Australian Government

Department of Education, Employment and Workplace Relations

Australian Government

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

Revised December 2003

IMPLEMENTATION GUIDELINES

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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 Australian Government construction projects.

In 2003, the Australian Government decided to extend the application of the code to all construction projects to which it contributes funding, subject to financial thresholds.

These guidelines have been developed to assist Australian Government departments and agencies and bodies covered by the *Commonwealth Authorities and Companies Act 1997* (CAC Act bodies), with the implementation of the code, and to provide further advice and assistance on the operation of the code on Australian Government projects and projects that receive Australian Government funding.

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 with 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.

Any party wishing to do business with the Australian Government or work on government construction projects will be required to comply with all aspects of the code applicable to their activities.

Adoption of the code and the implementation guidelines by government agencies and CAC Act bodies will ensure that the government's reform agenda for the construction industry is significantly advanced.

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

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 December 2003)" to reflect the recent Machinery of Government Changes as a result of the last Federal election.

The following items 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	Department of Employment and Workplace Relations
2 Department of Finance and Deregulation	Department of Finance and Administration
3 Department of Infrastructure, Transport, Regional Development and Local Government	Department of Transport and Regional Services

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The text in shaded boxes in section 8 of these guidelines is from the National Code of Practice for the Construction Industry

SECTION 1

Introduction

The National Code of Practice for the Construction Industry 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.

The implementation guidelines are intended to assist Australian Government agencies and *Commonwealth Authorities and Companies Act 1997* bodies to interpret and implement aspects of the code in relation to construction projects.

The guidelines also detail the extra-agency processes that the government has set up to:

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

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.

In August 2001, a Royal Commission was launched into the building 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.

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 industry, including improvements to the effectiveness of the code and these implementation guidelines.

These guidelines were previously revised due to the 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 Interim Building Industry Taskforce (IBIT). The IBIT 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 industry.

This revision to the guidelines includes changes resulting from the government's response to the recommendations of the Royal Commission. This includes extension of the code and implementation 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. The government has also decided to extend the code and guidelines to those government authorities and businesses covered by the *Commonwealth Authorities and Companies Act 1997.*

These revised implementation guidelines also include specific changes the government has decided to adopt which have been suggested by the Royal Commission's recommendations. Further initiatives will occur as the government progresses its consideration of the recommendations. This includes the establishment of the Australian Building Construction Commission which will have a role in the investigation of breaches of the code. The code and implementation guidelines will be revised as necessary to reflect any changes emerging from the government's response to the Royal Commission recommendations.

In addition to these implementation guidelines, Australian Government *Industry* Guidelines were issued in March 1998 to assist Commonwealth agencies as clients in their dealings with industry partners including: consultants, contractors, subcontractors and suppliers.

The industry guidelines provide a clear statement of government policy and set out the workplace relations and administrative requirements of those parties with whom the Australian Government wishes to do business. For clarity, reference to the 'guidelines' in this document refers to the implementation guidelines. Where the industry guidelines are referred to, it is always as the '*industry* guidelines.'

SECTION 2

Application and scope

The code is to be applied to the maximum practicable extent to all construction and building 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

The code defines construction as all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering.

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.

Activity which does not fall within the scope of the code includes ongoing maintenance of building systems, such as 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.

The code covers material supply contracts where the supplied material is integral to the construction of the project and the prefabrication of made-to-order components to form part of any building, structure or works, whether carried out on-site or off-site.

2.2 Construction activity undertaken by departments and agencies

The code and guidelines apply to all construction activity undertaken by or on behalf of departments, agencies and budget-funded statutory authorities subject to the *Financial Management and Accountability Act 1997*. This applies to all activities irrespective of the value of a project.

2.3 Australian Government authorities and companies

As of 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.

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

As of 1 January 2004, the code and guidelines also apply to all construction projects indirectly funded by the Australian Government through grant and other programs where:

(i) 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

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

The application of the code and guidelines to indirectly funded projects requires funding recipients, contractors and subcontractors to comply with them. This includes agreeing to Australian Government monitoring of compliance through site visits and inspection of documents by the IBIT.

The code and guidelines do not apply to Australian Government funded projects where funding for construction was not an explicit component of the grant. Such is the case for industry development programs with a legislated entitlement administered by the Department of Industry, Tourism and Resources.

2.5 Pre-commitment lease projects

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.

2.6 Build Own Operate Transfer/Build Own Operate

The code 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 2.5.

2.7 Public Private Partnerships and Private Finance Initiatives

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. A government agency may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid by the 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

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).

As noted in sections 2.3 and 2.4, with effect from 1 January 2004, the code and these guidelines apply:

- 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
- to 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.

The above start date applies to all projects, including those already announced, where the Australian Government is yet to enter into a formal arrangement for the project such as a contract, deed of grant, funding agreement or formal government approval at 1 January 2004, with the proviso that:

- where existing arrangements include an obligation to apply to both the code and implementation guidelines those arrangements remain in place
- an earlier implementation date be adopted if possible in any review of existing arrangements, except where the late insertion of a condition relating to compliance with the code and implementation guidelines may jeopardise the project negotiations.

SECTION 4

Documentation

4.1 All parties to be advised of requirement to comply

All parties invited to express interest in Australian Government construction projects or projects to which the Australian Government contributes funding should 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 etc, should incorporate the following statement:

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

4.2 Tender documents to incorporate code and requirement to comply

Compliance with the code and the industry guidelines for workplace relations and occupational health and safety components of the National Code of Practice for the Construction Industry (the industry guidelines), which are based on section 8 of these guidelines, should be made a condition of tender. The code and the industry 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 on where those documents can be viewed at the Australian Workplace website at www.workplace.gov.au

Tenderers should also be advised that compliance with the code and the industry 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 industry guidelines.

Agencies covered by the *Financial Management and Accountability Act 1997* (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. The Department of Employment and Workplace Relations can provide advice to agencies and CAC Act bodies on compliance with the code and industry guidelines in the context of their preferred tendering process.

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 request for tender and draft contract documents issued should clearly state that the code and industry guidelines apply. An undertaking to apply the code of practice should be included in the tender schedules to be submitted. An assessment on the previous performance of the contractor on applying the code to Australian Government projects should also be included as a separate tender schedule. It may be useful for agencies to obtain a completed and signed undertaking to apply the code and

guidelines at the assessment stage before a company can proceed to tender. Previous compliance performance in applying the code to projects can be included in the weighted assessment of the tenderers satisfying the mandatory criteria.

In a single stage process where tender documents are issued to all companies responding to an advertisement, the advertisement must state that the project is covered by the code and implementation guidelines. Further information on tender procedures can be obtained from the Department of Finance and Administration (see section 10 of these guidelines for contact details).

Model clauses, including clauses for a two-stage tender process, are available at the Australian Workplace Website at www.workplace.gov.au These model clauses will be updated from time to time to reflect changes in Australian Government contractual practice and arrangements.

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

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 the industry guidelines, and for all subcontractors, material suppliers and consultants associated with the project to comply in turn.

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

Australian Government departments, agencies and CAC Act bodies are required to ensure that the code and the guidelines are applied to minor works contracts. Departments, agencies and CAC Act bodies are encouraged to use the model contract available on the Australian Workplace Website for tenders and contracts relating to minor works. Agencies and CAC Act bodies may determine whether the model clauses are appropriate for minor works projects based on the value and complexity of projects and their own operational requirements.

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 clauses:

> *The National Code of Practice for the Construction Industry (the code) and the Australian Government Industry Guidelines of December 2003 (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 industry guidelines.*

In circumstances where minor works or very small contracts are undertaken without tendering, the organisation performing the minor works or very small contract must be made aware of the requirement to comply with the code and the industry guidelines. They should also be provided with copies of the code and the industry guidelines.

4.5 Consultant contracts

The model clauses are also appropriate for consultant contracts for construction related activities. These include contract management contracts, project management contracts, 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, applies to this project.*

4.6 Projects funded under Australian Government grants and programs

Agencies acting as funding administrators must ensure that funding recipients include the requirement to apply the code and 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. These model clauses can be used by departments and agencies for projects where the code and 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 Department of Employment and Workplace Relations where significant modifications to these model clauses are proposed for particular projects.

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.

SECTION 5

Australian Government directly funded construction

This section applies to Australian Government departments, agencies and CAC Act bodies which 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

Australian Government departments, agencies and authorities that are subject to the *Financial Management and Accountability Act 1997,* and the *Commonwealth Authorities and Companies Act 1997,* that are acting as clients of the construction industry are expected to apply the code and guidelines in the same manner as any other government policy. 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 subcontracts discharge their contractual obligations to comply with the code and guidelines on Australian Government construction projects. The client is responsible for ensuring that:

- the application of the code and guidelines are included as an integral component of construction contract management procedures within their organisations
- parties developing proposals, expressing interest, tendering or undertaking work in relation to an Australian Government construction project, are informed of their responsibility to comply with the code and the industry guidelines
- commitments are obtained that the code and the industry guidelines will be complied with in the form specified in section 4.3
- initial action is undertaken to address code and industry guidelines issues which may arise in relation to a project. 'Initial action' is further defined in section 9.1
- they respond to requests for information concerning code-related matters made on behalf of the CMG
- advertisements calling for expressions of interest, tenders, submissions and invitations regarding projects incorporate the code. The advertisement should include the words:

  The National Code of Practice for the Construction Industry, in accordance with the Australian Government Implementation Guidelines, applies to this project

- the code and industry guidelines extend through the contract chain to all subcontractors, consultants and material suppliers who may be engaged by the head contractor on the project
- there are no tenderers on the exclusion list due to previous breaches of the code (this information is available from the CMG)
- the workplace relations arrangements proposed for the project are consistent with the code and guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements

- there is a reporting mechanism in regard to the application of the code and the guidelines on the project
- application of the code and the guidelines is a standing item on the agenda for site/project meetings
- 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 they are proposing to authorise a project agreement, there is a demonstrable benefit to the Australian Government in having such an agreement on the project
- the project manager or the head contractor has established appropriate processes to support freedom of association and union right of entry to premises in accordance with the law
- where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism;
- there is an OHS&R plan for the project
- the contractor initiates remedial action aimed at rectifying non-compliant behavior when it is drawn to their attention
- all parties involved in the project are aware of the requirement to report any alleged breaches or other code-related matters to the IBIT, the CMG or the Industries Branch of the Department of Employment and Workplace Relations
- the CMG is notified of all allegations of breaches of the code and industry guidelines within 28 days
- sanctions applied under the code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by the CMG.

Clients are expected to cooperate with requests for information concerning code-related matters made on behalf of the CMG or investigative bodies to which complaints have been referred.

5.2 Contractors, subcontractors, consultants, and employees

Contractors, subcontractors, consultants, and all employees undertaking work on the project must:

- comply with the code and the industry guidelines
- require compliance with the code and the industry guidelines from all subcontractors and material suppliers. All contracts should specifically require code and industry guidelines are complied with
- assess whether the workplace relations arrangements proposed for the project are consistent with the code and guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements

- ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism
- ensure contractors or subcontractors initiate remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention
- ensure that all parties involved in the project are aware of the requirement to report any alleged breaches or other code-related matters to the IBIT, the CMG or the Industries Branch of the Department of Employment and Workplace Relations
- ensure that the CMG is notified of all allegations of breaches of the code and industry guidelines within 28 days
- be aware that sanctions applied under the code are enforced, including the exclusion of identified parties from work opportunities in accordance with decisions advised by the CMG.

Contractors, subcontractors, consultants or employees should also report any suspected breaches of the code to the client, the CMG or the IBIT.

Australian Government indirectly funded construction

This section applies to Australian Government departments and agencies which fund construction activity through grants or program 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

The code and guidelines apply to indirectly funded Australian Government projects as set out in section 2.4. In situations where departments and agencies are not the client, but are responsible for administering Australian Government program 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.

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 agency or organisation to ensure that all parties involved in the project comply with the code and industry guidelines.

Funding administrators should consider the following points to assist funding recipients understand the requirements under the code and guidelines applying to contractors engaged by them.

Departments and agencies which administer funding should ensure that:

- funding recipients developing proposals, tendering or undertaking work in relation to a project are informed of their responsibility to comply with the code and guidelines
- they obtain commitments from the funding recipient that the code and the industry guidelines will be complied with. Agencies should ensure that tenders and contractual documents include the requirements for the code
- adequate reporting arrangements are in place with funding recipients for reporting on code-related issues
- they respond to requests for information concerning code-related matters made on behalf of the CMG
- the CMG is notified of all allegations of breaches of the code and industry guidelines within 28 days
- sanctions applied under the code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by the CMG.

Departments and agencies which administer funding should seek assurance from funding recipients that they ensure/have ensured that:

- all advertisements calling for expressions of interest, tenders, submissions and invitations regarding applicable projects incorporate the obligation to apply the code and the implementation guidelines. The advertisement should include the words:

The National Code of Practice for the Construction Industry, in accordance with the Australian Government Implementation Guidelines, applies to this project

- the code and industry guidelines extend through the contract chain to all subcontractors, consultants and material suppliers who may be engaged by the head contractor on the project
- there are no tenderers on the exclusion list due to previous breaches of the code (this information is available from the CMG)
- the workplace relations arrangements proposed for the project by contractors are consistent with the code and industry guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
- there is a reporting mechanism in regard to the application of the code and the guidelines on the project
- application of the code and the guidelines is a standing item on the agenda for site/project meetings
- the head contractor has established appropriate processes to support freedom of association and right of entry provisions
- where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism
- there is an OHS&R plan for the project
- the contractor initiates remedial action aimed at rectifying non-compliant behavior when it is drawn to their attention
- all parties involved in the project, including the funding recipient, are aware of the requirement to report any alleged breaches or other code-related matters to the IBIT, the CMG or the Industries Branch of the Department of Employment and Workplace Relations.

6.2 Responsibilities of grant and funding recipients

Recipients of grants or funds from Australian Government departments and agencies have a responsibility to ensure projects involving Australian Government program expenditure are bound by the code and industry guidelines. Grant and funding recipients, including state and territory agencies, must ensure that:

- contractual documents concerning Australian Government funded projects include an acknowledgement of the role of the IBIT in monitoring compliance with the code and industry guidelines, and accepting the right of taskforce officers in gaining access to sites to monitor compliance
- they provide a commitment to the funding agency that the code and industry guidelines will be complied with and that tender and contractual documents include the requirement to comply with the code and industry guidelines

- they respond to requests for information concerning code-related matters made on behalf of the funding agency, the CMG and the IBIT
- advertisements calling for expressions of interest, tenders, submissions and invitations regarding projects incorporate the code. The advertisement should include the words:

  The National Code of Practice for the Construction Industry and Australian Government industry guidelines apply to this project
- the code and industry guidelines extend through the contract chain to all subcontractors, consultants and material suppliers who may be engaged by the head contractor on the project
- there are no tenderers on the exclusion list due to previous breaches of the code (this information is available from the CMG)
- the workplace relations arrangements proposed for the project are consistent with the code and guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
- there is a reporting mechanism on the project and that the code is a standing item on the agenda for site/project meetings
- 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)
- the project manager or the head contractor has established appropriate processes to support freedom of association and right of entry provisions
- where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism
- there is an OHS&R plan for the project
- the contractor initiates remedial action aimed at rectifying non-compliant behavior when it is drawn to their attention
- all parties involved in the project are aware of the requirement to report any alleged breaches or other code-related matters to the IBIT, the CMG or the Industries Branch of the Department of Emolpyment and Workplace Relations
- the CMG is notified of all allegations of breaches of the code and industry guidelines within 28 days
- sanctions applied under the code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by the CMG.

6.3 Contractors, subcontractors, consultants, and employees

Contractors, subcontractors, consultants and all employees undertaking work on the project must:

- comply with the code and the industry guidelines
- require compliance with the code and the industry guidelines from all subcontractors and material suppliers. All contracts should specifically require code and industry guidelines are complied with
- ensure that the workplace relations arrangements proposed for the project are consistent with the code and guidelines with particular emphasis on freedom of association and freedom of choice in agreement making and do not require compliance with unregistered industry agreements
- ensure that where threatened or actual industrial action occurs on a project, contractors, subcontractors, consultants or employees report such action in accordance with the appropriate compliance mechanism
- ensure contractors or subcontractors initiate remedial action aimed at rectifying non-compliant behaviour when it is drawn to their attention
- ensure that all parties involved in the project are aware of the requirement to report any alleged breaches or other code-related matters to the IBIT, the CMG or the Industries Branch of the Department of Employment and Workplace Relations
- ensure that the CMG is notified of all allegations of breaches of the code and industry guidelines within 28 days
- ensure that sanctions applied under the code are enforced including the exclusion of identified parties from work opportunities in accordance with decisions advised by the CMG.

SECTION 7

Australian Government administration of the code and guidelines

This section sets out some of the responsibilities of the CMG secretariat, the Department of Employment and Workplace Relations and the Department of Finance and Administration in relation to the implementation of the code and guidelines.

7.1 CMG secretariat

The secretariat of the CMG instituted by these guidelines is drawn from the Workplace Relations Implementation Group of the Department of Employment and Workplace Relations. 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 the CMG
- reporting to the government on code matters through the Minister for Employment and Workplace Relations
- liaising with other jurisdictions at officer level about code matters.

The functions of the CMG are detailed separately in section 9.3.

7.2 Department of Finance and Administration

The Department of Finance and Administration 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 government procurement policy, including the Commonwealth Procurement Guidelines.

7.3 Department of Employment and Workplace Relations

The Department of Employment of Workplace Relations has the following code-related responsibilities:

- advising agencies, CAC Act bodies and other interested parties about the workplace relations and occupational health safety and rehabilitation (OHS&R) aspects of the code
- monitoring and promoting compliance with the workplace relations aspects of the code on behalf of the Australian Government.

The IBIT has primary responsibility for investigating alleged breaches of the workplace relations provisions of the code. The IBIT will report the results of its investigations to the CMG for handling in accordance with section 9.3 of these guidelines.

SECTION 8

Workplace relations and occupational health and safety components

8.1 Awards and legal obligations relating to employment

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*
- *legislative requirements.*

Awards set out minimum conditions of employment and employers are obliged to comply with awards unless they have entered into certified agreements (CAs) or Australian workplace agreements (AWAs) that displace or vary the terms of awards. CAs and AWAs are also legally enforceable and must be complied with by all parties. This includes CAs, AWAs and enterprise agreements approved under state legislation. The requirement to comply with legal obligations extends to orders and directions of tribunals and courts. This includes state Supreme Court and Federal Court injunctions, and orders issued by the Australian Industrial Relations Commission such as those issued under section 127 of the Workplace Relations Act (the Act). It should be noted that state-registered project agreements cannot override federal awards (or AWAs or CAs). The code does not require compliance with unregistered industry agreements.

Parties must comply with any obligations arising from legislation such as the Act and all other relevant laws governing employment conditions such as annual holidays, long service leave, workers compensation, rehabilitation, superannuation, taxation, industrial and commercial training.

Any situations that arise where award, agreement or legislative obligations have not been met are to be dealt with by government agencies and CAC Act bodies through existing compliance procedures and the compliance principles of the code.

8.2 Workplace arrangements

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*
- *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.

The Australian Government's workplace relations policies emphasise the importance of relationships at the workplace and enterprise level, with primary responsibility for workplace relations resting with employers and employees at the enterprise and workplace level. The government's legislation provides a framework for cooperative workplace relations and enables employers and employees to choose the most appropriate form of agreement for their particular circumstances.

The Act provides for more effective choice and flexibility for parties in reaching workplace agreements. AWAs and CAs are available and are designed to enable employers and employees to take responsibility for their own workplace arrangements and relations.

Parties should 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.

Under the Act a party must not take or threaten to take any industrial action or other action, or refrain or threaten to refrain from taking any action with the intent to coerce another person to agree, or not to agree to the making, varying or extending of an agreement. An employer must not coerce or attempt to coerce an employee not to request the involvement of an industrial organisation in negotiations over a CA.

The code prohibits head contractors or clients requiring (either through the tendering process or otherwise) that subcontractors or material suppliers 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 (and their employees' representatives where that is the employees' wish) what form of workplace arrangement, if any, should apply. It is up to employers and their employees to decide whether to have a CA (and if so what kind), AWAs, a state enterprise agreement, or to work under the terms of the relevant award (supplemented possibly by overaward payments).

Except where a project agreement has been agreed to by the client in accordance with the code, a party must not require another party to agree to pay certain rates as a condition for the allocation of work or the awarding of a tender.

8.3 Overaward payments

Overaward 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 overaward 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 overaward 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.

The code prohibits direct or indirect coercion or pressure being applied by a contractor to another contractor, subcontractor, consultant or supplier to make overaward payments. This means that no contractor, subcontractor, consultant or supplier is allowed to 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 overaward payments.

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. No party may compel or attempt to compel another party into making such voluntary contributions into such schemes including schemes which provide top up payments over and above the provisions contained in awards, agreements or legislation.

The code does not prohibit employers, employees, or unions from taking 'protected' industrial action in accordance with the applicable legislation in pursuit of new workplace arrangements.

Where there is a project agreement which provides for special payments, conditions or benefits to be applied on a site-wide basis, the contractor, subcontractor, consultant or supplier may be required to comply with the terms of the project agreement where the terms of the project agreement have been advised at the tender stage.

8.4 Project agreements

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 'overaward' 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.

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 strict conditions, the most important of which is the agreement of the principal (that is, the client). Clients may, consistent with the code, adopt a policy of not agreeing to project agreements.

It is very important that Australian Government clients do not agree to project agreements 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.

The principal is accountable for decisions to approve project agreements and must state their reasons for doing so in writing to the relevant portfolio minister.

Decisions to approve project agreements must be defensible on objective and detailed grounds and clearly demonstrate a benefit to the project, such as improved completion schedules that would not otherwise have been achievable on a best practice basis.

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.

Project agreements will only be appropriate for major contracts as defined by the principal from time to time and will not be permitted on projects worth less than $25 million except in exceptional cases.

In this context, 'principal' means the government agency responsible for the project, initiative or scheme, regardless of the agency not being the nominated principal in the construction contract. For example, in a Build Own Operate Transfer (BOOT) project there will not be a construction contract with the initiating government agency. However, there will be a contract or a concession agreement between the agency and the proponent of the BOOT project. The government agency will retain the right, in consultation with the relevant proponent, through the concession agreement to authorise the negotiation of a project agreement.

Where contractors wish to negotiate a project agreement to regulate special payments, conditions or benefits for more than one contractor, the strategy must first be discussed with, and authorised by, the principal before work commences. Whenever practical, subcontractors should be involved in the process of developing a project agreement before it is finalised.

Given the workplace focus of the agreement system, the capacity for multi-employer agreements to be made

requires the consent of all employers and the majority of the employees to be covered and involves testing by the Australian Industrial Relations Commission or relevant state industrial tribunals.

While project agreements may cover matters other than pay and conditions, in regard to the latter they should generally only provide for project-specific productivity payments, which should be tied to the achievement of identified performance targets. They should not cover other types of benefits such as superannuation or redundancy contributions, workers' compensation insurance, '24 hour cover' etc. These are all matters that should be covered in enterprise or workplace agreements, if at all.

The integrity of workplace arrangements including CAs and AWAs must be maintained. A project agreement does not override a CA or an AWA. The project agreement must not require employers with their own workplace agreements in place to make payments or provide other benefits which would result in double dipping by other parties. For example, where a project agreement provides for a project/productivity allowance, the subcontractor must be able to absorb any enterprise productivity allowance against the project allowance. Parties must not use any term, condition or benefit in the project agreement as a precedent on any other project or for any other purpose.

It should be noted that state-registered project agreements should maintain the integrity of workplace arrangements including CAs and AWAs.

In deciding whether to approve the use of a project agreement, the principal should 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
- the manner in which the proposed project agreement will interact with workplace arrangements including CAs and AWAs already in place or in the process of being negotiated, endorsed or certified
- whether there is anything in the proposed agreement which is inconsistent with the code, awards or other legislation.

Project agreements shall be certified or registered under relevant legislation. In particular, project agreements covering several employers should be certified under the multiple-business provisions of the Act (s. 170LC) and this should be made a condition of approval by the client.

8.5 Freedom of association and right of entry

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.

Among the fundamental principles underpinning the Australian Government's workplace relations policy are:

- 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
- all Australians must be treated equally before the law.

Greater choice will encourage the development of registered organisations that are more competitive, providing a higher level of service to members. Organisations must be representative of, and accountable to, their members and able to operate effectively.

Membership of all organisations must be voluntary. Compulsory unionism, 'no ticket no start' and preference clauses are not acceptable and are unlawful. Parties are protected from coercion (whether direct or indirect) to join or not to join an organisation or to cease to be a member of an organisation. Provisions in federal awards and CAs which provide for preference in employment are null and void and unenforceable.

The payment of 'bargaining fees' or other payments to industrial associations by persons who are non members is contrary to the principles of freedom of association. Membership of industrial associations and any associated membership fees or other payments must be entirely voluntary. Employment discrimination against, or victimisation of, a party (or threatened discrimination or victimisation) is unlawful where that occurs on the grounds of:

- the party's membership or non-membership of a registered organisation or an association applying for registration
- a party seeking to exercise rights under legislation, awards or agreements, or seeking the assistance of any person or body to seek the observance of the party's rights under legislation, awards or agreements, or the party's participation in industrial proceedings.

Contractors must adopt policies to ensure that all those working on projects covered by the code have their right to choose whether or not to join a union or employer association properly respected. 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, posters, helmets, stickers etc that imply that union membership is anything other than a matter for individual choice
- 'show card' days
- an employer encouraging or discouraging employees to join a union
- the imposition, or attempted imposition, by a union of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate, or other person, on a construction site and any attempt by a union to compel any contractor,

- subcontractor or employer 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 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
- the existence, whether in a certified agreement or otherwise, 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.

Employers must not cooperate with or act to facilitate these practices. Employers will be held responsible under the code if they are found to have done so.

Parties must report any alleged or suspected breaches of the freedom of association provisions of the code or the Act of which they are aware to the IBIT.

8.5.1 Right of entry

No principal contractor, subcontractor, consultant or employee is to grant admission to a site by a representative of an industrial association other than in strict compliance with the procedures governing entry and inspection under the Act or under relevant state legislation.

Under the Act, representatives of registered organisations do not have an automatic right of entry to workplaces. A registered organisation may apply to a registrar to issue a permit to an officer or employee of the organisation. A permit holder must observe the legislative provisions relating to the rights of permit holders to enter workplaces. An entry permit can be revoked if a registrar is satisfied that the permit holder has intentionally hindered or obstructed an employer or employee or otherwise acted in an improper manner.

The Act provides that permit holders may only enter a workplace for two reasons. The first is to investigate a suspected breach of the Act, of a federal award or CA, or of an order of the Australian Industrial Relations Commission. To exercise a right of entry, there must be employees who are members of the permit holder's organisation who work at the premises. In addition, the permit holder's organisation must be bound by the relevant federal award, agreement or commission order. If these conditions are met, the permit holder may enter a workplace during working hours and inspect and make copies of any pay or time sheets relevant to the suspected breach, inspect machinery and other appliances relevant to the suspected breach, and speak to employees about the suspected breach. However, permit holders cannot inspect an AWA or

documents that show some or all the contents of an AWA.

The second reason is to hold discussions with employees who are members, or eligible to be members, of the relevant organisation at the workplace. To exercise a right of entry, a federal award binding on the organisation must apply to work that is being carried on at the premises. A permit holder may only enter the premises during working hours and may only hold the discussions during the employees' meal-time or other breaks. If an award is 'displaced' on the site by a CA, or if all employees on the site are covered by AWAs, the permit holder does not have the right to enter the premises to hold discussions with employees.

In each of these above reasons to enter, a permit holder must give the occupier of the site (that is, whoever is in charge of the work site such as the project manager or head contractor) 24 hours notice of the proposed entry.

Employers, industrial organisations (including employer associations/any association of building or construction contractors) must observe and comply with all provisions of relevant industrial and workplace relations legislation and the appropriate occupational health and safety legislation. Construction sites often involve a mixture of employees bound by national and state awards and agreements. Parties should ensure that they comply with all the terms of such legislation, awards and agreements.

8.6 Dispute settlement

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.

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

Reasonable time limits should be allowed for each stage of relevant dispute settlement processes. All parties are required to comply with industrial tribunal decisions, subject to appropriate appeal rights. While dispute settlement procedures are being followed the parties are to ensure that:

- industrial action does not take place
- the circumstances that existed prior to the dispute prevail
- work is to continue as normal without detriment to any of the parties.

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

8.7 Strike pay

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).

Legislative provisions relating to industrial action provide a fair balance between the rights of employers, employees, representative organisations and the general community. Consistent with accepted principles of collective bargaining, industrial action is permitted under the federal workplace relations legislation in relation to bargaining for a CA or an AWA. Industrial action other than genuine bargaining for agreements is not compatible with the system and is not lawful.

It is unlawful for an employer to pay strike pay. Similarly, it is unlawful for a union or its representatives to take industrial action to pursue strike pay or for an employee or other party to accept strike pay. The Act prohibits contractors, subcontractors, consultants and material suppliers from paying employees for any period during which they were engaged in any form of industrial action including strikes, stop work meetings not authorised by the employer, bans and restrictions or limitations on work.

A person who refuses to do certain work is not engaged in industrial action where the refusal is based on a reasonable concern that the work poses an imminent risk to the person's health or safety. In such circumstances, the person must, however, perform other safe and appropriate work if directed to do so.

8.8 Industrial impacts

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 program, the principal contract, other related contracts or project costs.

Any disputes or disagreements relating to workplace relations or OHS&R matters, which can impact on the construction program or the contract, project costs or other related contracts, 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.

Such reporting structures should enable government agencies and CAC Act bodies 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
- assist with better managing their overall work programs.

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

8.9 Workplace reform

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.

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.

Workplace reform is by nature a dynamic and evolving change process and requires the commitment of employers and 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
- occupational health safety and rehabilitation (OHS&R).

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
- improved remuneration and working conditions for the workforce.

The code seeks to provide an environment conducive to the pursuit of workplace reform strategies. The parties shall not seek to negotiate arrangements that restrict the efficient performance of work and contain provisions that restrict productivity improvement. Such practices could include last-on first-off arrangements, ratios of employees and 'one-in-all-in' procedures for overtime.

8.10 OHS&R

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.

Federal and state governments have given the highest priority to improving the management of OHS&R in the construction industry.

All contractors must meet their obligations under relevant laws when working on 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 prevention and eliminating hazards that cause injuries and illnesses at the workplace.

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.

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.

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.

SECTION 9

Compliance and monitoring provisions for the code and guidelines

9.1 The agency role as client

The intention of the code is to encourage cooperation, best practice and ethical behaviour by all parties involved in a construction project. 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.

It is the client's role to insist the code and guidelines are applied. The client ensures that the code is formally applied to the project through inclusion in tender and contract documentation and by obtaining an undertaking of compliance from the successful tenderer. The client is also responsible for initial actions taken to address code issues which might arise in relation to a project.

If a code-related problem is brought to their attention, clients should respond with initial actions designed to encourage the modification or cessation of non-compliant behaviour. It would be open to a client to write to a party to request clarification of behaviour which is considered to have breached the code or to write requesting that the behaviour cease or be modified. In some cases clients may simply wish to advise relevant parties that the matter has been referred to the CMG for further action.

Clients should, however, inform the CMG of all breaches of the code, and refer serious breaches of the code for further action by the CMG.

9.2 The agency role as funding administrator

Agencies responsible for administering Australian Government program expenditure will ensure that funding recipients require that parties subsequently engaged to undertake building and construction work apply the code and guidelines on the project.

9.3 Whole-of-government compliance and sanction principles and procedures

The 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.

The CMG will consist of a representative from each of the Department of Finance and Administration, the Department of Employment and Workplace Relations and the IBIT. Representatives will also be drawn from agencies having current or continuing construction programs. The CMG includes standing representation from the Department of Defence, recognising that department's significant and continuing interest in construction matters. The current membership of the CMG is attached as appendix A.

Once an agency or another party has advised the CMG secretariat or the Department of Employment and Workplace Relations of an alleged breach, a course of action appropriate to the referral will be taken. This may include:

- referral of the matter for action by the client agency responsible for the project
- referral of the matter for investigation by an appropriate

agency, prior to consideration by the CMG

- direct consideration of the matter by the CMG.

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

Steps which the CMG could take include:

- reporting the alleged breach to an appropriate statutory body or law enforcement agency. Where appropriate, the party alleged to have committed the breach would be advised of this step. For instance, an alleged breach of the freedom of association provisions should be referred to the IBIT for investigation. This does not preclude the possibility of such matters being taken direct to the IBIT by affected parties
- issuing a formal warning that continued non-compliance, where a breach is clearly established to have occurred, will lead to more severe sanctions
- referring the alleged breach to the appropriate industry association for action consistent with industry codes of practice. Where appropriate, the party alleged to have committed the breach would be advised of such a step.

Where whole-of-government action which may have serious commercial impacts is being considered, the party alleged to have committed the breach would be offered the opportunity to show cause why such a sanction should not be imposed. Such sanctions could include:

- reduction in the number of tendering opportunities that are given, for example by excluding the non-complying party from tendering for Australian Government work above a certain value
- preclusion from tendering for any Australian Government work for a specified period
- publication of details of the breach and the identification of the party committing the breach.

Given the potentially serious nature of such sanctions, and their likely infrequency, the CMG would carefully consider their implications on a case by case basis. This may require consultation with relevant ministers in reaching decisions on the imposition of severe sanctions.

The CMG would inform the party affected by the sanction and advise the relevant ministers as appropriate. The CMG would also advise agencies, CAC Act bodies and departments through the promulgation of a list of imposed sanctions.

9.4 Complaints concerning agency breaches of the code

The code imposes obligations on all parties and it is possible that the client agency or its representatives may breach, or be alleged to have breached, the code. In such circumstances the complaint should be dealt within the first instance by the normal internal complaints mechanism of the subject Australian Government department and agency, and

through the other avenues available for the review of Australian Government departments' performance, such as the Ombudsman. However, this does not prevent complaints from being lodged directly with the CMG or the IBIT.

While it is not possible for sanctions as such to be imposed on a department, agency or its employees, the following actions may be taken:

- if reported breaches are attributable to an agency's policies, practices or procedures, appropriate changes may be made
- if the breach has resulted from the actions of an individual in contravention of established policies, practices and procedures, consideration should be given to appropriate action consistent with the Public Service Act or the relevant Act which applies to the particular agency or organisation.

Ministers responsible for the code may draw the breach to the attention of the portfolio minister responsible for the project on which the breach has occurred.

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.

9.5 Appeals and complaints concerning sanctions applied under the code

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* are not available. However, parties would have access to the Ombudsman.

9.6 Exclusion of parties from tendering opportunities

The code provides that breaches by parties can be regarded as a relevant factor when awarding contracts. In general, this would only apply in situations where the CMG advises that a sanction has been applied, and would only apply in the terms and for the period that the sanction applies. All tenderers should be advised of this condition in the tendering documentation.

Information concerning the exclusion of parties from tendering opportunities can be obtained from the CMG secretariat (see section 10 for details).

If a party is excluded from a specific business opportunity on these grounds, the client should inform them of the reason, in writing, at the earliest opportunity.

SECTION 10

Contact details

Queries about the code or its application can be referred to the CMG secretariat. **The contact for the secretariat and for workplace relations and OHS&R matters is:**

Mr Leigh Quealy

Workplace Relations Implementation Group
Department of Employment and Workplace Relations

Phone (02) 6121 6015
Fax (02) 6276 7004

Email: leigh quealy@dewr.gov.au

The contact for procurement and tendering matters is:

Mr Guy Verney

Asset Management Group
Department of Finance and Administration

Phone (02) 6215 3617
Fax (02) 6267 3018

Email: guy.verney@finance.gov.au

These Australian Government Implementation Guidelines and the Australian Government Industry Guidelines for the workplace relations and OHS&R components of the National Code of Practice for the Construction Industry are available on the Department of Employment and Workplace Relations Australian Workplace portal at: http://www.workplace.gov.au

The code and the model clauses to the implementation guidelines are also available on the website.

APPENDIX A

MEMBERSHIP OF THE CODE MONITORING GROUP

Department of Employment and Workplace Relations (Chair)

Interim Building Industry Taskforce

Department of Finance and Administration

Department of Defence

Department of Transport and Regional Services

Australia Post

Commonwealth Scientific and Industrial Research Organisation

APPENDIX B

ACRONYMS

AWA	Australian Workplace Agreement
BOO	Build, Own, Operate
BOOT	Build, Own, Operate, Transfer
CA	Certified Agreement
CAC Act	Commonwealth Authorities and Companies Act 1997
CMG	Code Monitoring Group
FMA Act	Financial Management Accountability Act 1997
IBIT	Interim Building Industry Taskforce
PFIs	Private Finance Initiatives
PPRs	Public Private Partnerships
OHS & R	Occupational Heath Safety and Rehabilitation