Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

WITNESS STATEMENT OF WAYNE JENKINSON

1. I, Wayne Jenkinson, say on oath:

Background

2. I am currently employed by Fulton Hogan Construction Pty Ltd (**FHC**) in the role of Project Industrial Relations Manager.

3. FHC is a civil construction company that operates throughout Australia and is part of the broader Fulton Hogan group. As a civil construction company, FHC tenders for and, where successful, manages and builds civil infrastructure projects such as roads, tunnels, airports and renewable energy. A large number of the projects FHC is involved with are funded, at least in part, by the Commonwealth and/or State governments. The views and opinions given in this statement are my own.

4. I am currently working on the Coomera Connector Stage 1 Central project – the construction of a six-lane section of motorway in south east Queensland between Helensvale and Molendinar. As Project Industrial Relations Manager, I am responsible for the oversight of all industrial relations matters on the project. I have held this role since April 2024.

My regulatory experience

5. I have extensive experience in regulatory roles in the building and construction industry.

6. From October 2003 to March 2005, I was employed as an Investigator by the Interim Building Industry Taskforce (**IBIT**) and, subsequently, the Building Industry Taskforce (**BIT**). The BIT was the Federal regulatory body that preceded the establishment of the Australian Building and Construction Commission (**ABCC**). The focus of my time with the BIT was investigating instances of alleged misconduct and non-compliance with workplace laws.

7. From March 2005 to April 2012, I was then employed by the ABCC, first as an Inspector, and then as State Director of the ABCC's Queensland operations. In these roles I was involved in investigating alleged contraventions of non-compliance with

Federal industrial relations legislation – principally the *Fair Work Act 2009* (**FW Act**), the *Building and Construction Industry Improvement Act 2005* (**BCII Act**), the 1997 National Code of Practice for the Construction Industry (**1997 Code**), and the associated *Implementation Guidelines for the National Code of Practice for the Construction Industry 2006* (**2006 Cth Guidelines**).

Now shown to me and marked **WJ-1** is a copy of the 1997 Code.

Now shown to me and marked **WJ-2** is a copy of the 2006 Cth Guidelines.

8. From April 2012 to December 2016, I was employed by the Office of the Fair Work Building Industry Inspectorate (**FWBI**) – the organisation that the Labor Government established to replace the ABCC. Again, my role was principally an investigative one, although the focus of my investigations shifted as the BCII Act was amended and, eventually, replaced by the *Fair Work (Building Industry) Act 2012* (**FWBI Act**). Specifically, during my time with the FWBI, there was a greater emphasis placed on investigating non-payment of wages and entitlements, rather than the misconduct and industrial disputation that had been the focus of the investigations of the BIT and ABCC.

9. From August 2013 to July 2014, during the period of my employment with FWBI, I was seconded to the Queensland Government Department of Justice and Attorney-General to serve as the Director, Building and Construction Compliance Branch (**BCCB**). The BCCB was a Queensland Government Agency established by the State LNP Government in August 2013 to monitor and audit compliance with the *Implementation Guidelines to the Queensland Code of Practice for the Building and Construction Industry* (**2013 QLD Guidelines**). As the first Director of the BCCB, I was involved with establishing the BCCB office and overseeing the roll-out of the BCCB's regulatory operations.

Now shown to me and marked **WJ-3** is a copy of the 2013 QLD Guidelines.

10. From December 2016 to November 2022, I was again employed by the ABCC, most recently in the role of Director of Operations for the ABCC's Northern Region. In that role, I had oversight of the ABCC's investigative function across Queensland and the Northern Territory and was assisted in that role by a team of around 10 inspectors. My role with the ABCC was made redundant when the ABCC was abolished by the Federal Government at the end of 2022.

The QLD Code and the 2013 QLD Guidelines

11. The Code of Practice for the Building and Construction Industry (**QLD Code**) was introduced in Queensland in 2000. However, the QLD Code was more aspirational than prescriptive in its content, and much of the QLD Code was directed to matters such as tendering ethics, contract administration, and continuous improvement. The QLD Code did not deal with industrial relations and workplace management practices with any degree of specificity.

    Now shown to me and marked **WJ-4** is a copy of the QLD Code as at 2000.

12. It was following the abolition of the first iteration of the ABCC and the repeal of the BCII Act at the Commonwealth level in 2012 that the LNP Government, recognising the resulting regulatory gap, introduced the 2013 QLD Guidelines to supplement the QLD Code.

13. The 2013 QLD Guidelines were focussed on improving industrial relations practices on building and construction projects. They were largely modelled off, and indeed substantially reflected the terms of, the Victorian *Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry* (**2013 Victorian Guidelines**).

    Now shown to me and marked **WJ-5** is a copy of the 2013 Victorian Guidelines.

14. The 2013 QLD Guidelines then operated in much the same way as their Federal and Victorian analogues – the 2013 QLD Guidelines set out a range of requirements regarding workplace relations practices, and contractors risked being excluded from Government funded building work should they fail to comply with those requirements.

15. The ultimate objective of the 2013 QLD Guidelines was stated on page 2 of the 2013 QLD Guidelines to be as follows:

    > *These Guidelines reflect the Queensland Government's commitment to greater flexibility, innovation and productivity within the State's building and construction industry <u>to ensure that the Queensland Government maximises tax payer value-for-money on publicly funded building and construction projects</u>* (my emphasis).

The BCCB

The intention behind the BCCB

16. The BCCB was established in 2013 for the purpose of administering the 2013 QLD Guidelines. While the BCCB was initially a unit within the Department of Justice and Attorney General, the intention was that the BCCB would eventually evolve into an independent regulator that would monitor compliance with the relevant standards in Queensland in much the same way as the ABCC had done at the Federal level between 2005 and 2012.

17. The role of the BCCB was set out at Part 10.1 of the 2013 QLD Guidelines, and could be summarised as:

    a) promoting awareness of the QLD Code and 2013 QLD Guidelines;

    b) monitoring compliance;

    c) investigating suspected breaches;

    d) actioning non-compliance; and

    e) making recommendations for sanctions in the event of a breach.

18. As part of its role in monitoring compliance, the BCCB was also responsible for assessing Workplace Relationship Management Plans (**WRMP**).[1] WRMPs were a document that the 2013 QLD Guidelines required all contractors to submit when tendering for government funded building and construction work that exceeded certain value thresholds.[2]

19. The 2013 QLD Guidelines set out a range of matters that a WRMP was expected to address.[3] The intention was that in preparing a WRMP, contractors would need to give proper consideration to how they would ensure their industrial relations practices complied with the 2013 QLD Guidelines. I say more about the effectiveness of the WRMP framework later in this statement.

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[1] 2013 QLD Guidelines at cl. 10.1.
[2] 2013 QLD Guidelines at cl 5.
[3] 2013 QLD Guidelines at cl 5.1.

The activities of the BCCB

20. During my time with the BCCB, I was assisted by a team of five administrative and investigative staff (which although adequate for the early days of the BCCB, was a constraint on the ability of the BCCB to deliver the desired reform). The BCCB delivered briefings to industry, conducted site inspections to monitor compliance with the 2013 QLD Guidelines, and reviewed WRMPs submitted by contractors.

21. In my experience, building and construction companies operating in Queensland were almost all receptive to the work of the BCCB. Industry representatives consistently remarked to me that the 2013 QLD Guidelines and the establishment of the BCCB were welcome developments for the industry and were contributing to improved productivity and more stable industrial environments on construction sites.

22. Ultimately, the BCCB was a fairly cost-effective vehicle for bringing about improvements in productivity and behaviour in the industry. Because of the significant commercial implications that would follow from a contractor being excluded from government funded building work, I observed Boards and senior executives of construction companies take a much greater interest in, and adopt a far more active role in managing, the industrial relations practices being adopted on their projects. The risk of exclusion motivated contractors to prioritise compliance, and introduced a degree of self-regulation, without the BCCB needing to expend any particularly significant resources on enforcement.

The disbanding of the BCCB

23. In 2014, I was recalled to my substantive position with the FWBI, and a new Director took over responsibility for the BCCB.

24. Shortly thereafter, there was a change in Government at the State level and the BCCB was disbanded. I do not recall any particular justification being offered by the State Labor Government for the disbanding of the BCCB, however I recall from my discussions with colleagues and industry that a widely held view was that the Labor Government had disbanded the BCCB at the request of the CFMEU.

The success of the 2016 Code and the ABCC

25. While my time with the BCCB was short lived, I had the opportunity to observe the benefits that a code could deliver during my subsequent work with the ABCC.

26. When the ABCC was re-established in December 2016, the Commonwealth Government concurrently introduced the *Code for the Tendering and Performance of Building Work 2016* (**2016 Code**) – a code of practice for the construction industry that set out minimum standards and expectations in relation to workplace relations matters.

Now shown to me and marked **WJ-6** is a copy of the 2016 Code.

27. The 2016 Code shared many similarities with, and indeed mirrored much of the content of, the 2013 QLD Guidelines, albeit with a greater level of formality given the status of the 2016 Code as a legislative instrument.

28. Among other matters, the 2016 Code:

(a) prohibited the inclusion of certain inefficient terms in enterprise agreements;

(b) prohibited certain undesirable practices and arrangements being adopted on building and construction sites; and

(c) included measures directed toward protecting freedom of association.

29. Contrary to what the CFMEU often suggested, the 2016 Code was not about attacking unions, but instead motivating and empowering contractors to enforce compliance with the law and drive productivity so as to deliver value for money on tax payer funded projects.

30. As Director of Operations for the ABCC's Northern Region, I oversaw the investigations being conducted by the ABCC into alleged contraventions of workplace laws on building and construction sites in Queensland.

The improvements observed in Queensland

31. From around 2016, as I oversaw the ABCC's Northern Region, the improvements in industrial relations practices on construction sites in Queensland were significant. The 2016 Code and the work of the ABCC drove an observable improvement in compliance on construction sites, which in turn improved project productivity.

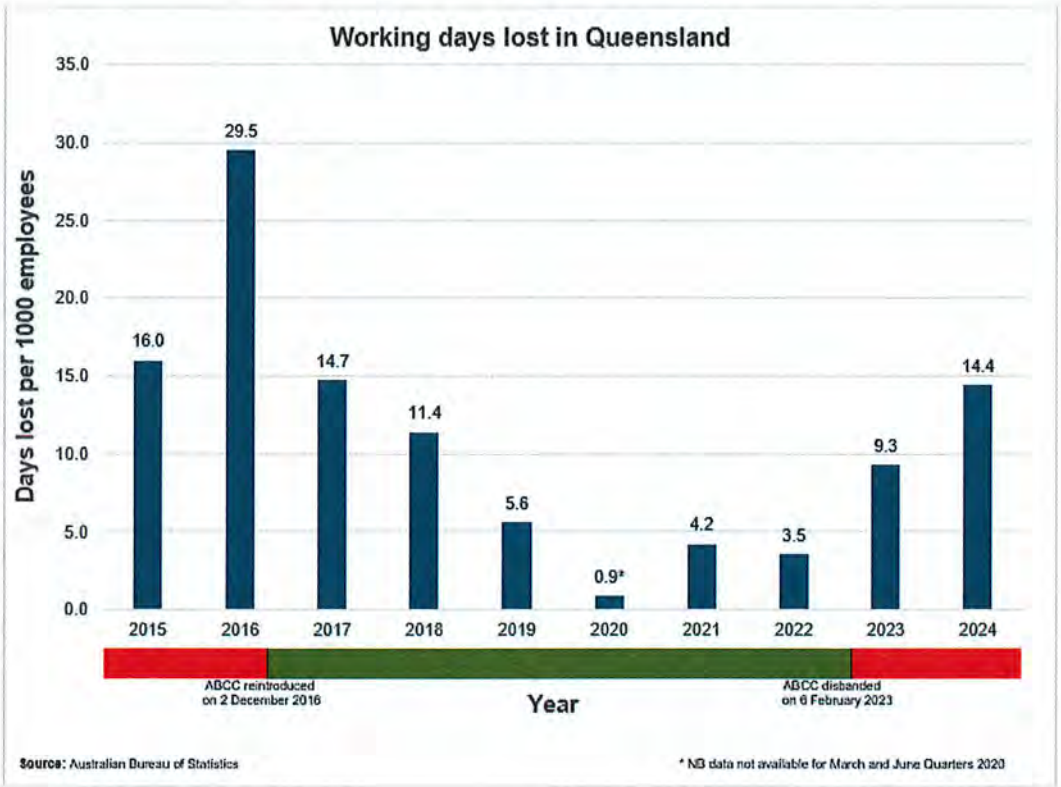
32. Much like the 2013 QLD Guidelines:

(a) the 2016 Code motivated contractors to ensure their operations were compliant – the risk of losing government funded building work served as a significant

incentive for contractors to crack down on misconduct and insist that unions and workers followed proper process; and

(b) perhaps just as importantly, the 2016 Code provided contractors with cover when challenged by unions. Whereas contractors who insisted on compliance might have previously been branded as "anti-union" and become targets for retaliation, the 2016 Code allowed contractors to point to the potential loss of government funded building work as effectively "tying their hands".

33. One relevant data point in assessing the effectiveness of the work of the ABCC is the number of working days lost to industrial disputation. This data discloses that the ABCC's operations directly correlated with a *significant* reduction in the number of working days lost to industrial disputes in Queensland.



34. As can be seen from this graph, days lost to industrial disputes in Queensland were significantly lower during the period the ABCC was in existence. The data that underpins this graph is set out in the table below.

Working days lost in Queensland per 1000 employees					
Year	**March Quarter**	**June Quarter**	**September Quarter**	**December Quarter**	**Annual Total**
2015	2.3	2.9	5.3	5.5	16.0
2016	6.9	6.1	6.5	10.0	29.5
2017	1.7	4.2	4.2	4.6	14.7
2018	3.2	1.1	3.3	3.8	11.4
2019	1.2	2.3	1.2	0.9	5.6
2020	N/A*	N/A*	0.6	0.3	N/A*
2021	0.2	0.7	1.7	1.6	4.2
2022	1.2	0.2	1.0	1.1	3.5
2023	0.6	1.3	3.2	4.2	9.3
2024	3.6	3.9	4.9	2.0	14.4
Source: Australian Bureau of Statistics			*NB data not available for March and June Quarters 2020		

Commentary on particular clauses of the 2016 Code

Application to related entities

35. One key feature of the 2016 Code was clause 6(2), which had the effect of extending the 2016 Code's application to any "related entities" of a code covered entity.

36. Clause 6(2) served two important functions:

(a) the clause ensured contractors could not avoid the consequences of non-compliance with the 2016 Code by setting up "clean-skin" entities to bid for and undertake Commonwealth funded work; and

(b) the clause served to accelerate the rate of reform through the industry. Where a contractor wished to tender for Commonwealth funded building work, clause 6(2) required the contractor to ensure that its various related entities were complying with the requirements of the 2016 Code in respect of any other work they were undertaking (including on privately funded construction projects). This allowed the 2016 Code to instantaneously motivate improvements in behaviour and compliance on projects that would have otherwise been outside of the 2016 Code's reach.

37. Clause 6(2) was, at least in my view, integral to the success of the 2016 Code.

Obligations in relation to subcontractors

38. Another significant provision of the 2016 Code was the obligation on contractors to ensure that any *subcontractors* the contractor engaged also complied with the requirements of the 2016 Code. The 2016 Code achieved this through imposing a series of obligations on contractors as it concerned the conduct and practices of their subcontractors.[4]

39. Principal amongst those obligations were requirements that contractors:

    (a) ensure that any requests for tender (howsoever described) required the subcontractor responding to the tender to comply with the 2016 Code;[5]

    (b) ensure that any agreement entered into in relation to building work with a subcontractor required the subcontractor to act consistently with the 2016 Code;[6] and

    (c) ensure that subcontractors complied with the 2016 Code in respect of building work that is the subject of any agreement between the contractor and subcontractor.[7]

40. This cascading of obligations encouraged a degree of self-regulation in the industry. I observed head contractors in Queensland take on an active role in monitoring the conduct of the subcontractors they engaged – the risk of being excluded from future government funded construction work meant that head contractors simply could not tolerate non-compliant subcontractors on their sites.

41. Requiring contractors to ensure compliance by their subcontractors again accelerated the improvements in behaviour that the 2016 Code was designed to bring about, and transferred much of the burden of enforcing compliance from a regulator to the industry participants themselves.

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[4] 2016 Code at cl. 8.
[5] 2016 Code at cl. 8(2).
[6] 2016 Code at cl. 8(4).
[7] 2016 Code at cl. 8(5).

Prohibition on accommodating non-compliant right of entry

42. One particularly prevalent challenge for construction projects in Queensland has been union officials entering sites other than in accordance with the legislative right of entry framework. Union officials often take it upon themselves to enter construction sites as and when they please, including for purposes that the legislative framework does not permit, and without always notifying the site occupier of their presence. That practice presents risks to both safety and productivity.

43. It can be difficult for contractors to resist attempts by union officials to improperly enter construction sites as the official will often threaten to retaliate with industrial disruption and delay should the entry not be facilitated.

44. The combined effect of clauses 11(4) and 11(3)(p) of the 2016 Code was that a code covered entity was prohibited from providing for an official of a building association to enter a construction site other than in compliance with the right of entry framework set out at Part 3-4 of the FW Act.

45. That prohibition allowed contractors to point to their obligations under the 2016 Code, and the potential loss of government funded building work, as a basis for pushing back on attempts by union officials to walk onto site. Specifically, it allowed a contractor to claim that "their hands were tied" and that their refusal to facilitate the irregular entry was not their being anti-union but was instead simply their needing to avoid the consequences of non-compliance with the 2016 Code.

Project agreements

46. The 2016 Code also played a role in reducing the incidence of project agreements.

47. Project agreements most commonly comprise a deal between a union and the head contractor to the effect that all workers who work on a site will receive certain minimum (and above Award) terms and conditions. Such agreements effectively compel the head contractor to force the agreed minimum terms and conditions on any subcontractor, irrespective of the industrial arrangements the subcontractor may have otherwise negotiated with its own workforce.

48. Project agreements were not uncommon on the larger construction sites in Queensland prior to the introduction of the 2016 Code.

49. The problem with project agreements is that they effectively eliminate the ability for subcontractors to compete on labour costs (which is generally the largest component of a subcontractor's cost base). The elimination of competition between subcontractors on labour costs invariably results in higher project costs.

50. In the 2016 Code the proscription on project agreements (or site rates) was found at clause 10, which prohibited code covered entities from making an agreement that provides for terms on which a subcontractor may be engaged. Clause 10 went on to explicitly identify project agreements as the sort of agreement that the clause is intended to prohibit.

51. In retrospect, whilst clause 10 of the 2016 Code played an important role, clause 6 of 2013 QLD Guidelines perhaps constituted a more effective (and certainly more comprehensive) clause dealing with project agreements.

WRMPs

52. Like the 2013 QLD Guidelines, the 2016 Code contained a requirement that contractors provide a compliant WRMP before they could be awarded the tender for any government funded building work (although the 2016 Code referred to these documents as a "workplace relations management plan", rather than a "workplace relationship management plan").[8]

53. The requirement that contractors prepare and submit a WRMP was one of the most effective mechanisms in the 2016 Code – it forced contractors to prepare a written proposal explaining how they would ensure compliance with their industrial / legal obligations, and how they would deliver the relevant work on time and within budget.

54. The process of preparing a WRMP helped educate contractors on their regulatory and legal obligations, encouraged investment in forward planning, and provided a document against which the contractor could be audited and assessed by the ABCC.

55. The presence of a WRMP made it far easier for the ABCC to monitor whether the contractor was complying with their obligations under the 2016 Code.

[8] 2016 Code at Part 6.

A missed opportunity

56. My experience with the ABCC left me with no doubt that the BCCB had had the potential to deliver significant reform of the building and construction industry in Queensland.

57. Had the BCCB been given the opportunity to deliver on its mandate, unlawful and disruptive behaviour would be less pervasive through the industry than it now is, and government funded construction projects would no doubt be operating more efficiently.

58. In that context, the disbanding of the BCCB in 2015 represented a significant missed opportunity for Queensland and left the State without a dedicated regulator. While the ABCC stepped into that void over the following years, the abolition of the ABCC in 2022 exposed the gap in the regulatory landscape and saw a marked deterioration in behaviour on construction sites. The reintroduction of industry guidelines and an ABCC-like body is essential to improve productivity on construction sites in Queensland.

59. Based on my experience with various Commonwealth and State based codes and guidelines, I am confident that both the 2013 Queensland Guidelines and the 2016 Code would represent effective models for achieving that end.

The QBCC as a regulatory body

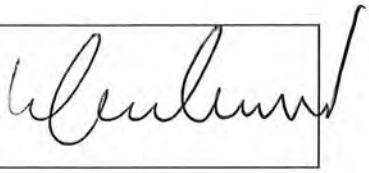
60. The Queensland Building and Construction Commission (**QBCC**) is a statutory regulator established under the *Queensland Building and Construction Commission Act 1991* (QLD).

61. The QBCC has a remarkably broad scope of responsibility, being involved in, among other matters, the licensing of builders, regulating product supply chains, enforcing compliance with building standards, and assisting with disputes regarding payments and building defects. Much of the work that the QBCC is involved with entails smaller residential projects, rather than large scale construction sites.

62. Based on my past dealings with the QBCC and from what I had been told by other industry participants, the QBCC lacks the necessary experience in enforcing industrial relations standards to serve as an effective regulator and is ill-equipped to handle instances of non-compliance by well-resourced contractors and unions.

63. In my view, the role of the regulator should be served by a new dedicated, specialised, and properly resourced body.

I ☑ swear / ☐ affirm the contents of this statement are true.

Signature of Deponent 

Place Brisbane Date 8/4/2026

Before me (signature of witness) 

CHRISTOPHER PAUL SAXON

Full name of witness (please print)

☐ Justice of the Peace (JP #)

☐ Notary public

☑ Lawyer

☐ Other authorised person (specify)

Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

ANNEXURE SHEET

This is the document referred to as WJ-1 in the statement of Wayne Jenkinson sworn at Brisbane on 8 April 2026.

Wayne Jenkinson

Witness (Lawyer)

WJ-1

DOLAC

National Code of Practice for the Construction Industry

1997

Meeting of Procurement and Construction Ministers
Australian Procurement & Construction Council Inc
National Code of Practice for the Construction Industry
Perth, 1997

Requests for additional copies of this document should be addressed to:

Australian Procurement & Construction Council Inc (APCC)
PO Box 106
DEAKIN WEST ACT 2600

6/42 Geils Court
DEAKIN ACT 2600

Phone 02 6285 2255 or Fax 02 6282 3787

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Web Site: http://www.apcc.gov.au

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INTRODUCTION

The construction industry is an important sector of the Australian economy because of its direct contribution to the national economy and its influence on other sectors of the economy. In peak periods the industry produces almost seven per cent of Gross Domestic Product and employs nearly five per cent of the work force. The construction industry in Australia must be efficient and competitive if it is to fulfil its potential to contribute towards national economic growth.

A major share of output across all construction sectors is generated by the continuing demand for public asset and infrastructure development. This demand is generated by direct government investment and, increasingly, through joint arrangements between the public and private sector for the provision of community infrastructure.

As major clients of the industry Governments are providing leadership in effecting major improvements in the way business is conducted, encouraging changes in industry production processes to raise productivity, and other actions that will help develop an industry which achieves internationally-competitive standards.

The National Code of Practice for the Construction Industry (the Code) expresses the principles which Commonwealth, State and Territory Governments agree should underpin the future development of the construction industry in Australia.

The Code emphasises the maintenance of the highest ethical standards in all construction-related activities. The core principles of the Code, supported by the practices and initiatives of each jurisdiction, are aimed at ensuring that the industry:

- is client-focused and respects the rights of clients
- builds relationships on a foundation of trust
- observes the highest ethical principles in tendering
- maintains a positive commitment to continuous improvement and best practice
- supports broadly-based workplace reform
- maintains high standards in occupational health safety and rehabilitation and in environmental management, and
- encourages responsible industrial relations leading to economically-sustainable arrangements.

The principles incorporated in the Code represent the Governments' agreed positions regarding the industry issues detailed. Individual governments will be able to maintain existing codes or develop codes to suit the priorities and circumstances relevant to particular jurisdictions.

It is acknowledged that existing codes or new codes developed will be consistent with the principles established in the Code. Where a relevant State/Territory Code provides for provisions in addition to the Code those provisions will apply in that State/Territory. The Code provides the minimum level of compliance.

APPLICATION OF THE CODE

The construction industry in Australia is one of the largest employers in the country. Its activity in residential and non-residential building and engineering construction produces much of the infrastructure that drives our economy. It also facilitates the delivery of services to the community by government, and contributes to a better working and living environment for everyone.

The construction industry includes all organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering.

This National Code of Practice for the Construction Industry in Australia was developed by the Commonwealth, State and Territory Governments.

The Code establishes a set of principles and standards of behaviour that is expected to apply in dealings between clients, their representatives and members of the construction industry. The private sector is to be encouraged to adopt the code on a voluntary basis.

Any party wishing to do business with governments or work on government construction projects will be required to comply with all aspects of the Code applicable to their activities:

- the term "party" in the Code includes but is not limited to: clients, principal contractors, subcontractors, suppliers, consultants, employees, unions—their officials, employees and members and industry associations whilst undertaking a representative role.

Adoption of the Code 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. In particular coercion of any form is prohibited.

Achievement of best practice throughout the industry is the responsibility of all participants and adoption of the principles on private sector projects is strongly encouraged. The industry as a whole and the community will be best served if industry participants adhere to high standards of honesty and integrity.

NATIONAL PRINCIPLES

Client's Rights and Responsibilities

Clients have the right to choose with whom they do business and to determine and communicate the standards of performance and behaviour they expect from all industry participants.

Clients recognise that their expectations play a central role in driving industry improvement and, in future, they will apply even more stringent criteria to identify, encourage and reward better performers.

Clients will base their decisions on the track record of service providers in terms of trust, capacity and capability to perform and a demonstrated ability to deliver high quality solutions.

Clients will also respect the need for fairness and equity in all business transactions and selection processes, and apply these standards consistently in all dealings with the industry.

Relationships

Business relationships must be built upon the essential qualities of trust, cooperation, equity, and honesty. These qualities must be reflected at all links in the contract chain.

All jurisdictions have clearly defined expectations for service providers which reflect this principle and have implemented business practices which help participants to focus on successful project outcomes.

Industry participants are expected to respond to these requirements by a positive commitment to develop relationships that are: cooperative (i.e., founded on shared objectives and shared benefits); built upon the essential qualities of openness, trust, equity and honesty; established for the long rather than short-term; complement and enhance the business outcomes of all parties involved.

To facilitate a cooperative approach a number of jurisdictions are promoting approaches such as Partnering and Alternative Dispute Resolution. These approaches require a commitment by all parties to address dealings positively and cooperate in finding solutions to problems or disputes should they arise.

Competitive Behaviour

Principles of ethical behaviour must be adhered to by all parties, at all times, and at all levels. Tendering processes must be conducted with commitment, honesty and fairness. Anti-competitive behaviour or any other practice which denies other participants legitimate business opportunities are unacceptable. These practices are inconsistent with the establishment and maintenance of ethical business practices which must underlie good working relationships between a client and a service provider and between service providers.

All clients emphasise the need for ethical behaviour at all levels of a project. These expectations are essentially based on the following nine ethical principles:

- all aspects of the tendering process must be conducted with honesty and fairness at all levels of the industry
- parties must conform to all legal obligations
- parties must not engage in any practice which gives one party an improper advantage over another
- tenderers must not engage in any form of collusive practice and must be prepared to attest to their probity
- conditions of tendering must be the same for each tenderer on any particular project
- clients must clearly specify their requirements in the tender documents and indicate criteria for evaluation
- evaluation of tenders must be based on the conditions of tendering and selection criteria defined in the tender documents
- the confidentiality of all information provided in the course of tendering must be preserved
- any party with a conflict of interest must declare that interest as soon as the conflict is known to that party

These principles apply to all parties in the contractual chain thus the terms 'client' and 'tenderer' are interchangeable at each link in the chain. For example, a contractor will act as a client when seeking tenders for subcontract packages.

All jurisdictions emphasise that collusive tendering, participation in price-fixing cartels for either service or supplies, 'bid shopping' or any other practice which seeks to limit competition, are specifically prohibited. Prohibited practices include:

- agreement between tenderers as to who should be the successful tenderer
- any meetings of tenderers to discuss tenders prior to the submission of the tenders if the client is not present
- exchange of information between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderer
- agreements between tenderers to fix prices or conditions of contract (this means any collaboration between tenderers on prices or conditions

to be included in contracts or commissions without the consent of the client)

- any assistance to any tenderer to submit a cover tender (that is, a tender submitted as genuine but which has been deliberately priced in order not to win the contract or commission)
- any agreement between tenderers prior to submission of tenders to fix the rate of payment of employer or industry association fees where the payment of such fees is conditional upon the tenderer being awarded the contract or commission

All jurisdictions agree to promptly report suspected cases of anti-competitive behaviour to the appropriate authority.

The Commonwealth, State and Territory Governments also have a particular responsibility to ensure that the principles in the National Competition Policy Agreements are observed in their own practices and in dealings with industry.

Continuous Improvement & Best Practice

A positive commitment to best practice is required of all industry participants. This commitment will be demonstrated by evidence of continuous improvement; excellent business practices and relationships; effective organisational systems and standards; exceptional people management policies and practices; and, superior time, cost, and quality outcomes.

A commitment to fostering industry development is expected of all service providers and suppliers by clients.

This extends to performance in terms of such things as: business relationships and practices; organisational systems and standards; employee qualifications; people management policies and practices; time, cost and quality outcomes; value for money; training; research and development; equal employment opportunity; effective management of occupational health safety and rehabilitation issues; security of payment; cooperative contracting; pro-active project planning (which includes environmental, business and financial issues); and, ensuring contract management is undertaken with an appropriate level of competence.

The Commonwealth, State and Territory Governments have agreed to use pre-qualification as one strategy to drive the development of a national industry committed to best practice, international competitiveness and the highest ethical behaviour.

Wherever possible the commitment to best practice will be tested and measured using criteria incorporated into pre-qualification and other selection processes. Service providers will be expected to justify claims by reference

to past performance or evidence of the implementation, where appropriate, of appropriate business and operating systems and standards. Service providers may also expect to be monitored, reviewed and/or audited during the contract period. Post-contract analysis of performance may also be undertaken.

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.

A broad agenda is being encouraged, aimed at achieving improved productivity by: effective communication; teamwork; high standards in OHS&R; competency-based training and skill formation opportunities; flexible workplace practices; implementation of policies designed to promote access, equity and equal employment opportunity; continuous improvement and best practice.

Clients encourage reform through their own work practices and policies and by requiring evidence of these practices at an appropriate level when selecting service providers.

Occupational Health Safety & Rehabilitation (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.

The highest priority has been given by all jurisdictions to improvement in the management of OHS&R in the Construction industry.

Service providers must meet their OHS&R obligations according to relevant laws whether working on private or government client's projects and sites. Additionally, they are expected to prove that they have an appropriate OHS&R management system operating within their individual enterprise.

They may also be expected to establish a site specific OHS&R management plan before work commences on a government project or site.

Clients will prefer to deal with service providers who recognise that the active management of OHS&R issues leads to superior safety and less costly outcomes than reliance on the lowest common denominator approach typified by simple regulatory compliance.

Industrial Relations

It is agreed by Australian Governments that the industrial relations principles embodied in this Code are to apply to their construction projects.

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; and
- legislative requirements.

Workplace Arrangements

Workplace arrangements which reflect the needs of the enterprise are important elements in achieving continuous improvement and best practice.

The content 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; and
- 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.

Overaward Payments

"Overaward payment" is defined to mean any payment and/or benefit above that is 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 that there is an award or legal requirement to do so. This does not prevent action sanctioned by relevant industrial relations legislation.

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 "over award" payments.

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.

Freedom of Association

All parties have the right to freedom of association. This means that parties are free to join or not to 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.

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.

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).

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.

Security of Payment

To ensure that all parties receive payments due to them, the highest ethical standards must be observed throughout the contract chain. This specifically includes ensuring the timely progress of the processing, management and finalisation of claims, payments, retentions and securities due under the contract for all parties.

The Commonwealth, State and Territory Governments are applying the following set of principles[1] to security of payment in their jurisdictions:

- Participants have the right to receive full payment as and when due;
- All cash security and retention monies should be secured for the benefit of the party entitled to receive them;
- Payment periods lower in the contractual chain should be compatible with those in the head contract;
- Outstanding payments to participants, to the extent consistent with Commonwealth and State legislation, should receive priority over payments to other unsecured creditors;
- All construction contracts should provide for non payment to be a substantial breach;
- All construction contracts should make provision for alternative dispute resolution mechanisms.
- Only those parties who have the financial and technical capacity and business management skills to carry out and complete their obligations should participate in the industry;
- All construction contracts in the contractual chain should be in writing.

COMPLIANCE PRINCIPLES

[1] As incorporated into the 'National Actions on Security of Payment', agreed to by Construction Ministers on 18 October 1996

The Commonwealth, State and Territory Governments are developing appropriate sanctions, consistent with their business activities and the laws applicable in their respective jurisdictions, to encourage compliance with the principles.

Each jurisdiction will establish effective compliance and enforcement mechanisms to apply to the national code subject to the following principles:

- sanctions are based on the right of the client to choose who they do business with.
- the type of sanctions that is to be applied for an infringement will vary according to the nature of the specific breach and other circumstances.
- in the case of non compliance by a party the sanction may include but not be limited to:
  - — the reporting of the breach to an appropriate statutory body or law enforcement agency;
  - — a formal warning that continued non-compliance will lead to more severe sanctions;
  - — reduction in the number of tendering opportunities that are given e.g. by excluding the non-complying party from tendering for Government work above a certain value;
  - — preclusion from tendering for any Government work for a specified period; and/or;
  - — publication of details of the breach and the identification of the party committing the breach; and
  - — referral of the breach to the appropriate industry association for action consistent with industry codes of practice
- Full use is to be made of existing remedies and sanctions under existing legislation particularly under federal and state industrial relations laws.
- Each jurisdiction will be expected to ensure that there are avenues for appeal and review where a sanction has been or is to be imposed—appropriate administrative or commercial law mechanisms should be available.
- The Code and/or State Codes should be established as a condition of the tendering process.
- Jurisdictions will establish or provide effective coordinating mechanisms to ensure that the code is applied effectively in all agencies.
- Breaches of the Code in one jurisdiction will be regarded as a relevant factor by other jurisdictions when considering the suitability of parties for government projects.

- Labour Ministers will monitor the effectiveness of the industrial relations and occupational health and safety elements of the Code as a standing agenda item on the Labour Ministers' Council meeting.

- Construction Ministers will monitor the effectiveness of the broader construction elements of the Code as a standing agenda item on the Construction Ministers' Council meeting.

The National Code of Practice for the Construction Industry has been written by the Australian Procurement and Construction Council Inc. (APCC) in consultation with the Department of Labour Advisory Committee (DOLAC).

The APCC is the national reference for policy advice on procurement and construction matters and is the peak Council for industry interface for the

Commonwealth, State and Territory Governments in these matters. The APCC convenes meetings of the Procurements and Construction Ministers Council.

DOLAC provides a consultative forum on industrial relations matters of significant interest to the Commonwealth, States and Territories. In this forum, matters of mutual interest are discussed, agreed policies are endorsed and recommendations are made to Commonwealth, State and Territory Governments, through the Labour Ministers' Council (LMC).

CONTACTS

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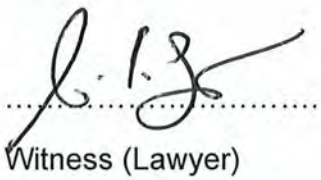
www.workplace.gov.au/workplace/Organisation/Industry/BuildingConstruction/

Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

ANNEXURE SHEET

This is the document referred to as WJ-2 in the statement of Wayne Jenkinson sworn at Brisbane on 8 April 2026.

Wayne Jenkinson



Witness (Lawyer)

Australian Government

Department of Education, Employment and Workplace Relations

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

ISBN 0642326126

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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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).

Note (added on 3 November 2006): 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*

Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

ANNEXURE SHEET

This is the document referred to as WJ-3 in the statement of Wayne Jenkinson sworn at Brisbane on 8 April 2026.

Wayne Jenkinson

Witness (Lawyer)

Department of Justice and Attorney-General

Implementation Guidelines to the Queensland Code of Practice for the Building and Construction Industry

Delivering value for money to Queensland taxpayers

July 2013

Great state. Great opportunity.

Queensland Government

Implementation Guidelines to the Queensland Code of Practice for the Building and Construction Industry

Contents

1. Introduction

The Queensland Code of Practice for the Building and Construction Industry (the Queensland Code) was published in 2000. The Code outlines the Government's expectations for the principles and standards of behaviour to be observed within the building and construction industry in Queensland.

The Queensland Code provides for the development of Implementation Guidelines (Guidelines) to expand on the priorities and objectives of the Queensland Code. The following Guidelines have been developed to assist effective workforce management at all levels of the building and construction industry that achieves the objectives of the Queensland Code. In particular, these Guidelines support:

- **Proactive management of workplace relations.** Workplace relations practices shall ensure the strict rule of law applies so all parties are protected from unlawful conduct.
- **Cost efficiency and productivity**
  Projects are to be delivered on time and within budget with real value for money for the Government and the Queensland taxpayer
- **Workplace Health and Safety and Rehabilitation**
  Parties shall achieve and maintain high standards in workplace health and safety and rehabilitation management and practices
- **Innovation and continuous improvement**
  Parties are to demonstrate a commitment to innovation and continuous improvement in workplace and workforce management practices at the enterprise and project levels, and in the industry generally.

These Guidelines reflect the Queensland Government's commitment to greater flexibility, innovation and productivity within the State's building and construction industry to ensure that the Queensland Government maximises tax payer value-for-money on publicly funded building and construction projects.

2. Application and Scope

2.1 Application

These Guidelines shall apply from 1 July 2013 to all publicly funded building and construction work, as defined in section 11, exceeding $2 million in value that is the subject of an expression of interest or request for tender by the Queensland Government.

For the purposes of the application of the requirements of Section 5 (the requirement to provide a Workplace Relations Management Plan) publicly funded building and construction work shall mean:

i) **building construction projects exceeding $10 million in value that are the subject of an expression of interest or request for tender** and shall include those projects assessed to be High Risk/Significant projects under the PQC System, or other building construction projects involving State Government funding exceeding $10M.

ii) **Road and rail transport infrastructure, bridgework and other civil engineering construction projects exceeding $20 million in value that are the subject of an expression of interest or request for tender** and shall include those projects assessed by the Department of Transport and Main Roads to be High Risk/Significant projects, or other civil construction projects involving State Government funding exceeding $20M.

From 1 July 2013, all parties and related entities must comply with these Guidelines from the date that party first expresses an interest in, tenders for, or enters into a contract to perform public building and construction work to which these Guidelines apply.

2.2 Contract documentation and project management procedures

Client agencies and head contractors are responsible for ensuring the application of, and compliance with, these Guidelines by:

- ensuring that compliance with these Guidelines is an integral component of their contract management systems and procedures; and
- all expressions of interest, tender and contractual documents clearly set out the requirements specified in these Guidelines.

While the form of wording may vary according to the contract form and the type of service supplied, the relevant contractual documents must incorporate a warranty by the head contractor, subcontractors, other contractors, consultants and/or related entities (as applicable) to comply with all aspects of the Queensland Code and these Guidelines.

Relevant contractual documents must also incorporate the consent of the head contractor, subcontractors, other contractors, consultants and/or related entities (as applicable) to allow Building Construction Compliance Branch (BCCB) officials and other Queensland Government authorised personnel to:

- inspect any work, material, machinery, appliance, article or facility;
- inspect and copy any record or document relevant to the project; or
- interview any person, as is necessary to demonstrate compliance with the Queensland Code and these Guidelines.

Head contractors will be required to ensure that their subcontractors consent and allow BCCB officials and other Queensland Government authorised personnel to monitor and investigate compliance as indicated in these Guidelines through relevant contractual provisions and documentation.

2.3 Notification of any threatened, impending, possible or probable or actual unlawful industrial conduct.

Head Contractors and consultants undertaking work covered by the Queensland Code and these Guidelines must notify the Director, BCCB and the client agency of any threatened, impending, possible, probable or actual unlawful industrial conduct or breach of these Guidelines within 24 hours of becoming aware of the threatened, impending, possible, probable or actual unlawful conduct or breach.

Parties with an obligation under the Code and Guidelines will also be required to provide the BCCB with advice of their response (actual and/or proposed) to the threatened, impending, possible, probable or actual unlawful industrial conduct or remedy to the breach as soon as practicable after becoming aware of the threatened, impending, possible, probable or actual unlawful industrial conduct or remedy to the breach.

2.4 Scope

A party interested in performing public building and construction work is expected to strictly comply with these Guidelines from the date that party first expresses interest in, tenders for, or enters into a contract to perform public building and construction work to which these Guidelines apply. A party will also be required to comply with Sections 3, 4, 7, 8 and 9 of these Guidelines (except where expressly exempted) when undertaking privately funded building and construction work in Queensland where expressions of interest or tenders are called for after 1 July 2013.

These Guidelines apply solely to parties who participate in on-site activities.

These Guidelines are intended to apply to all forms of procurement methods including but not limited to: traditional fully documented/lump sum contracts, public private partnerships (PPPs), alliance contracts, managing contractor arrangements -design and construct (D&C); construction management procurement method and any other project funding arrangements or other procurement methods that may be introduced from time to time to reflect changes in Queensland Government contractual and delivery practices.

To achieve the objectives of these Guidelines outlined in section 1 a party must require and actively ensure compliance with these Guidelines by any party with whom it contracts, or enters into an arrangement, to undertake public building and construction work.

A client agency may seek to waive elements of these Guidelines, but only in exceptional circumstances where it is considered in the public interest to do so. In instances where waiver is sought, the client agency chief executive officer must fully document the reasons for seeking the waiver and submit these to the Responsible Minister for consideration. Following a request from the Responsible Minister, the Attorney-General may either approve or not approve the waiver.

Related entities of any party that first expresses interest for, tenders for, or enters into a contract to perform public building and construction work are also required to comply with these Guidelines in respect of any building and construction work they undertake in, or connected with, Queensland.

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.

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.

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

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 the above, controls the tenderer.

2.5 Relationship with the Federal Building Code 2013

The Commonwealth Government issued the Building Code 2013 (the National Code) effective from 1 February 2013. The National Code is a statutory instrument pursuant to s.27(1) of the Fair Work (Building Industry) Act 2012 (Cth).

These Guidelines support the Queensland Code of Practice for the Building and Construction Industry and are to be interpreted in a manner that ensures that they do not contravene the National Code.

2.6 Relationship with the Fair Work Act 2009

a) These Guidelines do not require, encourage or promote conduct that would constitute a contravention of the Fair Work Act 2009 (Cth).

b) To the extent that any provision of these Guidelines, or a party's compliance with any provision of these Guidelines, would, but for this Section 2.6, require, encourage or promote conduct that would constitute a contravention of the Fair Work Act 2009 (Cth), that provision is of no effect.

c) Subject to paragraph (f) below, if any party that is required to comply with these Guidelines considers that a provision of these Guidelines would, but for this Section 2.6,

i. require, encourage or promote conduct by them or any of their contractors, or

ii. apply to or in relation to them or any of their contractors in a manner, that would constitute or give rise to a contravention of the Fair Work Act 2009 (Cth), that party must within 7 days give notice to the BCCB of the reasons why and circumstances in which that party considers the provision would so require or apply, and must thereafter provide the BCCB with any further details of the reasons and circumstances that the BCCB may reasonably require.

d) Without limiting the generality of paragraphs (a) and (b) above, if the BCCB considers at any time that a provision of these Guidelines would or may, but for this Section 2.6, require, encourage or promote conduct that would constitute a contravention of the Fair Work Act 2009 (Cth), the BCCB may issue (and may modify or withdraw from time to time) a Practice Direction declaring the extent to which and the circumstances in which the relevant provision is inoperative while the Practice Direction is in force, and the relevant provision is inoperative and is to be disregarded accordingly.

e) For the avoidance of doubt, if a party acts in reliance on a Practice Direction issued by the BCCB, conduct undertaken in such reliance does not constitute non-compliance with the Guidelines.

f) Parties are not required to notify the BCCB under paragraph (c) in relation to provisions of the Guidelines where the BCCB has issued a Practice Direction specifying that the provision is inoperative in the relevant circumstances.

3. Legal and Related Obligations

3.1 Legal obligations relating to employment

As a minimum, a party must comply, and demonstrate past compliance required by these Guidelines, with all applicable:

- legislation
- 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.

Where a party cannot demonstrate past compliance required by these Guidelines, consideration will be given to the extent of non-compliance and the capacity for future compliance.

3.2 Practices designed to avoid compliance with legal obligations

A party must not enter into, participate in, or facilitate arrangements or practices designed to avoid its own legal obligations, or the legal obligations of others. Without limiting the forgoing, this includes arrangements or practices:

- that are sham contracting arrangements;
- that are designed to avoid or circumvent strike pay obligations;
- that are designed to avoid or circumvent strict conformance with their right of entry requirements in accordance with applicable legislation; or
- that undermine freedom of association.

When undertaking building and construction work, contractors must implement on-site practices and procedures which:

- ensure proactive management of industrial relations for compliance with the objectives of the Queensland Code and these Guidelines;
- encourage cost efficiency and productivity
- provide workplace health, safety and rehabilitation management and practices;
- promote innovation and continuous improvement.

3.3 Unregistered written agreements

A party must not enter into an unregistered written agreement with any third party or parties. An unregistered written agreement is an individual or collective agreement that has not been certified, registered, lodged or otherwise approved under an industrial law, but is concerned with the relationship between an employer and its employees and/or registered or unregistered industrial association. However, it does not include common law agreements made between an employer and an individual employee.

3.4 Independent contractors

Genuine independent contractors undertake a legitimate form of work on Queensland Government building and construction sites and must not be discriminated against.

Arrangements that constrain or otherwise constrict the use of independent contractors and the terms of their engagement are inconsistent with the Guidelines.

This includes terms of an enterprise agreement that (in effect) requires a contractor to ensure where it engages subcontractors, that these subcontractors and their employees will receive terms and conditions of engagement (or terms no less favourable) as they would receive if they were engaged as employees of the head contractor.[1]

4. Workplace arrangements

The Queensland Code stipulates that workforce management will ensure workplace health and safety; industrial relations; training and skill development are integrated within the organisational procedures, practices and performance standards of the organisation.

Effective workforce management at all levels of the construction industry is a key contributor to achieving the key priorities and objectives of the Queensland Code. The Queensland Government is committed to continuous improvement by ensuring service providers achieve an effective workforce-management focus at the enterprise and project levels and in the industry generally.

The following arrangements or agreements, however described or implemented, are inconsistent with the requirements of the Guidelines:

- Parties are prohibited from applying direct or indirect coercion or pressure on another party to make over-award payments. Further, no contractor or consultant is allowed to unduly influence, enter into any agreement, or issue a contract, subcontract or industrial instruction that directly or indirectly binds or otherwise pressures or coerces another party into making over-award payments.
- Payments to industry superannuation, redundancy and income protection funds which provide for contributions in excess of award and legislative requirements are matters to be decided by each employer subject to applicable legislation.
- Provisions in industrial instruments or contracts should not require, or have the effect of coercing or pressuring, any third party including labour-hire firms or group apprenticeship schemes or similar providers to set particular terms and conditions, including the making of an over-award payment.
- Parties are prohibited from requiring or attempting to unduly influence another party to have particular workplace arrangements in place. This includes, but is not limited to, the imposition, or attempted imposition, of a requirement for a contractor to apply project-specific wages and conditions. It is the responsibility of a contractor to negotiate with its employees the form and content of their workplace arrangements free of any coercion or undue influence. Industrial instruments that contain the provisions that impose a site allowance by the head contractor will be non-compliant with the Queensland Code and these Guidelines.
- 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, the following arrangements, or provisions in agreements providing for them, will be non-compliant with the Queensland Code and these Guidelines, if the provision or arrangement is not otherwise required by a relevant Commonwealth or state law:
  - no ratios of employees. An industrial instrument, or workplace practice, must not prescribe or limit the number of employees or workers a company may engage on a particular site or work area, or within their company in general. This includes references to permanent, temporary and casual employees, or the source of labour a company may engage;
  - 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;

[1] Agreements that invoke an 'average' of wages from enterprise agreements other than the agreement of the head contractor would also be inconsistent with these guidelines.

- no last on, first off clauses. An industrial instrument must not contain selection criteria for redundancy that ignore 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, or by reference to the engagement of other sources or types of labour;
- no restrictions on labour. An industrial instrument must not contain a provision that restricts an employer's short or long-term labour requirements (including casual labour; part-time labour; labour hire or the source of labour etc) 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 third party to the employment relations (such as a union) over the number, source, type (for example casual, contract) or payment of labour required by the employer; and
- 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.

- No relaxation of the right of entry provisions for officials of industrial organisations. An industrial instrument must not seek to relax or circumvent the legislative provisions or processes in relation to the right of entry for officials of industrial organisations and/or provide for a person or entity that is not a party to the instrument to monitor its operation. For this purpose, any reference in an industrial instrument to right of entry must provide for entry in the same terms as Part 3-4 of the *Fair Work Act 2009* (Cwth) and/or any relevant and applicable Queensland legislation These procedures govern access to employer and employee records and/or the holding of discussions with employees. Attempts to avoid right of entry requirements for union officials by allowing delegates or shop stewards to have access to employer and employee records and/or the holding of discussions with employees are inconsistent with these Guidelines. Any breaches of this requirement may be deemed a significant breach of the contract.
- An employer must not allow, and an instrument must not provide for, a person or entity that is not covered by the instrument to monitor its operation. Monitoring does not include activity required or permitted under Commonwealth or State law, or monitoring by a Queensland Government or Commonwealth Government agency to ensure compliance with the Queensland Code and these Guidelines.
- No 'standing' authorisation to cease work. An industrial instrument must not contain any terms which provide an entitlement for employees to take paid time off to attend union activities. Provided that training leave arrangements under the relevant modern award are consistent with these Guidelines.
- Clauses that attempt to negate or render ineffective the application of the Queensland Code and these 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 Queensland Code and these 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 Queensland Code and these Guidelines.
- An industrial instrument must not make provision for project agreements to apply in whole or in part, other than for major contracts as defined by the client. (See Section 6 for further details on project agreements.)
- If an industrial instrument provides for a site allowance (howsoever described) , the amount of the allowance must be specified in the industrial instrument, or the instrument must contain an objective and predictable method of determining the allowance amount.

5. Cost, efficiency and productivity

The Queensland Code states that key contributors to quality and value for money outcomes in the building and construction industry are an improved workplace and management culture, better employer and employee relationships, and improved industrial relations planning and management.

All parties must ensure their tenders or expressions of interest strictly comply with the Queensland Code and Guidelines.

5.1 Obligations in Expressions of Interest or tender response

The requirement to provide a Workplace Relationship Management Plan (WRMP) as specified in this section will apply to:

i) **building construction projects exceeding $10 million in value that are the subject of an expression of interest or request for tender** and shall include those projects assessed to be High Risk/Significant projects under the PQC System, or other building construction projects involving State Government funding exceeding $10M.

ii) **Road and rail transport infrastructure, bridgework and other civil engineering construction projects exceeding $20 million in value that are the subject of an expression of interest or request for tender** and shall include those projects assessed by the Department of Transport and Main Roads to be High Risk/Significant projects, or other civil construction projects involving State Government funding exceeding $20M.

The requirement to provide a WRMP does not extend to future privately funded building and construction work or to publicly funded building and construction work under the aforementioned threshold although the tenderer is encouraged to adopt a WRMP to meet the obligations of the Guidelines.

The WRMP must address the following matters:

- Sourcing of labour requirements (e.g. trade packages, direct employees, labour hire, apprentices)
- how workplace arrangements will be regulated, including the provision of any industrial instruments;
- how the head contractor will ensure subcontractors will comply and remain in compliance with the Code and Guidelines;
- engagement of the required labour including, but not limited to, selection processes for engaging contractors, apprentices and other labour procurement arrangements; reference checks and inductions;
- approach to developing and maintaining a productive workforce, ensuring the optimal use of labour requirements (e.g. approach to managing inclement weather and heat, RDOs); and sourcing, selection and training of suitably experienced construction supervisors;
- utilisation of major plant and equipment and the minimisation of unproductive time;
- approach to relationship management with employees, employee representatives and/or unions including, but not limited to, the approach and process for communicating and consulting with the workforce;
- approach to the use and engagement of labour hire;
- approach to managing third party site access;
- approach to ensuring compliance with statutory workplace rights including, but not limited to, freedom of association, freedom from unlawful coercion and freedom from unlawful discrimination;
- approach to performance and conduct management of labour (e.g. disciplinary process to be applied);
- identification of industrial relations risks in relation to the project and details as to the proposed approach to managing those risks, including but not limited to, the following:

- approach to dispute resolution;
- approach to dealing with demarcation disputes;
- response to industrial action (both threatened, impending, probable and actual, lawful and unlawful; protected and unprotected) including in respect of subcontractors;
- approach to management of disputes in relation to rights of entry; and
- approach to minimising lost time or limitations due to industrial disputes.

- approach to the management of subcontractors, outlining:
  - the measures to be taken to select subcontractors who have the skills, capacity and resources to comply with legislative requirements, employment obligations and the WRMP (to the extent relevant);
  - contractual conditions to be imposed on subcontractors to ensure they comply with legislative requirements, employment obligations and the WRMP (to the extent relevant);
  - how dealings with subcontractors and other contractors are to be managed including, but not limited to, identification of representatives and methods for engaging with those representatives; and
  - how subcontractor compliance with the workplace relations requirements will be monitored and enforced

- Be able to demonstrate how it will:
  - achieve the objectives of the Queensland Code and these Guidelines on the project; and
  - deliver the project on time and within budget.

    For example, a tenderer must be able to demonstrate how the objectives of the Queensland Code and these Guidelines relating to costs and improved efficiency and productivity can be met in the context of any of the following (if applicable to the tenderer):
    - restrictions on when work can be performed, such as mandated or fixed rostered day off schedules and one-in-all-in arrangements;
    - the potential for unexpected costs or increased costs during the life of a project, such as site allowances which are not quantifiable at the time of contracting;
    - adoption of a pattern agreement to a project or an industry and which has terms and conditions that are not specific to, or reflect, the needs of the enterprise; and
    - impositions or restrictions on the engagement and/or utilisation of labour.

- Demonstrate that it has a track record of delivering construction projects on time and within budget. However, if this is not possible, the tenderer must demonstrate what actions it has taken to achieve such objectives in the future.

  For example, where a tenderer has failed to deliver construction projects on time and within budget in the past as a result of industrial relations matters, that tenderer must be able to identify:
  - the reasons for the failure; and
  - the steps it has taken to address those matters for future projects.

- Demonstrate that it has a track record of adopting efficient and productive work practices. However, if this is not possible, the tenderer must demonstrate what actions it has taken to achieve such objectives in the future.

A model WRMP is available at www.justice.qld.gov.au

5.2 Contractor obligations

A successful contractor must:

- Comply with its WRMP.
- Act in accordance with its tender response.
- Require compliance with these matters set out above by any party with whom it contracts, or enters into an arrangement, to undertake public building and construction work, to the extent applicable to that party.
- Comply with any reasonable request for access and information from the BCCB or other authorised Government officer.
- Submit to and cooperate with any investigation process by the BCCB or other authorised Government officer on any matters pertaining to compliance with the Queensland Code and Guidelines, including investigations into claims made by a contractor as to its ability to comply with the Queensland Code and Guidelines.

6. Project agreements

The Queensland Code provides that certified agreements, project agreements and multi-employer agreements can provide scope for employers and their employees to improve working conditions and gain a competitive edge by ensuring value for money and quality outcomes. Parties are encouraged to make certified agreements appropriate to their circumstances.

This section does not apply to privately funded building and construction work.

Project agreements on public building and construction projects may only be considered for major contracts as defined by the client. Consideration of a project agreement will be at the discretion of the client agency. Other than in exceptional cases, project agreements will not be permitted on projects worth less than $100 million.

In relation to public building and construction work, the client must not agree to project agreements or project awards unless there is a clear and demonstrable benefit to the Queensland Government in doing so and the use of a project agreement is approved in advance by the Attorney-General on the recommendation of the Responsible Minister. Approval for the use of a project agreement rests with the Attorney-General.

In deciding whether to seek Attorney-General approval for the use of a project agreement, the following must be considered:

- the degree of commitment demonstrated by the parties to the proposed agreement to improving productivity and workplace relations;
- the form of improved time or cost performance compared to what might reasonably be expected in the absence of a project agreement; and
- past performance and the parties' history of maintaining strict compliance and abiding by agreements.

The client agency Chief Executive Officer is accountable for decisions to seek approval of a project agreement and must state the reasons for seeking approval for such an agreement in writing to the responsible Minister. The reasons must satisfy the public interest and include objective and detailed grounds and clearly demonstrate the benefit to the project and the Queensland Government.

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

7. Dispute settlement, industrial action, strike pay and payments[2]

The Queensland Code provides that

- 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.
- the client of the head contractor shall be advised during the progress of the work, and at the earliest opportunity within 24 hrs, of any industrial relations or WH&S matter which may have an impact on the construction program, the head contract, other related contracts or project costs.
- 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).
- No payments, commissions, gratuities or similar payments shall be made directly or indirectly by any contractor or their representatives to a union delegate, union official, union representative or agent or to any union-controlled account or fund however described, for any reason. Payment of any monies is a breach of these guidelines.

7.1 Dispute Settlement

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.

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. 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.

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.

An enterprise 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, the clause must contain an express limitation that any outcome determined by the third party cannot be inconsistent with the Queensland Code and these Guidelines or inconsistent with legislative obligations.

Where a dispute relates to WH&S issues, the procedures contained in the relevant WH&S legislation shall be strictly followed. Parties must take all reasonable steps to resolve grievances or disputes at the enterprise level at the earliest opportunity, in accordance with the procedures outlined in the relevant industrial instrument or other workplace arrangement. Any time lost through industrial action, either lawful or unlawful, must be reported to the BCCB as soon as practicable or within 24 hours of the commencement of the lost time.

The head contractor must report any grievance or dispute, including any threatened, possible probable or impending dispute, relating to workplace relations or WH&S matters that may impact on project costs, related contracts or timelines to the BCCB and the client agency within 24 hours of it becoming aware of

[2] This section replaces Section 5.3.2 of the Queensland Code of Practice for the Building and Construction Industry.

the grievance or dispute. The head contractor must provide regular updates to the BCCB and the client agency about the steps being taken to resolve such grievances or disputes.

The head contractor must implement procedures to enable such reporting to occur at the earliest opportunity. All lost time information as a consequence of lawful and unlawful industrial conduct must be accurately recorded and provided to the BCCB and client agency on a timely basis.

7.2 Industrial Action

Parties must take all reasonable steps to resolve industrial action which adversely affects, or has the potential to adversely affect, the delivery of a project or other related contracts on time and within budget.

Contractors must report any threatened or actual industrial action that may impact the project, project costs, related contracts or timelines to the BCCB and the client agency as soon as practicable and within 24 hours of the threatened or actual industrial action. The contractor must provide regular updates to the BCCB and the client agency about the steps being taken to resolve the threatened or actual industrial action.

Contractors must take all steps reasonably available to them to prevent or bring to an end unprotected industrial action occurring on, or affecting the project, including by pursuing legal action where possible. Contractors will be required to use their best endeavours to pursue legal remedies to protect their rights and obligations under the Code and Guidelines. A failure to instigate appropriate legal remedies may be considered to be a breach of the Guidelines.

Contractors must also report any request by any industrial organisation or their representative for payment of any kind in relation to a threatened, impending, possible, probable or actual industrial dispute.

8. Workplace health and safety and rehabilitation

Consistent with the National Code, the Queensland Code provides that workplace health and safety obligations must be actively addressed by all industry participants

All parties must meet their WH&S obligations according to relevant laws.

8.1 Achievement of the workplace health and safety objectives of the Queensland Code and these Guidelines

A tenderer must have policies and practices and be able to demonstrate how they will achieve the objectives of the Queensland Code and these Guidelines in relation to workplace health, safety and rehabilitation including how it will promote the highest standards of safety practice in the industry.

8.2 Effective workplace health and safety risk management

A tenderer must have policies and practices and be able to demonstrate:

- detailed risk management processes that can be applied to both the design and construction phases of the project;
- processes for reviewing, updating and communicating the WH&S and Rehabilitation Management Plans
- a documented 'Fit-for-Work' policy and procedures applicable on all projects[3].
- provision of adequate WH&S and rehabilitation resources during the project, including human resources, financial resources and technical resources;

[3] A framework for alcohol and drug management in the workplace is available at http://www.deir.qld.gov.au/workplace/resources/pdfs/alcohol-drug-management.pdf

- emergency response and incident management processes, including identification of personnel with specific responsibilities and proposed engagement with emergency services prior to and during the project;
- processes for the preparation and communication of task specific safety procedures (e.g. SWMSs), including sample procedures for addressing high risk construction activities (e.g. work at heights);
- processes for ensuring all persons working on the project receive necessary information and training, including general induction training, site induction training and task-specific training;
- reporting and investigation of incidents resulting in (or with the potential to result in) personal injury and property damage;
- strict adherence to lawful right of entry provisions;
- appropriate WH&S and rehabilitation performance monitoring, auditing and reporting processes for the project, including frequency and responsible personnel;
- appropriate systems for case management and rehabilitation of injured workers;
- appropriate record-keeping and document management systems.

A tenderer must be able to demonstrate that it has a track record of delivering construction projects safely. However, if this is not possible, the tenderer must demonstrate what actions it has taken to achieve such a track record in the future.

For example, where a tenderer has failed to deliver construction projects safely in the past, that tenderer must be able to identify:

- the reasons for the failure; and
- the steps it has taken to address those matters for future projects.

8.3 Commitment of senior management to safety

A tenderer must have policies and practices that demonstrate its senior managers are proactively involved in, and committed to, achieving safety objectives and improving safety outcomes on the project.

Such commitment may be demonstrated by:

- recognition under the Queensland Government prequalification systems and/or WH&S Queensland's Zero Harm at Work Program;
- the tenderer's WH&S policy;
- governance structures and reporting requirements that enable senior management to understand and respond to WH&S issues on the project including the identification of WH&S and rehabilitation personnel, WHS and rehabilitation responsibilities and accountabilities and WHS and rehabilitation reporting lines.

8.4 Consultation and issue resolution

A tenderer must have policies and practices and demonstrate how it will engage with other parties about safety on the project and resolve safety issues that arise in order to achieve the objectives of the Queensland Code and these Guidelines, including how it will promote the highest standards of safety practice in the industry as well as the delivery of the project on time and within budget.

A tenderer must have a process for each of the following:

- **Consultation with workers and employee representatives,** which addresses: determination of designated work groups, election/training of health and safety representatives, establishment of health and safety committees, agreement on specific roles/rights for Health and Safety Representatives (HSRs) and committee members, establishment of WH&S right of entry protocols and the procedural requirements for consultation (e.g. how consultation is to occur – in person, via email, through HSR)

- **Consultation, cooperation and coordination with other stakeholders**, which addresses: transfer of knowledge and information before and during the project, allocation of WH&S roles and responsibilities, collaboration about risk management and emergency response and communication/reporting protocols. Relevant stakeholders may include (depending on the project) other contractors/consultants, residents or occupiers near the project site; utility/asset owners and emergency services;
- **WH&S issue/dispute resolution**, which addresses: reporting of WH&S issues to the tenderer, roles and responsibilities for responding to issues reported, consultation requirements, protocols for involving third parties (including regulators, employee representatives, other stakeholders, independent bodies/experts, etc) and timelines for resolution/escalation; and
- **Engagement with regulatory authorities**, which addresses: proactive engagement and relationship building with relevant regulators; consultation with regulators regarding safety issues and best practice, provision of information regarding the project to regulators and responding to the exercise of regulatory powers and/or enforcement action.

9. Freedom of association and right of entry

Consistent with the National Code, the *Fair Work Act 2009* and the Queensland *Industrial Relations Act 1999*, all parties have the right to freedom of association. This means that parties are free to join or not to join an industrial organisation 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 organisation. A person cannot be forced to pay a fee to an industrial organisation if not a member.

The Guidelines require:

- All contractors must adopt policies and procedures that promote freedom of association;
- Practices which do not promote freedom of association are inconsistent with these Guidelines. By way of example, the following practices are inconsistent with these Guidelines:
  - providing the names of new staff, job applicants, contractors or subcontractors to unions other than as required by law;
  - no ticket, no start signs, show card days or any other similar practices that imply that union membership is anything other than a matter for individual choice;
  - employers unlawfully encouraging or discouraging employees to join a union;
  - using employee representatives, site delegates or other union representatives to administer site induction processes. Administering site induction processes is a responsibility of site management and cannot be delegated. These process are to be undertaken by site management. Where there is a requirement in any enterprise agreement for employee representatives, site delegates or other union representatives to administer site induction processes, then any such process must be overseen by, and actively involve, site management;
  - discriminating against or disadvantaging elected employee representatives;
  - using forms requiring the employee to identify their union status, or requiring employers and contractors to identify the union status of employees or subcontractors;
  - refusing to employ, or terminating an employee's employment, because of their union status;
  - an employer refusing a reasonable request from a workplace delegate to represent an employee or employees in relation to grievances and disputes or discussions with members;
  - the request, threat or imposition, or attempted imposition, of a requirement for any contractor, subcontractor or employer to hire any individual nominated by a union or to employ a non-working shop steward or job delegate. Practices or arrangements which facilitate non-working shop stewards or job delegates are inconsistent with the Queensland Code and Guidelines;
  - a requirement by a Union that an employer display Union or other logos, mottos or other signage at the worksite or on property or equipment supplied by an employer; and

- any requirement that a person pay a bargaining fee, however described, to an industrial association of which he/she is not a member, in respect of services provided by it.

- An employer, or an industrial instrument, must not seek to relax or circumvent the legislative provisions or processes in relation to the right of entry for officials of industrial organisations and/or provide for a person or entity that is not a party to the instrument to monitor its operation. For this purpose, any reference in an industrial instrument to right of entry must provide for entry in the same terms as Part 3-4 of the Fair Work Act 2009 (Cwth) and/or any relevant and applicable Queensland legislation. These procedures govern access to employer and employee records and/or the holding of discussions with employees. Attempts to avoid right of entry requirements for union officials by allowing delegates or shop stewards to have access to employer and employee records and/or the holding of discussions with employees are inconsistent with these Guidelines. Any breaches of this requirement may be deemed a significant breach of the contract.
- An employer must not allow, and an instrument must not provide for, a person or entity that is not covered by 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 a Queensland Government or Commonwealth Government agency to ensure compliance with the Queensland Code and these Guidelines.

10. Queensland Government oversight and administration of these Guidelines[4]

The Queensland Government and its agencies are committed to the implementation of the Queensland Code and these Guidelines. Breaches of the Queensland Code and these Guidelines may result in sanctions being imposed. These may include:

- Commercial sanctions;
- Remedies under the contract;
- Disciplinary action where the breach is by a public sector employee.

Commercial sanctions

Commercial sanctions for breaches of the Guidelines are based on the Government's right as the client to choose with whom they do business. Sanctions will depend on the nature and seriousness of the breach and on any lack of commitment shown to the requirements of the Code. The sanction imposed may involve one or more of the following:

- A formal warning;
- Partial exclusion from tendering for a specified period (i.e. a reduction in the number of tendering opportunities);
- Full exclusion from tendering for any work for a unspecified period;
- Review of prequalification accreditation;
- Publication of the breach.

Contractual remedies

Client agencies may choose to exercise the right to seek remedies under relevant clauses of the contract.

Where it is suspected that the breach of the Guidelines involves an infringement of a law or statute, the matter will be referred to the relevant administering agency. The monitoring of compliance with specific statutory requirements remains the responsibility of the relevant government agencies that administer those requirements.

[4] The following section replaces the monitoring and compliance provisions contained in Section 6 of the Queensland Code.

10.1 Monitoring compliance

Attorney-General

The Attorney-General has overall responsibility for the implementation and management of these Guidelines. The Attorney-General will report on performance and incidents of non-compliance with the Guidelines to Cabinet at least annually.

The Building Construction Compliance Branch (BCCB)

The BCCB, within the Department of Justice and Attorney-General, will have operational responsibility for monitoring compliance with the Guidelines, investigating suspected breaches and reporting non-compliance.

Monitoring activity will include desktop and field audit activities, site visits, site inspections, inspection and copying of any relevant documentation, interviewing relevant stakeholders and post contract review any other activity that will enable the BCCB to determine a party's compliance or otherwise with the Queensland Code and Guidelines.

Where a tenderer is required to submit a WRMP the BCCB will assess the WRMP for compliance with the Guidelines and report to the client agency on its findings.

The BCCB will also:

- promote awareness of the Queensland Code and these Guidelines to all stakeholders through a range of information products and educational activities;
- liaise with relevant Commonwealth and other government agencies, including Fair Work Building and Construction, on matters relating to the operation and compliance with the Guidelines;
- make recommendations for sanctions in the event of a proven breach of the Guidelines; and
- make recommendations to further develop the effectiveness of the Guidelines to deliver improved productivity and value for money for publicly funded projects.

The BCCB will respond to reports of alleged breaches of these Guidelines and conduct audit activity on its own initiative.

The avenues already available to individuals in the private sector who wish to raise issues associated with the performance of government agencies, including representations to government Ministers, Members of Parliament and the Ombudsman are unaffected by these Guidelines.

The BCCB will provide feedback to the head contractor and client agency as appropriate, including where alleged breaches of the Guidelines are identified.

The BCCB must give the party alleged to have breached the Guidelines an opportunity to make submissions to the BCCB. The BCCB may, or will if requested by a party, liaise with the relevant industry association representing the party alleged to have breached these Guidelines.

After the party has been given the opportunity to respond to the alleged breach of the Guidelines, the Director, BCCB or delegate will provide a notice of the outcome of the investigation to the party and to the client agency. Notification of any proven breach may be accompanied by a recommendation for any sanction or remedial action. Action in response to the notification, including sanction, is to be timely to ensure the breach is remedied and future breaches are discouraged. Such action is to be reported to the BCCB within 14 days of receipt of the notice of outcome from the Director, BCCB.

Review of a decision made under these Guidelines

Any party wishing to contest or appeal any action or decision made by the BCCB under these Guidelines in relation to alleged non-compliance with these Guidelines may request a review of that action or decision by writing to the Director-General, Department of Justice and Attorney-General within 14 days of the date of the letter advising of the action or decision.

The review will be conducted by a person appointed by the Director-General Department of Justice and Attorney-General who, in the Director-General's opinion, has relevant experience.

The review is to be conducted in an informal manner and taking into account those matters considered during the process in light of the matters raised in the letter requesting the review. It is intended that there will be no delay to a project as a result of the conducting a review.

The person conducting the review shall provide a written report to the Director-General who, in turn, will respond to the person requesting the review and provide the report to the Attorney General. The report and response must be completed within 28 days of the request for review.

Breaches by agencies and agency employees

The Government has made adherence to these Guidelines a key measure of agencies' performance. Chief Executive Officers are responsible for ensuring their agency's compliance with the Guidelines. Proven breaches by a client agency will be reported to the Chief Executive Officer of the client agency. The client agency CEO will provide advice to the BCCB of remedial action taken to remedy the breach and stop a recurrence (including any disciplinary action where the breach is by a public sector employee).

Industry associations

Industry Associations are expected to contribute towards making the Queensland Code and Guidelines operate effectively. Where a Head contractor, contractor, consultant or related entity is found to have breached the Code, the circumstances of the breach may be referred to the relevant association for appropriate action under the association's rules or code of practice.

Notification to client agencies

Where a tendering party is to be subject to an industrial instrument that has been approved by Fair Work Commission, the party must include details of any areas wherein the instrument does not conform with the requirements of these Guidelines and for any related entity or entities in any declarations it makes to client agencies in relation to compliance with these Guidelines.

11. Definitions[5]

The following are explanations of terms used in these Guidelines:

a) **Building and construction work** includes:

- all organised activities concerned with demolition, building, landscaping, civil engineering, process engineering, mining and heavy engineering; and
- 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;

but excludes

- mining operations, maintenance, landscaping such as lawn mowing, pruning and other horticultural activities and cleaning buildings.

For the purposes of the application of the requirements of Section 5 (Workplace Relations Management Plan) publicly funded building and construction work shall mean:

i) **building construction projects exceeding $10 million in value that are the subject of an expression of interest or request for tender** and shall include those projects assessed to be

[5] Definitions are to be drawn from the Section 7 of the Queensland Code of Practice for the Building and Construction Industry.

High Risk/Significant projects under the PQC System, or other building construction projects involving State Government funding exceeding $10M.

ii) **Road and rail transport infrastructure, bridgework and other civil engineering construction projects exceeding $20 million in value that are the subject of an expression of interest or request for tender** and shall include those projects assessed by the Department of Transport and Main Roads to be High Risk/Significant projects, or other civil construction projects involving State Government funding exceeding $20M.

b) **Building and Construction Compliance Branch (BCCB)** means the Branch established within the Department of Justice and Attorney-General which has operational responsibility for the administration of the Guidelines.

c) **Client** means the project, building or facility owner or their agent. In relation to public building and construction work means the client agency.

d) **Client agency** means any department or statutory body as those expressions are defined in the *Financial Accountability Act 2009* and any government owned corporation and its subsidiaries where the shareholding Minister has given a notification pursuant to section 123 of the *Government Owned Corporations Act 1993* that enters into a contract for building and construction work with the head contractor.

e) **Consultant** means a professional acting as an organisation or individual such as an architect, engineer, quantity surveyor, project manager, building scientist or the like, commissioned to advise on or undertake planning, design, supervision or specific technical advisory activities relevant to a project or building.

f) **Contractor** means an organisation, entity or individual responsible for the performance of the work specified under a contract.

g) **On-site** includes the primary construction site(s) or any auxiliary or holding sites, where building and construction related work is performed.

h) **Over-award payment** means any payment and/or benefit above that set out in the relevant award, registered agreement and/or legislation and includes payments provided for in workplace arrangements.

i) **Party** includes, but is not limited to, clients, agents of clients, head contractors , subcontractors, suppliers, consultants, employees, unions including their officials, employees and members and industry associations while undertaking a representative role.

j) **Head contractor** means the party with whom the client agency enters into a contract for building and construction work as nominated under the Queensland *Work Health and Safety Regulation 2011.*

k) **Privately funded building and construction work** means building and construction work in Queensland that is not publicly funded building and construction work.

l) **Public building and construction work** means publicly funded (in whole or in part) building and construction work undertaken by, or on behalf of a client agency.

m) **Responsible Minister** means, in relation to a client agency, the Minister responsible for the portfolio within which the client is located.

n) **Tender** means an offer in writing, which includes price, bids, quotations and consultant proposals in response to an invitation to execute work or supply goods.

o) **Tenderer** means any party responding to an expression of interest or submitting a tender for public building and construction work, including head contractors, contractors, subcontractors and suppliers.

p) **WH&S** means work, health and safety.

Contact the Building Construction Compliance Branch at:

Telephone: **(07) 3225 2299**

Email: BCCB@justice.qld.gov.au

Postal: **GPO Box 69,**
BRISBANE QLD 4001

Web: www.justice.qld.gov.au

Guidelines: http://www.justice.qld.gov.au/building-and-construction-industry-guidelines

Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

ANNEXURE SHEET

This is the document referred to as WJ-4 in the statement of Wayne Jenkinson sworn at Brisbane on 8 April 2026.

Wayne Jenkinson

Witness (Lawyer)

Queensland Code of Practice for the *Building and Construction Industry*

Queensland Government

QUEENSLAND

CODE OF PRACTICE

FOR THE

BUILDING AND CONSTRUCTION INDUSTRY

ISBN 0 7242 9315 9

Queensland Government
– Department of Employment, Training and Industrial Relations
– Department of Public Works
– Department of Main Roads

Contents

1 Introduction

1.1 A Cooperative and Integrated Approach

To ensure its continued contribution to economic growth, the Queensland Government is committed to the development and long-term viability of the building and construction industry in Queensland. This commitment embraces a wide range of initiatives dealing with such issues as licensing, dispute resolution, security of payment, tendering and selection processes, cooperative industrial relations, workplace health and safety, and skill development.

Improved performance in the building and construction industry has a marked influence on the wellbeing of the Queensland economy. To sustain this performance in an increasingly globalised market, the industry must strive for continuous improvement, integration, value for money and international competitiveness. These outcomes will create economic and social benefits, particularly in terms of increased economic activity and employment, and a skilled and adaptable workforce.

The *Queensland Code of Practice for the Building and Construction Industry* (the Code) is a key element of the Government's industry-development strategy. This Code outlines specific principles and standards of behaviour that underpin best practice while promoting positive change in the industry. In particular, the Code promotes a shift in industry culture away from the prevailing adversarial approach to a more cooperative model.

1.2 Key Priorities

As a major client of the building and construction industry, the Queensland Government will provide leadership in effecting major improvements in the way business is conducted. The Queensland Government's *Key Priorities* in this regard are:

- a viable and growing Industry;
- the achievement of world's best practice and international competitiveness by the Queensland industry;
- the establishment of cooperative, long-term relationships between Government and the industry; and
- quality and value-for-money outcomes that will continue to improve public and private infrastructure for Queenslanders.

The introduction of the Code expresses a commitment by the Queensland Government to deal only with organisations and personnel whose standards of behaviour conform to the principles of the Code.

1.3 Objectives

The *Objectives* of the Code are to:

- define ethics and standards of behaviour expected of all parties;
- encourage best practice and improve the performance of all parties in the industry in Queensland;
- promote a cooperative (non-adversarial) approach by all parties in their dealings with one another to achieve the *Key Priorities*;
- outline expectations of performance for industrial relations;
- outline expectations for workplace health and safety and environmental management;

- outline the standards the Queensland Government requires as a client;
- maximise opportunities for local industry participation as an aspect of value for money;
- encourage high standards within the building and construction industry by seeking from those involved in the industry a commitment to comply with the spirit and intent of all laws, regulations, codes of practice and contracts relating to the industry;
- encourage professional development and industry training;
- support the principles of sustainable development; and
- encourage innovation and the use of technology.

1.4 Application

The Code of Practice and any *Implementation Guidelines*, which expand on key aspects and objectives of the Code, must be observed by all parties involved in building and engineering contracts, maintenance contracts and consultants' commissions with any Government agency. They also prescribe what Government agencies must observe in their dealings with the industry. Projects involving private sector participation in the provision of public infrastructure, including Build/Own/Operate (BOO) will be subject to the Code when expressly provided for.

Parties seeking Government building and construction work are required to adhere to the Code in all their operations. All parties involved in local government and non-government building and construction work are encouraged to adopt this Code on a voluntary basis.

This Code applies to all procurement processes relating to all building and construction contracts and consultant commissions for which tenders are invited. The Code does not apply retrospectively.

The application of the provisions of the Code is, at all times, subject to the provisions of any legislation and relevant individual contracts.

1.5 Monitoring

A consultative committee consisting of Government, industry associations and unions will:

- monitor and encourage compliance by all parties with the Code; and
- review processes to ensure the *Key Priorities* and *Objectives* are achieved.

2 Relationships and Responsibilities

Successful working relationships are built upon the essential qualities of trust, cooperation, equity and honesty. These qualities should be reflected in all links in the contractual chain. Parties shall make a positive commitment to develop relationships that are founded on common goals and shared benefits rather than conflict.

Government agencies will seek to work with service providers who can work cooperatively and are willing to develop business relationships designed to deliver optimum benefits to all parties.

2.1 Responsibilities

All parties to the Code are required to:

- comply with the Code and take action to address Code issues;
- adopt and promote a cooperative (non-adversarial) approach and communicate honestly in all relationships and business dealings in all combinations and at all levels;
- promote and strive to achieve the *Key Priorities* and *Objectives*;
- improve skills and capabilities in procurement, financial planning, management and business efficiency;
- maintain confidentiality, particularly in connection with commercial issues;
- operate within the law and comply with all relevant legislation, regulations and Government policy regarding employment and training, workplace health and safety, and environmental management;
- comply with the *State Government Building and Construction contracts – Structured Training Policy (10% Training Policy)*;
- comply and promote compliance with the provisions of applicable awards and/or enterprise or project agreements, dispute settlement procedures, all orders, formal directions and decisions of any court of competent jurisdiction, and all other legislative obligations relating to employment; and
- establish internal mechanisms to ensure compliance and deal with transgressions of the Code.

3 Tendering Ethics

The *Australian Standard Code of Tendering* (AS 4120-1994[1]) constitutes a statement of ethics that underpins best-practice tendering procedures and obligates all parties who adopt it to refuse to condone unethical behaviour by others in the industry. All parties operating at all levels on Queensland Government building and construction projects are to adopt ethical principles consistent with *The Australian Standard Code of Tendering.* Inherent in the adoption of this standard is a commitment to deal only with industry parties whose standards of performance and behaviour conform to those expected by this Standard. Parties tendering will demonstrate a history of compliance with Queensland law and this Code.

3.1 Ethical Principles

The *Australian Standard Code of Tendering* is based on the following principles:

- tendering at all levels in the construction industry shall be conducted honestly and in a manner that is fair to all parties involved;
- parties shall comply with all legislative obligations, including those required by trade practices and consumer affairs legislation;
- the Principal shall have regard to the costs of tendering and the number of tenderers, recognising that the cost of tendering is a significant industry overhead;
- tenderers shall only tender where they intend to carry out the work;

[1] Australian Standard Code of Tendering – AS 4120-1994, Standards Australia, 1994.

- the Principal shall call for tenders only after the Principal has arranged funding for the project and has made a firm commitment to proceed with the project;
- the conditions of tendering shall be the same for each tenderer;
- parties shall not engage in practices such as collusion on tenders, inflation of prices to compensate unsuccessful Tenderers, secret commissions or any other such improper arrangements;
- the Principal and tenderers shall be prepared to attest to their probity, if necessary by statutory declaration and other reasonable means;
- tender documents shall specify the Principal's requirements as clearly and precisely as possible and when documents are altered, sufficient time shall be allowed for all tenderers to review and revise their tenders;
- the Principal shall specify what information in the tender documents is required to be treated by tenderers as confidential. However, it is acceptable to have public openings of tenders and disclosure of Tender prices;
- any party with a conflict of interest shall immediately disclose that conflict of interest.

3.2 Collusive Practices

Collusive tendering practices are illegal and inconsistent with the establishment and maintenance of the ethical business practices that underlie good working relationships. Parties will ensure that collusive practices do not occur.

For the purpose of the principles outlined above, collusive practices include but are not limited to:

- any agreement between tenderers as to who should be the successful tenderer;
- any meetings of tenderers to discuss tenders before the submission of the tenders if the client is not present;
- exchange of information between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderer;
- agreements between tenderers to fix prices or conditions of contract; that is, any collaboration between tenderers on prices or conditions to be included in contracts or commissions without the consent of the client;
- any assistance to any tenderer to submit a cover tender; that is, a tender submitted as genuine yet has been deliberately priced in order not to win the contract or commission; and
- any agreement between tenderers before submissions of tenders to fix the rate of payment of employer or industry association fees, where the payment of such fees is conditional on the tenderer being awarded the contract or commission.

Collusive activity and anti competitive behaviour are minimised by client practices which emphasise the principle of value for money in procurement and the tendering and selection process.

4 Continuous Improvement and Best Practice

4.1 Commitment

Those seeking to do business with the Queensland Government and those working on Government projects must demonstrate a commitment to the *Key Priorities* and *Objectives* of the Code. This is essential if the industry is to maintain and enhance its influential position in the Queensland economy.

In the context of a building and construction industry enterprise, best practice embraces superior:

- business relationships and practices;
- organisational systems and standards;
- workforce-management policies and practices;
- time, cost and quality outcomes.

Commitment to continuous improvement and best practice will be tested and measured using criteria that reflect these qualities. Such criteria have been incorporated into the Queensland Government's prequalification systems. Incentives may be provided for enterprises that demonstrate superior performance including, for example, more opportunities for work and longer-term relationships. In their dealings with industry, Government agencies are expected to encourage the attainment of best practice by all parties.

4.2 Project Planning and Contract Documentation

Building and construction is an inherently complex undertaking. Poor project planning and poor or inconsistent contract documentation can lead to cost overrun, quality issues and disputes. All parties have a responsibility to ensure that effective project planning is carried out and that an appropriate level of expertise and resourcing is applied to the process.

The stated objectives of the Queensland Government's State Purchasing Policy are to advance Government priorities, achieve value for money and ensure probity and accountability for outcomes. The Local Industry Policy outlines the Queensland Government's commitment to supporting local industry and to ensuring that local industry is provided with full, fair and reasonable opportunity to tender for work on major projects in Queensland. All Government agencies are to apply the principles and processes outlined in these policies during their project planning and in their contract documentation.

Additionally, all parties should adopt a proactive approach to project planning by:

- applying strategic management principles;
- clearly defining project scopes;
- developing clear risk-identification and management strategies, including industrial relations;
- identifying planning and resource issues early, including human, physical, workplace health and safety, rehabilitation, environmental and financial concerns;
- establishing and maintaining well-defined lines of communication;
- clearly defining roles and responsibilities;
- deploying staff to tasks who have appropriate technical qualifications, skills and experience;

- preparing contingency plans; and
- seeking approval to subcontract or sub-subcontract core works.

4.3 Cooperative Contracting

All parties are expected to adopt a cooperative approach to contracting and contract administration. Parties involved in contracts are to:

- cooperate and maintain communication and relationships with other parties in the administration of contracts so they may fulfil their contractual obligations and mitigate potential cost and time overruns;
- maintain confidentiality;
- appoint personnel with appropriate levels of skill, competence and authority to administer contracts;
- respond promptly to reasonable requests for advice and information;
- cooperate to minimise problems, claims or disputes; and
- adopt a non-adversarial approach to dispute resolution to the extent that legal recourse is reserved as a last resort.

4.4 Management and Administration of Contracts

All parties must devote an appropriate level of skill and competence to the management and administration of contracts. This incorporates:

- technical skills and experience;
- financial skills;

- knowledge of the applicable procurement and contract system;
- commercial expertise; and
- identification and allocation of risk.

4.5 Innovation and the Use of Technology in Construction

The Queensland Government is committed to promoting a culture of innovation in the building and construction industry and as a client, is keen to deal with service providers who are prepared to provide innovative solutions to complex problems. Innovation requires parties to re-examine the ways things are done and to find new and better ways of achieving superior results. This means the achievement of continuous improvement in all aspects of an enterprise, such as design and construction processes; business practices; financial management; project management; workforce management; and the use of technology.

In the future, trends in technology, particularly information technology (IT), may be the greatest driver of change in the building and construction industry. Electronic tendering and documentation, data communication, virtual design, shared project data and databases, construction automation, and energy management will have a significant impact on industry practices. Those parties that are slow to react to these trends will have difficulty in remaining competitive.

The Queensland Government will help facilitate this change by developing policy and practices concerning the use of IT in the industry and by integrating them into its own business processes and interfaces when and where it is feasible and appropriate. All parties are encouraged to respond by addressing technology changes and enhancing the use of IT in their own operations.

4.6 Environmental Management

The increasing rate of change that human activity imposes on local and global environments is becoming a major source of concern to communities and governments alike. 'Valuing the environment' is one of the Queensland Government's whole-of-government priorities. It encompasses protecting the environment for current and future generations and the responsible and sustainable development of Queensland's natural and primary resources.

All parties shall work towards incorporating best-practice environmental management into the culture of their organisations. In this way, environmental practices that are above and beyond mere compliance with regulatory requirements will become integrated with day-to-day work practices.

All parties are to comply with all relevant legislation, associated regulations and environmental protection policies concerned with environmental protection.

4.7 Security of Payment

At all levels throughout the contract chain, all parties are entitled to receive payments due to them under the contract.

All parties are to comply with all relevant legislation concerning security of payment and to strive for best practice in this regard. In the context of best practice, this means a:

- responsibility on claimants for accurate and timely preparation, documentation and submission of claims;

- responsibility on parties to consider, process, pay and finalise claims in a reasonable and timely manner;
- requirement on parties to a claim to address, negotiate and settle any dispute in a reasonable, timely and cooperative way;
- requirement by contractors, subcontractors, consultants and suppliers and employers to fulfill applicable industrial awards and/or certified agreements or legislative requirements regarding their employees;
- responsibility to advise the client that wages and entitlements are owed to employees; and
- responsibility to seek approval to subcontract or sub-subcontract core works.

5 Workforce Management

Workforce management will ensure workplace health and safety; industrial relations, training and skill development are integrated with the organisational procedures, practices and performance standards of the organisation.

Effective workforce management at all levels of the construction industry is a key contributor to achieving the *Key Priorities* and *Objectives*. The Queensland Government is committed to continuous improvement by ensuring service providers achieve an effective workforce-management focus at the enterprise and project levels, and in the industry generally.

Workforce management requires service providers to:

- create and maintain a safe working environment;
- integrate training and skill development into project management; and

- support cooperative and productive industrial relations, including compliance with awards and/or agreements and legislation.

These objectives centre on industry participants adopting a broad-based agenda to improve productivity through:

- effective communication;
- teamwork;
- high standards in workplace health and safety;
- training and skill development;
- effective workplace practices;
- promotion of access, equity and equal employment opportunity; and
- continuous improvement and best practice.

5.1 Training and Skill Development

Industry wide flexible, accessible and innovative approaches to skill development will enable the building and construction industry to react positively to the changing demands of the workplace, and provide opportunities for the workforce to obtain nationally recognised qualifications.

By integrating training and skill development into management processes and project management, enterprises can positively react to changing knowledge and skill requirements. Compliance with policies such as the *State Government Building and Construction Contracts—Structured Training Policy (10% Training Policy)* on Government projects is a major step in the training process. Service providers are expected to implement a systematic and rigorous approach to training and skill development.

Training and skill development on construction projects will be based on:

- compliance with the Government's relevant training, skill development and equal employment opportunity policies for the construction industry;
- training for the next generation of construction employees;
- commitment to skilling workers to support technological changes;
- equal employment strategies in non-traditional areas; and
- commitment to training, which leads to nationally recognised qualifications.

5.2 Workplace Health and Safety

The Queensland Government attaches a very high priority to the improvement of workplace health and safety for participants in the building and construction industry. It is imperative that workplace health and safety management is integral to the culture of the industry.

Service providers are required to implement comprehensive management systems, ensuring a safe working environment, in compliance with existing workplace health and safety legislation.

Overall control of the management of workplace health and safety on government projects and sites, is the responsibility of the principal contractor as defined in the *Workplace Health and Safety Act 1995*. Principal contractors, in meeting their obligations under this Act, will:

- take all practical steps to ensure their service providers and workers engaged in work subject to the contract comply with all relevant legislation;

- maintain a documented workplace health and safety management plan for each project;
- meet performance standards in nominated core areas;
- implement a monitoring and self-assessment regime; and
- ensure on-site workplace health and safety provisions are met.

5.2.1 Workplace Health and Safety Management Systems

Service providers are required to ensure that quality workplace health and safety management systems are implemented and maintained to ensure a high standard of performance.

Implementation of a managed and systematic approach to health and safety will lead to definition of roles, duties and responsibilities for all parties involved on the project and will drive continuous improvement of individual and industry performance.

5.2.2 Workers' Compensation Insurance

Queensland WorkCover legislation provides benefits for workers who are injured in their employment and protection for employers. Service providers are to ensure all applicable requirements of this legislation are met, including the payment of any premiums or charges levied in respect of all workers and the provision of rehabilitation for injured workers.

No party shall require or compel any party, either directly or indirectly, to pay workers' compensation benefits above the statutory obligation to do so under the *Workplace Health and Safety Act 1995* and/or registered industrial agreements.

5.3 Industrial Relations

Key contributors to quality and value for money outcomes in the building and construction industry are an improved workplace and management culture, better employer and employee relationships, and improved industrial relations planning and management.

Service providers shall adopt a strategic approach in managing industrial relations and integrate industrial relations into all normal aspects of activity. Service providers are discouraged from subcontracting core works without the principal's approval.

In implementing a strategic approach to industrial relations it is expected service providers will:

- integrate industrial relations with the normal procedures, practices and performance standards of the enterprise and projects; and
- develop and implement a sound industrial relations management plan that ensures industrial relations issues and risks are identified, assessed and managed.

5.3.1 Awards and Legal Obligations Relating to Employment

All parties must comply with the provisions of applicable:

- awards and industrial relations arrangements that have been certified, registered or otherwise approved under the relevant industrial relations legislation; and
- legislative requirements.

Arrangements or practices designed to avoid awards, registered agreements and/or legislative obligations are not permitted, including inappropriately treating a genuine employee as an independent contractor and inappropriate application of taxation arrangements.

Any information obtained to ensure obligations are being met is to be obtained through proper means, and in a way that respects confidentiality.

5.3.2 Workforce Dispute Settlement

All parties are required to make every effort to resolve grievances or disputes at the enterprise level in accordance with the procedure outlined in the relevant award or registered agreement. If a dispute cannot be resolved at a particular level, it should be referred to higher levels within an acceptable timeframe.

Where, due to the nature of the dispute, a conflict arises between the dispute procedures of the principal contractor and that of subcontractor/s then the principal contractor's procedures shall prevail for the settlement of the dispute. If the matter remains unresolved, the dispute should be referred to the Industrial Relations Commission for settlement.

All parties to a dispute are required to comply with industrial tribunal decisions, subject to any legal appeal rights, whilst adhering to the following dispute settlement procedures:

- no industrial action is to take place;
- the status quo that existed before the dispute must prevail; and

  work is to continue normally, without prejudice to any of the parties.

5.3.3 Certified Agreements

Certified agreements (including project agreements and multi-employer agreements) provide considerable scope

for employers and their employees to improve working conditions and gain a competitive edge by ensuring value for money and quality outcomes. Parties are encouraged to make certified agreements appropriate to their circumstances.

5.3.4 Industrial Impacts: Reporting to the Principal

Disputes or disagreements relating to industrial relations and/or occupational health and safety matters that may impact on the construction program, the contract, other related contracts or project costs must be reported to the Principal at the earliest opportunity. To ensure this, an effective and clear reporting structure must be established at an early stage in any project. This will provide the client with the opportunity to:

- provide assistance to service providers where appropriate in resolving disputes or disagreements; and
- assist with managing their own overall works program more effectively.

Any actual or threatened industrial action must be reported by the Government agency and/or their managing agents to the Government's industrial relations representatives. Individual Government agencies are expected to put in place internally coordinated arrangements that ensure effective communications with these representatives.

5.3.5 Membership of Industrial Associations

Participation in industrial relations by employees and employers and responsible representation by industrial associations is encouraged.

5.3.6 Strike Pay

An employer cannot be coerced into making payment for a period when Employees are engaged in a strike (as defined by the *Queensland Industrial Relations Act 1999*).

6 Compliance

The Queensland Government is committed to the implementation of this Code.

Breaches of the Code and any related *Implementation Guidelines* by parties to the Code as may be evidenced through non-compliance or unethical activity, may result in sanctions being invoked.

Where the breach also involves any law or statute, the matter will be referred to the relevant enforcement agency. Monitoring compliance with specific statutory requirements, however, remains the responsibility of the Government agency that administers those requirements.

The Queensland Government has made compliance with the Code a key measure of agencies' performance.

6.1 Breaches by Government Agencies and Agency Employees

Proven breaches by a Government agency will be reported to the responsible or portfolio Minister who will consider appropriate changes to that agency's policies practices and/or procedures to ensure future compliance with the Code.

Where it is demonstrated that individuals have acted in contravention of the agency's policies, practices and/or procedures and this Code, disciplinary action may be taken where appropriate.

6.2 Breaches by Other Parties

The Queensland Government will impose sanctions for proven breaches of the Code which, depending on the nature and severity of non-compliance may involve:

- a formal warning;
- referral of a complaint to the relevant industrial association for assessment against its own code of conduct, if applicable, and appropriate action;
- reporting the breach to an appropriate statutory body;
- partial exclusion from tendering opportunities; that is, a reduction in the number and/or nature of tendering opportunities; or
- preclusion from tendering for any work for a specified period.

6.3 Enforcement

Government Agencies as Clients

Government agencies will support the application of the Code. As a minimum, in order to facilitate industry accessibility, each agency will:

- establish internal coordination procedures for managing Code matters; and
- establish and advertise a central point of contact.

In addition, the Department of Employment, Training and Industrial Relations, Department of Public Works and the Department of Main Roads will cooperate in monitoring the Code on a whole-of-government basis.

6.4 Role of Industry

In addition to the Queensland Government seeking to ensure compliance with the standards of behaviour defined in the Code, it is expected that the relevant industry parties will contribute to achieving these standards. The circumstances of any breach will be referred to the relevant association for action.

7 Definitions

Award

Legally enforceable determination made by the Commonwealth and/or Queensland Industrial Relations Commissions containing the minimum terms and conditions of employment to be met by an employer.

Best Practice

Continuous improvement of processes, products and services to ensure world-class standards of performance.

Building and Construction Industry

Those activities associated with residential and non-residential building; refurbishment and fitout; landscaping; demolition; civil and other engineering construction; all associated maintenance; and related consultancies.

Certified Agreement

An agreement between an employer and a group of employees on the terms and conditions of employment and certified by the Queensland Industrial Relations Commission.

Client

The project, building or facility owner, or their agent.

Code of Practice

A document that outlines and establishes principles and standards of behaviour.

Consultant

A professional acting as an organisation or individual such as an architect, engineer, quantity surveyor, project manager, building scientist or the like, commissioned to advise on or undertake planning, design, supervision or specific technical advisory activities relevant to a project or building.

Contract

An agreement for the supply of goods or the performance of services.

Contractor

An organisation, entity or individual responsible for the performance of the work specified under a contract.

Employee

A person whose employment is governed by a contract of service or a person deemed to be an employee under the *Queensland Industrial Relations Act 1999.*

Employer

A person, corporation, enterprise or organisation that employs a person or persons under a contract of service or a person deemed to be an employer under the *Queensland Industrial Relations Act 1999.*

Employer Association

An association whose membership generally consists of employers who operate in the construction or related industries and is registered under the *Workplace Relations Act (Commonwealth)* and/or the *Queensland Industrial Relations Act 1999.*

Government Agency

- Any department or statutory body as those expressions are defined in the *Financial Administration and Audit Act 1977*; and
- Any government owned corporation and its subsidiaries where the shareholding Ministers have given a notification pursuant to section 123 of the *Government Owned Corporations Act 1993.*

Industry Association

An organisation representing the professional and/or trade or commercial interests of its members.

Party

Includes but is not limited to clients; agents of clients; principals; contractors; subcontractors; suppliers; consultants; employees; unions, including their officials, employees and members; and industry associations while undertaking a representative role.

Principal

The person, entity or organisation responsible for contracting with a contractor or consultant for the carrying out of the work.

Principal Contractor

For a construction workplace (other than a construction workplace for domestic premises) the principal contractor is:

- the person appointed as principal contractor by the owner of the workplace;
- if no principal contractor is appointed, the owner of the workplace; and
- for a construction workplace for domestic premises, the principal contractor is the person in control of the workplace.

Project

An activity or undertaking with a defined objective or objectives, beginning and end.

Service Provider

Includes contractors, subcontractors, consultants, suppliers and agents who are contracted to provide goods and/or services.

Subcontractor

A party that provides goods and/or services to a contractor or to a subcontractor.

Supplier

Any party that provides goods to a contractor or subcontractor.

Tender

Prices, bids, quotations and consultant proposals.

Tenderer

The party submitting a tender.

Union

An organisation of employees working in the construction or related industries that is registered under the *Workplace Relations Act (Commonwealth)* and/or the *Queensland Industrial Relations Act 1999*.

Value for Money

Value for money does not automatically mean the lowest price and should consider factors including but not limited to:

- contribution to Government objectives;
- fitness for purpose and other considerations of quality;
- performance;

- delivery;
- accessories and consumables;
- service support;
- cost related factors, such as whole of life costs and transaction costs;
- disposal;
- environmental standards;
- industry development;
- health and safety of the work force and the public;
- risk exposure; and
- technical and financial issues.

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Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

ANNEXURE SHEET

This is the document referred to as WJ-5 in the statement of Wayne Jenkinson sworn at Brisbane on 8 April 2026.

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Wayne Jenkinson

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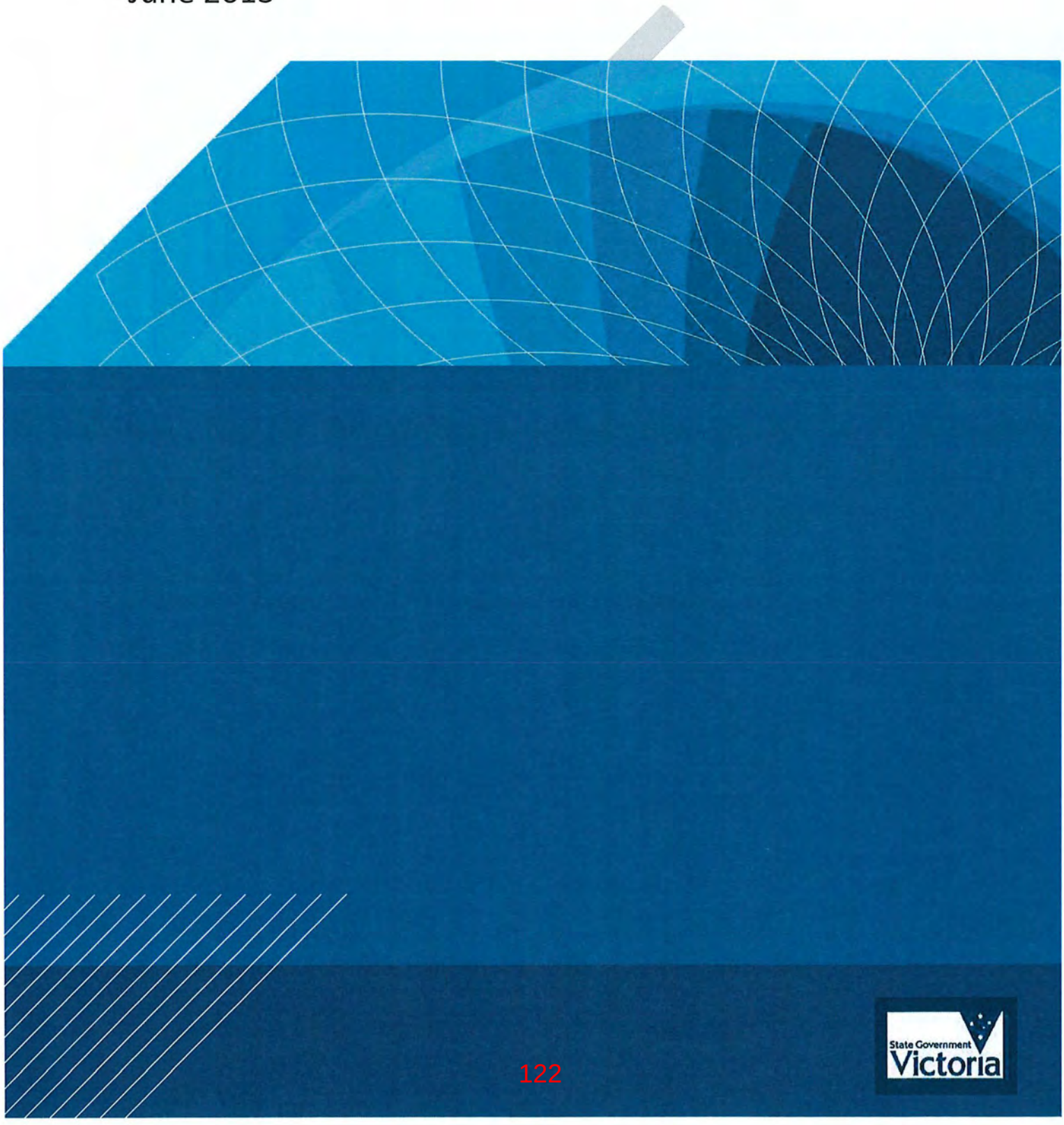
Witness (Lawyer)

Department of **Treasury and Finance**

Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry

June 2013



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This document must be attributed as the Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry June 2013.
ISBN 978-1-922045-29-4
Published June 2013.

If you would like to receive this publication in an accessible format please telephone 039651 0909 or email information@dtf.vic.gov.au

This document is also available in PDF format at www.dtf.vic.gov.au

Contents

1. Introduction

The National Code of Practice for the Construction Industry (the National Code) was developed in 1997 jointly by the Commonwealth, state and territory governments.

The National Code contains industrial relations, occupational, health, safety and rehabilitation (OHS&R) and workforce reform elements that are adopted by the Victorian Government's Code of Practice for the Building and Construction Industry (the Victorian Code).

These Implementation Guidelines (Guidelines) have been developed to further assist in the achievement of the objectives of the Victorian Code and in particular, the industrial relations, OHS&R and workforce reform elements as adopted from the National Code.

These Guidelines reflect the Victorian Government's commitment to greater flexibility and productivity within the State's building and construction industry and to ensure that the Victorian Government maximises value for money on its spending on infrastructure projects.

In particular, these Guidelines are directed to supporting the following outcomes:

- **Compliance**

  Compliance with the law, without exception.

- **Productivity**

  Projects should be delivered on time and within budget.

- **Safety**

  Parties should achieve and maintain high standards in occupational health and safety.

- **Freedom of association**

  Parties must recognise the right of individuals to be or not be involved in lawful industrial activity and to be free from harassment in relation to workplace relations matters.

2. Definitions

The following are explanations of terms used in these Guidelines:

a) **Building and construction work** includes:
   - all organised activities concerned with demolition, building, landscaping, civil engineering, process engineering, mining and heavy engineering; and
   - 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;

   but excludes
   - mining operations, maintenance, landscaping such as lawn mowing, pruning and other horticultural activities and cleaning buildings.

b) **Client** means any project owner, project manager, or initiator, inviting or receiving proposals or tenders and in relation to public building and construction work means the client agency.

c) **Client agency** means the Victorian Government department or public sector body (as defined in the *Public Administration Act 2004*) that enters into a contract for building and construction work with the principal contractor.

d) **Construction Code Compliance Unit (CCCU)** means the unit established to monitor compliance with and receive reports of alleged breaches of these Guidelines.

e) **Consultant** means a person who provides specialist advice and/or professional service.

f) **Contractor** means a person who provides building and construction work and services, and includes a principal contractor and a subcontractor.

g) **National Implementation Guidelines** means the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry.

h) **OHS&R** means occupational health, safety and rehabilitation.

i) **On-site** includes the primary construction site(s) or any auxiliary or holding sites, where building and construction related work is performed.

j) **Over-award payment** means any payment and/or benefit above that set out in the relevant award, registered agreement and/or legislation and includes payments provided for in workplace arrangements.

k) **Party** includes, but is not limited to, clients, contractors, subcontractors, suppliers, consultants, employees, unions – their officials, employees and members and industry associations while undertaking a representative role.

l) **Principal contractor** means the party with whom the client agency enters into a contract for building and construction work.

m) **Privately funded building and construction work** means building and construction work in Victoria that is not public building and construction work.

n) **Public building and construction** means building and construction work undertaken by, or on behalf of a client agency.

o) **Responsible Minister** means, in relation to a client agency, the Minister responsible for the portfolio within which the client is located.

p) **Tender** means an offer in writing, which includes price, in response to an invitation to execute work or supply goods.

q) **Tenderer** means any party responding to an expression of interest or submitting a tender for public building and construction work, including principal contractors, contractors, subcontractors and suppliers.

3. Application and scope

3.1 Application

These Guidelines apply to all public building and construction work that is the subject of an expression of interest or request for tender on or after 1 July 2012.

These Guidelines replace the previous versions of the Guidelines published in April 2012 and December 2012 and operate from 20 May 2013.

3.2 Contract documents and project management procedures

Clients and principal contractors are responsible for ensuring the application of, and compliance with, these Guidelines through:

- ensuring that compliance with these Guidelines is included as an integral component of their contract management procedures; and
- all expressions of interest, tender and contractual documents clearly setting out the requirements specified in these Guidelines.

While the form of wording will vary according to the contract form and the type of service supplied, the relevant contractual documents must incorporate the requirement for the contractor, consultant and/or related entities (as applicable) to comply with all aspects of the Victorian Code and these Guidelines. This includes but is not limited to allowing authorised personnel to:

- inspect any work, material, machinery, appliance, article or facility;
- inspect and copy any record relevant to the project; or
- interview any person,

as is necessary to demonstrate compliance with the Victorian Code and these Guidelines.

Principal contractors will be required to ensure that their contractors allow Victorian Government authorised personnel to monitor and investigate compliance as above through relevant contractual documents.

The relevant contractual documents must allow Victorian Government authorised personnel to access sites, documents and personnel to monitor and investigate compliance with the Victorian Code and these Guidelines.

Contractors and consultants undertaking work covered by the Victorian Code and these Guidelines must notify the CCCU (or nominee) and the client of any alleged breaches of these Guidelines and of voluntary remedial action taken within 24 hours of becoming aware of the alleged breach.

Model contract clauses are available at www.dtf.vic.gov.au. These model clauses may be updated from time to time to reflect changes in Victorian Government contractual practice.

3.3 Scope

a) A party interested in performing public building and construction work must comply with these Guidelines from the date that party first expresses interest in, tenders for, or enters into a contract to perform public building and construction work to which these Guidelines apply. A party will also be required to comply with these Guidelines (except where their application is expressly excluded) when undertaking privately funded building and construction work where expressions of interest or tenders were called for after 1 July 2012.

b) These Guidelines apply solely to parties who participate in on-site activities.

c) These Guidelines also apply to public private partnerships (PPPs), alliance contracts, design and construct (D&C) procurement method and any other project funding arrangements initiated by a client agency or any other procurement method that may be introduced from time to time to reflect changes in Victorian Government contractual practice.

d) A party must require and actively ensure compliance with these Guidelines by any party with whom it contracts, or enters into an arrangement, to undertake public building and construction work.

e) The client may seek to waive elements of these Guidelines in limited circumstances based on a public interest test as per the National Implementation Guidelines. The client must fully document the reasons for seeking the waiver and submit them to the Responsible Minister. Following a request from the Responsible Minister, the Minister for Finance may approve the waiver.

f) Related entities of any party that first expresses interest for, tenders for, or enters into a contract to perform public building and construction work are also required to comply with these Guidelines in respect of any building and construction work they undertake.

   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.

   Connected means the entity:

   i. can control, or materially influence, the tenderer's activities or internal affairs; or
   ii. has the capacity to determine or materially influence the outcome of the tenderer's financial and operating policies; or
   iii. is a member of the tenderer; or
   iv. is financially interested in the tenderer's success or failure or apparent success or failure.

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

i. is a holding company of the tenderer; or
ii. is a subsidiary of the tenderer; or
iii. is a subsidiary of a holding company of the tenderer; or
iv. has one or more directors who are also directors of the tenderer; or
v. without limiting the above, controls the tenderer.

3.4 Relationship with National Code

These Guidelines are intended to supplement and apply in addition to the requirements of the National Code.

These Guidelines are to be interpreted in a manner that ensures that they do not contravene the National Code or the National Implementation Guidelines.

3.5 Relationship with Fair Work Act 2009

a) These Guidelines do not require, encourage or promote conduct that would constitute a contravention of the Fair Work Act 2009 (Cth).

b) To the extent that any provision of these Guidelines, or a party's compliance with any provision of these Guidelines, would, but for this Section 3.5, require, encourage or promote conduct that would constitute a contravention of the Fair Work Act 2009 (Cth), that provision is of no effect.

c) Subject to paragraph (f) below, if any party that is required to comply with these Guidelines considers that a provision of these Guidelines would, but for this Section 3.5,

i. require, encourage or promote conduct by them or any of their contractors, or
ii. apply to or in relation to them or any of their contractors in a manner,

that would constitute or give rise to a contravention of the Fair Work Act 2009 (Cth), that party must within 7 days give notice to the CCCU of the reasons why and circumstances in which that party considers the provision would so require or apply, and must thereafter provide the CCCU with any further details of the reasons and circumstances that the CCCU may reasonably require.

d) Without limiting the generality of paragraphs (a) and (b) above, if the CCCU considers at any time that a provision of these Guidelines would or may, but for this Section 3.5, require, encourage or promote conduct that would constitute a contravention of the Fair Work Act 2009 (Cth), the CCCU may issue (and may modify or withdraw from time to time) a Practice Direction declaring the extent to which and the circumstances in which the relevant provision is inoperative while the Practice Direction is in force, and the relevant provision is inoperative and is to be disregarded accordingly.

e) For the avoidance of doubt, if a party acts in reliance on a Practice Direction issued by the CCCU, conduct undertaken in such reliance does not constitute non-compliance with the Guidelines.

f) Parties are not required to notify the CCCU under paragraph (c) in relation to provisions of the Guidelines where the CCCU has issued a Practice Direction specifying that the provision is inoperative in the relevant circumstances.

4. Legal and related obligations

The National Code states that 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.

The National Code also states that 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).

4.1 Legal obligations relating to employment

As a minimum, a party must comply, and demonstrate past compliance required by these Guidelines, with all applicable:

- legislation;
- 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.

Where a party cannot demonstrate past compliance required by these Guidelines, consideration will be given to the extent of non-compliance and the capacity for future compliance.

4.2 Practices designed to avoid compliance with legal obligations

A party must not enter into, participate in, or facilitate arrangements or practices designed to avoid its own legal obligations, or the legal obligations of others. Without limiting the forgoing, this includes arrangements or practices:

- that are sham contracting arrangements;
- that are designed to avoid or circumvent strike pay obligations;
- that are designed to avoid or circumvent strict compliance with their right of entry requirements in accordance with applicable legislation, court and tribunal orders, and industrial instruments; or
- that undermine freedom of association.

When undertaking building and construction work, contractors must implement on-site practices and procedures which:

- promote compliance with the objectives of the Victorian Code and these Guidelines;
- encourage best-practice; and
- promote productive and safe work practices.

4.3 Unregistered written agreements

A party must not enter into an unregistered written agreement.

An unregistered written agreement is an individual or collective agreement that has not been certified, registered, lodged or otherwise approved under an industrial law, but is concerned with the relationship between an employer and its employees and/or registered or unregistered industrial associations. However, it does not include common law agreements made between an employer and an individual employee.

4.4 Independent contractors

Genuine independent contractors undertake a legitimate form of work on Victorian Government building and construction sites and must not be discriminated against. Arrangements that constrain or otherwise restrict the use of independent contractors and the terms of their engagement are inconsistent with these Guidelines.

5. Workplace arrangements and over-award payments

The National Code states that a party must not, directly or indirectly, pressure or coerce another party to enter into, vary or 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 National Code states that 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.

The National Code defines over-award payment 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.

The Implementation Guidelines require:

5.1 A tenderer must, as part of any expression of interest or tender response, provide a Workplace Relations Management Plan (WRMP) where the Victorian Government department or public sector body contribution (directly or indirectly) to a project is $10 million or more or is at least $5 million and represents at least 50 per cent of the total construction project value. The requirement to provide a WRMP does not extend to future privately funded building and construction work (although the tenderer is encouraged to adopt the theme and intent of the WRMP).

5.2 Parties are prohibited from applying direct or indirect coercion or pressure on another party to make over-award payments. Further, no contractor or consultant is allowed to unduly influence, enter into any agreement, or issue a contract, subcontract or industrial instruction that directly or indirectly binds or otherwise pressures or coerces another party into making over-award payments.

5.3 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.

5.4 Parties are prohibited from requiring or attempting to unduly influence another party to have particular workplace arrangements in place. This includes, but is not limited to, the imposition, or attempted imposition, of a requirement for a contractor to apply project-specific wages and conditions. It is the responsibility of a contractor to negotiate with its employees the form and content of their workplace arrangements free of any coercion or undue influence.

5.5 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 Victorian Code and these 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 or 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 ignore 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; and
- 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;

5.6 Clauses that attempt to negate or render ineffective the application of the Victorian Code and these 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 Victorian Code and these 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 Victorian Code and these Guidelines;

5.7 An industrial instrument must not make provision for project agreements to apply in whole or in part, other than for major contracts as defined by the client. (See Section 7 for further details on project agreements.)

5.8 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 approved under the *Fair Work Act 2009* or otherwise approved under relevant state legislation, or in a project agreement or project award.

6. Cost, efficiency and productivity

The National Code states that 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.

6.1 Obligations in Expressions of Interest or tender response

A tenderer must, where required under clause 5.1, as part of any expression of interest or tender response:

a) Submit a Workplace Relations Management Plan (WRMP) for the project aimed at meeting the objectives of the Victorian Code and these Guidelines that addresses the following:

- labour requirements (e.g. skills, numbers required, manner of supply, recruitment, engagement, termination, redundancy of labour to allow for changing demands across the life of the project);
- how workplace arrangements will be regulated;
- engagement of the required labour including, but not limited to, mobilisation plans and selection procedures (e.g. reference checks and inductions);
- approach to developing and maintaining a productive workforce, ensuring the optimal use of labour requirements (e.g. approach to managing inclement weather and heat, RDOs);
- sourcing, selection and training of suitably experienced construction supervisors;
- approach to relationship management with employees, employee representatives and/or unions including, but not limited to, the approach and process for communicating and consulting with the workforce;
- approach to the use and engagement of labour hire;
- approach to managing third party site access;
- approach to ensuring compliance with statutory workplace rights including, but not limited to, freedom of association, freedom from unlawful coercion and freedom from unlawful discrimination;
- approach to performance and conduct management of labour (e.g. disciplinary process to be applied);

- identification of industrial relations risks in relation to the project and details as to the proposed approach to managing those risks, including but not limited to, the following:
  - approach to dispute resolution;
  - approach to dealing with demarcation disputes;
  - response to industrial action (both threatened and actual, protected and unprotected) including in respect of subcontractors;
  - approach to management of disputes in relation to rights of entry; and
  - approach to minimising lost time or limitations due to industrial disputes.
- approach to the management of subcontractors, outlining:
  - the measures to be taken to select subcontractors who have the skills, capacity and resources to comply with legislative requirements, employment obligations and the WRMP (to the extent relevant);
  - conditions to be imposed on subcontractors to ensure they comply with legislative requirements, employment obligations and the WRMP (to the extent relevant);
  - how dealings with subcontractors and other contractors are to be managed including, but not limited to, identification of representatives and methods for engaging with those representatives; and
  - how subcontractor compliance with the workplace relations requirements will be monitored.

b) Explain the systems, processes and procedures it has in place (or will implement) to:

- achieve the objectives of the Victorian Code and these Guidelines on the project; and
- deliver the project on time and within budget.

(This may be done as part of the WRMP.)

c) Be able to demonstrate how it will:

- achieve the objectives of the Victorian Code and these Guidelines on the project; and
- deliver the project on time and within budget.

For example, a tenderer must be able to demonstrate how the objectives of the Victorian Code and these Guidelines relating to costs and improved efficiency and productivity can be met in the context of any of the following (if applicable to the tenderer):

- restrictions on when work can be performed, such as mandated or fixed rostered day off schedules and one-in-all-in arrangements;
- the potential for unexpected costs or increased costs during the life of a project, such as site allowances which are not quantifiable at the time of contracting;
- adoption of terms and conditions common to a project or an industry and which are not specific to, or reflect, the needs of the enterprise; and
- impositions or restrictions on the engagement and/or utilisation of labour.

d) Demonstrate that it has a track record of delivering construction projects on time and within budget. However, if this is not possible, the tenderer must demonstrate what actions it has taken to achieve such objectives in the future.

   For example, where a tenderer has failed to deliver construction projects on time and within budget in the past as a result of industrial relations matters, that tenderer must be able to identify:

   - the reasons for the failure; and
   - the steps it has taken to address those matters for future projects.

e) Demonstrate that it has a track record of adopting efficient and productive work practices. However, if this is not possible, the tenderer must demonstrate what actions it has taken to achieve such objectives in the future.

f) Set out its view on whether a project agreement might be appropriate for the project, including by reference to any past projects where the tenderer has been a party to such an agreement.

6.2 Contractor requirements

A contractor must:

a) Comply with its WRMP.

b) Act in accordance with its tender response.

c) Require compliance with these matters set out above by any party with whom it contracts, or enters into an arrangement, to undertake public building and construction work, to the extent applicable to that party.

7. Project agreements

The National Code states that 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 payments.

The National Code also states that 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.

This section does not apply to privately funded building and construction work.

7.1 Project agreements on public building and construction projects will only be appropriate for major contracts as defined by the client. Other than in exceptional cases, project agreements will not be permitted on projects worth less than $100 million. Clients are free not to agree to the creation of project agreements.

7.2 In relation to public building and construction work, the client must not agree to project agreements or project awards unless there is a clear and demonstrable benefit to the Victorian Government in doing so and the use of a project agreement is approved in advance by the Minister for Finance. In deciding whether to seek approval for the use of a project agreement, the following must be considered:

- the degree of commitment demonstrated by the parties to the proposed agreement to improving productivity and workplace relations;
- the form of improved time or cost performance compared to what might reasonably be expected in the absence of a project agreement; and
- past performance and the parties' history of maintaining and abiding by agreements.

7.3 The client is accountable for decisions to seek approval of a project agreement and must state their reasons for seeking approval for such an agreement in writing to the Minister for Finance (and copied to the responsible Minister). The reasons must include objective and detailed grounds and clearly demonstrate the benefit to the project. Approval of a project agreement rests with the Minister for Finance.

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

7.5 A project agreement must be made under the *Fair Work Act* 2009 (Cwth).

8. Dispute settlement, industrial action and strike pay

The National Code states that 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.

The National Code also states that 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.

The National Code also states that 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).

The Implementation Guidelines require:

Dispute settlement

8.1 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.

8.2 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.

8.3 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.

8.4 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.

8.5 An enterprise 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, the clause must contain an express limitation that any outcome determined by the third party cannot be inconsistent with the Victorian Code and these Guidelines or inconsistent with legislative obligations.

8.6 Where a dispute relates to OHS&R issues, the procedures contained in the relevant Victorian OHS&R legislation should be observed. Parties must make take all reasonable steps to resolve grievances or disputes at the enterprise level at the earliest opportunity, in accordance with the procedures outlined in the relevant industrial instrument or other workplace arrangement.

8.7 The principal contractor must report any grievance or dispute relating to workplace relations or OHS&R matters that may impact on project costs, related contracts or timelines to the CCCU (or nominee) and the client within 24 hours of it becoming aware of the grievance or dispute. The principal contractor must provide regular updates to the CCCU (or nominee) and the client about the steps being taken to resolve such grievances or disputes.

8.8 The principal contractor must implement procedures to enable such reporting to occur at the earliest opportunity.

Industrial action

8.9 Parties must take all reasonable steps to resolve industrial action which adversely affects, or has the potential to adversely affect, the delivery of a project or other related contracts on time and within budget.

8.10 Contractors must report any threatened or actual industrial action that may impact the project, project costs, related contracts or timelines to the CCCU (or nominee) and the client within 24 hours. The contractor must provide regular updates to the CCCU (or nominee) and the client about the steps being taken to resolve the threatened or actual industrial action.

8.11 Contractors must take all steps reasonably available to them to prevent or bring to an end unprotected industrial action occurring on, or affecting, the project, including by pursuing legal action where possible.

9. Workplace safety

The National Code states that 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.

The highest priority has been given by all jurisdictions to improvement in the management of OHS&R in the Construction industry.

Service providers must meet their OHS&R obligations according to relevant laws whether working on private or government clients' projects and sites. Additionally, they are expected to prove that they have an appropriate OHS&R management system operating within their individual enterprise.

They may also be expected to establish a site specific OHS&R management plan before work commences on a government project or site.

Clients will prefer to deal with service providers who recognise that the active management of OHS&R issues leads to superior safety and less costly outcomes than reliance on the lowest common denominator approach typified by simple regulatory compliance.

The Implementation Guidelines require:

9.1 Achievement of the objectives of the Victorian Code and these Guidelines

A tenderer must be able to demonstrate how they will be able to achieve the objectives of the Victorian Code and these Guidelines in relation to safety, including encouragement of best practice and promotion of the highest standards in the industry and application of relevant OHS legislation, regulations and codes.

9.2 Commitment of senior management to safety

A tenderer must be able to demonstrate that its senior managers are proactively involved in, and committed to, achieving safety objectives and improving safety outcomes on the project.

Such commitment may be demonstrated by:

- the tenderer's OHS policy;
- reference to the OHS obligations of senior management in the tenderer's OHS management plan;
- governance structures and reporting requirements that enable senior management to understand and respond to OHS issues on the project; and
- involvement of senior management in the project (including attendance, from time to time, on the project site and during project safety meetings).

9.3 Effective risk management

A tenderer must submit a Health and Safety Management Plan (HSMP) aimed at meeting the objectives of the Victorian Code and these Guidelines that addresses the following, at a minimum:

- processes for reviewing, updating and communicating the HSMP;
- provision of adequate OHS resources during the project, including human resources, financial resources and technical resources;
- details of the organisational structure as it relates to safety, including identification of key OHS personnel, key OHS responsibilities and accountabilities and key OHS reporting lines;
- detailed risk management processes that can be applied to both the design and construction phases of the project;
- processes for the preparation and communication of task specific safety procedures (e.g. JSAs and SWMSs), including sample procedures for addressing common construction hazards and risks (e.g. work at heights);
- processes for ensuring all persons working on the project receive necessary information and training, including general induction training, site induction training and task-specific training;
- reporting and investigation of incidents resulting in (or with the potential to result in) personal injury and property damage;
- reporting and responding to regulatory action;
- emergency response and incident management processes, including identification of personnel with specific responsibilities and proposed engagement with emergency services prior to and during the project;
- monitoring and auditing processes for the project, including frequency, responsible personnel and proposed response to non-conformance or non-compliance identified;
- appropriate systems for case management and rehabilitation of injured workers;
- appropriate record-keeping and document management systems; and
- appropriate OHS performance monitoring and reporting.

A tenderer must demonstrate that it has a track record of delivering construction projects safely. However, if this is not possible, the tenderer must demonstrate what actions it has taken to achieve such a track record in the future.

For example, where a tenderer has failed to deliver construction projects safely in the past, that tenderer must be able to identify:

- the reasons for the failure; and
- the steps it has taken to address those matters for future projects.

9.4 Consultation and issue resolution

A tenderer must submit details of how it intends to engage with other parties about safety on the project and resolve safety issues that arise in order to achieve the objectives of the Victorian Code and these Guidelines, including encouragement of best practice, promotion of the highest standards as well as the delivery of the project on time and within budget.

In responding, a tenderer should include a process for each of the following:

- **Consultation with workers and employee representatives,** which addresses: determination of designated work groups, election/training of health and safety representatives, establishment of health and safety committees, agreement on specific roles/rights for HSRs and committee members, establishment of OHS right of entry protocols and the procedural requirements for consultation (e.g. how consultation is to occur – in person, via email, through HSRs);
- **Consultation, cooperation and coordination with other stakeholders**, which addresses: transfer of knowledge and information both before and during the project, allocation of OHS roles and responsibilities, collaboration about risk management and emergency response and communication/reporting protocols. Relevant stakeholders may include (depending on the project) other contractors/consultants, residents or occupiers near the project site; utility/asset owners and emergency services;
- **OHS issue/dispute resolution**, which addresses: reporting of OHS issues to the tenderer, roles and responsibilities for responding to issues reported, consultation requirements, protocols for involving third parties (including regulators, employee representatives, other stakeholders, independent bodies/experts, etc) and timelines for resolution/escalation; and
- **Engagement with regulatory authorities**, which addresses: proactive engagement and relationship building with relevant regulators; consultation with regulators regarding safety issues and best practice, provision of information regarding the project to regulators and responding to the exercise of regulatory powers and/or enforcement action.

9.5 Project learnings and initiatives

A tenderer must demonstrate how it intends to improve OHS outcomes (both on the project and in the industry more generally) to achieve the objectives of the Victorian Code and these Guidelines, in particular encouragement of best practice and improvement of the performance of all participants in the industry.

In responding, a tenderer should address the following, at a minimum:

- process for sharing learnings from the project, which may include development of a safety alert publication to be produced following major incidents or key safety milestones and then distributed across the industry;
- process for monitoring, measuring and communicating key performance indicators for safety, which may include development of a monthly report containing lead and lag indicators to be provided to the client;

- process for transferring knowledge and analysing performance at the end of the project, which may include development of a completion report detailing OHS performance across the project, key safety initiatives and learnings and areas for improvement on future projects; and
- process for engaging with third parties to achieve improvements in safety, which may include appointment of an independent auditor for the project and engagement with industry bodies or experts to address OHS issues that arise.

10. Freedom of association and right of entry

The National Code states that all parties have the right to freedom of association. This means that parties are free to join or not to 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.

The Implementation Guidelines require:

10.1 Contractors must adopt policies that promote freedom of association.

10.2 Practices which do not promote freedom of association are inconsistent with these Guidelines. By way of example, the following practices are inconsistent with these Guidelines:

- providing the names of new staff, job applicants, contractors or subcontractors to unions other than as required by law;
- no ticket, no start signs, show card days or any other similar practices that imply that union membership is anything other than a matter for individual choice;
- employers unlawfully encouraging or discouraging employees to join a union;
- using employee representatives, site delegates or other union representatives to undertake or administer site induction processes. This process should be undertaken by site management. Where there is a requirement in any existing enterprise agreement made before the application date of these Guidelines for employee representatives, site delegates or other union representatives to undertake or administer site induction processes, then any such process must be overseen by, or also involve, site management;
- discriminating against or disadvantaging elected employee representatives;
- using forms requiring the employee to identify their union status, or requiring employers and contractors to identify the union status of employees or subcontractors;
- refusing to employ, or terminating an employee, because of their union status;
- employers refusing a reasonable request from a workplace delegate to represent employees in relation to grievances and disputes or discussions with members;
- the imposition, or attempted imposition, of a requirement for any contractor, subcontractor or employer to employ a non-working shop steward or job delegate or to hire an individual nominated by a union;

- a requirement for an employer to apply union or any other logos, mottos or other indicia to company supplied property or equipment, including clothing, unless there is a requirement to do so in any existing enterprise agreement made before the application date of these Guidelines; and
- any requirement that a person pay a bargaining fee, however described, to an industrial association of which he/she is not a member, in respect of services provided by it.

10.3 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 such representatives under the *Fair Work Act 2009* and any relevant and applicable OHS or Victorian legislation. These procedures govern access to employer and employee records and/or the holding of discussions with employees.

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

10.5 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 a Victorian Government or Commonwealth Government agency to ensure compliance with the Victorian Code and these Guidelines.

11. Victorian Government oversight and administration of these Guidelines

The Department of Treasury and Finance (DTF), through the Construction Code Compliance Unit (CCCU), has responsibility for the following elements of these Guidelines:

- overall policy responsibility;
- setting of the overall direction and work plan for the CCCU;
- providing policy advice to the Victorian Government through the Minister for Finance;
- promoting awareness of the Victorian Code and these Guidelines through a range of information and educational activities;
- liaising with relevant Commonwealth and Victorian bodies;
- undertaking monitoring and compliance activities including investigation of alleged breaches; and
- recommending the imposition of sanctions to the Secretary, DTF.

Monitoring and sanctions

11.1 Compliance

The Minister for Finance has overall responsibility for the implementation of these Guidelines.

The CCCU is established to monitor compliance with these Guidelines and receive reports of alleged breaches.

The monitoring of compliance with specific statutory requirements remains the responsibility of the relevant government agencies that administer those requirements.

The following section replaces the monitoring and compliance provisions contained in section 7 of the Victorian Code as they relate to the former Industrial Relations Principles.

11.2 Breaches

11.2.1 Monitoring and reporting

The CCCU will undertake monitoring and compliance work including site visits, site inspections and audits.

The CCCU will provide feedback and report to the principal contractor as appropriate, including where alleged breaches of the Victorian Code or these Guidelines are identified.

The CCCU will also respond to reports of alleged breaches of these Guidelines, which must be made in writing to the CCCU (or an approved nominee). Such reports must include:

- details of the circumstances and extent of the alleged breach or breaches; and
- a copy of any written information or advice exchanged in relation to the matter.

The party reporting an alleged breach must notify the party alleged to have breached these Guidelines of the report. The CCCU (or an approved nominee) must provide a copy of the report to the party alleged to have breached these Guidelines. The CCCU (or an approved nominee) must give the party alleged to have breached these Guidelines an opportunity to make submissions to the CCCU (or an approved nominee). Parties reporting alleged breaches must be informed of the investigations made and any action taken.

Where the matter involves an alleged breach of Commonwealth or State legislation, the CCCU may refer it to the appropriate statutory body.

The CCCU's approved nominee may, or will if requested by a party, liaise with the relevant industry association representing the party alleged to have breached these Guidelines.

The CCCU will report all proven breaches to the Minister for Finance.

In connection with an investigation or a review, the CCCU (or an approved nominee) has absolute discretion as to which, if any, information or documents should be provided to any person.

11.2.2 Review of a decision made under these Guidelines

Any person aggrieved by any action or decision made under these Guidelines in relation to alleged non-compliance with these Guidelines may request a review of that action or decision by writing to the Secretary of DTF within 14 days of the date of the letter advising of the action or decision.

The review is to be conducted in an informal manner, usually without a hearing and taking into account those matters considered during the process in light of the matters raised in the letter requesting the review. It is intended that there will be no delay to a project as a result of the review.

The review will be conducted by a person appointed by the Secretary who, in the Secretary's opinion, has relevant experience.

The person conducting the review shall provide a written report to the Secretary who, in turn, will respond to the person requesting the review and provide the report to the Minister for Finance. The report and response must be completed within 14 days of the request for review.

11.2.3 Breaches by agencies and agency employees

Proven breaches by a government agency will also be reported by the Secretary to the responsible Minister.

The Government has made adherence to these Guidelines a key measure of agencies' performance.

Chief Executive Officers are responsible for ensuring their agency's performance.

The avenues already available to individuals in the private sector who wish to raise issues associated with the performance of government agencies, including representations to government Ministers, Members of Parliament and the Ombudsman are unaffected by these Guidelines.

11.2.4 Breaches by others

The Secretary will report proven breaches by other parties to the Minister for Finance.

11.3 Sanctions

The scope of sanctions imposed for proven breaches of these Guidelines will depend on the nature of the breach.

11.3.1 Sanctions on client agencies and agency employees

On the advice of the Secretary, the Minister for Finance and the responsible Minister will consider appropriate actions to ensure future compliance with these Guidelines.

Where it is demonstrated that public sector employees have breached these Guidelines, disciplinary action may be taken.

Further breaches will lead to more severe sanctions.

11.3.2 Sanctions on others

In the case of a proven breach by other parties, sanctions may include, but are not limited to:

- a formal warning that a further breach will lead to severe sanctions;
- referral of a complaint to the relevant industry organisation for assessment against its own professional code of conduct and appropriate action;
- reduction in tendering opportunities at either agency or government-wide level, for example, by exclusion of the breaching party from tendering for government work above a certain value or for a specified period (this sanction may only be imposed by the Minister for Finance in consultation with the responsible Minister);
- reporting of the breach to an appropriate statutory body; and
- publicising the breach and the identity of the party.

12. Transitional arrangements

12.1 Application

The transitional arrangement in this clause 12 applies to tenders or expressions of interest submitted, or contracts entered into, for public building and construction work , on or before 30 June 2013. This transitional arrangement ceases to apply on and from 1 July 2013.

12.2 Related entities deemed compliant in certain circumstances

Clause 3.3(f) of these Guidelines requires related entities (as defined) of a party to comply with these Guidelines in respect of building and construction work the related entity undertakes, where the party expresses an interest for, tenders for, or enters into a contract to perform public building and construction work.

While this transitional arrangement is in effect, where a related entity (the first related entity) has entered into an arrangement or agreement between 1 July 2012 and 17 December 2012 that is non-compliant with these Guidelines, the first related entity's non-compliance on this basis will not result in its related entities being considered non-compliant with these Guidelines (through the operation of clause 3.3(f)). This transitional arrangement applies only in respect of non-compliance on this basis.

On and from 1 July 2013, the terms of clause 3.3(f) of these Guidelines will apply in full. Where a first related entity has not remedied its non-compliance with these Guidelines by 1 July 2013, its related entities will be considered non-compliant with the Victorian Guidelines on and from this date.

For the avoidance of doubt, the transitional arrangement in this clause 12:

a) does not apply in respect of an arrangement or agreement entered into on or after 18 December 2012;

b) does not deem the first related entity compliant with these Guidelines. That entity will continue to be considered non-compliant unless and until it remedies its non-compliant arrangement or agreement (whether or not this occurs before or after 1 July 2013);

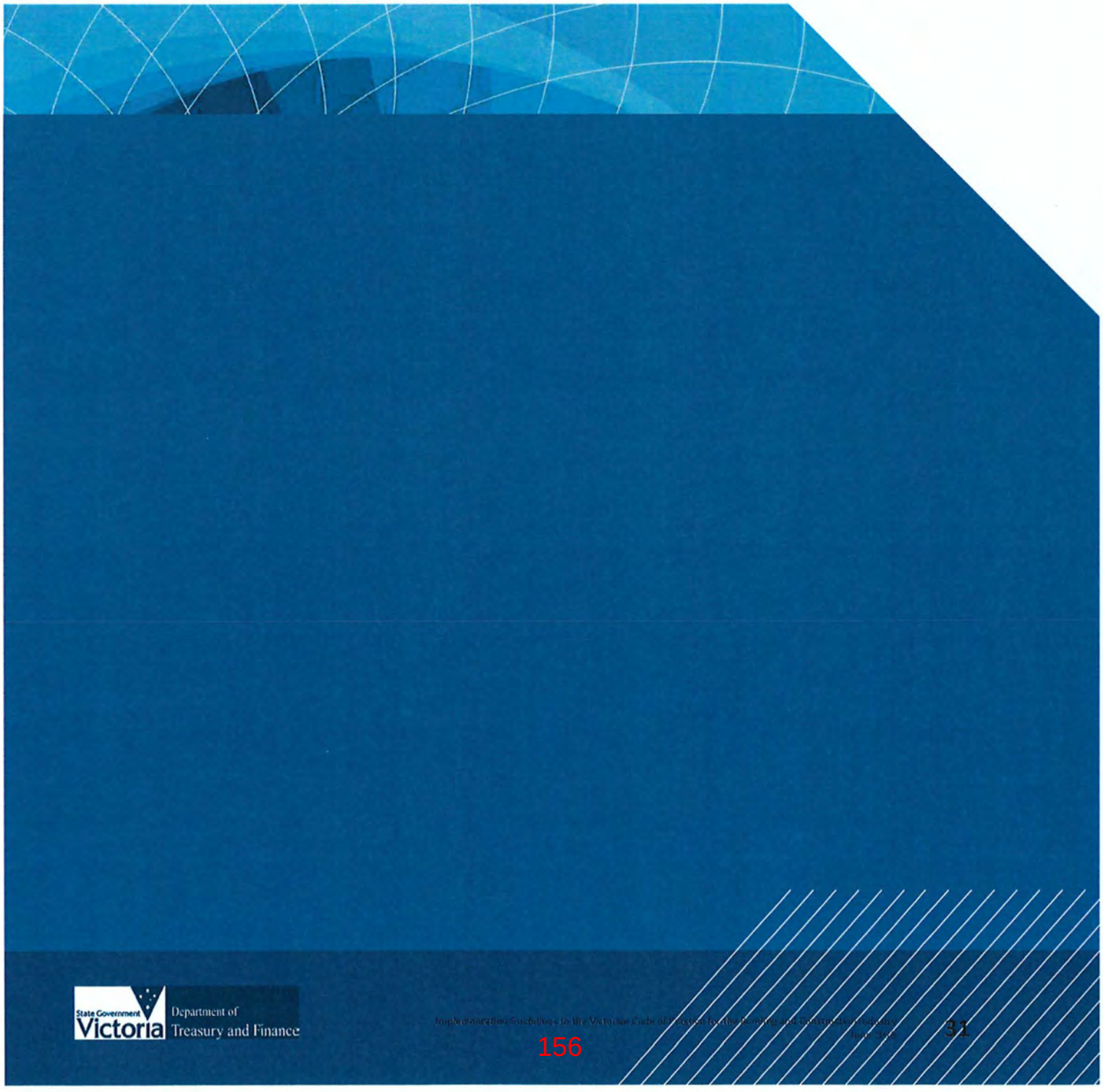
c) applies only in respect of related entities and only in relation to the period up to and including 30 June 2013; and

d) does not impact upon the operation of these Guidelines in all other respects to all parties, including in relation to the conduct of a tenderer and its related entities. A party, and its related entities, must comply with these Guidelines from the date that party first expresses an interest in, tenders for, or enters into a contract to perform public building and construction work to which these Guidelines apply: see clause 3.3(a), (b) and (c) of these Guidelines.

12.3 Notification to client agencies

Where a party seeks to rely on this transitional arrangement, the party must include details of the non-compliance by its related entity or entities in any declarations it makes to client agencies in relation to compliance with these Guidelines.

www.dtf.vic.gov.au

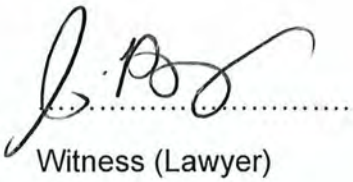


Commission of Inquiry into the CFMEU and Misconduct in the Construction Industry

ANNEXURE SHEET

This is the document referred to as WJ-6 in the statement of Wayne Jenkinson sworn at Brisbane on 8 April 2026.

Wayne Jenkinson



Witness (Lawyer)

Code for the Tendering and Performance of Building Work 2016

made under section 34 of the

Building and Construction Industry (Improving Productivity) Act 2016

Compilation No. 3

Compilation date: 21 March 2019

Includes amendments up to: F2019L00324

Prepared by the Department of Jobs and Small Business, Canberra

About this compilation

This compilation

This is a compilation of the *Code for the Tendering and Performance of Building Work 2016* that shows the text of the law as amended and in force on 21 March 2019 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

Contents

Part 1 Introductory

1 Name of code of practice

This code of practice is the *Code for the Tendering and Performance of Building Work 2016*.

2 Commencement

This code of practice commences on the day that it is registered on the Federal Register of Legislation.

3 Definitions

(1) In this code of practice:

ABCC means the body referred to in subsection 29(2) of the Act.

above-entitlements payment means a payment or benefit above the amount or value of a payment or benefit required to be paid under a Commonwealth industrial instrument or industrial law (within the meaning of the FW Act).

Act means the *Building and Construction Industry (Improving Productivity) Act 2016*.

code covered entity has the meaning given by section 6.

Note 1: paragraph 34(3)(a) of the Act provides that the code may require a person to comply with it in respect to building work only if the person is a building contractor that is a constitutional corporation.

Note 2: paragraph 34(3)(b) of the Act provides that the code may require a person to comply with it only if the person is a building industry participant carrying out work in a Territory or Commonwealth place. The definition of 'building industry participant' includes building contractors.

Commonwealth funded building work means building work described in any of items 1 to 8 of Schedule 1, other than building work to which item 10 of that Schedule applies.

Department of Finance means the Department whose Minister administers the *Public Governance, Performance and Accountability Act 2013*.

enterprise agreement has the same meaning as in the FW Act.

essential services infrastructure: see subsection 6B(5).

acquiring entity: see subsection 18(2).

funding entity: see section 4.

FW Act means the *Fair Work Act 2009*.

head contractor means the person with management or control of the building site.

individual flexibility arrangement has the same meaning as in the FW Act.

infrastructure exemption: see subsection 6B(2).

inspector means a person appointed as, or taken to be appointed as, an Australian Building and Construction Inspector under the Act.

intelligence or security agency has the same meaning as in section 85ZL of the Crimes Act 1914.

security has the same meaning as in the *Australian Security Intelligence Organisation Act 1979.*

subcontractor is not confined to an individual.

working day means a day other than a Sunday or a public holiday.

WRMP means a Workplace Relations Management Plan that is developed in accordance with this code of practice.

Note: some terms used in this code of practice have defined meanings in the Act. For the definitions of the following terms, see section 5 of the Act:

- ABC Commissioner
- building association
- building contractor
- building industry participant
- building work
- Commonwealth industrial instrument
- designated building law
- industrial action
- protected industrial action

(2) In this code of practice, an entity (the second entity) is a ***related entity*** of a code covered entity if the second entity is engaged in building work and is:

(a) connected with the code covered entity by being a member of the entity; or

(b) an associated entity (within the meaning of section 50AAA of the *Corporations Act 2001*) of the code covered entity.

Note: two entities will be associated if they are related bodies corporate.

(3) In this code of practice, an ***exclusion sanction*** means a period during which a code covered entity is not permitted to tender for, or be awarded, Commonwealth funded building work. An exclusion sanction may:

(a) be for any period that the Minister is satisfied is appropriate, but no longer than 1 year in duration;

(b) be subject to conditions that apply the exclusion sanction only to a division of a business operating in a particular state or territory; and

(c) be extended to related entities if the Minister is satisfied it is appropriate to do so.

(4) In this code of practice, ***building work*** has the same meaning as in section 6 of the Act, but does not include:

(a) work that is described in paragraph 6(1)(e) of the Act;

(b) the off-site prefabrication of made-to-order components to form part of any building, structure or works unless that work is performed on an auxiliary or holding site that is separate from the primary construction site or sites.

4 Funding entities

In this code of practice, each of the following is a ***funding entity***:

(a) a non-corporate Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013*;

(b) a corporate Commonwealth entity within the meaning of the *Public Governance, Performance and Accountability Act 2013* that is directed by the Minister for Finance to comply with this code of practice.

Part 2 Conduct

5 General

This code of practice has been developed to:

(a) promote an improved workplace relations framework for building work and promote compliance with this code of practice, the Act and designated building laws and encourage the development of safe, healthy, fair, lawful and productive building sites for the benefit of all building industry participants; and

(b) assist industry stakeholders to understand the Commonwealth's expectations of, and requirements for, entities that choose to tender for Commonwealth funded building work, are awarded Commonwealth funded building work, or both; and

(c) increase efficiency and cost savings in the work performed by code covered entities by ensuring that they understand and comply with this code of practice, the Act and designated building laws; and

(d) increase the likelihood of timely, predictable, and cost-efficient delivery of Commonwealth funded building work through the use of building contractors and building industry participants that consistently adhere to this code of practice, the Act and designated building laws; and

(e) help funding entities to identify and work with building contractors and building industry participants with track records of compliance with this code of practice, the Act and designated building laws; and

(f) reduce execution delays and costs in relation to Commonwealth funded building work by not engaging building contractors and building industry participants with track records of non-compliance with this code of practice, the Act and designated building laws; and

(g) establish an enforcement framework under which building contractors and building industry participants may be excluded from tendering for, or being awarded, Commonwealth funded building work if they do not comply with this code of practice.

Note: the ABC Commissioner is responsible for monitoring compliance with this code of practice: see subsections 16 (a) and (b) of the Act.

6 Application of the code of practice

(1) A building contractor or building industry participant that could be required to comply with this code of practice by section 34 of the Act becomes subject to this code of practice (a ***code covered entity***) from the first time they submit an

expression of interest or tender (howsoever described) for Commonwealth funded building work on or after the date this code of practice commences.

Related entities become code covered entities

(2) A related entity of an entity (the ***first entity***) becomes a code covered entity subject to this code of practice at the time the first entity becomes subject to the code of practice.

Code of practice applies to all new work

(3) A code covered entity is subject to this code of practice in respect of all building work that is described in any of items 1 to 9 of Schedule 1 for which an expression of interest or request for tender (howsoever described) was called on or after the date this code of practice commenced.

Note 1: see section 2 for commencement date.

Note 2: Commonwealth funded building work is a defined term, see section 3.

Note 3: related entity is a defined term, see subsection 3(2).

Note 4: once a building contractor or building industry participant is subject to this code of practice, it and its related entities must comply with this code of practice on all new projects, including projects that are privately funded. However, some obligations in the code of practice only apply in respect of Commonwealth funded building work—see for example subsections 8(2)-(7) and Part 6.

6A Exemption for essential service providers

(1) The ABC Commissioner may exempt a building contractor or building industry participant from this code of practice if the Commissioner is satisfied that:

(a) building work performed by the building contractor or building industry participant involves the provision of essential services related to supply of electricity, natural gas, water, waste water, or telecommunications; and

(b) granting an exemption would be appropriate having regard to the objective in subparagraph 5(a) of this code of practice.

(2) An exemption must be issued in writing and may apply to building work performed by the building contractor or building industry participant for a period of time or may apply to a specified project.

(3) If the building contractor or building industry participant is a code covered entity the effect of an exemption is that the entity is deemed to not be a code covered entity for the duration of the specified period or in relation to the specified project.

(4) If the building contractor or building industry participant is not a code covered entity the effect of an exemption is that section 6 does not apply in relation to work covered by the exemption.

6B Exemption for essential services infrastructure

Applying for exemptions

(1) A building contractor or building industry participant may apply to the ABC Commissioner for an exemption from this code of practice.

(2) The ABC Commissioner must grant the exemption (the ***infrastructure exemption***) if the Commissioner is satisfied that:

(a) the principal business of the building contractor or building industry participant involves performing work for the provision of essential services related to supply of electricity, natural gas, water, waste water, or telecommunications; and

(b) the principal building work of the building contractor or building industry participant involves performing work for the provision of essential services infrastructure.

(3) An infrastructure exemption must be issued in writing and applies:

(a) for the period specified in the exemption; or

(b) if no period is specified, until it is revoked.

Revoking exemptions

(4) The ABC Commissioner must revoke an infrastructure exemption (including an exemption issued for a specified period) if the Commissioner is satisfied that paragraph (2)(a) or (b) no longer applies in relation to the building contractor or building industry participant.

*Meaning of **essential services infrastructure***

(5) ***Essential services infrastructure*** means systems or networks:

(a) to which consumers can connect for supply of electricity, natural gas, water, waste water, or telecommunications; and

(b) that:

(i) are important for the life, the personal safety or health, or the welfare, of the population or a significant part of it; or

(ii) make a significant contribution to the Australian economy or an important part of it.

Effect of infrastructure exemption

(6) If a building contractor or building industry participant is a code covered entity the effect of an infrastructure exemption is that the entity is deemed to not be a code covered entity while the exemption applies.

(7) If a building contractor or building industry participant is not a code covered entity the effect of an infrastructure exemption is that section 6 does not apply while the infrastructure exemption applies.

Part 3 Requirements to be complied with by code covered entities in respect of building work

7 General responsibilities of code covered entities

Code covered entities must:

(a) comply with this code of practice; and

(b) comply with any WRMP that applies to the building work; and

(c) respond to requests for information made by the ABCC concerning matters relating to this code of practice.

8 Subcontractors and related bodies and entities

(1) Subsections (2)–(7) apply in relation to Commonwealth funded building work only.

(2) A code covered entity must ensure that any request for expressions of interest or requests for tender (howsoever described) for building work requires a person responding to the tender:

(a) to comply with this code of practice; and

(b) to meet the eligibility requirements set out in section 23 at the time of lodging the expression of interest or tender.

(3) A code covered entity must not enter into an agreement in respect of building work with a subcontractor that could be required to comply with this code of practice by section 34 of the Act if:

(a) the subcontractor is subject to an exclusion sanction or is excluded from undertaking work funded by a state or territory government unless approval to do so is provided by the ABC Commissioner; or

(b) the subcontractor does not meet the requirements of section 11 of this code of practice.

(4) A code covered entity must ensure that an agreement entered into in relation to building work with a subcontractor requires the subcontractor to act consistently with this code of practice in respect of the building work that is the subject of the agreement.

(5) A code covered entity must ensure that subcontractors comply with this code of practice in respect of the building work that is the subject of the agreement.

Note: subsections (4) and (5) apply in respect of the conduct of all participants engaged in the relevant Commonwealth funded building work whether or not the subcontractor could be required to comply with this code of practice by s 34 of the Act. Note further, the prospective obligation in section 6 on subcontractors that could be required to comply with this code of practice by section 34 of the Act in respect of all future building work undertaken by that subcontractor.

(6) A code covered entity must ensure as far as is reasonably practicable that subcontractors that are engaged by the code covered entity in respect of building work take remedial action to rectify non-compliant behaviour.

(7) A code covered entity that is the head contractor in respect of building work at a particular site must ensure that all subcontractors on site comply with the WRMP that applies to the building work.

(8) A code covered entity must ensure that each of its related entities that could be required to comply with this code of practice by section 34 of the Act comply with this code of practice in respect of building work.

9 Compliance with laws, decisions, directions and orders

(1) A code covered entity must comply with the Act and all designated building laws that apply to the entity.

Examples

1 Commonwealth industrial instruments.

2 Laws relating to payments to employees during periods of industrial action (strike pay).

3 Laws relating to the right to enter premises where building work is performed and to have access to records.

(2) A code covered entity must comply with the *Competition and Consumer Act 2010* to the extent that it applies to the entity in relation to tendering for, or undertaking, building work.

(3) A code covered entity must comply with work health and safety laws, including work health and safety training requirements and asbestos safety requirements, to the extent that they apply to the entity in relation to building work, including strict compliance with procedures for the election of health and safety representatives and right of entry requirements.

(4) A code covered entity must comply with its obligations under the *Migration Act 1958* and its subordinate legislation.

(5) A code covered entity:

(a) must comply with a compliance notice issued under section 99 of the Act;

(b) must comply with a decision, direction or order made or given by a court or tribunal that applies to the entity in respect of building work; and

(c) must not enter into, participate in or facilitate an arrangement or practice which conflicts with a decision, direction or order made or given by a court or tribunal that applies to the code covered entity in respect of building work.

Note: an infringement notice or provisional improvement notice issued by an inspector is not a decision, direction or order made or given by a court or tribunal.

(6) Subsection (5) does not apply if:

(a) the period for payment, or for other compliance with the decision, direction or order, has not expired; or

(b) the decision, direction or order is stayed or has been revoked.

10 Unregistered written agreements and other agreements

(1) A code covered entity must not bargain in relation to an agreement, make an agreement, or implement an agreement in respect of building work:

(a) that deals with matters that would be not be permitted by section 11 to be included in the agreement if the agreement were an enterprise agreement; or

(b) that provides for terms, conditions or benefits of employment of employees of the employer or the employer's subcontractors (which may include above-entitlements payments); or

(c) that restricts or limits the form or type of engagement that may be used to engage subcontractors; and

(d) that either:

(i) will not be registered, lodged or otherwise approved under the FW Act; or

(ii) the code covered entity reasonably believes will not be registered, lodged or otherwise approved under the FW Act.

(2) Subsection (1) does not apply to an agreement that is a common law agreement made between an employer and an individual employee or to an individual flexibility arrangement.

Example: an unregistered site agreement or project agreement between a head contractor and relevant union would be an unregistered written agreement.

11 Content of agreements and prohibited conduct, arrangements and practices

(1) A code covered entity must not be covered by an enterprise agreement in respect of building work which includes clauses that:

(a) impose or purport to impose limits on the right of the code covered entity to manage its business or to improve productivity;

(b) discriminate, or have the effect of discriminating against certain persons, classes of employees, or subcontractors; or

(c) are inconsistent with freedom of association requirements set out in section 13 of this code of practice.

Example 1: clauses that impose a requirement on the code covered entity or a subcontractor engaged by the code covered entity to employ a non-working shop steward or job delegate, or which result in the employment of a non-working shop steward or job delegate.

Example 2: clauses permitting officials, delegates or other representatives of a building association to undertake or administer induction processes.

Note: Subsection (3) provides a non-exhaustive list of clauses that are not permitted to be included in enterprise agreements.

(2) Subsections (1) and (3) are subject to Schedule 5.

(3) Without limiting the generality of subsection (1), clauses are not permitted to be included in enterprise agreements that:

(a) prescribe the number of employees or subcontractors that may be employed or engaged on a particular site, in a particular work area, or at a particular time;

Note: this does not prevent the inclusion of clauses in an enterprise agreement that encourage the employment of apprentices.

(b) restrict the employment or engagement of persons by reference to the type of contractual arrangement that is, or may be, offered by the employer;

Example: an agreement or practice that prohibits or limits the employment of casual or daily hire employees.

(c) require, or result in, discrimination between classes of employees because of the basis on which they are lawfully entitled to work in Australia;

(d) require a code covered entity to consult with, or seek the approval of, a building association or an officer, delegate or other representative of the building association in relation to the source or number of employees to be engaged, or type of employment offered to employees;

(e) require a code covered entity to consult with, or seek the approval of, a building association or an officer, delegate or other representative of the building association in relation to the engagement of subcontractors;

(f) prescribe the terms and conditions on which subcontractors are engaged (including the terms and conditions of employees of a subcontractor);

(g) prescribe the scope of work or tasks that may be performed by employees or subcontractors;

(h) limit or have the effect of limiting the right of an employer to make decisions about redundancy, demobilisation or redeployment of employees based on operational requirements;

Example: an arrangement or practice whereby employees are selected for redundancy based on length of service alone.

(i) prohibit the payment of a loaded rate of pay (whether or not expressed as an annual amount);

Example: an amount paid that nominally incorporates payment for ordinary time and other matters such as overtime and allowances in one loaded rate.

(j) require, or have the effect of requiring, the allocation of particular work to individual employees only if that allocation is extended to all other employees in the class of employees to which the individual employee belongs;

Example: a clause or practice that prevents an individual employee being selected to perform overtime unless other employees are similarly provided overtime.

(k) provide for the monitoring of agreements by persons other than the employer and employees to whom the agreement applies;

(l) include requirements to apply building association logos, mottos or indicia to company supplied property or equipment;

(m) directly or indirectly require a person to encourage, or discourage, a person from becoming, or remaining, a member of a building association;

(n) directly or indirectly require a person to indicate support, or lack of support, for persons being members of a building association or any other measure that suggests that membership is anything other than a matter for individual choice;

(o) limit the ability of an employer to determine with its employees when and where work can be performed to meet operational requirements or limit an employer's ability to determine by whom such work is to be performed;

(p) provide for the rights of an official of a building association to enter premises other than in compliance with Part 3-4 of the FW Act;

(q) provide for the establishment or maintenance of an area which is intended to be designated to be used by members, officers, delegates or other representatives of a building association in that capacity.

Note 1: this section does not authorise the taking of action that would constitute a contravention of the FW Act, and should be read in a manner that ensures consistency with that Act. For example, paragraph (d) does not override section 205 of the FW Act which provides that an enterprise agreement must include a consultation term that provides for consultation on major changes at the workplace.

Note 2: clauses of an enterprise agreement that are inconsistent with this section will impact on a code covered entity's eligibility to tender for or be awarded Commonwealth funded building work, see subsection 23(1)(a) of this code of practice.

Note 3: subsection 15(1) contains additional requirements for enterprise agreement content in relation to dispute settlement terms.

Conduct by parties

(4) A code covered entity must not engage in conduct, or implement a procedure or practice (howsoever described) in respect of building work which has, or is likely to have, any of the effects described in subsections (1) or (3) if the conduct, practice or procedure was contained in an enterprise agreement.

Example: a contractor must not attempt to circumvent the code by agreeing to run a redundancy process on the basis of a 'last on first off' rule or agree to set a schedule for rostered days off that does not allow for flexibility around operational requirements.

(5) Subsection (4) does not apply if the conduct, practice, or arrangement is:

(a) expressly permitted or required by a Commonwealth industrial instrument; or

(b) necessarily linked to the code covered entity's compliance with, or conduct expressly permitted by, an industrial instrument.

Note: section 11 does not require, permit or authorise a code covered entity to fail to comply with an enterprise agreement. A failure to meet the requirements of section 11 by a code covered entity, however, renders the entity ineligible to tender for, or be awarded, Commonwealth funded work—see subsection 23(1)(a).

11A Attempts to avoid section 11 requirements

(1) A code covered entity must not be covered by an agreement in respect of building work which includes clauses that:

(a) purport to remedy, or render ineffective, clauses in an enterprise agreement that are inconsistent with section 11, including clauses which:

(i) provide for clauses in the enterprise agreement to be read in a manner that is consistent with subsections 11(1) and (3); or

(ii) provide for clauses in the enterprise agreements to have no effect if they are inconsistent with subsection 11(1) or subsection 11(3); or

(b) require or provide for the application of terms and conditions contained in an enterprise agreement that does not cover and apply to the relevant employer and employees.

(2) Subsection (1) is subject to Schedule 5.

11B Sham contracting

(1) A code covered entity (the employer) must not engage, or propose to engage, an individual to perform building work under a contract for services where the true character of the engagement or proposed engagement is that of employment.

(2) A code covered entity (the employer) must not enter into a contract with another person (the contractor) under which services in the nature of building work are to be provided to the employer, if:

(a) the services are to be performed by an individual (who is not the contractor); and the individual has any ownership in, or is an officer or trustee of, the contractor; and

(b) if the contract were entered into with the individual, the contract would be a contract of employment.

11C Collusive practices

(1) A code covered entity must not engage in collusive tendering practices.

(2) For the purposes of subsection (1), collusive tendering practices include but are not limited to:-

(a) any agreement between tenderers as to who should be the successful tenderer;

(b) any meetings of tenderers to discuss tenders before the submission of tenders if the client is not present;

(c) any exchange of information between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderers;

(d) any agreements between tenderers to fix prices or conditions of contract; that is, any collaboration between tenderers on prices or conditions to be included in contracts without the consent of the client;

(e) any assistance to any tenderer to submit a cover tender; that is, a tender submitted as genuine yet has been deliberately priced in order to not win the contract; and

(f) any agreement between tenderers before submission of tenders to fix the rate of payment of building association fees, where the payment of such fees is conditional on the tenderer being awarded the contract.

11D Security of payment

(1) A code covered entity must:

(a) comply with all applicable laws and other requirements relating to the security of payments that are due to persons; and

(b) ensure that payments which are due and payable by the code covered entity are made in a timely manner and are not unreasonably withheld; and

(c) have a documented dispute settlement process that details how disputes about payments to subcontractors will be resolved, and must comply with that process; and

(d) as far as practicable, ensure that disputes about payments are resolved in a reasonable, timely and cooperative way; and

(e) comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code covered entity in relation to Commonwealth funded building work; and

(f) report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due.

(2) A code covered entity must not engage in illegal or fraudulent phoenix activities for the purpose of avoiding any payment due to another building contractor or building industry participant or other creditor.

(3) A code covered entity must not:

(a) organise or take or threaten to organise or take action with intent to coerce a contractor, subcontractor or consultant to:

(i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or

(ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.

(b) apply or attempt to apply undue influence or undue pressure on a contractor, subcontractor or consultant to:

(i) exercise or not exercise, or propose to exercise or not exercise rights arising under state or territory laws relating to the security of payments that are due to persons; or

(ii) exercise or propose to exercise rights arising under laws relating to the security of payments that are due to persons in a particular way.

11E Disputed payments

(1) A code covered entity must:

(a) ensure that its documented dispute settlement process detailing how disputes about payments to subcontractors will be resolved includes a referral process to an independent adjudicator for determination if the dispute cannot be resolved between the parties, and must comply with that process and any determination; and

(b) as far as practicable, ensure that disputes about payments referred to 11E(1)(a) are resolved in a reasonable, timely and cooperative way; and

(c) comply with any requirements relating to the operation of any project bank account or trust arrangement that apply to the code covered entity in relation to Commonwealth funded building work; and

(d) report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due.

11F Engagement of non-citizens or non-residents

(1) A code covered entity must ensure that no person that is not an Australian citizen or Australian permanent resident (within the meaning of the *Migration Act 1958*) is employed to undertake building work for the code covered entity unless:

(a) the position is first advertised in Australia; and

(b) the advertising was targeted in such a way that a significant proportion of suitably qualified Australian citizens and Australian permanent residents would be likely to be informed about the position; and

(c) any skills or experience requirements set out in the advertising were appropriate to the position; and

(d) the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job.

Note: The *Migration Act 1958* and its subordinate legislation contain requirements relating to the engagement of persons that are not Australian citizens or Australian permanent residents.

12 Above-entitlements payments and related matters

(1) A code covered entity must not organise or take, or threaten to organise or take action with intent to coerce a contractor, subcontractor or consultant into making an above-entitlements payment in respect of building work.

(2) A code covered entity must not exert undue influence or undue pressure on a contractor, subcontractor or consultant to make an above-entitlements payment in respect of building work.

(3) A code covered entity, in respect of building work, must not:

(a) organise or take, or threaten to organise or take, action with intent to coerce a contractor, subcontractor or consultant into contributing to a particular fund or scheme, or supporting a particular product, service or arrangement; and

(b) apply, or attempt to apply, undue influence or undue pressure on a person to contribute to a particular fund or scheme, or to support a particular product, service or arrangement.

Example: a building contractor must not place undue pressure on a subcontractor to select a particular income protection insurance scheme or to make use of a particular training provider.

13 Freedom of association

(1) A code covered entity must protect freedom of association in respect of building work by adopting and implementing policies and practices that:

(a) ensure that persons are:

(i) free to become, or not become, members of building associations; and

(ii) free to be represented, or not represented, by building associations; and

(iii) free to participate, or not participate, in lawful industrial activities; and

(iv) not discriminated against in respect of benefits in the workplace because they are, or are not, members of a building association.

(2) Without limiting subsection (1), the code covered entity must ensure that:

(a) personal information is dealt with in accordance with the *Privacy Act 1988* and the FW Act; and

(b) 'no ticket, no start' signs, or similar, are not displayed and such arrangements are not implemented; and

(c) signs that seek to vilify or harass employees who participate, or do not participate, in industrial activities are not displayed; and

(d) 'show card' days do not occur; and

(e) there is:

(i) no discrimination against elected employee representatives; and

(ii) no disadvantage to elected employee representatives; and

(f) forms are not used to require:

(i) an employee to identify whether they are a member of a building association; or

(ii) a subcontractor to identify whether the contractor or its employees or subcontractors are a member of a building association; and

(g) practices that are not authorised by law which require, directly or indirectly, a person to disclose whether or not they are a member of a building association, are not engaged in; and

(h) individuals are not refused employment or engagement because they are, or are not, a member of a building association; and

(i) the employment of employees or engagement of subcontractors is not terminated because they are, or are not, a member of a building association; and

(j) building association logos, mottos or indicia are not applied to clothing, property or equipment supplied by, or which provision is made for by, the employer or any other conduct which implies that membership of a building association is anything other than an individual choice for each employee; and

(k) reasonable requests from a workplace delegate to represent an employee of the code covered entity in relation to a grievance, a dispute or a discussion with a member of a building association are not refused; and

(l) requirements are not imposed, or attempted to be imposed, on the code covered entity or a subcontractor engaged by the code covered entity to:

(i) employ a non-working shop steward or job delegate; or

(ii) hire an individual nominated by a building association; and

(m) the code covered entity does not employ a non-working shop steward or job delegate; and

(n) individuals are not required to pay a 'bargaining fee' (howsoever described) to a building association of which the individual is not a member, in respect of services provided by the association; and

(o) employees must be provided a freedom of choice in deciding whether to be represented in grievance or dispute procedures (whether or not pursuant to an enterprise agreement), and, if so, by whom; and

(p) officials, delegates, or other representatives of a building association do not undertake or administer induction processes.

14 Entry to premises where building work is performed

(1) A code covered entity must, in relation to premises where building work is performed, comply with all laws of the Commonwealth and each relevant State and Territory to which the entity is subject that give a right of entry permit holder a right to enter premises where work is performed.

Examples

1 The FW Act.

2 Work health and safety laws.

(2) A code covered entity must, so far as is reasonably practicable, ensure that:

(a) entry by an officer of a building association to premises where building work is performed must be for a purpose for which a right of entry could be exercised under Part 3-4 of the FW Act or a relevant work health and safety law; and

Example: a contractor could permit entry for the purposes of holding discussions with workers where the permit holder provides the requisite notice and complies with all requirements in the FW Act. However, inviting an officer of a building association to enter the site other than as could be permitted by the right of entry requirements would breach this code of practice.

(b) when an officer of a building association seeks to enter premises, the officer must strictly comply with all applicable legislative requirements in Part 3-4 of the FW Act or a work health and safety law, including permit and notice requirements.

Note: *officer* is a defined term in the Act and includes officials and employees of a building association.

15 Dispute settlement

(1) A code covered entity must:

(a) ensure that an enterprise agreement that covers the entity in respect of building work includes a term for settling disputes in accordance with subsection 186(6) of the FW Act; and

(b) if a dispute settlement term of an enterprise agreement in respect of building work provides for arbitration of a dispute or other binding outcome, the entity must ensure that the term requires any decision of the arbiter to be consistent with this code of practice.

(2) Subsection (1) is subject to Schedule 5.

16 Industrial impacts

(1) A code covered entity must, in relation to Commonwealth funded building work:

(a) report actual or threatened industrial action (whether protected industrial action under section 8 of the Act or industrial action that is not protected) by employees of the code covered entity to the ABCC as soon as practicable, but no later than 24 hours, after becoming aware of the threat or action.

(2) A code covered entity must, in relation to building work:

(a) report actual or threatened industrial action that is not protected action by employees of the code covered entity to the ABCC as soon as practicable, but no later than 24 hours, after becoming aware of the threat or action.

(3) A code covered entity must, to the extent reasonably practicable, take steps to prevent or bring an end to industrial action that is not protected action taken by the employees of the entity.

Note: reasonably practical steps may include, depending on the circumstances, the taking of legal action in the Fair Work Commission or a court where remedies are available.

(4) A code covered entity must, in relation to building work, report any request or demand by a building association, whether made directly or indirectly, that the code covered entity engage in conduct that appears to be for the purposes of a secondary boycott within the meaning of the *Competition and Consumer Act 2010* to the ABCC as soon as practicable, but no later than 24 hours, after the request or demand is made.

Note: subsection 9(2) requires code covered entities to comply with the *Competition and Consumer Act 2010*.

16A Fitness for work – alcohol or other drugs

(1) A code covered entity must ensure there is an approach to managing drug and alcohol issues in the workplace to help ensure that no person attending the site to perform building work does so under the influence of alcohol or drugs listed in Schedule 4.

(2) A code covered entity that is a head contractor must not pass the implementation and cost of any drug and alcohol testing to its subcontractors.

Part 4 Compliance, monitoring and enforcement arrangements

17 Notification

(1) A code covered entity must notify the ABCC of a breach, or a suspected breach, of this code of practice as soon as practicable, but no later than 2 working days after becoming aware of the breach or suspected breach and advise the ABCC of the steps proposed to be taken to rectify the breach.

(2) Where a notification under subsection (1) is made in relation to a breach of this code of practice, the code covered entity must notify the ABCC of the steps taken to rectify the breach within 14 days of providing the notification.

18 Consequences of breaching this code of practice

(1) If the ABC Commissioner is satisfied that:

(a) a code covered entity has failed to comply with this code of practice including, but not limited to, by having failed to comply with:

(i) work health and safety laws; or

(ii) the FW Act in relation to the underpayment of an employee's wages or entitlements; or

(b) a code covered entity has failed to comply with a compliance notice issued under section 99 of the Act in relation to this code of practice without a reasonable excuse,

the ABC Commissioner may refer the matter to the Minister with recommendations, if any, that a sanction should be imposed.

(1A) Where a matter has been referred to the Minister under subsection 18(1) (with the exception of a referral under subparagraph 18(1)(a)(i)) the Minister may:

(a) impose an exclusion sanction on the code covered entity; or

(b) issue a formal warning to the code covered entity that a further failure may result in the imposition of an exclusion sanction on the code covered entity.

Note: when considering whether to impose an exclusion sanction, the Minister will consider factors such as whether the failure to comply with this code of practice was intentional, ongoing and/or subject to timely notification and voluntary rectification.

(1B) Where a matter has been referred to the Minister under subparagraph 18(1)(a)(i) the Minister must impose an exclusion sanction on the code covered entity unless the Minister is satisfied that it would not be appropriate in the

circumstances because of the nature of, or factors contributing to, the failure to comply. In those circumstances the Minister may issue a formal warning to the code covered entity that a further failure may result in the imposition of an exclusion sanction on the code covered entity.

(2) The Minister may impose an exclusion sanction on an entity (the *acquiring entity*) that has acquired ownership or beneficial use of some or all of the assets (whether tangible or intangible) of a code covered entity (the *acquired code covered entity*) if the Minister is satisfied that:

(a) the acquired code covered entity failed to comply with this code of practice; or

(b) the acquired code covered entity failed to comply with a compliance notice issued under section 99 of the Act in relation to this code of practice.

(3) Subsection (2) applies if the first entity is a building industry participant or building contractor that could be required to comply with this code of practice by section 34 of the Act.

19 Decision to impose an exclusion sanction

(1) If the Minister proposes to impose an exclusion sanction under section 18, the Minister must give a written notice to the code covered entity:

(a) informing the entity of the details of the alleged breach; and

(b) advising the code covered entity that they may, by a specified date (being not less than 21 days after giving the notice), make a submission in relation to the proposed sanction.

(2) Where the Minister proposes to impose an exclusion sanction on a related entity of the code covered entity, the Minister must give the same information in subsection (1) to the related entity.

(3) After the date specified in a notice under subsection (1), the Minister must:

(a) if the code covered entity or a related entity has made a submission—consider that submission; and

(b) whether or not the code covered entity or a related entity has made a submission—decide whether to impose a sanction; and

(c) within 14 days after making that decision, give the code covered entity and any relevant related entity written notice of the decision, including the reasons for the decision.

(4) An exclusion sanction imposed on a code covered entity takes effect on the date specified by the Minister in the written notice of decision issued pursuant to paragraph (3)(c).

(5) Where the Minister proposes to impose an exclusion sanction on an acquiring entity in accordance with subsection 18(2), the Minister must treat the acquiring entity as if it were a code covered entity for the purpose of this section.

(6) The Minister must advise the Finance Minister prior to imposing an exclusion sanction on a code covered entity.

22 Determination of Compliance with Section 11

(1) The ABCC may issue a determination that an enterprise agreement meets the requirements of section 11 of this code of practice.

(2) The ABCC may provide preliminary advice on whether a proposed enterprise agreement, if made and approved in a certain form, would become an enterprise agreement that meets the requirements of section 11 of this code of practice.

(3) A determination issued pursuant to subsection (1) is taken to be conclusive of the fact an enterprise agreement meets the requirements of section 11.

Part 5 Funding Entities

23 Key criteria for eligibility to be awarded Commonwealth funded building work

(1) To be eligible to be awarded Commonwealth funded building work:

(a) a code covered entity and its related entities must meet the requirements of section 11 of this code of practice; and

(b) a code covered entity must not be subject to an exclusion sanction.

24 Expressions of interest and tenders

(1) A funding entity must ensure that tender processes and calls for expressions of interest (howsoever described) in respect of Commonwealth funded building work are conducted in a manner consistent with this code of practice and must ensure that respondents are only permitted to participate in tender processes (howsoever described) where the respondent meets the eligibility requirements set out in section 23.

(2) A funding entity must ensure that any request for expressions of interest or request for tender (howsoever described) for Commonwealth funded building work requires a respondent:

(a) to confirm that the respondent and any related entity will comply with this code of practice when undertaking the Commonwealth funded building work; and

(b) to confirm that the respondent, and any related entities, will comply with this code of practice from the time of lodging an expression of interest or tender response (if not already obliged to do so); and

(c) to confirm that it is eligible to perform Commonwealth funded building work at the time of lodging an expression of interest or tender; and

(d) to demonstrate a positive commitment to the provision of appropriate training and skill development for their workforce. Such commitment may be evidenced by compliance with any state or territory government building training policies and supporting the delivery of nationally endorsed building and construction competencies; and

(e) include details of the number of current apprentice and trainee employees and the number and classes of persons that hold visas under the *Migration Act 1958* that are engaged by the respondent, and that are intended to be engaged by the respondent to undertake the Commonwealth funded building work; and

(f) to advise whether the respondent has, within the preceding 3 year period:

(i) had an adverse decision, direction or order made by a court or tribunal for a breach of a designated building law, work health and safety law or the *Migration Act 1958*; or

(ii) been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) including by any related entity to a building contractor or building industry participant; or

(iii) owed any unsatisfied judgement debts (including such debts owed by any related entity) to a building contractor or building industry participant.

Note 1: see section 23 which sets out eligibility requirements. Eligibility pursuant to that section includes a consideration of whether related entities meet the requirements of section 11.

Note 2: once a building contractor or building industry participant is subject to this code of practice (see section 6), it and its related entities, must comply with this code of practice on all new projects, including projects that are privately funded. However, some obligations in the code of practice only apply in respect of Commonwealth funded building work, see for example subsections 8(2)-(7) and Part 6.

25 Projects requiring a WRMP

(1) Where building work is of a type described in Schedule 2, a funding entity must:

(a) ensure the requirement to have a WRMP approved by the ABCC is included in all expressions of interest and tender documents;

(b) provide to the ABCC the WRMP of each of the respondents the funding entity proposes to shortlist, or has shortlisted, as part of the tender evaluation process; and

(c) not award the tender to a respondent unless that respondent's WRMP has been approved by the ABCC.

Example: a funding entity must not enter into a period of exclusive negotiation with a respondent tenderer unless the respondent's WRMP has been approved by the ABCC.

Note: see Part 6 for requirements for approval by the ABCC.

(2) As soon as practicable after a funding entity issues a request for expressions of interest or requests for tender (howsoever described) for building work, the funding entity must inform the ABCC.

(3) As soon as practicable after receiving a notification under subsection 25(2) the ABCC must inform the funding entity about whether the ABCC requires any of

the matters outlined in Schedule 3 to be addressed in the proposed WRMP for the project.

25A Information to be provided by preferred tenderer

(1) A funding entity must ensure that before a contract is entered into in respect of Commonwealth funded building work, the preferred tenderer provides the following information:

(a) the extent to which domestically sourced and manufactured building materials will be used to undertake the building work;

(b) whether the building materials to be used to undertake the building work comply with relevant Australian standards published by, or on behalf of, Standards Australia;

(c) the preferred tenderer's assessment of the whole-of-life costs of the project to which the building work relates;

(d) the impact on jobs of the project to which the building work relates; and

(e) whether the project to which the building work relates will contribute to skills growth.

26 Contracts

(1) A funding entity must not enter into a contract in respect of Commonwealth funded building work with a code covered entity that does not meet the eligibility requirements set out in section 23.

Note: see, in respect of subcontractors, paragraph 8(3)(b) which provides that a code covered entity performing Commonwealth funded building work must not enter into a contract with a subcontractor that either does not comply with section 11 of this code of practice or is subject to an exclusion sanction.

(2) A funding entity must not enter into a contract in respect of Commonwealth funded building work with a code covered entity that is excluded from performing work funded by a state or territory government unless approval to do so is provided by the ABC Commissioner.

Example: other than with the approval of the ABC Commissioner funding entities must apply exclusion sanctions (howsoever described) imposed on building contractors pursuant to state or territory government funded procurement policies in respect of Commonwealth funded projects.

(3) A funding entity must only enter into a contract in respect of Commonwealth funded building work with a code covered entity if the funding entity is satisfied that the code covered entity will comply with this code of practice when undertaking the work.

Example: a funding entity may be satisfied of future compliance if the person has a history of compliance with this code of practice or has provided sufficient undertakings that it will comply with this code of practice.

(4) A funding entity must not enter into a contract in respect of Commonwealth funded building work with any code covered entity that:

(a) has had an adverse decision, direction or order made by a court or tribunal for a breach of the Act, a designated building law, work health and safety law or competition and consumer law; and

(b) has not fully complied, or is not fully complying, with such a decision, direction or order.

(5) Paragraphs (4)(a) and (b) do not apply if:

(a) the period for payment, or for other compliance with the decision, direction or order, has not expired; or

(b) the decision, direction or order is stayed or has been revoked.

(6) A funding entity must not enter into a contract with a code covered entity for a project of the type described in Schedule 2 for which the funding entity is required to have a WRMP approved by the ABCC but for which the funding entity has not obtained that approval.

(7) A funding entity must only enter into a contract in respect of Commonwealth funded building work with a code covered entity that will require its subcontractors:

(a) to advise, prior to entering into a contract with them, whether the subcontractor has, within the preceding three year period:

(i) had an adverse decision direction or order made by a court or tribunal for a breach of a designated building law, work health and safety law or the *Migration Act 1958;* or

(ii) been required to pay any amounts under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) or owed any unsatisfied judgement debts (including by any related entity) to a building contractor or building industry participant; and

(b) to update the advice referred to in paragraph (7)(a) every six months for the duration of the contract between the code covered entity and the subcontractor.

(8) A funding entity must only enter into a contract in respect of Commonwealth funded building work with a code covered entity that only uses products in

building work that comply with the relevant Australian standards published by, or on behalf of, Standards Australia.

27 Notification of head contractor

(1) Funding entities must notify the ABCC when a tender process is completed and a code covered entity has been awarded a contract to undertake Commonwealth funded building work. The notification must include:

(a) the name and contact details of the code covered entity; and

(b) a description of the work; and

(c) the location of the proposed work; and

(d) the cost of the project; and

(e) proposed project start and completion dates.

28 Notification by funding entities

(1) Funding entities must:

(a) notify the ABCC of all allegations of breaches of this code of practice as soon as practicable but no later than 7 days after the funding entity became aware of the alleged breach;

(b) respond to requests for information concerning matters related to this code of practice made by the ABCC; and

(c) respond to alleged breaches, with initial actions designed to encourage the voluntary modification or cessation of noncompliant behaviour.

29 Funding entity compliance

(1) Where the ABC Commissioner considers a funding entity, or an official, is not complying with, or has not complied with, this code of practice (whether or not in relation to a particular project, tender or expression of interest), the ABC Commissioner may:

(a) refer the matter; or

(b) make a complaint,

to the Secretary of the Department of Finance for investigation or further action.

Note: funding entities and officials in funding entities must strictly comply with the requirements of this code of practice.

Part 6 Workplace Relations Management Plans

30 Requirement for a WRMP

(1) This Part sets out the requirements for a WRMP to be approved within tender processes for projects of a type described in Schedule 2.

Note: section 26 provides that a funding entity must not enter into a contract with any person or entity that has been required to, but has not submitted a WRMP that has been approved by the ABCC.

31 Application for approval of a WRMP

(1) Funding entities must apply to the ABCC to have a WRMP for a particular project approved.

(2) An application to the ABCC for approval of a WRMP must be made in the manner and form required by the ABC Commissioner.

(3) The proposed WRMP must be accompanied by any supporting evidence required by the ABCC.

(4) If an application for approval of a WRMP by the ABCC does not contain sufficient information to enable the ABCC to make a decision whether or not to approve the proposed WRMP, the ABCC may ask the funding entity to obtain and provide additional information.

Note: section 26 provides that a funding entity must not enter into a contract with a code covered entity if the entity is required to have a WRMP approved by the ABCC and has not obtained that approval.

32 Content of a WRMP

(1) A proposed WRMP must demonstrate how the code covered entity proposes to comply with the requirements of this code of practice on a particular project by:

(a) explaining the systems, processes and procedures that the code covered entity has in place (or will put in place) to:

(i) clearly and effectively communicate how the requirements of this code of practice apply to all building industry participants on site, including subcontractors that are engaged by the code covered entity; and

(ii) promote a fair, lawful, efficient and productive workplace;

(iii) deliver the project on time and within budget; and

(b) addressing any of the matters listed in Schedule 3 that the ABCC considers necessary.

(2) A proposed WRMP must include:

(a) a fitness for work policy to manage alcohol and other drugs in the workplace that applies to all persons engaged to perform building work on a project and addresses the matters set out in Schedule 4; and

(b) details of the processes that are or will be put in place to ensure that all applicable laws and other requirements in relation to the security of payments that are due to persons in respect of building work will be adhered to throughout the life of the project.

Note: section 25 provides that as soon as practicable after receiving notification about an expression of interest the ABCC must inform the funding entity about whether the ABCC requires any of the matters outlined in Schedule 3 to be addressed in the proposed WRMP for the project.

33 Approval process of a WRMP

(1) The ABCC must approve a proposed WRMP if satisfied that the proposed WRMP sufficiently:

(a) demonstrates how the code covered entity will comply with the requirements of this code of practice on the project to which the WRMP relates;

(b) addresses the matters in Schedule 3 that the ABCC requires to be addressed in the WRMP for the particular project; and

(c) addresses the matters in subsection 32(2).

(2) The ABCC must notify the funding entity about whether it approves or does not approve a proposed WRMP.

(3) If the ABCC does not approve a proposed WRMP, the ABCC must give a written notice to the funding entity informing the funding entity of the reasons for not approving the code covered entity's WRMP.

(4) A funding entity is not prevented from reapplying for approval of a code covered entity's WRMP.

34 Compliance with an approved WRMP

(1) A head contractor must ensure that, so far as is reasonably practicable, all subcontractors comply with the WRMP on the project to which the WRMP relates.

Note: section 7 places a general obligation on all code covered entities to comply with relevant WRMPs. A failure by a subcontractor to comply with a WRMP may result in a breach of this code of practice by the head contractor. See also subsection 8(7).

(2) A failure by a head contractor to comply with its WRMP is a breach of this code of practice.

Schedule 1 Building work to which code of practice applies

(subsection 6(3))

1 Building work that is being undertaken for, or on behalf of, a funding entity (irrespective of the value of a project).

2 Building work:

(a) that is indirectly funded by the Commonwealth by a grant or other program in circumstances in which funding for the building work is an explicit component of the grant or program; and

(b) for which:

(i) the value of the Commonwealth's contribution to the project that includes the building work is at least $5,000,000 and represents at least 50% of the total construction project value; or

(ii) the Commonwealth's contribution to the project that includes the building work is at least $10,000,000 (irrespective of its proportion of the total construction project value).

3 Building work:

(a) for which the Commonwealth provides assistance in advance of the commencement of construction; and

(b) which has an identified capital component; and

(c) for which:

(i) the value of the Commonwealth's contribution to the project that includes the building work is at least $5,000,000 and represents at least 50% of the total construction project value; or

(ii) the Commonwealth's contribution to the project that includes the building work is at least $10,000,000 (irrespective of its proportion of the total construction project value).

4 A Build, Own, Operate, Transfer ('BOOT') project initiated by an agency of the Commonwealth for the delivery of functions or services of the Commonwealth.

5 A Build, Own, Operate ('BOO') project initiated by an agency of the Commonwealth for the delivery of functions or services of the Commonwealth.

6 Building work that involves a pre-commitment lease to which a funding entity is a party.

7 Building work that involves a Public Private Partnership ('PPP') for the delivery of functions or services of the Commonwealth.

Note: a PPP involves 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 the Commonwealth. An agency of the Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user.

8 Building work that involves a Private Finance Initiative ('PFI') for the delivery of functions or services of the Commonwealth.

Note: a PFI involves 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 the Commonwealth. An agency of the Commonwealth may contribute to establishing the infrastructure, for example through land, capital works or risk sharing. The service delivered may be paid for by the Commonwealth or directly by the end user.

9 Building work (***privately funded building work***):

(a) whose funding is not described in any of items 1 to 8; or

(b) whose funding is described in any of those items, if it is building work to which item 10 applies.

10 This item applies to building work for which both of the following conditions are met:

(a) the building work forms part of a project to support the operations of an intelligence or security agency;

(b) a Minister, who administers the provision of the Act under which the agency exists or the Department that the agency forms part of, has determined in writing that disclosing the connection of the Commonwealth with the work or project would prejudice security.

Schedule 2 Building work for which a Workplace Relations Management Plan is required

(Part 6)

1 Commonwealth funded building work for which:

(i) the value of the Commonwealth's contribution to the project that includes the building work is at least $5,000,000 and represents at least 50% of the total construction project value; or

(ii) the Commonwealth's contribution to the project that includes the building work is at least $10,000,000 (irrespective of its proportion of the total construction project value).

Schedule 3 Workplace Relations Management Plans

The ABCC may require WRMPs to address:

1 Workplace Arrangements and Compliance

a) how workplace arrangements will be regulated and monitored on the project;

b) the approach to ensuring compliance with statutory workplace rights including, but not limited to, applicable Commonwealth industrial instruments, freedom of association, freedom from unlawful coercion and undue influence and freedom from unlawful discrimination.

2 Productivity measures—measuring productivity

a) the approaches that have been, or will be, adopted to develop and maintain a productive workforce, ensuring the optimal use of labour requirements (e.g. the approach to managing inclement weather and heat, rostered days off and how the head contractor will maintain the ability to determine when, where and by whom work will be performed on the project to meet operational requirements);

b) how productivity will be objectively measured, monitored and recorded on the project.

3 Other parties and lines of communication

a) the approach to relationship management with employees, subcontractors and officers, delegates and other representatives of building associations, including but not limited to the approach to, and process for, communicating with the workforce;

b) outline the organisational structure and reporting lines that will be implemented on the project, and identifying the personnel that will be responsible for:

(i) monitoring and delivering labour productivity;

(ii) subcontractor management;

(iii) compliance with this code of practice;

(iv) grievance management.

c) the approach to managing site access by third parties, including:

(i) how right of entry and the requirements of this code of practice will be monitored and implemented on the project (including by subcontractors);

(ii) how unauthorised entry will be monitored and dealt with.

4 Workplace relations risk and past experience

a) the identification of workplace relations risks in relation to the project and details of the proposed approaches to managing those risks;

b) the management of subcontractors that are engaged by the code covered entity;

c) the processes and procedures that will apply to dealing with and addressing:

(i) industrial action (including threatened industrial action); and

(ii) employee and workforce grievances.

d) the head contractor's past experience and track record of delivering projects on time and on budget. This may include a requirement to provide a summary of current and completed projects in Australia within 2 years of the date of tender identifying:

(i) the estimated and actual completion costs and completion dates for the projects;

(ii) where there was a cost escalation or completion delay, a summary of the causes, factors or reasons for the cost escalation or delay; and

(iii) where workplace relations management issues caused or were a factor in the cost escalation or delay, an explanation of what steps have been, and will be, taken to prevent similar issues impacting on productivity, project costs or the completion schedule.

Note: The information in paragraph 4(d) will be required to be addressed in a WRMP for projects of significant value or importance.

5 Compliance with this Code of Practice

a) how compliance with this code of practice (including compliance against the WRMP) will be monitored and promoted throughout the life of the project.

Example: Information about the requirements of this code of practice, how it will be implemented on site, and the importance of doing so should be communicated on site, for example, during site inductions.

Schedule 4 Fitness for Work/Alcohol and other drugs in the workplace

(paragraph 32(2)(a))

The fitness for work policy referred to in paragraph 32(2)(a) must address:

1 how those on site (including employees of the head contractor, subcontractors and their employees and others) will be required to comply with the relevant fitness for work policy (i.e. through contract or some other enforceable means).

2 the use of an objective medical testing method/s to detect the presence of drugs or alcohol in a worker's system and outline the detection method/s to be used on the project.

3 the requirement that all of the following substances are tested for:

(i) Alcohol;

(ii) Opiates;

(iii) THC;

(iv) Cocaine;

(v) Benzodiazepines;

(vi) Amphetamine; and

(vii) Methamphetamine.

4 that a person who returns a positive result for any of the substances listed above will be deemed not to be fit for work (in respect of each substance listed above, subject to testing detectable levels, there is a zero level tolerance).

5 how a person who returns a positive result will be prevented from performing work until they can prove they are fit to return to work, and other processes that will apply in the event of a positive result or deemed positive result (i.e. a failure to submit to a test).

6 the requirement that, as a minimum, frequent and periodic testing (at least once per month) of the workforce (both construction workers and site office workers) will be as follows:

(i) where there are less than 30 workers on site – at least 10% of the workforce;

(ii) where there are 30 to 100 workers on site – a minimum of 5 workers per month; and

(iii) where there are greater than 100 workers on site – a minimum of 10 workers per month.

7 procedures for the selection of personnel to be tested (including staged selection across a worksite or random selection for testing if the entire workforce is not to be tested in a testing round).

8 procedures for the targeted testing of higher-risk activities, voluntary testing and for-cause testing.

9 how workers who attend for work affected by drugs or alcohol will be counselled and assisted, apart from any disciplinary process that might apply.

Schedule 5 Application of sections 11, 11A and 15

(subsections 11(2), 11A(2) and 15(2))

1 Application of sections 11, 11A and 15

(1) Subsections 11(1) and (3), 11A(1) and 15(1) do not apply in relation to an enterprise agreement made before 2 December 2016 that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant, to the extent that the requirements in those subsections must be met for the purposes of:

(a) the lodging of an expression of interest or tender by the contractor or participant before 1 September 2017; or

(b) the awarding, before 29 November 2018, of building work relating to an expression of interest or tender lodged by the contractor or participant in the period beginning on 2 December 2016 and ending at the commencement of the *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (the ***Amendment Act commencement***); or

(c) the undertaking of building work referred to in paragraph (b); or

(d) the awarding, before 1 September 2017, of building work relating to an expression of interest or tender lodged by the contractor or participant after the Amendment Act commencement if the enterprise agreement does not apply to the contractor, participant or related entity in respect of that building work; or

(e) the undertaking of building work referred to in paragraph (d).

(2) Subsections 11(1) and (3), 11A(1) and 15(1) do not apply in relation to an enterprise agreement that covers a building contractor, a building industry participant, or a related entity of a building contractor or building industry participant, if:

(a) the enterprise agreement:

(i) was made before 2 December 2016; and

(ii) applies to the contractor, participant or related entity in respect only of building work relating to an expression of interest or tender lodged by the contractor or participant before 2 December 2016; or

(b) the enterprise agreement:

(i) was made before 25 April 2014; and

(ii) has not been varied in accordance with section 207 of the *Fair Work Act 2009*.

Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes
Endnote 2—Abbreviation key
Endnote 3—Legislation history
Endnote 4—Amendment history

Abbreviation key—Endnote 2

The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Misdescribed amendments

A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation "(md)" added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation "(md not incorp)" is added to the details of the amendment included in the amendment history.

Endnote 2—Abbreviation key

ad = added or inserted

am = amended

amdt = amendment

c = clause(s)

C[x] = Compilation No. x

Ch = Chapter(s)

def = definition(s)

Dict = Dictionary

disallowed = disallowed by Parliament

Div = Division(s)

exp = expires/expired or ceases/ceased to have effect

F = Federal Register of Legislation

gaz = gazette

LA = *Legislation Act 2003*

LIA = *Legislative Instruments Act 2003*

(md) = misdescribed amendment can be given effect

(md not incorp) = misdescribed amendment cannot be given effect

mod = modified/modification

No. = Number(s)

o = order(s)

Ord = Ordinance

orig = original

par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)

pres = present

prev = previous

(prev…) = previously

Pt = Part(s)

r = regulation(s)/rule(s)

reloc = relocated

renum = renumbered

rep = repealed

rs = repealed and substituted

s = section(s)/subsection(s)

Sch = Schedule(s)

Sdiv = Subdivision(s)

SLI = Select Legislative Instrument

SR = Statutory Rules

Sub-Ch = Sub-Chapter(s)

SubPt = Subpart(s)

underlining = whole or part not commenced or to be commenced

Endnote 3—Legislation history

Name	Registration	Commencement	Application, saving and transitional provisions
Code for the Tendering and Performance of Building Work 2016	2 December 2016 (F2016L01859)	2 December 2016	
Code for the Tendering and Performance of Building Work Amendment Instrument 2017	20 February 2017 (F2017L00132)	21 February 2017	—
Code for the Tendering and Performance of Building Work Amendment (Infrastructure Exemptions) Instrument 2017	21 August 2017 (F2017L01052)	22 August 2017	—
Code for the Tendering and Performance of Building Work Amendment (Exemptions) Instrument 2019	20 March 2019 (F2019L00324)	21 March 2019	—

Endnote 4 –Amendment History

Provision affected	How affected
Part 1	
s 3(1)	am F2017L01052
s 3(1)	rs F2019L00324
	ad F2019L00324
Part 2	
s 6B	ad F2017L01052
s 6(3)	am F2019L00324
Part 3	
s 11(2)	rs F2017L00132
s 11A(2)	rs F2017L00132
s 15(2)	rs F2017L00132
Part 5	
s 26(1)	am F2019L00324
s 26(2)	am F2019L00324
s 26(3)	am F2019L00324
s26(4)	am F2019L00324
s26(7)	am F2019L00324
s26(8)	am F2019L00324
Schedule 1	
Sch 1	rs F2019L00324
Schedule 5	
Sch 5	ad F2017L00132