordance with bilateral agreements and contractual arrangements.

9.4 Complaints concerning agency breaches of the Code

9.4.1 The Code imposes obligations on all parties. A client agency or its representatives may breach, or be alleged to have breached, the Code and these Guidelines. In such circumstances the complaint may be dealt with by the relevant agency and DEWR. However, this does not prevent complaints from being lodged directly with CMG or the ABCC.

9.4.2 Where it has been established that an agency has breached the Code and these Guidelines, CMG will bring the breach to the attention of the relevant portfolio minister and the Minister for Finance and Administration.

9.4.3 If the breach has been committed by a party contracted to represent the agency, consideration may also be given to imposing sanctions on that party such as reduced business opportunities or exclusion from further work for a specified period.

9.4.4 It is possible that a funding recipient—that is a State or Territory agency—may breach the Code and these Guidelines. Where a State or Territory agency breaches the Code and these Guidelines the Australian Government funding agency will raise the issue with the funding recipient. The funding agency will seek to have the funding recipient rectify the breach and obtain an assurance the funding recipient will comply with the Code and these Guidelines.

9.4.5 Following consultation with DEWR, the funding agency may refer the matter to its portfolio minister. The portfolio minister may write to the relevant State or Territory minister.

9.4.6 Continued non-compliance by a State or Territory agency may require broader consideration of an appropriate response by the Australian Government.

9.5 Appeals and complaints concerning sanctions applied under the Code

9.5.1 Existing avenues for the review of administrative decisions can be used to process complaints arising from the Code. Access to the Administrative Appeals Tribunal or to a review under the *Administrative Decisions (Judicial Review) Act 1977* are not available.

9.5.2 However, judicial review of executive decisions (including those of CMG or the Minister) may be available under s.75(v) of the Constitution or s.39B of the *Judiciary Act 1903*.

Alternatively, parties may make a complaint to the Ombudsman, or seek internal review by the Secretary of DEWR, who may review a CMG decision.

Contact Details

General queries about the Code and Guidelines, workplace relations matters or the CMG secretariat can be directed to:

- the National Code Hotline: 1800 552 075
- the National Code Mailbox: building@dewr.gov.au

For assessment of workplace arrangements, including industrial instruments (awards, workplace agreements, etc) for Code compliance contact:

- the Code Assessment Hotline: 1300 731 293
- the Code Assessment Mailbox: code.assessment@dewr.gov.au

For any queries about WorkChoices contact:

- the WorkChoices Infoline: 1300 363 264
- or visit the WorkChoices website www.workchoices.gov.au

The contact for the Office of the Australian Building and Construction Commissioner is:

- Phone: 1800 003 338
- Web address: www.abcc.gov.au

The contact for the Federal Safety Commissioner is:

- Assist-line: 1800 652 500
- Fax: (02) 6121 9270
- Web address: www.fsc.gov.au

The contact for procurement and tendering matters is:

Mr Robert Butterworth
Asset Management Group
Department of Finance and Administration
Phone: 02 6215 3552
Fax: 02 6267 3522
Email: robert.butterworth@finance.gov.au

These Guidelines are available on the DEWR Australian Workplace portal at www.workplace.gov.au/building. The Code and the model tender and contract clauses to the Guidelines are also available on the website.

Appendix A

Abbreviations

ABCC	Office of the Australian Building and Construction Commissioner
AWA	Australian Workplace Agreement
BCII Act	*Building and Construction Industry Improvement Act 2005*
BIT	Building Industry Taskforce
BOO	Build, Own, Operate
BOOT	Build, Own, Operate, Transfer
CA	Certified Agreement
CAC Act	*Commonwealth Authorities and Companies Act 1997*
CMG	Code Monitoring Group
Code	National Code of Practice for the Construction Industry
DEWR	Department of Employment and Workplace Relations
DOTARS	Department of Transport and Regional Services
Finance	Department of Finance and Administration
FMA Act	*Financial Management Accountability Act 1997*
FSC	The Office of the Federal Safety Commissioner
Guidelines	Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry
OHS	Occupational health and safety
OHS&R	Occupational health safety and rehabilitation
PFIs	Private Finance Initiatives
PPPs	Public Private Partnerships
WorkChoices	*Workplace Relations Amendment (Work Choices) Act 2005*
WR Act	*Workplace Relations Act 1996*